

FEDERAL ELECTION
COMMISSION

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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

CELA

SENSITIVE

MUR: 6872
DATE COMPLAINT FILED: 9/18/14
DATE OF NOTIFICATION: 9/24/14
DATE OF LAST RESPONSE: 11/17/14
DATE ACTIVATED: 2/3/15

ELECTION CYCLE: 2012
EARLIEST SOL: 1/10/2017
LATEST SOL: 2/10/2018

COMPLAINANTS:

Citizens for Responsibility and Ethics in
Washington

Melanie Sloan

RESPONDENT:

New Models

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30101(4)
52 U.S.C. § 30102
52 U.S.C. § 30103
52 U.S.C. § 30104

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter involves an allegation that New Models violated the Federal Election Campaign Act, as amended (the "Act"), by failing to register and report as a political committee in 2012. As discussed below, in 2012 New Models satisfied the statutory threshold for political committee status and appears to have had the major purpose of federal campaign activity. Accordingly, we recommend that the Commission find reason to believe that New Models

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1 violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register and report as a political
2 committee in 2012, and authorize an investigation.

3 **II. FACTS**

4 New Models was organized in 2001 and operates as a 501(c)(4) social welfare
5 organization.¹ New Models states that it has raised \$15,787,616 over the life of the
6 organization.² According to its tax return, New Models spent a total of \$4,506,176 in 2012.³ Of
7 that total, the group spent \$2,840,500 on the following political campaign and lobbying
8 activities⁴:

- 9 • \$2,171,000 to Now or Never PAC, a political committee registered with the
10 Commission⁵
- 11 • \$37,500 to Freedom PAC, at the time a political committee registered with the
12 Commission⁶
- 13 • \$5,000 to Special Operations OPSEC Political Committee⁷
- 14
- 15
- 16

¹ Compl. at 3; Resp., Affidavit of Tim Crawford ¶ 2 ("Crawford Affidavit"). The Crawford Affidavit appears to lack proper notarization.

² Crawford Aff. ¶ 14. New Models does not state how much it has spent over that period.

³ New Models 2012 Form 990 ("2012 Tax Return"), Part I, Line 18; Compl., Ex. A. The group's tax year appears to coincide with the calendar year. *Id.*, Line A.

⁴ 2012 Tax Return, Sched. C, Line 2.

⁵ *See* Statement of Organization (Feb. 21, 2012).

⁶ *See* Statement of Organization (Mar. 30, 2012). The Commission has since approved Freedom PAC's termination. *See* Termination Approval (Feb. 11, 2015). The Complaint does not include this disbursement in calculating New Models's spending for major purpose.

⁷ The recipient is identified only as "OPSEC" in the 2012 Tax Return, but Special Operations OPSEC Political Committee (which is also identified as "Special Operations OPSEC Political Fund" in a Miscellaneous Report to the Commission) reported receiving \$5,000 from New Models on September 21, 2012. *See* Miscellaneous Report to FEC at 32 (Dec. 19, 2012) (this document appears to be a late-filed October 2012 Quarterly Report of Special Operations OPSEC Political Fund). In the October 2012 Quarterly Report, OPSEC requested termination but has not received Commission approval. The Complaint does not include this disbursement in calculating New Models's spending for major purpose.

- 1 • \$627,000 to Government Integrity Fund Action Network ("GIFAN"), a political
2 committee registered with the Commission⁸

3
4 Additionally, New Models states that in 2012 it disbursed \$292,000 to Citizens for a
5 Working America for issue advocacy.⁹ This disbursement, however, appears to have been made
6 to Citizens for a Working America PAC, an independent expenditure-only political committee
7 ("CWA PAC").¹⁰

8 The Complaint alleges that New Models was a political committee in 2012 because it
9 crossed the Act's \$1,000 threshold for political committees and spent approximately 68.5% of its
10 total spending for 2012 on contributions to independent expenditure-only political committees.¹¹

11 The Complaint does not include the New Models disbursements to Freedom PAC (\$37,500) or
12 OPSEC (\$5,000) in its calculation, but it does include the disbursements to Now or Never PAC
13 (\$2,171,000), GIFAN (\$627,000), and Citizens for a Working America PAC (\$292,000).

14 New Models concedes that it surpassed the statutory threshold for political committee
15 status by making over \$1,000 in contributions during 2012 but states that its major purpose has
16 never been federal campaign activity.¹² New Models (through its President and COO, Tim

⁸ Statement of Organization (July 12, 2011). The 2012 Tax Return states that these funds were given to "Government Integrity Fund," which is a separate 501(c)(4) organization than Government Integrity Fund Action Network. See 2012 Tax Return, Schedule C, Part I-C, Line 5. As the Complaint points out, the employer identification number listed on the 2012 Tax Return is that of GIFAN, and GIFAN reported receiving the New Models contribution in its 2012 Pre-General Report. See Compl. at 4 n.1, Ex. B.

⁹ 2012 Tax Return, Schedule I, Part II, Line 3; Compl., Ex. A.

¹⁰ See Compl. at 4, Ex. D; Statement of Organization of CWA PAC (Sep. 13, 2010).

¹¹ See Compl. at 6-7.

¹² Resp. at 2; Crawford Aff. ¶ 3. The Commission should afford no particular weight to mere legal conclusions made in an affidavit. *A.L. Pickens Co., Inc. v. Youngstown Sheet & Tube Co.*, 650 F.3d 118, 121 (6th Cir. 1981) (giving no weight to legal conclusions in affidavit because "[t]he affidavit is no place for ultimate facts and conclusions of law") (quoting 6 MOORE'S FEDERAL PRACTICE ¶ 56.22(1), at 56-1316 (Supp. 1979)); *Schubert v. Nissan Motor Corp. in U.S.A.*, 148 F.3d 25, 30 (1st Cir. 1998); 2A C.J.S. AFFIDAVITS § 39 ("It is improper for affidavits to embody legal arguments, and legal arguments and summations in affidavits will be disregarded by the courts.").

1 Crawford) states that it has never made an independent expenditure, electioneering
2 communication, or public statement advocating the election or defeat of a federal candidate, nor
3 has its website or any of its materials stated that the organization's purpose is to support the
4 election or defeat of a federal candidate.¹³ New Models further states that the contributions
5 identified in the Complaint amount to less than 20% of the group's spending from 2001 to 2014,
6 and that this is the proper time frame for determining its major purpose.¹⁴

7 II. LEGAL ANALYSIS

8 The Act and Commission regulations define a "political committee" as "any committee,
9 club, association or other group of persons which receives contributions aggregating in excess of
10 \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000
11 during a calendar year."¹⁵ In *Buckley v. Valeo*,¹⁶ the Supreme Court held that the term "political
12 committee" "need only encompass organizations that are under the control of a candidate or the
13 major purpose of which is the nomination or election of a candidate."¹⁷ Accordingly, an
14 organization that is not controlled by a candidate must register as a political committee only if

¹³ *Id.* ¶¶ 4-10. The Crawford Affidavit also states that "New Models has made no federal political contributions in any year other than in 2012." *Id.* ¶ 11; see Resp. at 4. The Commission's records, however, show that New Models made two contributions to Citizens for a Working America PAC ("CWA PAC") on September 3, 2010 (for \$255,000), and October 14, 2010 (for \$10,000). See October 2010 Quarterly Report of CWA PAC at 6-7; Post-General 2010 Report of CWA PAC at 6. CWA PAC is registered with the Commission as an independent expenditure-only political committee. See Statement of Organization of CWA PAC (Sep. 13, 2010). The New Models contributions were the only contributions received by CWA PAC during 2010, and it made only one independent expenditure (for \$254,779) on September 13, 2010. See October 2010 Quarterly Report at 7. The reporting of these contributions in Commission-filed reports appears to be at odds with the Crawford Affidavit and contentions made in the Response. These contributions, however, were not within the 2012 calendar year, which we use to analyze major purpose in this case. See *infra*.

¹⁴ Resp. at 4-5.

¹⁵ 52 U.S.C. 30101(4)(A); 11 C.F.R. § 100.5.

¹⁶ 424 U.S. 1 (1976)

¹⁷ *Id.*

1 (1) it crosses the \$1,000 threshold and (2) it has as its "major purpose" the nomination or election
2 of federal candidates.

3 New Models concedes that it surpassed the Act's threshold for political committee status
4 by making over \$1,000 in contributions during 2012.¹⁸ Therefore, the sole issue here is whether
5 New Models also had the requisite major purpose.

6 To determine an entity's "major purpose," the Commission considers a group's "overall
7 conduct," including its disbursements, activities, and statements.¹⁹ The Commission compares
8 how much of an organization's spending is for "federal campaign activity" relative to "activities
9 that [a]re not campaign related."²⁰ In this case, the available information does not include
10 examples of New Models's public statements or non-contribution activities. With regard to its
11 known spending, New Models spent a total of \$4,506,176 in 2012.²¹ Approximately \$3,090,000

¹⁸ A contribution to a political committee satisfies the definition of "expenditure," which includes "(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 52 U.S.C. § 30101(9)(A); see Advisory Op. 1996-18 (International Association of Fire Fighters) at 2-3 (account would not be "accepting or making contributions for the purposes of the Act" and thus would not constitute a political committee). New Models's contributions to political committees in 2012 satisfy the Act's threshold requirement for political committee status. See 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5.

¹⁹ Political Committee Status, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007).

²⁰ *Id.* at 5601, 5605.

²¹ The time frame used for determining major purpose has been considered in previous matters before the Commission, including MURs 6081 (American Issues Project), 6396 (Crossroads GPS), 6402 (American Future Fund), 6538 (Americans for Job Security), and 6589 (American Action Network). As we have noted, we believe that a calendar year provides the firmest statutory footing for the Commission's major purpose determination and is consistent with the Act's plain language and prior decisions of those courts that have previously addressed questions of political committee status. The Act defines "political committee" in terms of expenditures made or contributions received "during a calendar year." 52 U.S.C. § 30101(4); see *FEC v. Malenick*, 310 F. Supp. 2d 230, 237 (D.D.C. 2004) ("Accordingly, because Triad and then Triad Inc.'s major purpose was the nomination or election of specific candidates in 1996, and because Triad received contributions aggregating more than \$1,000 in 1996, I find that Triad and Triad, Inc., operated as a 'political committee' in 1996.") (emphasis added); *FEC v. GOPAC*, 917 F.Supp. 851, 853 (D.D.C. 1996) (group founded in 1979, yet court discusses major purpose only in 1989 and 1990); see also MUR 5492 (Freedom, Inc.) (analyzing group's admitted major purpose in 2004 even though group was formed in 1962); MURs 5577, 5620 (National Association of Realtors – 527 Fund) (analyzing NAR-527 Fund's 2004 spending even though group had registered with IRS since 2000); MUR 5755 (New Democrat Network) (analyzing New Democrat Network's 2004 spending while group had existed since at least 1996); MUR 5753 (League of

1 (or 68.5%) of that total was spent on the contributions identified in the Complaint, an amount
2 that is sufficient to establish that the group's major purpose in 2012 was the nomination or
3 election of federal candidates.²²

4 Although we maintain that a calendar year is the most appropriate time frame for
5 analyzing major purpose, under the facts here New Models's spending over the 2011-2012
6 election cycle also indicates that its major purpose may be federal campaign activity. New
7 Models spent \$1,480,065 in 2011.²³ and thus a total of \$5,986,241 during 2011-2012. The
8 contributions identified in the complaint make up 51.6% of New Models's spending over that
9 period.²⁴ Thus, whether the analytical time frame for major purpose is a calendar year, the
10 group's fiscal year,²⁵ or the relevant election cycle, New Models's spending on federal campaign
11 activity appears to constitute the majority of its overall spending.

12 New Models argues that it lacks major purpose because the contributions identified in the
13 Complaint amount to "less than 20%" of its overall spending since the group's inception in
14 2001.²⁶ Even assuming that this is the proper time frame for analyzing its major purpose, the
15 available information does not provide an adequate basis for such an assessment. New Models

Conservation Voters) (analyzing LCV's 2004 spending even though one of LCV's funds had registered with the IRS as early as 2000); MURs 5694, 5910 (Americans for Job Security) (analyzing activity from 2000 through 2006 in determining group's major purpose in 2006, despite the fact that the group was founded in 1997); MUR 5487 (Progress for America VF) (analyzing group's major purpose based on 2004 disbursements where group had raised \$4.6 million and spent \$11.2 million through 2006).

²² The total rises to \$3,132,500 (69.5%) if the contributions to Freedom PAC and OPSEC are included.

²³ Compl., Ex. E, 2011 Tax Return of New Models, Line 18.

²⁴ The total rises to 52.3% if the contributions to Freedom PAC and OPSEC are included.

²⁵ In this case, the fiscal year aligns with the calendar year. *See supra* note 3.

²⁶ Resp. at 4-5.

1 includes in its Response a list of annual fundraising totals for each year from 2002-2014,²⁷ but
2 does not include any summary of its spending over that period. Given that omission — and
3 recognizing also that the Response appears to have mistaken certain material facts concerning its
4 past spending²⁸ — New Model's assertion concerning the character of its spending since the date
5 of its formation does not discredit the record evidence that suggests that its major purpose
6 appears to have been federal campaign activity, as alleged.²⁹

7 Thus, based on the currently available information, it reasonably appears that New
8 Models made over \$1,000 in expenditures in 2012 and had the major purpose of nominating or
9 electing federal candidates. Accordingly, we recommend that the Commission find reason to
10 believe that New Models violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register
11 and report as a political committee in 2012.

12 III. INVESTIGATION

13 We plan to seek information to afford the Commission the ability to determine the scope
14 of New Models's reporting obligations and to identify potential witnesses who may have
15 relevant knowledge of those facts. Although we intend to seek information through voluntary
16 means, we also request that the Commission authorize the use of compulsory process, including

²⁷ Crawford Aff., Attach. 1. According to Crawford, these fundraising totals are drawn from federal tax returns, with the exception of 2003, which is based on "expenditures from bank records" and 2014, which is based on year-to-date bank records. *Id.* ¶ 14, Attach. 1.

²⁸ *See supra* notes 8, 13.

²⁹ A reason to believe determination is not conclusive that an allegation is true, but rather recognizes the seriousness of the allegations and provides an opportunity to conduct an administrative fact-finding inquiry to resolve whether in fact a violation occurred. *See* Statement of Policy Regarding Commission Act in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) (A reason-to-believe finding indicates "only that the Commission found sufficient legal justification to open an investigation to determine whether a violation of the Act has occurred."). Thus, the Commission previously has determined as a matter of policy that a reason-to-believe finding is appropriate "in cases where the available evidence in the matter is at least sufficient to warrant conducting an investigation." *See id.* (reason-to-believe finding appropriate where complaint "credibly alleges that a significant violation may have occurred, but further investigation is required to determine whether a violation in fact occurred and, if so, its exact scope").

