



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA ELECTRONIC AND FIRST CLASS MAIL

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JUN 26 2015

RE: MUR 6816
American Future Fund

Dear Messrs. Torchinsky and Bayes:

On May 14, 2014, the Federal Election Commission notified your client, American Future Fund ("AFF") 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 AFF 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 AFF 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: American Future Fund

MUR 6816

6
7 I. INTRODUCTION

8 This matter involves allegations that American Future Fund ("AFF") 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 AFF denies the allegations. While AFF admits that it received funds from CPPR, it
14 denies that the funds were earmarked for particular advertisements.² Rather, it argues that CPPR
15 awarded unrestricted, general support grants to AFF.³ Further, because AFF also received
16 substantial funds from other sources, AFF 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 AFF, 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 AFF. The fact that Noble decided whether AFF received CPPR funds and
22 advised AFF as to which advertisements it should broadcast suggests that CPPR donated funds

¹ Compl. at 1. The Complaint also alleges that CPPR Executive Director Sean Noble and AFF President Sandy Greiner 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 AFF ("AFF Resp.") at 2.

³ *Id.*

⁴ *Id.*

1 for the purpose of furthering specific advertisements. Accordingly, the Commission finds reason
2 to believe that AFF 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 \$11,685,000 to AFF. The available information indicates that CPPR did not
16 distribute the funds in one lump sum to AFF but sent them throughout the year.⁶

17 **B. AFF**

18 Founded in 2007, AFF is also a section 501(c)(4) social welfare organization.⁷ AFF
19 states that its mission is "to promote conservative free market principles to the citizens of

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 See AFF Resp., Attach. B. (letter dated Feb. 22, 2010 transmitting a general support grant to AFF in the amount of \$150,000).

⁷ *Id.* at 2.

1 America.”⁸ Sandy Greiner is the President of AFF and served in that capacity during the
2 relevant time period in this matter.⁹ Nicholas Ryan is a strategist for and consultant to AFF and
3 has served in that capacity since 2007.¹⁰

4 AFF admits receiving \$11,685,000 from CPPR in 2010 but asserts that the funds were
5 “unrestricted, general support grants.”¹¹ In his sworn affidavit, Ryan recalls that Elissa Scannell,
6 of Noble Associates, “acting on behalf of CPPR,” contacted him from “time to time” to inform
7 him that CPPR had funds available if AFF sought to make a request.¹² Ryan would subsequently
8 submit a written request on behalf of AFF, but Ryan avers that he “never specified any project or
9 activity for which the grant funds would be spent.”¹³

10 The \$11,685,000 given by CPPR comprised roughly half of AFF’s gross receipts, which
11 totaled \$23,304,826 in 2010.¹⁴ AFF’s total expenses were \$21,352,090,¹⁵ and its expenses on
12 both independent expenditures (\$7,396,831) and electioneering communications (\$916,035)
13 targeting House races in 2010 were \$8,313,866.

14 **C. AFF’s Advertising Campaign Targeting 2010 House Races**

15 The Complaint’s allegations regarding the funds provided by CPPR rely almost entirely
16 upon a *National Review* article published on March 31, 2014.¹⁶ Noble himself appears to have
17 been the primary source for the article.¹⁷

⁸ AFF 2010 IRS Form 990.

⁹ AFF Resp. at 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² Affidavit of Nicholas Ryan ¶ 4 (June 19, 2014) (“Ryan Aff.”), AFF Resp., Ex. C.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ 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).

1 According to the article, beginning in March 2010, CPPR and Noble decided to focus on
2 the struggle for control of the House of Representatives and sought to produce dozens of
3 advertisements targeting hundreds of congressional candidates in the 2010 midterm elections.¹⁸
4 The article indicates that Noble and his team prepared an Excel spreadsheet identifying over 100
5 House members prioritized by likelihood of defeat and allotted their resources accordingly.¹⁹

6 The article states that Noble oversaw the disbursement of over \$50 million to groups,
7 including AFF, that paid to put advertisements on the air.²⁰ The article describes several
8 advertisements, which were produced by Noble and aired by one of the recipient organizations.
9 For example, based on polling research, Noble determined that aligning Democratic candidates
10 with Nancy Pelosi would be an effective way to persuade voters to vote Republican.²¹
11 Thereafter, AFF aired advertisements linking Democratic members of Congress to Nancy
12 Pelosi.²²

13 AFF does not deny that it disseminated the advertisements in question during the 2010
14 mid-term elections as described in the *National Review* article. It also admits to using the same
15 media consultants, McCarthy, Marcus, Hennings Ltd. (“MMH”), which produced the
16 advertisements, and Mentzer Media Services (“MMS”), which placed the advertisements,
17 although it claims it also used other vendors.²³

17 *Id.*

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

19 *Id.*

20 *Id.* at 3.

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

22 *Id.* at 6. For example, AFF aired an advertisement in South Dakota attacking Stephanie Herseth Sandlin for voting with Nancy Pelosi more than 90 percent of the time. *Id.*

23 AFF Resp. at 3.

1 AFF denies, however, that it solicited or used any earmarked funds from CPPR to pay for
2 those advertisements. AFF's consultant, Nick Ryan, claims that he never had discussions with
3 Noble regarding detailed plans or projects of AFF.²⁴

4 III. LEGAL ANALYSIS

5 A. Reporting of Independent Expenditures and Electioneering Communications 6 Under the Act

7
8 Both independent expenditures²⁵ and electioneering communications²⁶ are subject to
9 disclosure under Federal law. The Act requires persons, other than political committees, to
10 report independent expenditures that exceed \$250 during a calendar year.²⁷ Such a report must
11 include, among other information, "the identification of each person who made a contribution in
12 excess of \$200 to the person filing such statement which was made for the purpose of furthering
13 an independent expenditure."²⁸ The Commission's implementing regulation provides that an
14 independent expenditure report must include "[t]he identification of each person who made a
15 contribution in excess of \$200 to the person filing such report which contribution was made for
16 the purpose of furthering *the reported* independent expenditure."²⁹

²⁴ Ryan Aff. ¶ 7.

²⁵ 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)).

²⁶ "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)).

²⁷ *Id.* § 30104 (formerly § 434(c)(1)); 11 C.F.R. § 109.10(b).

²⁸ *See* 52 U.S.C. § 30104(c)(2)(C) (formerly 2 U.S.C. § 434(c)(2)(C)) (emphasis added).

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

1 The Act also provides that a person that has made electioneering communications
2 aggregating in excess of \$10,000 in a calendar year must file a disclosure statement.³⁰ Such a
3 report must include, among other information, “the names and addresses of all contributors who
4 contributed an aggregate amount of \$1,000 or more to the person making the disbursement”
5 during a specified time period.³¹ Commission regulations in effect at the time of the conduct in
6 question provided that when an electioneering communication has been financed by a
7 corporation or a labor organization, pursuant to 11 C.F.R. § 114.15, these statements must
8 disclose the names and addresses of all those who donated an aggregate amount of \$1,000 or
9 more within a specified time period “for the purpose of furthering electioneering
10 communications.”³²

11 **B. There is Reason to Believe that CPPR Made Contributions for the Purpose of**
12 **Furthering the Communications at Issue**
13

14 The available information indicates that under the regulations in effect at the time of the
15 relevant conduct, AFF may have been required to disclose CPPR as a contributor on independent
16 expenditure disclosure reports and as a donor on electioneering communication disclosure
17 reports AFF filed with the Commission in 2010 and January 2011. The available information
18 indicates that CPPR, through its Executive Director and agent Sean Noble, gave funds to AFF
19 for the purpose of furthering communications in 2010 based on Noble’s undisputed role in AFF’s
20 advertising campaign. Specifically, the Commission is in possession of information indicating

³⁰ See 52 U.S.C. § 30104(f)(1) (formerly 2 U.S.C. § 434(f)(1)).

³¹ See *id.* § 30104(f)(2) (formerly 2 U.S.C. § 434(f)(2)).

³² 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).

1 that Noble's solely owned consulting firm, Noble Associates, helped to produce advertisements
2 and determine advertisement placement strategy for AFF. There is also information that Noble
3 Associates participated in working groups that included representatives from AFF, as well as
4 pollsters, media vendors, and media buyers. For example, the strategy to link Democrats to
5 Nancy Pelosi, as reported in the *National Review* article, appears to have emerged from those
6 working groups. It was against this backdrop that CPPR, through Noble, provided millions of
7 dollars to AFF. Therefore, the multiple roles that Noble played in these organizations, along
8 with his various involvements surrounding these transactions, indicate that Noble may have
9 known when he dispersed CPPR funds that those funds were to be used in connection with the
10 relevant advertisements.

11 The argument that there was no violation because Noble was acting in his capacity as a
12 member of Noble Associates is unpersuasive. Here, Noble Associates provided management
13 consultant services to CPPR apparently while also helping AFF produce specific advertisements.
14 Moreover, an officer's knowledge, however gained, may be imputed to the corporation.³³ So,
15 here, the information Noble learned while working for AFF may be imputed to CPPR and could
16 have informed CPPR's giving to AFF. And, although AFF claims that it received sufficient
17 funds from other sources to pay for its ad campaigns, the fact remains that CPPR alone provided
18 sufficient funds to pay for all of its advertisements relating to the 2010 House races.

19 The present record supports a reason to believe finding. For example, there is
20 information confirming that Noble was the source for the article and that certain key facts as

³³ 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).

1 reported by the article are true. Further, while Noble was providing funds to the recipient
2 organizations in 2010, he was also actively working on their ad campaigns as a subcontractor. In
3 addition, representatives of AFF participated in working groups with Noble Associates and the
4 media firms to work on the 2010 House advertising campaign. Such evidence supports an
5 inference that CPPR, through its officer and agent, Sean Noble, had knowledge of the particular
6 ads that the recipient organizations planned to run, and relevant information about the
7 organizations' advertising campaigns may have been shared between Noble Associates and AFF.

8 Thus, there is information indicating that AFF should have disclosed CPPR as a
9 contributor on the independent expenditure disclosure reports and as a donor on the
10 electioneering communication disclosure reports filed with the Commission in 2010 and January
11 2011. For these reasons, the Commission finds reason to believe AFF violated 52 U.S.C.
12 § 30104(c)(2)(C) and (f)(2) (formerly 2 U.S.C. § 434(c)(2)(C) and (f)(2)) and 11 C.F.R.
13 §§ 109.10(e)(1)(vi) and 104.20(c)(9).