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March 15, 2017

Chairman Steven T. Walther
Federal Election Commission
999 E Street, NW
Washington, DC 20463
VIA FACSIMILE AND REGULAR U.S. MAIL

Re: MUR 6920– Factual and Legal Analysis

Dear Chairman Walther:

We are in receipt of your letter dated February 7, 2017, notifying our client, American Conservative Union ("ACU"), that the Commission found reason to believe it violated 52 U.S.C. § 30122 (formerly 2 U.S.C. §441f), and the so-called Factual and Legal Analysis ("F&LA") that sets forth the purported basis for the Commission's finding. Your letter also states that we may "submit any factual or legal materials that [we] believe are relevant to the Commission's consideration of this matter." Accordingly, we request clarification regarding the following legal issues with respect to the provided F&LA, which constitutes necessary information for our client to determine whether to engage in pre-probable cause conciliation.

The F&LA you provided does not provide a legal rationale for the application of 52 U.S.C. § 30122 to Independent Expenditures-Only Committees (hereinafter "Super PACs"), which are not subject to the contribution limits and prohibitions of the Federal Election Campaign Act of 1971, as amended (the "Act"). The cases cited in the F&LA as the basis for applying § 30122 do not address that issue and are not on point in this matter.

The Supreme Court has clearly stated that "independent expenditures...do not give rise to corruption or the appearance of corruption."[1] On the other hand, contributions can be restricted to a candidate because of the risk that they will lead to quid pro quo corruption. As we stated previously, Section 441f bolsters this restriction.[2] Indeed, the *O'Donnell*[3] and *Boender*[4] cases

[1] *Citizens United v. FEC*, 558 U.S. 310, 357 (2010).

[2] *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976) (per curiam).

(Ninth Circuit and Seventh Circuit, respectively) involved contributions made to a Federal candidate's campaign committee through straw donors. In both cases, the contributors were subject to the Act's "hard money" contribution limits and prohibitions, which is not the case here. Even if you apply these cases to this situation, the F&LA conveniently ignores additional language in those cases that cites the anti-circumvention interest of Section 30122, which is simply not applicable in this context.

In fact, prior to the enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Courts concluded that 441f does not apply in the soft money context.[5] For example, the U.S. Court of Appeals for the District of Columbia Circuit concluded that "there is no soft money counterpart to *§ 441f* in FECA itself, which prohibits conduit transfers of 'contributions,' *i.e.*, hard money."[6] Likewise, the U.S. Court of Appeals for the Third Circuit stated that the disclosure requirement of § 441f was limited to "contributions of hard money."[7] Although the Supreme Court's decision in *Citizens United v. FEC* was not about national party soft money,[8] the Supreme Court struck the "hard money" prohibition that applied to independent expenditures. Furthermore, the U.S. Court of Appeals for the D.C. Circuit's decision in *SpeechNow v. FEC* resulted in the elimination of "hard money" limits to entities that make independent expenditures.[9] Thus, Super PACs are not subject to "hard money" contribution limits and prohibitions, which raises legitimate questions as to the applicability of Section 30122 to Super PACs and their contributors.[10]

This matter is more akin to the cases addressing soft money prior to enactment of BCRA. The *O'Donnell* and *Boender* cases cited in the F&LA deal with candidate committees where there are strict contribution limits and source prohibtions that do not exist in the Super PAC context. Moreover, the rationale in those cases was not just the disclosure interest, which is what is suggested by the F&LA, but more so an anti-circumvention interest, which is inherent in any contributions made to candidates. The anti-circumvention interest is not at issue here.

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[3] *United States v. O'Donnell*, 608 F.3d 546 (9th Cir. 2010)

[4] *United States v. Boender*, 649 F.3d 650 (7th Cir. 2011).

[5] *See United States v. Trie*, 23 F. Supp.2d 55 (D.D.C. 1998); *United States v. Kanchanalak*, 192 F.3d 1037, 1042 (D.C. Cir. 1999); *Mariani v. United States*, 212 F.3d 761, 775 (3rd Cir. 2000).

[6] *United States v. Kanchanalak*, 192 F.3d 1037, 1042 (D.C. Cir. 1999).

[7] *Mariani v. United States*, 212 F.3d 761, 775 (3rd Cir. 2000) (concluding "that Congress was free to determine that disclosure of hard money donations was the most important form of disclosure, and to limit the regulation to that area.").

[8] *See Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

[9] *See SpeechNow v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc).

[10] We note that the Courts in the *Trie* and *Kanchanalak* cases held that the Commission's regulation at 11 C.F.R. §104.8(a),(e) required political committees to report soft money; however, this created the bizarre situation where an individual or political committee could violate a regulation but not the statute the regulation was purportedly rooted in, as well as potentially subject an individual to felony prosecution for false statements or conspiracy but not be able to prosecute that individual under FECA's misdemeanor provisions. *See* Robert D. Probasco, *Prosecuting Conduit Campaign Contributions – Hard Time for Soft Money*, 42 S. Tex. L. Rev. 841 (2001).

Even if the Commission suggests that *O'Donnell* and *Boender* are applicable here, this area of law is gray with respect to committees that can accept unlimited contributions. The Commission has not produced any binding precedent that indicates Section 30122 applies in this context.[11] Accordingly, based just upon the provided F&LA, there is no legal rationale for the Commission's RTB determination. We respectfully request that the Commission review the case-law cited in this letter and consequently dismiss this MUR. If the Commission is, upon reevaluation, sticking with the RTB determination, then we request that a coherent F&LA rationale be provided so our client can make an educated decision on how to proceed.

Thank you in advance for your considered response in this matter. Please do not hesitate to contact me directly at (202) 572-8663 with any questions.

Respectfully submitted,

Charles R. Spies
Elizabeth Beacham White

Cc: Vice-Chair Caroline C. Hunter
Commissioner Lee E. Goodman
Commissioner Matthew S. Petersen
Commissioner Ellen L. Weintraub
Antoinette Fuoto, Office of General Counsel

[11] The Commission closed the file with respect to MURs 6485 (W Spann LLC, et al.), 6487 & 6488 (F8, LLC, et al.), 6711 (Specialty Investments, Inc., et al.), and 6930 (SPM Holdings LLC, et al.). The Statement of Reasons issued by then Vice Chairman Steven T. Walther and Commissioners Ann M. Ravel and Ellen L. Weintraub, states that Section 30122 "squarely applies in this case" citing to the same decisions as the F&LA in this matter, which are not on point. The Statement of Reasons of then Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman provides an analysis in the context of contributions made via a closely held corporation or corporate LLC.