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September 5, 2017

VIA ELECTRONIC MAIL

Mark Shonkwiler
Antoinette Fuoto
Office of Complainants Examination and Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 22210

Re: MUR 6920 – Supplemental Response of Now or Never PAC

Dear Mr. Shonkwiler and Ms. Fuoto:

I am writing on behalf of Now or Never PAC and James C. Thomas, III, in his official capacity as Treasurer (collectively, "the Committee"), to provide a supplemental response to the complaint filed by Citizens for Responsibility and Ethics in Washington ("CREW") in February 2015. In summary, CREW alleges that the Committee and other Respondents in this matter (1) made, received, or facilitated a contribution in the name of another, and/or (2) violated the reporting requirements of the Federal Election Campaign Act, as amended (the "Act").

Procedural History

As you are aware, the Committee was previously represented in this enforcement matter by other legal counsel, and our firm was not engaged by the Committee until August 2017. The Committee, through its previous legal counsel, filed an initial response arguing that § 30122 is designed to prevent the circumvention of contribution limits, which do not apply to independent expenditure only committees ("Super PACs") like the Committee. The Committee now seeks to supplement that response with additional legal analysis and arguments.

The Office of Complainants Examination and Legal Administration has requested the Committee provide additional facts prior to the parties engaging in pre-probable cause conciliation. Therefore, it should be noted in the record that the Committee's ability to provide additional facts is limited since the Committee's Treasurer, James C. Thomas, III, and one known agent, Axiom Strategies, LLC, are each separately represented by their own legal counsel. The Committee does, however, anticipate that Mr. Thomas and Axiom Strategies, LLC will each provide the Commission with additional facts through their respective legal counsel, and it is our hope that our collective submissions will help bring this matter to a close.

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It is "Manifestly Unfair" to Pursue Enforcement Against the Committee

The Act's giving-in-the-name-of-another prohibition focuses on the "true source" of a contribution; in other words, whether a person (i) passed funds through a straw donor to make a contribution; (ii) *knowingly* permitted his or her name to be used to effect that contribution; (iii) *knowingly* helped or assisted any person in making a contribution in the name of another; or (iv) *knowingly* accepted a contribution made by one person in the name of another. *See* 52 U.S.C. § 30122; *see also* 11 C.F.R. § 110.4.

Legislative history shows the purpose of the prohibition was to prevent individuals from using conduits to evade contribution limits. For example, during the Senate floor debate on the bill that eventually became § 30122, one of the bill's principal sponsors directly addressed the problem of wealthy individuals using conduit contributors to evade the individual contribution limits:

> 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 financed.

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

Until recently, federal law prohibited all corporate contributions so § 30122 inquiries were consequently limited to whether a corporation (or some other person) paid or reimbursed individuals for making direct contributions in those individuals' names. In its landmark *Citizens United* opinion, the Supreme Court recognized the First Amendment right of corporations to expressly advocate the election or defeat of federal candidates. Therefore, Super PACs like Now or Never PAC and 501(c)(4) nonprofit corporations like the American Conservative Union ("ACU") are now permitted to expend funds to expressly advocate the election or defeat of federal candidates, as well as to contribute funds to Super PACs for such express advocacy. Accordingly, the alleged § 30122 violation in this matter differs substantially from those previously considered by the Commission.

Indeed, when the Commission considered MURs 6485, 6487, 6488, 6711, and 6930 in 2016—more than 3½ years *after* the facts giving rise to this enforcement matter—three Commissioners recognized that "application of the true source analysis to determine whether a corporation may be considered a straw donor for an individual's contribution is an issue of first impression before the Commission." Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 1-2 (April 1, 2016), MURs 6485, 6487, 6488, 6711, and 6930 (W Spann LLC, *et al.*). Those Commissioners reasoned:

> [T]his is the first occasion the Commission has examined whether it is possible for individuals to violate section 30122 by contributing in the names of their closely held corporations and corporate LLCs. Based on Commission precedent, the

> regulated community may have reasonably concluded that the answer to that question was "no." Therefore, because Respondents did not have prior notice of the legal interpretation discussed above, we determined that applying section 30122 to Respondents would be inconsistent with due process principles. The Supreme Court has observed that "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Stations*, 567 U.S. 239, 253 (2012); *see also* Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Peterson at 23 (July 25, 2013), MUR 6081 (American Issues Project) ("[D]ue process requires that the public know what is required *ex ante*, and that the Commission acknowledge and provide the public with prior notice of any regulatory change.").

Those Commissioners then concluded that it would be "manifestly unfair" to pursue enforcement against W Spann LLC and other respondents because Commission precedent did not provide adequate notice regarding the application of § 30122 to closely held corporations and corporate LLCs that make contributions to Super PACs. Similarly, at the time Now or Never PAC received the contribution in question—which occurred 3½ years *prior* to the Commissioners' Statement of Reasons in the W Spann LLC, *et al.* MURs—Commission precedent had not provided adequate notice regarding the application of § 30122 to nonprofit corporations like ACU that make contributions to Super PACs. Simply put, in determining whether the Respondents in this matter had adequate notice regarding the application of § 30122, there is no substantive distinction between W Spann LLC and ACU.

The Commission Must Prove Scienter to Establish a § 30122 Violation

The Act provides that "[n]o 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." 52 U.S.C. § 30122. The Commission's implementing regulation supplements the statute by also prohibiting the aiding and abetting of impermissible contribution-in-the-name-of-another schemes. That implementing regulation is codified at 11 C.F.R. § 110.4:

§ 110.4 Contributions in the name of another; cash contributions.

(a) [Reserved]

(b) *Contributions in the name of another.* (1) No person shall—

- (i) Make a contribution in the name of another;
- (ii) Knowingly permit his or her name to be used to effect that contribution;
- (iii) Knowingly help or assist any person in making a contribution in the name of another; or
- (iv) Knowingly accept a contribution made by one person in the name of another.

Notably, each prohibited action set forth in (b)(i) - (iv) requires the Commission to prove scienter to establish a violation of the contribution-in-the-name-of-another prohibition. To be clear, despite the absence of "knowingly" in paragraph (b)(i), no person can be found in violation of (b)(i), (b)(2),

(b)(3), <u>or</u> (b)(4) unless the Commission first proves that a source transmitted property to another with the intent to mask the identity of the true source.

This scienter requirement was discussed in detail in the Statement of Reasons of Commissioners Petersen, Hunter, and Goodman in the W Spann, LLC, *et al.* MURs, in which those Commissioners stated:

> [T]he proper focus in these matters is whether the funds used to make a contribution were *intentionally* funneled through a closely held corporation or corporate LLC *for the purpose of making a contribution that evades the Act's reporting requirements*, making the individual, not the corporation or corporate LLC, the true source of the funds. Thus, in matters alleging section 30122 violations against such entities, the Commission will examine whether the available evidence establishes the requisite purpose.

(emphasis added). On page 12 of that Statement of Reasons, those Commissioners further stated:

> Where direct evidence of this purpose is lacking, the Commission will look at whether, for instance, there is evidence indicating that the corporate entity did not have income from assets, investment earnings, business revenues, or bona fide capital investments, or was created and operated for the sole purpose of making political contributions. These facts would suggest the corporate entity is a straw donor and not the true source of the contribution. This analysis will be required even if a single member exercises sole authority over the disposition of the entity's resources. Because closely held corporations and corporate LLCs are constitutionally entitled to make contributions to Super PACs, such contributions shall be presumed lawful unless specific evidence demonstrates otherwise. Absent such evidence, the Commission will have no reason to believe that a contribution made by a closely held corporation or corporate LLC was in violation of section 30122. In short, this approach vindicates the purposes underlying section 30122 while simultaneously acknowledging the speech rights of closely held corporations and corporate LLCs and avoiding constitutional doubt.

Therefore, the Commission's test for determining whether a contribution was made in the name of another should effectively have two prongs:

1. First, an examination of whether a source transmitted property to another with the purpose that it be used to make or reimburse a contribution; <u>and</u>

2. Second, an examination of whether that source transmitted property to another with the intent to mask the identity of the true source.

While this scienter requirement may not be favored by certain Commission members and staff, it is nonetheless required to distinguish impermissible § 30122 contributions from conduit contributions transferred lawfully. For example, contributors often make conduit contributions

through platforms such as ActBlue that satisfy the first prong of the test, but every conduit contribution effectuated through that platform certainly does not constitute an impermissible contribution in the name of another. Simply put, intent matters.

Importantly, Commissioners Petersen, Hunter, and Goodman have agreed that contributions from closely held corporations and corporate LLCs to Super PACs, which is analogous to ACU's contribution to the Committee, "shall be presumed lawful unless specific evidence demonstrates otherwise." Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 12 (April 1, 2016), MURs 6485, 6487, 6488, 6711, and 6930 (W Spann LLC, *et al.*). It necessarily follows that the Commission cannot use circumstantial evidence to infer the scienter of the "Unknown Respondent" referenced in the complaint (or, for that matter, the intent of the Committee).

While the Commission may have deemed such circumstantial evidence to be sufficient to justify its initial "reason to believe" finding, the Commission cannot find probable cause in this matter unless there is sufficient, specific evidence to support CREW's allegation that the Unknown Respondent transmitted property to ACU with the *intent* to mask the identity of the true source. In the absence of such evidence, the Commission must conclude this matter without further action. H.R. Rep. No. 94-917, at 3-4 (Mar. 17, 1976); *see AFL-CIO v. FEC*, 628 F.2d 97, 98, 101 (D.C. Cir. 1980) (stating that a "knowing and willful" violation requires "'defiance' or 'knowing, conscious, and deliberate flaunting' of the Act"). It follows that, without a § 30122 violation, the Committee cannot be deemed to have violated the Act's reporting requirements by reporting a $1,710,000 contribution from ACU.

Conclusion

The Committee respectfully urges the Commissioners to follow previous precedent and conclude that it would be "manifestly unfair" to pursue enforcement against the Committee since it did not have adequate notice regarding the application of § 30122 to the contribution at issue. In the alternative, the Committee requests that the Commission promptly close this matter because there is not sufficient evidence to support CREW's allegation that the Unknown Respondent transmitted property to ACU with the *intent* to mask the identity of the true source. In other words, the Commission must acknowledge that it lacks proof of the requisite scienter needed to create and sustain a § 30122 violation. It follows that, without a § 30122 violation, the Committee cannot be deemed to have violated the Act's reporting requirements.

If you require additional information, or if I can be of any assistance, then I can be reached at (512) 354-1787.

Sincerely,

Chris K. Gober
Counsel, Now or Never PAC