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FIRST GENERAL COUNSEL'S REPORT

MUR 6920 **CELA**
DATE COMPLAINT FILED: February 27, 2015
DATE OF NOTIFICATIONS: March 4, 2015
LAST RESPONSE RECEIVED: May 4, 2015
DATE ACTIVATED: September 23, 2015
|
EXPIRATION OF SOL: October 31, 2017
(earliest)
ELECTION CYCLE: 2012

COMPLAINANT: Citizens for Responsibility and Ethics in
Washington

RESPONDENTS: American Conservative Union
Now or Never PAC and James C. Thomas III
in his official capacity as Treasurer
Unknown Respondent

RELEVANT STATUTES AND REGULATIONS: 52 U.S.C. § 30104(b)¹
52 U.S.C. § 30122
11 C.F.R. § 110.4(b)

INTERNAL REPORTS CHECKED: FEC Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Complaint in this matter alleges that American Conservative Union ("ACU"), Now or Never PAC, and Unknown Respondent violated the Act's prohibition against making and receiving contributions in the name of another. In its 2012 Post-General Election Report, Now or Never PAC disclosed a \$1.71 million contribution from ACU. Approximately 18 months later, ACU reported to the Internal Revenue Service ("IRS") that it had received the contribution

¹ On September 1, 2014, the Federal Election Campaign Act of 1971, as amended (the "Act") was transferred from Title 2 to new Title 52 of the United States Code.

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1 and stated that the "\$1,710,000 was a political contribution received by the Organization and
2 promptly and directly delivered to a separate political organization," Now or Never PAC.⁶

3 The Complaint alleges that Unknown Respondent is the true source of the \$1.71 million
4 contribution made in ACU's name to Now or Never PAC, and that ACU's amended tax return
5 reflects that ACU merely served as a conduit for the contribution.⁷ The Complaint highlights
6 representations in ACU's tax return that none of the money came from ACU's funds, and that
7 the contribution was "received and promptly and directly delivered" to Now or Never PAC.⁸ It
8 alleges that this activity was carried out under IRS regulations that permit such transactions
9 "when a section 501(c) organization collects political contributions" that are "earmarked for a
10 separate segregated fund," and "promptly and directly transfers them."⁹

11 ACU submitted a response asserting that its activities were permissible under the Act.¹⁰
12 The Response explains that the language in ACU's tax return describing the circumstances of the
13 contribution to Now or Never PAC was added by ACU's auditors, who "did not consult with
14 contemporaneous ACU staff regarding the nature of this transaction, and instead relied upon the
15 face of ACU's financials to support their notation on the amended IRS filing."¹¹ The Response
16 provides no other specific information regarding the circumstances of the transactions at issue,
17 however, noting only that ACU received a total of approximately \$10.2 million in donations in
18 2012, "including an amount similar to \$1.7 million," and that the donations were all placed in

⁶ *Id.* Ex. C at Schedule O, Schedule C.

⁷ Compl. ¶¶ 12, 17.

⁸ *Id.* ¶ 19.

⁹ *Id.* ¶ 18.

¹⁰ ACU Resp. at 2.

¹¹ *Id.*

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1 ACU's general treasury account.¹² ACU notes that it engaged in a variety of "public education
2 and political activities" in 2012, including the donation to Now or Never PAC.¹³ The Response
3 further states that ACU consulted with election law counsel when it received the funds and
4 during the course of its election-related activity in 2012 to ensure that its actions were
5 permissible under the Act.¹⁴ The majority of ACU's Response is devoted to contentions that
6 section 30122 is inapplicable to IEOPCs such as Now or Never PAC, as summarized below.¹⁵

7 Now or Never PAC also submitted a response in this matter which does not provide any
8 information regarding the contribution at issue, but denies that Now or Never PAC violated
9 section 30122.¹⁶ The Response notes that as an IEOPC, Now or Never PAC may raise unlimited
10 funds from sources including 501(c)(4) organizations such as ACU.¹⁷ Now or Never PAC
11 contends that it has complied with all reporting requirements by publicly disclosing all
12 contributions received during the 2012 election cycle, "including the contribution received from
13 ACU."¹⁸

14 Both Respondents argue that this matter is not worthy of the Commission's time and
15 resources because section 30122 does not, or should not, apply to IEOPCs such as Now or Never

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 2-4.

¹⁶ Now or Never PAC Resp. at 3 (May 4, 2015).

¹⁷ *Id.*

¹⁸ *Id.* at 2.

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1 PAC.¹⁹ They contend that the statute is intended to prevent circumvention of contribution limits
2 and avoid corruption.²⁰ Because IEOPCs are permitted to accept unlimited contributions, they
3 assert that there is no basis to apply section 30122 to such groups.²¹ The Respondents also assert
4 that the Commission has not yet applied section 30122 to IEOPCs.²² Now or Never PAC's
5 Response concludes that "[a]t best, the issue is far from settled, and the FEC should decline [to]
6 use this enforcement action to rewrite [section 30122] to apply to Super PACs."²³ And ACU's
7 Response similarly asserts that "[t]he application of [section 30122] to contributions made to
8 Super PACs is far from settled, and the Commission should not use an enforcement action to
9 resolve this question."²⁴ The Respondents request that the Commission dismiss the Complaint.²⁵

10 III. LEGAL ANALYSIS

11 A. There is Reason to Believe that ACU and Unknown Respondent Violated 12 52 U.S.C. § 30122

13 The Complaint alleges that Unknown Respondent, not ACU, was the source of the \$1.71
14 million contribution to Now or Never PAC. The Act prohibits a person from making a
15 contribution in the name of another, knowingly permitting his or her name to be used to effect
16 such a contribution, or knowingly accepting such a contribution.²⁶ The requirement that a

¹⁹ See, e.g., *id.* at 3; ACU Resp. at 3.

²⁰ Now or Never PAC Resp. at 2-3; ACU Resp. at 2-3.

²¹ *Id.*

²² See, e.g., ACU Resp. at 4 ("It is no coincidence that the Commission has not applied [section 30122] to Super PACs because it is constitutionally suspect in light of recent court decisions.").

²³ Now or Never PAC Resp. at 3.

²⁴ ACU Resp. at 4.

²⁵ *Id.*; Now or Never PAC Resp. at 1.

²⁶ 52 U.S.C. § 30122; see also 11 C.F.R. § 110.4(b). The term "person" for purposes of the Act and Commission regulations includes partnerships, corporations, and other organizations. 52 U.S.C. § 30101(11);

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1 contribution be made in the name of its true source promotes Congress's objective of ensuring
2 the complete and accurate disclosure by candidates and committees of the political contributions
3 they receive.²⁷ Courts have uniformly rejected the assertion that "only the person who actually
4 transmits funds . . . makes the contribution,"²⁸ recognizing that "it is implausible that Congress,
5 in seeking to promote transparency, would have understood the relevant contributor to be [an]
6 intermediary who merely transmitted the campaign gift."²⁹

7 Accordingly, the Act and the Commission's regulations provide that a person who
8 provides funds to another for the purposes of contributing to a candidate or committee "makes"
9 the resulting contribution.³⁰ In other words, the true source of a contribution is the person who
10 "made the gift by arranging for his money to finance the donation."³¹ If an intermediary merely
11 plays a "ministerial role" in transmitting a contribution, the contribution should not be attributed
12 to the intermediary but instead to the original source.³²

11 C.F.R. § 100.10.

²⁷ See, e.g., *United States v. O'Donnell*, 608 F.3d 546, 553 (9th Cir. 2010) ("[T]he congressional purpose behind [section 30122] — to ensure the complete and accurate disclosure of the contributors who finance federal elections — is plain.").

²⁸ *United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011).

²⁹ *O'Donnell*, 608 F.3d at 554; see also *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."); *Doe v. Reed*, 561 U.S. 186, 199 (2010) ("Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot.").

³⁰ See, e.g., *Boender*, 649 F.3d at 660 ("[W]e consider the giver to be the source of the gift, not any intermediary who simply conveys the gift from the donor to the donee.").

³¹ *O'Donnell*, 608 F.3d at 550; see also *United States v. Whittemore*, 776 F.3d 1074, 1080 (9th Cir. 2015) (holding that defendant's "unconditional gifts" to relatives and employees, along with suggestion they contribute the funds to a specific political committee, violated section 30122 because the source of the funds remained the individual who provided them to the putative contributors).

³² *O'Donnell*, 608 F.3d at 550.

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1 The record in this matter supports a finding that there is reason to believe that Unknown
2 Respondent violated the Act's prohibition against contributions in the name of another, and that
3 ACU violated the Act by knowingly permitting its name to be used to effect such a contribution.
4 ACU reported to the IRS that the \$1.71 million contribution at issue "was a political contribution
5 received by [ACU] and promptly and directly delivered to a separate political organization,"
6 Now or Never PAC.³³ ACU's Response does not contradict this, nor does it provide any
7 information regarding the circumstances surrounding the contribution that it received and made.
8 Instead, the Response is vague as to the nature of the contribution or contributions that it
9 received, does not assert that ACU exercised any control regarding the ultimate destination of the
10 contribution at issue, and does not address the Complaint's allegations that Unknown
11 Respondent gave the money to ACU with the intent that it be transmitted to Now or Never PAC.
12 The Response therefore fails to counter, or even address, the reasonable conclusion drawn in the
13 Complaint — that ACU's representations to the IRS regarding the contribution indicate it was
14 "earmarked to Now or Never PAC" by the Unknown Respondent, and that ACU merely "acted
15 as a conduit" for the funds.³⁴ This provides a sufficient basis for a finding that there is reason to
16 believe that the alleged violations may have occurred and that an investigation is warranted.³⁵

17 As discussed above, Respondents argue that this matter is not worthy of the
18 Commission's time and resources because section 30122 should not be applied to IEOPCs such
19 as Now or Never PAC. But the purpose of section 30122 is not restricted to ensuring adherence
20 to contribution limits. Federal circuit courts have noted that the statute also furthers disclosure:

³³ See Compl., Ex. C at Schedule O.

³⁴ Compl. ¶ 17.

³⁵ See Statement of Policy Regarding Comm'n Action in Matters at the Initial Stage in the Enf't Process, 72 Fed. Reg. 12545 (Mar. 16, 2007).

1 Requiring that contributions be made in the name of the true donor promotes "the congressional
2 purpose behind [section 30122] — to ensure the complete and accurate disclosure of the
3 contributors who finance federal elections."³⁶

4 In upholding the Act's disclaimer and disclosure requirements, the Supreme Court in
5 *Citizens United* noted that "the public has an interest in knowing who is speaking about a
6 candidate shortly before an election."³⁷ The public interest in disclosure can only be vindicated
7 if groups such as Now or Never PAC, which must report their donors, in fact report the true
8 source of contributions that they receive. Accordingly, we recommend that the Commission find
9 reason to believe that ACU and Unknown Respondent violated 52 U.S.C. § 30122, and authorize
10 an investigation.³⁸

11 **B. The Record Should be Developed Before Taking Action as to Now or Never**
12 **PAC**

13 The Act prohibits a committee from knowingly accepting a contribution made in the
14 name of another.³⁹ The Act also requires political committees such as Now or Never PAC to file

³⁶ *O'Donnell*, 608 F.3d at 553; see also *Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000) (rejecting constitutional challenge to section 441f [now section 30122] due to the compelling governmental interest in disclosure); *Boender*, 649 F.3d at 661 ("Straw man contributions undermine the goal of complete and accurate disclosure of the contributors who finance federal elections . . .").

³⁷ *Citizens United*, 558 U.S. at 369.

³⁸ The Complaint alleges that ACU's conduct — and possibly that of the other Respondents — was knowing and willful. See, e.g., Compl. ¶¶ 23, 25, 27. We do not recommend at this time that the Commission make such a finding, which would require that the respondent knew that his or her actions were unlawful. See H.R. Rpt. 94-917 at 3-4 (Mar. 17, 1976); *AFL-CIO v. FEC*, 628 F.2d 97, 101 (D.C. Cir. 1980) (stating that "knowing and willful" indicates "'defiance' or 'knowing, conscious, and deliberate flaunting' of the Act"). We currently lack sufficient information to support an inference that the Respondents knew their actions were illegal. Indeed, ACU's Response asserts that ACU consulted with election law counsel in connection with the transactions at issue, which suggests that ACU likely did not intend to violate the Act. And without information as to the identity or intentions of Unknown Respondent, there is no basis to make a recommendation that the donor knowingly and willfully violated the Act.

³⁹ 52 U.S.C. § 30122; 11 C.F.R. § 110.4(b).

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1 regular disclosure reports.⁴⁰ Committees must disclose itemized breakdowns of receipts and
2 disbursements, including the name and address of each person who has made any contribution or
3 received any disbursement in an aggregate amount or value in excess of \$200 within the calendar
4 year, together with the date and amount of any such contribution or disbursement.⁴¹ In addition,
5 if a committee treasurer discovers after receipt of an apparently legitimate contribution that it
6 was made in the name of another, the treasurer must refund or disgorge the contribution within
7 30 days.⁴²

8 In its 2012 Post-General Election Report, Now or Never PAC reported that it received the
9 contribution at issue from ACU on October 31, 2012. The Complaint and Responses do not
10 provide a sufficient basis for us to evaluate whether there is reason to believe that Now or Never
11 PAC knowingly accepted a contribution that was made by Unknown Respondent but
12 inaccurately attributed to ACU. Specifically, the record does not enable us to determine what, if
13 anything, Now or Never PAC knew about the origin of the \$1.71 million contribution that it
14 received from ACU. The record provides no information regarding whether Now or Never PAC
15 knew or should have known that the contribution actually came from Unknown Respondent.
16 Accordingly, we recommend that the Commission take no action at this time as to Now or Never
17 PAC.

⁴⁰ 52 U.S.C. § 30104.

⁴¹ 52 U.S.C. § 30104(b)(2)-(6); 11 C.F.R. § 104.3(a)(3)-(4), (b)(2)-(4).

⁴² 11 C.F.R. § 103.3(b)(2); *see* MUR 5643 (Carter's Inc.) (informing recipient committee of its obligation to refund or disgorge illegal contribution); AO 1996-05 (Jay Kim for Congress) (allowing for disgorgement of illegal contributions to U.S. Treasury as an alternative to refunding contributions).

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1 6. Approve the appropriate letters.

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4 DATE: 1/20/16

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6 BY: DP/ks
7 Daniel A. Petalas
8 Acting General Counsel

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10 Kathleen Guith
11 Kathleen Guith
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