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Via U.S. Mail and Electronic Mail to fhampton@fec.gov

Jeff S. Jordan
Assistant General Counsel
Federal Election Commission
Office of Complaints Examination
and Legal Administration
999 E Street, NW
Washington, DC 20436

Re: Now or Never PAC (Matter Number MUR 6920)

Dear Mr. Jordan:

Our client, Now or Never PAC, ("Now or Never") submits this letter in response to a Complaint filed by Citizens for Responsibility and Ethics in Washington ("CREW"). CREW's Complaint alleges that Now or Never and its treasurer, James C. Thomas, violated the Federal Election Campaign Act of 1971, as amended ("FECA"), and Federal Election Commission ("FEC") regulations by knowingly accepting a contribution in the name of another. The Complaint, filed by a self-titled "watchdog" group that regularly brings frivolous complaints against conservative-leaning entities, is baseless. We respectfully request that the Commission dismiss the Complaint in this matter, as it is not worthy of the Commission's limited time and resources.

I. Background

Now or Never is an independent expenditure-only committee (Super PAC) formed in 2012. During the 2012 election cycle, it received \$8,250,500 in contributions and spent \$7,760,174 on independent expenditures, which it reported to the FEC.

The Complaint focuses on an October 31, 2012 contribution Now or Never received from American Conservative Union (ACU) via wire transfer in the amount of \$1.71 million. The Committee timely reported this contribution to the FEC on December 5, 2012.

The Complaint alleges that the funds for this contribution were not from ACU, and as a result, ACU knowingly made a contribution in the name of another in violation of FEC rules. The Complaint relies on an 2014 amendment to ACU's IRS Form 990 tax return, which apparently included language by ACU's auditors that stated that the \$1.71 million was "a political contribution received by [ACU] and

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promptly and directly delivered to a separate political organization.” Complaint at ¶ 19. With respect to Now or Never, the Complaint further alleges that Now or Never violated FECA and FEC regulations “if Now or Never PAC knowingly accepted a \$1.71 million contribution from ACU made in the name of another”. Complaint at ¶ 25.

II. Legal Analysis

As an independent expenditure-only committee, Now or Never may raise unlimited sums of money from corporations, unions, individuals, and associations, including 501(c)(4) nonprofit organizations such as ACU. It may also spend unlimited sums to advocate for or against federal candidates, while reporting its donors to the FEC. During the 2012 election cycle, Now or Never lawfully raised and spent money to advocate for and against candidates and complied with all reporting requirements by publicly disclosing its contributions, including the contribution received from ACU.

A. Section 441f is designed to prevent the circumvention of contribution limits, which do not apply to Super PACs like Now or Never

The Complaint alleges that if Now or Never knowingly accepted the contribution from ACU made in the name of another, it violated 2 U.S.C. § 441f (current version at 52 U.S.C. § 30122). Section 441f provides that “no person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.” *Id.*

Section 441f, which has been enforced in situations where contributions have been made to candidates, separate segregated funds, and traditional PACs, was designed to prevent the circumvention of contribution limits. In an amicus brief filed in 2009, the FEC highlighted the anti-circumvention goal of section 441f, recognizing “section 441f’s anti-circumvention purpose” and noting that 441f is designed to prevent the circumvention of contribution limits.¹ As the Commission noted, the Supreme Court has even observed section 441f’s goal of “deterrence of ‘corruption by conduit,’ *i.e.*, ‘donations by parents through their minor children to circumvent contribution limits applicable to the parents.’” Amicus at 14, *citing McConnell v. FEC*, 540 U.S. 93, 232 (2003).

Legislative history also shows the purpose of 441f was to prevent individuals from using conduits to evade contribution limits. For example, during the Senate floor debate on the bill that eventually became Section 441f, one of the bill’s principal sponsors directly addressed the problem of wealthy individuals using conduit contributors to evade the individual contribution limits:

¹ See *United States v. O’Donnell*, Case No. 09-50296 (9th Cir. 2010), (brief amicus curiae of the FEC discussing the “purpose of section 441f in particular and of the provision’s role in the broader context of the Federal Election Campaign Act”), available at http://www.fec.gov/law/litigation/odonnell_fec_amicus.pdf



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If he is limited to \$5,000, what does he do? He has no limitation on his own money. He is a man of influence. He wants to find \$200,000. He finds 40 friends and gives it to them and each of them gives back \$5,000. Let us close that loophole and go after the man who would bribe the election because he is so well fixed.

117 Cong. Rec. S29295 (daily ed. Aug. 4, 1971) (statement of Sen. Scott).

Section 441f is a rule designed to prevent circumvention of contribution limits. Here, no contribution limits apply to Now or Never, as it is an independent expenditure-only committee. Circumvention of contribution limits is not a concern for contributions to Super PACs like Now or Never, as it may accept unlimited contributions and the Supreme Court has found there is no risk of corruption. Indeed, since *Buckley v. Valeo*, the Supreme Court has recognized there is a major distinction between independent expenditures and contributions to candidates. 424 U.S. 1, 26-27 (1976). Contributions to candidates may be restricted because of the risk that they will result in quid pro quo corruption, a restraint strengthened by the enforcement of section 441f. However, independent expenditures—like those made by Now or Never—present no corresponding threat of corruption. See *Buckley*, 424 U.S. at 45; *Citizens United v. FEC*, 558 U.S. 310, 357 (2010) (“independent expenditures...do not give rise to corruption or the appearance of corruption.”).

Section 441f was enacted to address the concern that contributions to candidates risk quid pro quo corruption. Independent expenditure-only committees like Now or Never present no such risk.

B. Now or Never did not violate section 441f

Now or Never PAC received a contribution from ACU and publicly disclosed the contribution as required by law. Now or Never PAC's receipt of the contribution did not violate section 441f. As the FEC has noted, section 441f is designed to prevent the circumvention of contribution limits—limits that do not apply to Now or Never PAC.

We could find no case or enforcement action where the FEC has applied section 441f to an independent expenditure-only committee such as Now or Never. Because there is no anti-corruption interest met by enforcing section 441f against independent expenditure-only committees, this is unsurprising. Indeed, the justification for contribution limits—the risk of quid pro quo corruption—is eliminated in the context of Super PACs.

III. Conclusion

Section 441f was enacted long before the advent of Super PACs, and Congress simply did not envision independent expenditure-only committees when it wrote 441f. At best, the issue is far from settled, and the FEC should decline use this enforcement action to rewrite 441f to apply to Super PACs.



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Thank you for your consideration of this matter. Please do not hesitate to contact me with any questions.

Very truly yours,

Edward D. Greim

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