JONES DAY

51 LOUISIANA AVENUE, N.W. • WASHINGTON, D.C. 20001.2113

TELEPHONE: +1.202.879.3939 • FACSIMILE: +1.202.626.1700

DIRECT NUMBER: (202) 879-3748
DMCGAHN@JONESDAY.COM

August 5, 2015

Federal Election Commission
Office of Complaints Examination and Legal Administration
Attn: Jeff Jordan, Assistant General Counsel & Kim Collins, Paralegal
999 E Street, NW
Washington, DC 20463

Re: MUR 6941

Dear Mr. Jordan:

We represent the National Rifle Association (NRA) in this matter, and write in response to your letter of June 16, 2015. The letter concerns a request for an audit by Citizens for Responsibility and Ethics in Washington (CREW).

For the reasons set forth below, CREW's request is meritless, and no further action should be taken. CREW's request relates to an inadvertent software glitch that affected fewer than three dozen donations intended for the NRA's lobbying arm, which donations were inadvertently and temporarily deposited in an account belonging to the NRA's political action committee. Those donations made up a tiny fraction (around 0.2%) of the money raised by the NRA in the relevant election cycle, and were not spent prior to the mistake's discovery, correction, and reporting. A full-scale audit of the NRA's finances would be a grossly disproportionate response to this sort of minor technical error, in addition to being inconsistent with the FEC's prior practice, and would do nothing more than waste the agency's scarce resources.

Background

The NRA's Institute for Legislative Action (NRA-ILA) is the lobbying arm of the NRA. Established in 1975, the NRA-ILA is committed to preserving the right of all law-abiding individuals to purchase, possess, and use firearms for legitimate purposes as guaranteed by the Second Amendment. The NRA-ILA employs a full-time staff of more than 80 people, and has a team of full-time lobbyists who work vigorously to pass pro-gun reform legislation and to oppose restrictive "gun control," anti-Second Amendment legislation. The NRA-ILA also works to educate the public about the facts concerning the many facets of gun ownership in the United States.

The NRA's Political Victory Fund (NRA-PVF) is the political action committee of the NRA and is organized as a separate, segregated fund. It ranks political candidates (without regard to party affiliation) based on their voting records, public statements, and responses to its questionnaire, and finances political activity in connection with both federal and state elections.

As a lobbying organization to which anyone can donate, the NRA-ILA operates a website (NRAILA.org) that accepts donations. Because these donations are not governed by the Federal Election Campaign Act, the NRA-ILA website collects only a donor's name, address, and payment information. As a segregated fund of a nonprofit membership corporation, the NRA-PVF website (NRAPVF.org) only accepts donations from its members; in the course of so doing, it collects a donor's employer and occupation, and discloses that the funds thus donated may be used for political activities. The NRA has approximately 5 million members.

During 2014, there was a four-month period in which a small subset of donations made through the NRA-ILA's website were (because of a database configuration error in the NRA's back office) deposited in an account belonging to the NRA-PVF. The donation process functioned normally otherwise. According to CREW's letters, a reporter named Alan Berlow made two donations to the NRA-ILA during the relevant period, each in the amount of $1, each of which was inadvertently deposited in the NRA-PVF account.[1] Berlow has been a member of the organization since February 2011 (and has renewed each year), and thus could then be lawfully solicited for donations to NRA-PVF.

The database configuration error was detected internally and corrected after having affected only a fraction of donations, amounting to around 0.2% of the more than $50 million raised by the NRA for its lobbying arm and PAC during the election cycle in question. Upon detecting and correcting the mistake, all funds that had been affected were transferred from the NRA-PVF account to the NRA-ILA account. In total, $125,135.03 had been affected by the coding error (with only 33 concerning non-members). Because the balance in the affected NRA-PVF account was always greater than the funds that were affected, the money that had been inadvertently deposited there was never spent. The corrective transfer between the accounts was timely reported in the next regularly scheduled FEC filing on May 20, 2015.

[1] Berlow then diligently tracked the fate of his donation, and upon learning that the money had been deposited into the NRA-PVF's account, published a 4,300-word expose about this fact on *Yahoo! News*, which accused the NRA of playing a "brazen shell game" with his $2. Berlow's article does not explain what inspired him to carefully monitor his credit card statement for information about the fate of his money, though CREW's rapid subsequent involvement gives rise to a more-than-reasonable suspicion that they were the agent provocateur, and Berlow merely their stalking horse who sought to find fault with the NRA at any cost. Critically, despite his bluster, Berlow has been a member since 2011.

On June 10, 2015, CREW submitted the letters that are the subject of this matter, and requested that the FEC's Audit Division conduct an audit into the finances of both NRA-ILA and NRA-PVF. Your office directed a response on June 16, 2015, which this letter constitutes.

Argument

CREW's letters do not come anywhere near making a persuasive case for the expenditure of the FEC's scarce resources, and the request for an audit should be denied, and the Commission should take no further action.

The simplest reason that the Commission should take no further action is because CREW's letter is procedurally deficient. It is not a "complaint" as that term is used in federal election law: A complaint must be filed in writing with the FEC's general counsel, and triggers a formal administrative process. See 11 C.F.R. § 111.5; see also 52 U.S.C. § 30109. CREW's letters were not submitted to the general counsel, but to the Audit Division, and the letters do not appear to request anything like the usual procedures. Audits, moreover, do not simply happen upon the request of any interested party. Only upon the "affirmative vote of 4 of its members" may the Commission authorize an enforcement audit. 52 U.S.C. § 30111(b). Even that may only occur following "an internal review of reports" by the FEC. *Id.* CREW has, instead, simply written directly to the Audit Division and proposed an end-run around these statutory requirements—even candidly admitting (at 8 n.54) that its letter is intended as a "request for an audit" rather than a "complaint." Given that, there is no cause to (as CREW euphemistically suggests) "construe" this piece of correspondence as a complaint at all. As a legal matter, what CREW has sent the FEC has approximately the same status as junk mail.[2]

Even if the FEC were to treat CREW's letters as complaints, there would be no cause for further action. Based on a Yahoo "news" report, CREW's letters suggest that the NRA violated FECA by (1) soliciting contributions for NRA-PVF from the general public, (2) failing to disclose how those contributions to NRA-PVF would be used, and (3) failing to collect the employer and occupation of contributors to NRA-PVF. None of these allegations warrant an audit of the NRA's finances. First, Yahoo "news" reports are not the sort of source that can justify the opening of a MUR. See MUR 4850 (Deliotte & Touche), Statement of Reasons of Commissioners Wold, Mason and Thomas ("A mere conclusory accusation without any supporting evidence does not shift the burden of proof to respondents. While a respondent may choose to respond to a complaint, complainants must provide the Commission with a reason to believe violations occurred. The burden of proof does not shift to a respondent merely because a

[2] Given that the letter was addressed to the head of the audit division, a MUR number should not have been assigned here, as CREW's correspondence does not constitute a complaint and ought not be treated as such.

complaint has been filed."). Second, all of CREW's accusations are simply variations on the exact same complaint: that fewer than three dozen donations from non-members were inadvertently and temporarily put into the wrong account. Because this was promptly corrected, there is nothing to audit, and no reason to take any further action at all.

First, although much of what CREW states about the law is true, it is beside the point. It is true that "a separate segregated fund established by a corporation" may not "solicit contributions to such a fund" from anyone other than "its stockholders," "executive or administrative personnel," "employee[s]," or (in the case of a membership organization) its "members," as well as the families of each of those groups. 52 U.S.C. §30118(b)(4). It is equally true that a separate segregated fund must "inform such employee or member of the political purposes of the fund at the time of the solicitation" and "of his or her right to refuse to so contribute without any reprisal." 11 C.F.R. § 114.5(a)(3)–(4). But the entirely accidental deposit of funds in the wrong account because of a technical error does not qualify as a "solicitation." No one was actually being *asked* to give money to NRA-PVF. It was simply the case that, after being asked to give to NRA-ILA and deciding to do so, the money was accidentally deposited by the NRA in the incorrect account and later remedied. A "separate segregated fund may *accept* contributions from persons otherwise permitted by law to make contributions"—the limitation is upon soliciting them. 11 C.F.R. § 114.5(j) (emphasis added). No improper solicitation occurred here.

But even if the NRA could be deemed to have solicited contributions to NRA-PVF, it is black-letter law that "[a]ccidental or inadvertent solicitation ... will not be deemed a violation" so long as (1) the segregated fund "has used its best efforts to comply with the limitations regarding the persons it may solicit," and (2) "the method of solicitation is corrected forthwith after the discovery of such erroneous solicitation." 11 C.F.R. § 114.5(h). As explained above, both criteria are satisfied here: the technical error was entirely accidental and quite limited in scope, and was corrected as soon as it was discovered.[3]

It is also true that a political committee must use its "best efforts ... to obtain, maintain, and submit" certain information about donors who give more than $200, including the donor's "name," "mailing address," and "occupation ... as well as the name of his or her employer." 52 U.S.C. §§30101(13)(A), 30102(i). But there is a very straightforward reason that the NRA-ILA donation form did not collect this information: the contributions were not intended to be deposited with the NRA-PVF, and so there was no need to collect it. When the NRA-PVF *does* solicit funds, it exercises its best efforts to collect the required information. Moreover, although CREW faults the NRA-PVF (at 7) for not reporting information on employer and occupation for all of its donors, federal law "does *not*" require that "donors ... *must* supply the requested

[3] At any rate, upon making his initial contribution to the organization, Berlow was a member of the NRA, and was therefore eligible to be solicited.

information." *Republican National Committee v. FEC*, 76 F.3d 400, 406 (D.C. Cir. 1996) (emphasis added). Thus, the "statute does *not* require political committees to report the information" for all donors—it "only requires committees to use their *best efforts* to gather the information and then report to the Commission whatever information donors choose to provide." *Id.* Given the NRA's use of the FEC's approved language for the actual NRA-PVF solicitation form, see 11 C.F.R. § 104.7(b), the best efforts standard is clearly satisfied here.

On these facts, an audit is simply unwarranted. The purpose of an audit is to uncover the facts—but all of the facts are known here, and the NRA has candidly admitted the technical mistake that led to the temporary deposit of the funds at issue in the wrong account. When a technical mistake such as the one at issue here has been promptly corrected and has not had any collateral effects, the Commission has not hesitated to dismiss the complaint in an exercise of prosecutorial discretion. See, *e.g.*, MUR 6085 (Illinois Victory 2008) General Counsel's Report at 2 (recommending dismissal where "mistake was inadvertent" and in the presence of "expeditious corrective action"). This bears absolutely no resemblance to those cases in which political committees have deliberately structured deposits into improper accounts in order to evade the campaign finance laws. *E.g.*, MUR 4250 (Republican National Committee) General Counsel's Report.

Perhaps sensing that minor and harmless technical errors are not the stuff of a full-dress federal investigation, CREW pads its letters with references (at 4–5, 7) to years-old minor violations about unrelated subjects. In a section (entitled "NRA-PVF's Prior FECA Violations") that is entirely disconnected from what comes immediately before and after, CREW points to an eleven-year old incident in which eight reports of independent expenditures were, because of an administrative oversight, not filed; a small civil penalty was levied. Reaching even further back, CREW points to a district court decision concerning a transfer of money between NRA-ILA and NRA-PVF ***in 1988*** (in nominal-dollar sums that, even in 1988, were far larger than those at issue here)—in a case that ultimately culminated in the FEC's composition being declared unconstitutional by the D.C. Circuit, see *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), and which was then followed by the FEC being stripped of its authority to conduct litigation in the Supreme Court, see *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994).

What exactly these decades-old examples of closed matters are supposed to illustrate is not spelled out in CREW's letter. More to the point, for an organization that has engaged in election activity on the scale the NRA does for as long as the NRA has, having only a few minor regulatory issue since the late stages of the Reagan administration is excellent evidence that the organization is generally overall very good at regulatory compliance.

* * *

In sum, the CREW letters paint a dark portrait in which the NRA, which successfully raises many tens of millions of dollars in perfect compliance with federal law each election cycle, engaged in nefarious cloak-and-dagger tactics in order to deposit around $125,000 in its PAC—a sum that would permit a single airing, perhaps, of one television advertisement in prime time. The truth is a great deal duller. This is a story about an innocent technical mistake that had no consequences and was rapidly unwound. It would be an egregious waste of the FEC's limited resources to expend effort necessary to audit the NRA-PVF's finances, and the Commission lacks the authority to audit the NRA-ILA.

Respectfully,

Donald F. McGahn II
Counsel for NRA-PVF & NRA-ILA