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January 10, 2018

Kathleen Guith, Esq.
Associate General Counsel for Enforcement
Federal Election Commission
999 E Street, NW
Washington, DC 20463
VIA EMAIL: CELA@fec.gov

Re: <u>MUR 6798: Response to December 14th Letter</u>

Dear Ms. Guith:

We are writing this letter on behalf of The Fund for Louisiana's Future, and Charles R. Spies in his official capacity as Treasurer (the "Fund"), and Courtney Guastella and Lisa Spies (collectively, the "Respondents"), in response to your letter dated December 14, 2017, in which you inform Respondents of certain information that the "Commission" happened to just notice "in the normal course of exercising its supervisory responsibilities with respect to this matter."[1] The letter points to a handful of contributions the Fund received from David Vitter for U.S. Senate (the "Vitter Committee"). It then states that "[i]f the Commission determines that this provision of funds results in the Vitter Committee having 'financed' The Fund within the meaning of 52 U.S.C. § 30125(e)(1), then The Fund could not permissibly raise or spend non-federal funds, and The Fund, Guastella, and Lisa Spies could be deemed to have violated 52 U.S.C. § 30125(e) by soliciting, raising and spending non-federal funds."[2]

Although we appreciate the opportunity to respond[3] to what you have described as "**<u>new</u>** funding information," which in fact occurred almost **<u>four years ago</u>** (emphasis added), both the letter and

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[1] MUR 6798, Letter from Kathleen Guith to Charles R. Spies, Dec. 14, 2017 (hereinafter, "OGC Letter"), at 2.
[2] OGC Letter at 2.
[3] It is refreshing (and surprising) to see OGC living up to the spirit of former Chairman Walther's 2013 draft policy aimed at giving notice to named respondents of additional material facts in enforcement matters. *See* Proposed Draft Policy on Agency Procedure for Notice to Named Respondents of Additional Material Facts or Additional Potential Violations, Agenda Document No. 13-21-L (Walther Draft) (Aug.21, 2013) ("A respondent will be given written notice by the OGC in the event that the OGC intends to include in its RTB recommendation to the Commission (1) any additional facts or information known to OGC and not created or controlled by the respondent, which are deemed material to the RTB recommendation, and (2) any potential violation of the Act and/or the Regulations that

its insinuations fly in the face of the Commission's procedures, due process, and well-established precedent pertaining to independent expenditure-only committees. In short, the "new" information bears no legal significance and appears to be a fishing expedition by Office of General Counsel ("OGC") staff.

The Vitter Committee's Contributions Did Not Constitute a "Substantial Percentage" of the Fund's Receipts.

Although it is irrelevant as a legal matter because of the Constitutional protections for such contributions explicated below, it is nonetheless pure hyperbole for OGC to suggest that the Vitter Committee's contributions to the Fund made up a "substantial percentage" of the Fund's overall receipts. The Fund raised close to $7.5 million during the 2014 and 2016 election cycles, and the Vitter Committee's contributions only amounted to twelve percent (12%) of its receipts during that period. Based on this fact alone, the Commission should dismiss any notion that such minimal funding would equate to a committee being "financed" by a federal candidate or officeholder. Moreover, the Fund was not established, maintained, or controlled by former Senator Vitter or his agents, or any other federal candidate or officeholder for that matter, so it is absurd on its face to argue that the Fund was somehow tainted by the Vitter Committee's nominal contributions.

OGC's Injection of Additional Unsworn Facts in this Complaint-Generated Matter is Inappropriate and Runs Counter to the Federal Election Campaign Act and the Commission's Regulations.

As an initial matter, it is extraordinary that OGC would send a letter informing Respondents of "new" information related to a complaint filed two election cycles ago when such "new" information consisted of contributions made and publicly disclosed in a timely manner almost four years ago, most of which took place after both the complaint and response were filed. In your letter, you state that "[i]n letters dated April 23, 2015, March 22, 2016, and April 20, 2017, we informed you that this matter was under review by the Office of the General Counsel,"[4] but you conveniently fail to mention that those letters also stated that "we expect the Commission to vote on the matter before the end of 2015," "by the end of 2016," and "before the end of 2017."[5] The cited contributions were accurately reported on the Fund's 2014 April Quarterly Report, 2014 Year-End Report, and 2015 Year-End Report, so it is strains credibility to maintain that these contributions were just recently uncovered.

In addition, as you note in your letter, the Vitter Committee made most of the cited contributions to the Fund "after the complaint and your and your clients' response in this matter were filed."[6] You assert that your letter was prompted by "information contained in The Fund's disclosure

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may not have been specifically alleged in the complaint/referral notification, and the facts and arguments supporting the potential RTB recommendation on the additional potential violation.").

[4] OGC Letter, at 1.

[5] MUR 6798, Directive 68 Letters dated Apr. 23, 2015, Mar. 22, 2015 & Apr. 20, 2017.

[6] OGC Letter, at 2.

reports, which the Commission reviewed in the normal course of exercising its supervisory responsibilities with respect to this matter,"[7] but just several sentences earlier, you state that this matter "has recently been forwarded to the Commission."[8] Then, at the end of your letter, you state that "if the Commission chooses to include the new funding information in its considerations,"[9] it will take into account any supplemental response we file. If it was the "Commission" that uncovered the cited contributions "in the normal course of exercising its supervisory responsibilities,"[10] then it is contradictory to opine that "if the Commission chooses to include the new funding information in its considerations,"[11] it will take into account our response. After all, how could the "Commission," "choose[] to include" this "new" information in its considerations when you allege it was the "Commission" that uncovered it in the first place?

Of course, it is much more likely you are using the term "Commission" (i.e. the Commissioners, who are presidentially appointed, approved by the Senate, and tasked with leading the Federal Election Commission[12]) interchangeably with the Commission's General Counsel (and the Office of General Counsel), who is appointed by the Commission. *See* 52 U.S.C. § 30106(f)(1). Assuming this is the case, and that it was OGC that decided to inject unsworn facts into a MUR almost four years after a complaint and response were filed, it cannot justify those actions simply by citing its "supervisory responsibilities." The "supervisory responsibilities" provision is narrow, as the Commission has no "roving statutory functions" to "gather and compile information and to conduct periodic investigations."[13] This is especially the case where the questioned activity occurred after a complaint and response have been filed. Furthermore, as the D.C. Circuit has made clear, "mere 'official curiosity' will not suffice as the basis for FEC investigations."[14]

OGC's *post hoc* injection of facts in this case runs counter to the Federal Election Campaign Act of 1971, as amended (the "Act"), in other ways. For example, the Act establishes two distinct methods by which an enforcement proceeding may be initiated: (1) by a sworn complaint; or, (2) "on the basis of information ascertained in the normal course of its supervisory responsibilities..."[15] In contrast with the Act, over the years OGC has created what is essentially a hybrid between these two methods, where they conduct their own *ad hoc* review and supplement the complaint, while at the same time avoiding the Act's due process protections afforded to respondents in complaint-generated matters.[16]

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[7] OGC Letter, at 2.
[8] OGC Letter, at 1.
[9] OGC Letter, at 2.
[10] OGC Letter, at 2.
[11] OGC Letter, at 2.
[12] *See* 52 U.S.C. § 30106(a)(1).
[13] *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981) ("*Machinists*").
[14] *See Machinists*, 655 F.2d at 388.
[15] 52 U.S.C. § 30109(a)(2); *see also* 11 CFR § 111.10(a).
[16] MUR 6540 (Rick Santorum for President), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioner Caroline C. Hunter, at 10-11.

In complaint-generated matters, the complaint must be under oath and notarized, protecting respondents from anonymous accusations. Commission regulations further require that complainants specify whether what is alleged is based on personal knowledge, or merely information or belief. Unsworn complaints are considered defective and will be returned to the complainant. Nonetheless, OGC seems to think that injecting facts into a complaint-generated matter—in this case, contributions that occurred after the complaint and response were filed—is somehow justified despite not being sworn or under oath.[17] In doing so, OGC is impermissibly stepping into the shoes of the Complainant, resulting in additional speculative and unsworn claims.

Any Pursuit of Respondents Pursuant to OGC's "Financed" Theory Under 52 U.S.C. § 30125(e)(1) Would Defy Well-Established Court Precedent Concerning the Fund and Independent-Expenditure Committees, in General.

Aside from the foregoing procedural and due process deficiencies, it is remarkable that OGC would pursue a legal theory based on the "financed" language in 52 U.S.C. § 30125(e)(1) as a means to target contributions to an independent expenditure-only committee like the Fund. As OGC is well-aware, the government can restrict contributions to a candidate because of the risk that they will lead to *quid pro quo* corruption. *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam). However, independent expenditures present no corresponding risk of corruption, *id.* at 45, because "independent expenditures...do not give rise to corruption or the appearance of corruption." *Citizens United v. FEC*, 558 U.S. 310, 357 (2010). With independent expenditures, "[t]he candidate-funding circuit is broken," thereby "negat[ing] the possibility that [the] expenditures will result in the sort of quid pro quo corruption with which our case law is concerned." *Az. Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826-27 (2011). "By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate." *Id.*

As the Fifth Circuit held in *Texans for Free Enterprise v. Texas Ethics Commission*, "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption[,]' and so 'government has no anti-corruption interest in limiting contributions to an independent expenditure group" *Texans for Free Enter. v. Texas Ethics Com'n*, 732 F.3d 535, 538 n. 3 (quoting *SpeechNow.org v. FEC*, 599 F.3d 686, 694-95 (D.C. Cir. 2010)). This is precisely why the Eastern District of Louisiana issued a permanent injunction against enforcement of a Louisiana state statute limiting contributions to independent expenditure-only committees when the Fund challenged those provisions in 2014.[18]

Furthermore, it is irrelevant whether the speaker (i.e. the contributor) is a corporation or individual—or in this case, a federal officeholder's campaign committee—as "the identity of the

[17] *Id.* at 11.
[18] *See Fund For Louisiana's Future v. Louisiana Bd. of Ethics*, 17 F.Supp.3d 562 (E.D. La. 2014) ("the State's restrictions on uncoordinated, independent political speech cannot pass constitutional muster." *Id.* at 570).

speaker is not decisive in determining whether speech is protected." *Citizens United*, 558 U.S. at 342. Justice Scalia's concurring opinion in *Citizens United* underscores the import of this tenet:

> The [First] Amendment is written in terms of "speech," not speakers. Its text offers no foothold for excluding any category of speaker, from single individuals to partnerships of individuals, to unincorporated associations of individuals, to incorporated associations of individuals...We are therefore simply left with the question whether the speech at issue in this case is "speech" covered by the First Amendment.[19]

The Vitter Committee had a constitutional right under the First Amendment to contribute to the Fund. The fact that the Vitter Committee is one of hundreds of corporations and individuals that exercised its First Amendment protected right does not somehow transform the Fund into an entity that is subject to the "soft money" provisions at 52 U.S.C. § 30125(e). Consequently, Ms. Guastella and Ms. Spies remained free to solicit unlimited individual and corporate contributions to the Fund when they were acting in their capacities as consultants for the Fund.

Conclusion

In light of the foregoing, we respectfully request that the Commission ignore OGC's belated fishing expedition to bolster an otherwise deficient complaint and instead promptly dismiss this matter based on the sworn allegations and facts actually contained in the complaint and the response we filed on Respondents' behalf almost four years ago.

Respectfully submitted,

Charles R. Spies
James E. Tyrrell III
Counsel to The Fund for Louisiana's Future, Courtney Guastella, and Lisa Spies

[19] *Citizens United*, 558 U.S. at 392-93 (Scalia, J., concurring).