



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA ELECTRONIC AND FIRST CLASS MAIL

JUN 26 2015

Michael E. Toner, Esq.
Brandis L. Zehr, Esq.
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006

RE: MUR 6816
Americans for Job Security

Dear Mr. Toner and Ms. Zehr:

On May 14, 2014, the Federal Election Commission notified your client, Americans for Job Security ("AJS") of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to AJS at that time.

Upon further review of the allegations contained in the complaint and information supplied by you, the Commission, on June 23, 2015, found that there is reason to believe AJS violated 52 U.S.C. § 30104(c)(2)(C) and (f)(2) (formerly 2 U.S.C. § 434(c)(2)(C) and (f)(2)) and 11 C.F.R. §§ 109.10(e)(1)(vi) and 104.20(c)(9). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter.

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Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 52 U.S.C. §§ 30109(a)(4)(B) and 30109(a)(12)(A) (formerly 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A)) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Jin Lee, the attorney assigned to this matter, at (202) 694-1650.

On behalf of the Commission,



Ann M. Ravel
Chair

Enclosure
Factual and Legal Analysis

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1 FEDERAL ELECTION COMMISSION

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3 FACTUAL AND LEGAL ANALYSIS

4
5 RESPONDENT: Americans for Job Security

MUR 6816

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7 I. INTRODUCTION

8 This matter involves allegations that Americans for Job Security (“AJS”) knowingly and
9 willfully violated the Federal Election Campaign Act of 1971, as amended (the “Act”) when it
10 failed to disclose the Center to Protect Patient Rights (“CPPR”) as a contributor on its
11 independent expenditure reports and as a donor on its electioneering communication reports filed
12 with the Commission in 2010 and January 2011.¹

13 AJS denies the allegations. While AJS admits that it received funds from CPPR, it denies
14 that the funds were earmarked for particular advertisements.² Rather, it argues that CPPR
15 awarded unrestricted, general support grants to AJS.³ Further, because AJS also received
16 substantial funds from other sources, AJS contends that it could have used such funds, not funds
17 from CPPR, to pay for the advertisements in question.⁴

18 Nevertheless, as explained below, the factual record in this matter indicates that Sean
19 Noble, acting as a subcontractor to AJS, participated in selecting the targets and contents of its
20 advertisements in 2010, and at the same time, acting as Executive Director of CPPR, provided
21 CPPR funds to AJS. The fact that Noble decided whether AJS received CPPR funds and advised
22 AJS as to which advertisements it should broadcast suggests that CPPR donated funds for the

¹ Compl. at 1. The Complaint also alleges that CPPR Executive Director Sean Noble and AJS President Stephen DeMaura unlawfully conspired to violate the Act and defraud the Commission in violation of 18 U.S.C. § 371. *Id.* at 18. These alleged violations of federal criminal law are outside the scope of the Commission’s jurisdiction.

² See Response of AJS (“AJS Resp.”) at 3.

³ *Id.*

⁴ *Id.* at 4.

1 purpose of furthering specific advertisements. Accordingly, the Commission finds reason to
2 believe that AJS violated 52 U.S.C. § 30104(c)(2)(C) and (f)(2) (formerly 2 U.S.C.
3 § 434(c)(2)(C) and (f)(2)) and 11 C.F.R. §§ 109.10(e)(1)(vi) and 104.20(c)(9) by failing to
4 disclose CPPR as a contributor on the independent expenditure disclosure reports and as a donor
5 on the electioneering communication disclosure reports it filed with the Commission in 2010 and
6 January 2011.

7 **II. FACTUAL BACKGROUND**

8 **A. CPPR and Sean Noble**

9 CPPR is a non-profit corporation organized under section 501(c)(4) of the Internal
10 Revenue Code ("IRC").⁵ According to the available information, Sean Noble is the owner and
11 sole member of Noble Associates, a consulting firm retained by CPPR to provide management
12 consulting services in 2009 and 2010. As part of the agreement, Noble served as the Executive
13 Director of CPPR.

14 CPPR disbursed over \$44 million to various organizations in 2010. Of the \$44 million,
15 CPPR gave \$4,828,000 to AJS. The available information indicates that CPPR did not distribute
16 the funds in one lump sum to AJS but sent them throughout the year.

17 **B. AJS**

18 AJS is a business league, founded in 1997, and operates under section 501(c)(6) of the
19 IRC.⁶ AJS describes itself as "an independent, bipartisan, pro-business advocacy organization

⁵ According to its 2010 Form 990 filed with the Internal Revenue Service, CPPR describes its mission as "building a coalition of like-minded organizations and individuals, and educating the public on issues, related to health care with an emphasis on patients rights. Engaging in issue advocacy and activities to influence legislation related to health care." Compl., Ex. D.

⁶ AJS Rrsp. at 1.

1 that promotes free market, pro-jobs, and pro-growth public policies on behalf of its members.”⁷

2 Stephen DeMaura has been the President of AJS since 2008.⁸

3 AJS asserts that it has had a “longstanding, strict policy of not soliciting or accepting
4 dues payments or donations that are earmarked, designated, or encumbered for any particular
5 program or activity, including electioneering communications and independent expenditures.”⁹

6 In its Response, AJS provides supporting information reflecting AJS’s strict policy of not
7 accepting earmarked dues. For example, AJS’s Membership Guidelines and Membership
8 Agreement state, “[t]he allocation of membership dues to various activities of AJS is the sole
9 discretion of the professional staff and the board of directors.”¹⁰ After receiving a payment for
10 membership dues from CPPR, DeMaura reiterated AJS’s policy concerning the allocation of
11 membership dues in a “thank you” letter to Noble on August 25, 2010.¹¹

12 Upon becoming a member of AJS in August 2010, CPPR subsequently paid AJS
13 \$4,828,000 in dues.¹² CPPR’s dues payment was almost 40% of the total funds that AJS
14 received for its 2009 fiscal year, which ran from November 1, 2009 to October 31, 2010.¹³ AJS
15 also spent a combined total of \$4,506,513.63 on independent expenditures (\$4,406,901.63) and
16 electioneering communications (\$99,672) targeting House races in 2010. AJS spent almost all of
17 this money, except \$45,100, in September and October of 2010.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 2 (citing Aff. of Stephen DeMaura ¶4 (July 7, 2014) (“DeMaura Aff.”)).

¹⁰ *Id.*, Ex. 1-A.

¹¹ *Id.*, Ex. 1-B.

¹² *Id.* at 2.

¹³ *See id.*, Ex. 3.

1 **C. AJS's Advertising Campaign Targeting 2010 House Races**

2 The Complaint's allegations regarding the funds provided by CPPR rely almost entirely
3 upon a *National Review* article published on March 31, 2014.¹⁴ Noble himself appears to have
4 been the primary source for the article.¹⁵

5 According to the article, beginning in March 2010, CPPR and Noble decided to focus on
6 the struggle for control of the House of Representatives and sought to produce dozens of
7 advertisements targeting hundreds of congressional candidates in the 2010 midterm elections.¹⁶
8 The article indicates that Noble and his team prepared an Excel spreadsheet identifying over 100
9 House members prioritized by likelihood of defeat and allotted their resources accordingly.¹⁷

10 The article states that Noble oversaw the disbursement of over \$50 million to groups,
11 including AJS, that paid to put advertisements on the air.¹⁸ The article describes several
12 advertisements, which were produced by Noble and aired by one of the recipient organizations.
13 For example, based on polling research, Noble determined that aligning Democratic candidates
14 with Nancy Pelosi would be an effective way to persuade voters to vote Republican.¹⁹
15 Thereafter, AJS aired advertisements linking Democratic members of Congress to Nancy
16 Pelosi.²⁰

17 AJS does not deny that it disseminated the advertisements in question during the 2010
18 mid-term elections as described in the *National Review* article. It also admits to using the same

¹⁴ See Compl. ¶ 28 (citing Eliana Johnson, *Inside the Koch-Funded Ads Giving Dems Fits*, NAT'L REV. (Mar. 31, 2014)) [hereinafter Johnson, *Inside the Ad*] (attached as Exhibit C of Complaint).

¹⁵ *Id.*

¹⁶ Johnson, *Inside the Ads*, *supra*, at 5.

¹⁷ *Id.*

¹⁸ *Id.* at 3.

¹⁹ Johnson, *Inside the Ads*, *supra*, at 5.

²⁰ *Id.* at 6. AJS aired another advertisement informing North Carolina's second district that Congressman Bob Etheridge "voted for Nancy Pelosi's health-care plan." *Id.*

1 media consultants, McCarthy, Marcus, Hennings Ltd. (“MMH”), which produced the
2 advertisements, and Mentzer Media Services (“MMS”), which placed the advertisements,
3 although it claims it also used other vendors.²¹

4 AJS denies, however, that it solicited or used any earmarked funds from CPPR to pay for
5 those advertisements. AJS states that while it hired MMH and MMS to manage its television
6 advertising, it retained sole discretion over the content, timing, and placement of the
7 advertising.²² AJS’s Stephen DeMaura states that AJS was actively involved in the development
8 of its advertising and that he reviewed scripts and made substantive edits; he and AJS’s outside
9 counsel also reviewed and gave final approval before each advertisement was publicly
10 disseminated.²³

11 III. LEGAL ANALYSIS

12 A. Reporting of Independent Expenditures and Electioneering Communications 13 Under the Act

14 Both independent expenditures²⁴ and electioneering communications²⁵ are subject to
15 disclosure under Federal law. The Act requires persons, other than political committees, to
16 report independent expenditures that exceed \$250 during a calendar year.²⁶ Such a report must
17

²¹ AJS Resp. at 4.

²² *Id.*

²³ DeMaura Aff. ¶ 12.

²⁴ An independent expenditure is an expenditure that expressly advocates the election or defeat of a clearly identified federal candidate and “that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.” 52 U.S.C. § 30101(17) (formerly 2 U.S.C. § 431(17)).

²⁵ “Electioneering communications” are defined as broadcast, cable or satellite communications that refer to a clearly identified candidate for federal office, are publicly distributed within sixty days before a general election or thirty days before a primary election, and are targeted to the relevant electorate. *See* 52 U.S.C. § 30104(f)(3)(A)(i) (formerly 2 U.S.C. § 434(f)(3)(A)(i)). A communication is “targeted to the relevant electorate” if it can be received by 50,000 or more persons in the district or state in which the candidate is running. *Id.* § 30104(f)(3)(C) (formerly 2 U.S.C. § 434(f)(3)(C)).

²⁶ *Id.* § 30104 (formerly 2 U.S.C. § 434(c)(1)); 11 C.F.R. § 109.10(b).

1 include, among other information, “the identification of each person who made a contribution in
2 excess of \$200 to the person filing such statement which was made for the purpose of furthering
3 *an* independent expenditure.”²⁷ The Commission’s implementing regulation provides that an
4 independent expenditure report must include “[t]he identification of each person who made a
5 contribution in excess of \$200 to the person filing such report which contribution was made for
6 the purpose of furthering *the reported* independent expenditure.”²⁸

7 The Act also provides that a person that has made electioneering communications
8 aggregating in excess of \$10,000 in a calendar year must file a disclosure statement.²⁹ Such a
9 report must include, among other information, “the names and addresses of all contributors who
10 contributed an aggregate amount of \$1,000 or more to the person making the disbursement”
11 during a specified time period.³⁰ Commission regulations in effect at the time of the conduct in
12 question provided that when an electioneering communication has been financed by a
13 corporation or a labor organization, pursuant to 11 C.F.R. § 114.15, these statements must
14 disclose the names and addresses of all those who donated an aggregate amount of \$1,000 or
15 more within a specified time period “for the purpose of furthering electioneering
16 communications.”³¹

²⁷ See 52 U.S.C. § 30104(c)(2)(C) (formerly 2 U.S.C. § 434(c)(2)(C)) (emphasis added).

²⁸ 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

²⁹ See 52 U.S.C. § 30104(f)(1) (formerly 2 U.S.C. § 434(f)(1)).

³⁰ See *id.* § 30104(f)(2) (formerly 2 U.S.C. § 434(f)(2)).

³¹ 11 C.F.R. § 104.20(c)(9). Though this regulation is the subject of ongoing litigation, it remained in effect at all times relevant to the conduct at issue in this matter. *Van Hollen v. FEC*, No. 11-0766 (ABJ), 2014 WL 6657240 (D.D.C. Nov. 25, 2014) (vacating the regulation), *remanded from Ctr. for Individual Freedom v. FEC*, 694 F.3d 108, 112 (D.C. Cir. 2012), *vacating Van Hollen v. FEC*, 851 F. Supp. 2d 69 (D.D.C. 2012) (striking down the regulation), *appeal docketed*, Nos. 15-5016, 15-5017 (D.C. Cir. Jan. 22, 2015); see Center for Individual Freedom Notice of Appeal, *Van Hollen v. FEC*, No. 11-0766 (ABJ) (D.D.C.) (Docket No. 101, Jan. 9, 2015); Hispanic Leadership Fund Notice of Appeal, *Van Hollen v. FEC*, No. 11-0766 (ABJ) (D.D.C.) (Docket No. 103, Jan. 12, 2015).

**B. There is Reason to Believe that CPPR Made Contributions for the Purpose of
Furthering the Communications at Issue**

The available information indicates that under the regulations in effect at the time of the relevant conduct, AJS may have been required to disclose CPPR as a contributor on independent expenditure disclosure reports and as a donor on electioneering communication disclosure reports AJS filed with the Commission in 2010 and January 2011. The available information indicates that CPPR, through its Executive Director and agent Sean Noble, gave funds to AJS for the purpose of furthering communications in 2010 based on Noble's undisputed role in AJS's advertising campaign. Specifically, the Commission is in possession of information indicating that Noble's solely owned consulting firm, Noble Associates, helped to produce advertisements and determine advertisement placement strategy for AJS. There is also information that Noble Associates participated in working groups that included representatives from AJS, as well as pollsters, media vendors, and media buyers. For example, the strategy to link Democrats to Nancy Pelosi, as reported in the *National Review* article, appears to have emerged from those working groups. It was against this backdrop that CPPR, through Noble, provided millions of dollars to AJS. Therefore, the multiple roles that Noble played in these organizations, along with his various involvements surrounding these transactions, indicate that Noble may have known when he dispersed CPPR funds that those funds were to be used in connection with the relevant advertisements.

The argument that there was no violation because Noble was acting in his capacity as a member of Noble Associates is unpersuasive. Here, Noble Associates provided management consultant services to CPPR apparently while also helping AJS produce specific advertisements.

1 Moreover, an officer's knowledge, however gained, may be imputed to the corporation.³² So,
2 here, the information Noble learned while working for AJS may be imputed to CPPR and could
3 have informed CPPR's giving to AJS. And, although AJS claims that it received sufficient funds
4 from other sources to pay for its ad campaigns, the fact remains that CPPR alone provided
5 sufficient funds to pay for all of its advertisements relating to the 2010 House races.

6 The present record supports a reason to believe finding. For example, there is
7 information confirming that Noble was the source for the article and that certain key facts as
8 reported by the article are true. Further, while Noble was providing funds to the recipient
9 organizations in 2010, he was also actively working on their ad campaigns as a subcontractor. In
10 addition, representatives of AJS participated in working groups with Noble Associates and the
11 media firms to work on the 2010 House advertising campaign. Such evidence supports an
12 inference that CPPR, through its officer and agent, Sean Noble, had knowledge of the particular
13 ads that the recipient organizations planned to run, and relevant information about the
14 organizations' advertising campaigns may have been shared between Noble Associates and AJS.

15 Thus, there is information indicating that AJS should have disclosed CPPR as a
16 contributor on the independent expenditure disclosure reports and as a donor on the
17 electioneering communication disclosure reports filed with the Commission in 2010 and January
18 2011. For these reasons, the Commission finds reason to believe AJS violated 52 U.S.C.
19 § 30104(c)(2)(C) and (f)(2) (formerly 2 U.S.C. § 434(c)(2)(C) and (f)(2)) and 11 C.F.R.
20 §§ 109.10(e)(1)(vi) and 104.20(c)(9).

³² Specifically, in Maryland, where CPPR is registered as a corporation, if an individual is an officer for two corporations, the "officer's knowledge of the affairs of one corporation will be imputed to the other when such knowledge is present in his mind and memory at the time he engages in a transaction on behalf of such other corporation, or when such knowledge comes to him while acting as an agent for such other corporation in his official capacity, or while acting as an agent of such corporation, and within the scope of his authority." *Mercy Med. Ctr., Inc. v. United Healthcare of the Mid-Atlantic, Inc.*, 815 A.2d 886, 904 (Md. Ct. Spec. App. 2003) (citation omitted).