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Federal Election Commission
999 E Street, NW
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VIA FAX: (202) 219-3923

Re: MUR 6920—Response to General Counsel's Brief in Support of Finding Probable Cause

Dear Ms. Stevenson:

We are writing this letter on behalf of American Conservative Union ("ACU") in response to your letter dated August 29, 2017, in which you inform ACU of the Office of General Counsel's ("OGC") intention to recommend finding probable cause to believe ACU violated the Federal Election Campaign Act of 1971, as amended (the "Act"). Included in your letter is OGC's brief in support of its recommendation to find probable cause.

I. ACU has made repeated attempt to engage in pre-probable cause conciliation with the Commission in an effort to quickly resolve this matter

As you know, this matter involves activity that occurred five years ago. The Complaint and Responses were filed over two years ago, and the Commission found reason to believe on January 24, 2017—almost two years later. The Commission and the Office of General Counsel ("OGC") have had ample time to consider this matter and engage in pre-probable cause conciliation; yet, here we are, within weeks of the statute of limitations expiring in this matter, proceeding to probable cause briefing.

Our client is keenly aware that the ability of the Commission to take any further action in this matter will soon be time barred. Nevertheless, our client, ACU, actively pursued engaging in pre-probable cause conciliation with OGC. Several months ago we expressed ACU's desire to attempt to resolve the matter through conciliation.

On August 2, 2017, OGC sent a revised tolling agreement that, according to

with discovery. On August 2, 2017, OGC sent a revised tolling agreement that, according to OGC, was "in consideration for the Commission's agreement to consider Respondent's request that the Commission authorize pre-probable cause conciliation." On August 9, we signed that tolling agreement on behalf of ACU, agreeing to toll for 15 days beginning on August 9, 2017 through August 24, 2017, which has had the effect of ACU providing 29 days (July 26 – August 24) for the Commission to authorize and/or OGC to engage in pre-probable cause conciliation. To our knowledge, OGC did not make this request. Instead, several weeks later, OGC came back and requested that our client toll for an additional 60 days in order to "consider [our] request that the Commission authorize pre-probable cause to believe conciliation," resulting in a total of 75 days of tolling by our client without an assurance that the Commission would even in engage in such pre-probable cause conciliation. This request was simply unrealistic and would clearly require our client to act against its interests.

ACU has in good faith attempted to resolve this matter and even agreed to toll the statute for a limited period. This, ironically, may have the effect of the statute running prior to any action being taken against other respondents, and ACU receiving disparately negative treatment as a result of trying to work with the Commission to resolve this issue.

II. This is a matter of first impression and the Commission has not issued binding precedent that Section 30122 applies in the context of Independent Expenditure-Only Committees

As we stated in our letter dated March 15, 2017, the Commission has not issued binding precedent that Section 30122 applies in this context. Indeed, OGC was insistent that any conciliation agreement state, without qualification, that Section 30122 applies to Independent Expenditure-Only Committees. If that were truly the case, then presumably this would not have been a concern for OGC. Moreover, when discussing potential penalties, OGC acknowledged on several occasions that there is no Commission precedent for setting a penalty in a matter involving Section 30122 and an Independent Expenditure-Only Committee.[1] The activity at issue in this matter occurred in 2012, the first full election cycle after the U.S. Supreme Court's decision in *Citizens United*. At the time, there was significant discussion and debate on the applicability of portions of the Act to the activities of Independent Expenditure-Only Committees. The Statement of Reasons in 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.) where the Commission, for the first time, stated (albeit separately) that they would apply Section 30122 in this context was not issued until April of 2016—while this matter was pending.

[1] We are aware of the Statements of Reasons issued in 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 decisions that were cited in the F&LA in this matter and in the General Counsel's Brief. These decisions 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.

Moreover, the anti-circumvention interest that Section 30122 is designed to prevent is not at issue here. The Supreme Court has clearly stated that "independent expenditures...do not give rise to corruption or the appearance of corruption," whereas contributions can be restricted to a candidate because of the risk that they will lead to quid pro quo corruption.[2] OGC again cites to the *O'Donnell*[3] and *Boender*[4] cases (Ninth Circuit and Seventh Circuit, respectively) as the legal basis for applying Section 30122 in this context; however, those cases 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.

As we stated previously, prior to the enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Courts concluded that Section 30122 (then 2 U.S.C. § 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]

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

[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).

This matter is more akin to the cases addressing soft money prior to the 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 OGC suggests, 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.

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, and doing so via an enforcement matter is nothing more than engaging in regulation via MUR. [11]

III. ACU did not knowingly enter into an agreement to allow its name to be used to effect a contribution in the name of another

Section 30122 of the Act states "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."[12] The inclusion of the word "knowingly" adds an element of intent to the violation.[13] As stated in the Stipulation of Facts provided to OGC, on October 31, 2012, Government Integrity transferred $1,800,000 to ACU, and on the same day, ACU transferred $1,710,000 to Now or Never PAC. The communications ACU provided to OGC confirm that this is what occurred. The communications, however, do not include any discussions by any of the individuals regarding how the contribution to Now or Never PAC would be reported. OGC, of course, turns this lack of discussion into an inference that "ACU agreed to allow the parties to use its name to make the contribution in the name of another."[14] OGC's support for this inference is an email where an ACU employee states he will "take action immediately upon receipt" of the wire, which OGC believes "provides a strong interference that the parties entered into an agreement by which ACU permitted its name to be used to effect a contribution to Now or Never PAC in the name of another."[15] Actually, one could also infer that the ACU employee simply meant what he said –

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[11] *See Republican Nat'l Committee v. FEC*, 76 F.3d 400, 407-08 (D.C. Cir. 1996) (courts will look to whether an agency's interpretation of a statute is the product of sound rulemaking procedures where there is ample opportunity for notice and comment); *Shays v. FEC*, 424 F. Supp. 2d 100,114 (D.D.C. 2006) (an agency's adoption of a standard rulemaking procedure is crucial in that it gives those parties affected by the rules "advance notice of the standards to which they will be expected to conform in the future, and uniformity of result is achieved"); *See also* MUR 5835 (Democratic Congressional Campaign Committee), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn II, at 9.

[12] 52 U.S.C. § 30122 (emphasis added).

[13] We recognize that OGC is not recommending that any violation was "knowing and willful," which the Commission may find under its statutory enforcement authority at 52 U.S.C. § 30109.

[14] *See* General Counsel's Brief at 8.

[15] *Id.*

that he would immediately wire the funds. This one email does not support an inference that the parties had an agreement regarding how this contribution would ultimately be reported.

Moreover, the second email OGC cites as support for its inference was an email from an ACU employee that was forwarded to ACU's legal counsel—experienced election law counsel—characterizing the contribution as a "pass through" and asking whether ACU had an obligation to file a report with the Commission. Rather than supporting an inference of an "agreement" with respect to the reporting of the contribution, this email arguably supports the opposite—that ACU was not at all clear on how or when the contribution would be reported. More importantly, legal counsel advised ACU that there was no FEC reporting obligation. This consultation with prominent counsel and subsequent public reporting of the money flow indicates a good faith effort by ACU to comply with what may be changing interpretations of technical reporting requirements.

Finally, in response to the investigative subpoena, Mr. Thomas confirmed that he did not discuss "how the transaction would be reported" and that he had no knowledge of "any agreement, plan or arrangement between or among GI LLC, ACU, Now or Never PAC, or any third party concerning how ACU would use the funds provided by GI LLC or how the transaction should be reported to the Commission."[16] Thus, it is far from clear that ACU *knowingly* entered into any agreement to allow its name to be used to effect a contribution in the name of another, which is the standard necessary to find a violation of the Act by ACU.

Finally, OGC's characterization of the $90,000 that ACU received from GI LLC as a "fee for allowing its name to be used" is false. There is nothing in the record that supports OGC's theory that this was a fee for the use of ACU's name. This was a contribution from GI LLC and was reported as such on ACU's original and amended 2012 990 reports.

OGC's inferences are nothing more than speculation and conjecture designed to lead to the desired conclusion that there was "an agreement among the parties" that ACU would allow its name to be used to effect the contribution. Such speculation and conjecture should not form the basis of a finding of probable cause to believe ACU *knowingly* permitted its name to be used to effect a contribution in the name of another.

IV. Conclusion

In light of the evolving interpretations in this area of reporting, ACU has been willing to work with OGC to resolve this matter through conciliation. Instead, almost five years after the alleged violation, OGC has been intransigent in its insistence and extreme interpretation of the facts of this matter. Consequently, we respectfully request that the Commission reject OGC's recommendation to find probable cause to believe Respondent violated the Act and dismiss the matter with regards to Respondent ACU.

[16] *See* Response of James Thomas to Investigative Subpoenas at 6, 8-9.

Respectfully submitted,

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