FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of	)	
	)	
Tread Standard LLC, *et al.*	)	MUR 6968
Right to Rise, *et al.*	)	MUR 6995
DE First Holdings, *et al.*	)	MURs 7014/7017/7019/7090

STATEMENT OF REASONS OF
CHAIR CAROLINE C. HUNTER AND
COMMISSIONER MATTHEW S. PETERSEN

Prior to *Citizens United* and subsequent legal developments stemming from that decision, corporate contributions and expenditures were generally prohibited under the Federal Election Campaign Act of 1971, as amended (the "Act"). Thus, the Commission had not considered whether a contribution made by a closely held corporation or limited liability company taxed as a corporation ("corporate LLC") would violate the ban on contributions made in the name of another, as opposed to the Act's prohibition on corporate contributions and expenditures. When presented with a contribution allegedly made by a corporation, the Commission did not peer behind the corporate veil to ascertain the "true source" of the funds. Instead, a contribution made by a corporation was simply a prohibited corporate contribution, even if the corporation used funds provided by an individual.

In those pre-*Citizens United* days, a typical name-of-another scheme involved individuals serving as conduits for prohibited corporate contributions, not corporations or corporate LLCs serving as conduits for individuals. The issue of whether an *individual* could violate the Act by making contributions through a corporation was unexplored.

In 2016, the Commission wrestled for the first time with whether, and under what circumstances, a contribution from a closely held corporation or a corporate LLC violated the prohibition against making a contribution in the name of another at 52 U.S.C. § 30122.[1] We concluded that "to vindicate the purpose underlying section 30122 without violating First Amendment rights, the proper focus . . . 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

[1] *See* MURs 6485 (W Spann LLC), 6487 & 6488 (F8, LLC), 6711 (Specialty Investments Group, Inc.), and 6930 (SPM Holdings LLC).

the corporation or corporate LLC, the true source of the funds."[2] We also concluded, however, that because the question was "one of first impression, and because past Commission decisions regarding funds deposited into corporate accounts may be confusing in light of recent legal developments, principles of due process, fair notice, and First Amendment clarity counsel against applying a standard to persons and entities that were not on notice of the governing norm."[3] Accordingly, we voted to exercise prosecutorial discretion and dismiss the matters.[4] Campaign Legal Center, complainant in the matters, soon challenged the Commission's dismissals.[5]

On June 7, 2018, the U.S. District Court for the District of Columbia determined that the dismissals were not contrary to law, recognizing that our fair notice and due process concerns were "proper" given the First Amendment context in which the Commission acts.[6] "Finding that there was a rational basis for the Commission's exercise of its prosecutorial discretion," the court upheld the Commission's handling of the matters addressed in the LLC Statement.[7]

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2 Statement of Reasons of Chairman Matthew S. Petersen, and Commissioners Caroline C. Hunter and Lee E. Goodman at 2, MURs 6485, 6487, 6711, and 6930 (April 1, 2016) ("LLC Statement") (attached as Appendix).

3 *Id.*

4 *Id.* at 2-3 (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)). Furthermore, in our prior LLC Statement we explained that we resolved several similar matters together. Not only did this reflect our attempt to treat like respondents similarly, "it was necessary to examine a sufficient number of factual scenarios to ensure a sound application of the Act and to provide clear public guidance on the appropriate standard that we will apply in future matters. Indeed, with the benefit of varying fact patterns . . . [OGC] significantly refined its analysis for considering these types of matters." LLC Statement at 2.

5 *See* Complaint at 1-2, *Campaign Legal Center v. FEC*, No. 1:16-cv-00752 (D.D.C. Apr. 22, 2016) (invoking judicial review under 52 U.S.C. § 30109(a)(8)). The U.S. District Court for the District of Columbia ruled that the plaintiffs lacked standing to challenge two of those dismissals. *See Campaign Legal Center v. FEC*, 245 F. Supp. 3d 119, 122 (D.D.C. 2017).

6 *See Campaign Legal Center v. FEC*, No. 1:16-cv-00752, 2018 WL 2739920, at *8 (D.D.C. June 7, 2018). We had preferred to resolve the matters here after a decision on the merits in Campaign Legal Center's challenge to benefit from judicial guidance on the legal issues involved. Ultimately, however, we decided to resolve these matters despite the pending litigation. Coincidentally, the District Court handed down its opinion upholding the Commission's dismissal of these matters shortly after our dispositive votes.

7 *Id.* at *1. Since the District Court's decision in *Campaign Legal Center*, the Court of Appeals for the District of Columbia ruled in a separate case that a Commission dismissal pursuant to prosecutorial discretion was "not subject to judicial review," *CREW v. FEC*, No. 17-5049, 2018 WL 2993249, at *5 (D.C. Cir. June 15, 2018), because FECA provides courts "no meaningful standard against which to judge the agency's exercise of discretion." *Id.* at *3 (internal quotes omitted) (quoting *Heckler*, 470 U.S. at 830). The plaintiffs were thus "not entitled to have the court evaluate for abuse of discretion the individual considerations the controlling Commissioners gave in support of their vote not to initiate enforcement proceedings." *Id.* at *5.

The complaints addressed in this statement similarly arise from contributions made by a closely held corporation[8] and corporate LLCs to Super PACs.[9] The conduct alleged in these complaints occurred before "the relevant notice date"[10] (that is, April 1, 2016), when we issued our prior LLC Statement, which first articulated the correct legal standard in these types of matters.[11] Therefore, the same considerations of due process, fair notice, and First Amendment clarity, which informed our decision to exercise prosecutorial discretion in those prior matters, also apply here.[12]

Accordingly, in exercise of prosecutorial discretion, we voted against finding reason to believe that the respondents in these matters violated the Act and instead voted to close the files.

I. FACTUAL BACKGROUND

A. MUR 6968 (TREAD STANDARD LLC, *ET AL.*)

On June 17, 2015, Tread Standard LLC made a $150,000 contribution to Right to Rise, a Super PAC that ran independent expenditures supporting Jeb Bush in the 2016 presidential election.[13] Tread Standard is a Delaware company that was created on April 30, 2015.[14] It appears to be taxed as a corporation.[15] Its owner's identity is unclear, but Vivian Rivero, a paralegal at a Miami law firm, filed Tread Standard's organizing paperwork.[16] In its Designation of Counsel, which was filed with the Commission in connection with this matter, Tread Standard

[8] One of the respondents here, DE First Holdings, is a Delaware statutory trust, not an LLC, but is taxed as a corporation. *See infra* I.C. For reasons explained below, *see infra* note 44, we analyzed DE First as we would a corporation and thus include it in the term "closely held corporation."

[9] The complaints also included allegations that certain respondents failed to register as political committees. OGC recommended taking no action on those allegations, and the Commission did not hold a substantive vote on those allegations, which are further discussed below. *See infra* Section III.

[10] *Campaign Legal Center*, 2018 WL 2739920, at *8 n.8.

[11] LLC Statement at 12-13.

[12] We adopt the full rationale in our LLC Statement for purposes of this Statement, and have appended it.

[13] Right to Rise USA, Inc., Amended 2015 Mid-Year Report at 1414, 1416 (May 20, 2016).

[14] First General Counsel's Report at 3 n.4 (Apr. 13, 2016), MUR 6968 (Tread Standard LLC, *et al.*) (citing "Tread Standard LLC," Dun & Bradstreet Public Records Search).

[15] FGCR at 3 n.7, MUR 6968 (Tread Standard LLC, *et al.*); Response of Tread Standard LLC at 1 (Nov. 4, 2015), MUR 6968 (Tread Standard LLC, *et al.*).

[16] FGCR at 3, MUR 6968 (Tread Standard LLC, *et al.*); Complaint at 2-3 (Sept. 14, 2015), MUR 6968 (Tread Standard LLC, *et al.*) (citing Zachary Mider, "Masked Donations to Jeb Bush Super-PAC Lead to Miami Paralegal," BLOOMBERG NEWS (Aug. 25, 2015), https://www.bloomberg.com/news/articles/2015-08-25/masked-super-pac-donations-to-jeb-bush-super-pac-lead-to-miami-paralegal).

identified an employee of Lennar Corporation, a Florida-based real estate company, as a contact and provided Lennar's address.[17]

On April 8, 2015, Tierranueva LLC made a $25,000 contribution to Right to Rise.[18] Tierranueva was organized in Florida on December 6, 2011, with the assistance of Vivian Rivero, who is also Tierranueva's registered agent and manager.[19] Rivero is authorized to convey property on Tierranueva's behalf and sign its annual reports.[20] Tierranueva's tax election status and owners are unclear. However, the Designation of Counsel that Tierranueva filed in connection with this complaint appears to include the email address of Jonathan Jaffe, also of Lennar.[21] Tierranueva purchased a home owned by Jaffe's father for $760,000 on January 18, 2012, and sold it on February 13, 2015.[22]

The complainant in this matter alleged that Tread Standard, Tierranueva, John and Jane Does, and Jaffe violated the Act by making contributions in the names of another and failing to register as political committees.[23] The complainant also alleged that Right to Rise knowingly accepted a contribution in the name of another.[24] Tread Standard responded that it acted on "advice of counsel" that the contribution was permissible, as *Citizens United* "held that corporations have a constitutionally protected right to make unlimited contributions to independent expenditure organizations."[25] Tierranueva, though represented by the same counsel as Tread Standard, did not file a response. Right to Rise denies the allegation and argues that the

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17 *See* Tread Standard Designation of Counsel (Oct. 15, 2015), MUR 6968 (Tread Standard LLC, *et al.*).

18 Right to Rise USA, Inc., Amended 2015 Mid-Year Report at 965 (May 20, 2016).

19 FGCR at 4, MUR 6968 (Tread Standard LLC, *et al.*).

20 *Id.* (citing a "Tierranueva LLC," Dun & Bradstreet Public Records Search).

21 *See* Tierranueva LLC Designation of Counsel (Oct. 15, 2015), MUR 6968 (Tread Standard LLC, *et al.*).

22 FGCR at 4 n.12, MUR 6968 (Tread Standard LLC, *et al.*). Florida public records indicate that Tierranueva bought property in Pinecrest, FL, for $760,000 on January 18, 2012, from Laurence Jaffe, and later sold the property for $765,000 on February 13, 2015. *See* Florida Property Info., Folio # 20-5014-035-0180, http://www miamidade.gov/propertysearch (last viewed Jan. 28, 2015); *see also* Florida Property Record Card, Folio # 20-5014-035-0180, http://www miamidade.gov/PaPortal/PRC/PRCdisplay.aspx?prcYear=2015&prcFol=2050140350180 (last viewed Jan. 28, 2015); *see also* Complaint, MUR 6968 (Tread Standard LLC, *et al.*) (citing Michael C. Bender, "Donations to Pro-Bush Super-PAC Tied to Florida Homebuilder," BLOOMBERG NEWS (Sept. 1, 2015), https://www.bloomberg.com/news/articles/2015-09-01/donation-to-pro-bush-super-pac-tied-to-florida-home-builder).

23 Complaint, MUR 6968 (Tread Standard LLC, *et al.*).

24 *Id.* at 4.

25 Response of Tread Standard at 1, MUR 6968 (Tread Standard LLC, *et al.*).

complaint includes insufficient information for the Commission to find reason to believe against Right to Rise.[26]

The Office of General Counsel ("OGC") recommended that the Commission find reason to believe that Tread Standard and Unknown Respondents violated section 30122, noting the connections between Tread Standard, Tierranueva, and Lennar, the lack of known "income-generating activities," and that Tread Standard's contribution came about six weeks after the LLC was formed.[27]

B. MUR 6995 (RIGHT TO RISE, *ET AL.*)

The complainant in MUR 6995 alleged violations stemming from contributions to Right to Rise by two otherwise unrelated LLCs. TH Holdings LLC is a New York-based limited liability company that filed its articles of organization in June 2010.[28] On February 26, 2015, Right to Rise received a $100,000 contribution from TH Holdings.[29] Marvin Schwartz, managing director of an investment firm, is the LLC's "manager and representative."[30] Schwartz has been the manager of TH Holdings since its inception, pursuant to its operating agreement.[31] Shortly after its organization, TH Holdings purchased property in Suffolk County, New York, for $452,000.[32]

In a joint response, Schwartz and TH Holdings stated that "[f]rom its inception in 2010, [TH] Holdings has operated as the owner of certain real estate interests and has been sufficiently capitalized by Mr. Schwartz to do so."[33] Schwartz executed and delivered the $100,000 contribution check to Right to Rise as manager and representative of TH Holdings, stating that he informed Right to Rise "that he personally controls and funds [TH] Holdings."[34] TH

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26 Response of Right to Rise (Oct. 15, 2015), MUR 6968 (Tread Standard LLC, *et al.*).

27 FGCR at 9-11, MUR 6968 (Tread Standard LLC). OGC recommended taking no action with respect to the other alleged violations, including those made against Tierranueva: Tierranueva "potentially had the financial resources to make a $25,000 contribution without outside funds provided to it for that purpose." *Id.* at 11. Further, OGC determined that "[t]he available record does not indicate that the Committee knowingly accepted a contribution in the name of another," but recommended that we take no action as further fact finding might have uncovered relevant information. *Id.*

28 Joint Response of Marvin Schwartz & TH Holdings LLC (Feb. 1, 2016), MUR 6995 (Right to Rise, *et al.*).

29 Right to Rise USA, Inc., Amended 2015 Mid-Year Report at 398 (May 20, 2016).

30 Joint Response of Schwartz & TH Holdings at 1, MUR 6995 (Right to Rise, *et al.*); Complaint ¶ 21 (Dec. 10, 2015), MUR 6995 (Right to Rise, *et al.*).

31 *Id.*

32 Complaint ¶ 19 and Exs. G& H, MUR 6995 (Right to Rise, *et al.*) (citing various New York state and local public records).

33 Joint Response of Schwartz & TH Holdings at 1, MUR 6995 (Right to Rise, *et al.*).

34 *Id.* at 2.

Holdings maintained its own bank account to make payments for operational costs, including maintaining insurance, securing property, retaining accountants to manage the books and records, and paying applicable taxes.[35] TH Holdings argued that the contribution was made "in accordance with its governing documents" and that it has "been operating as an LLC with a bona fide business purpose for almost five years" (as of the time of the contribution).[36]

On March 9, 2015, Right to Rise received a $100,000 contribution from Heather Oaks, LLC.[37] Heather Oaks is a Delaware LLC that was formed on February 25, 2015, as a "subsidiary of a long standing business entity"; "has been considered as an entity for certain real-estate purchases"; and "plans to continue to do business in the future."[38] Heather Oaks denied "impermissibly act[ing] as a conduit for a contribution made by another person,"[39] and asserted that it "made . . . this contribution pursuant to its own organizational documents, from a bank account in its own name, and with corporate funds under its control."[40]

OGC recommended that the Commission find reason to believe that TH Holdings, Schwartz, Heather Oaks, and Unknown Respondents violated section 30122.[41] As to TH Holdings, OGC reasoned that the amount of the contribution "exceeded the LLC's available funds absent a transfer of funds from Schwartz."[42] As to Heather Oaks, OGC based its recommendation on Heather Oaks having been formed two weeks before its contribution and the lack of information as to how it generated income.[43]

C. MURs 7014/7017/7019/7090 (DE First Holdings, *et al.*)

The complainants in these matters make two unrelated sets of allegations. Complainants in MURs 7014, 7017, and 7090 allege violations related to contributions by DE First Holdings,

35 *Id.* at 1.

36 *Id.* at 1-2.

37 Right to Rise USA, Inc., Amended 2015 Mid-Year Report at 519 (May 20, 2016).

38 Response of Heather Oaks, LLC at 2, 4 (Feb. 19, 2016), MUR 6995 (Right to Rise, *et al.*).

39 *Id.* at 4.

40 *Id.*

41 First General Counsel's Report at 11-12 (Aug. 4, 2016), MUR 6995 (Right to Rise, *et al.*). OGC recommended that the Commission take no action at this time against Right to Rise. *Id.* at 10.

42 *Id.* at 8.

43 *Id.* at 8-9.

which is a Delaware statutory trust[44] formed on December 23, 2015.[45] DE First is taxed as a corporation, and it states that its purpose is "to make and hold commercial investments for the benefit of entities controlled by Mr. [Vivek] Garipalli."[46] DE First made a $1 million contribution to Coalition for Progress, a Super PAC, on December 24, 2015.[47] In his response to the complaints, Garipalli acknowledged his role in the contribution, and stated that he asked Coalition for Progress to amend its reports accordingly.[48] The Super PAC did so on July 15, 2016.[49] OGC relied on Garipalli's acknowledgement of the transfer of funds from his personal account to DE First to make the contribution, as well as noting that the transfer occurred the day after the LLC was created, in its recommendation that the Commission find reason to believe.[50]

MURs 7019 and 7090 address contributions by Décor Services, LLC. Décor Services is a Delaware LLC formed on January 12, 2016.[51] On January 28, 2016, it made a $250,000 contribution to America Leads, a Super PAC.[52] The complainants allege that the temporal proximity between Décor Services' creation and the contribution to America Leads raises suspicion about the contribution's true source.[53] Décor Services argues that existing regulations are inapplicable to Super PACs, and that the Commission has failed to provide sufficient

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[44] OGC treated DE First as the "functional equivalent of a limited liability company" because, under Delaware law, a statutory trust is an unincorporated association that is considered "'a separate legal entity' that 'may be organized to carry on any lawful business or activity.'" First General Counsel's Report at 4 n.3 (Feb. 10, 2017), MURs 7014/7017/7019/7090 (DE First Holdings, *et al.*). "The beneficial owners of a statutory trust have limited personal liability for the trust" and "[s]tatutory trusts may also elect to be taxed as a corporation or partnership under the Internal Revenue Code." *Id.* (citing Del. Code. Tit. 12, §§ 3801(g), 3803(a), and 3809). We agreed and analyzed DE First accordingly.

[45] Complaint (Feb. 19, 2016), MUR 7014 (DE First Holdings, *et al.*); Complaint (Feb. 23, 2016), MUR 7017 (DE First Holdings, *et al.*); Complaint (June 13, 2016), MUR 7090 (DE First Holdings, *et al.*). Delaware Entity Search Result, "DE First Holdings," (Oct. 20, 2016), https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx.

[46] Joint Response of Vivek Garipalli & DE First Holdings at 3-4 (June 1, 2016), MUR 7017 (DE First Holdings, *et al.*).

[47] Supplemental Response of Coalition for Progress at 1 (July 15, 2016), MURs 7014/7017 (DE First Holdings, *et al.*); Response of Coalition for Progress at 2-3 (Aug. 5, 2016), MUR 7090 (DE First Holdings, *et al.*).

[48] Joint Response of Garipalli & DE First Holdings at 4, MUR 7017 (DE First Holdings, *et al.*); Joint Response of Vivek Garipalli & DE First Holdings at 4 (June 1, 2016), MUR 7014 (DE First Holdings, *et al.*).

[49] Coalition for Progress, Amended 2015 Year-End Report at 24 (July 15, 2016).

[50] FGCR at 8-9, MURs 7014/7017/7019/7090 (DE First Holdings, *et al.*). OGC also recommending taking no action at this time on the allegations that DE First failed to register and report as a political committee, *id.* at 17, as well as on the allegations against Coalition for Progress. *Id.*

[51] Complaint at 2 (Mar. 2, 2016), MUR 7019 (DE First Holdings, *et al.*); Complaint at 2 (June 13, 2016), MUR 7090 (DE First Holdings, *et al.*).

[52] America Leads, 2016 February Monthly Report at 9 (Feb. 19, 2016).

[53] Complaint at 1-3, MUR 7019 (DE First Holdings, *et al.*); Complaint at 2, MUR 7090 (DE First Holdings, *et al.*).

guidance in this area since *Citizens United*.[54] OGC concluded that the temporal proximity between the LLC's creation and its contributions, as well as the insufficient information about the LLC's income-generating activities, merited a reason to believe recommendation.[55]

II. LEGAL BACKGROUND

A. UNDER CERTAIN CIRCUMSTANCES, THE NAME-OF-ANOTHER PROHIBITION APPLIES TO CONTRIBUTIONS TO SUPER PACS BY CLOSELY HELD CORPORATIONS AND CORPORATE LLCS.

Under the Act, "[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."[56] The Act's definition of "person" includes partnerships, corporations, and other organizations.[57]

The traditional name-of-another scheme involves a corporation or other person reimbursing or advancing funds to an individual who makes contributions to federal candidates in his or her own name.[58] Thus, the individual "who actually transmits the money acts merely as

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[54] Response of Décor Services, LLC at 1-3 (May 20, 2016), MUR 7019 (DE First Holdings, *et al.*).

[55] On February 5, 2016, Décor Services made a second $250,000 contribution to another Super PAC, Conservative Solutions PAC. Conservative Solutions PAC, 2016 March Monthly Report at 16 (Mar. 20, 2016). OGC also points to this contribution, which was not raised in the complaint, as support for its recommendation. FGCR at 13-14, MURs 7014/7017/7019/7090 (DE First Holdings, *et al.*). As that contribution was not alleged in the complaint to have violated the Act, we did not consider it in our determination. Irrespective of its permissibility, however, it was made prior to the announcement of this legal interpretation, and would have fallen outside the window of fair notice.

OGC also recommended taking no action at this time against America Leads for accepting the contributions from Décor Services, as well as to the allegations that Décor Services failed to register and report as a political committee. *Id.* at 17.

[56] 52 U.S.C. § 30122. Commission regulations provide illustrative examples of activities that would constitute a violation of the Act by making a contribution in the name of another:

> (i) Giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made, or
>
> (ii) Making a contribution of money or anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source.

11 C.F.R. § 110.4(b)(2).

[57] 52 US.C. § 30101(11); 11 C.F.R. § 100.10.

[58] *See, e.g.*, MUR 6143 (Galen Capital Group) (finding violation of then-section 441f when corporation reimbursed individuals for contributions made); MUR 5666 (MZM) (same); MUR 4879 (Beaulieu of America) (same); MUR 4876 (Cadeau Express) (same); MUR 4871 (Broadcast Music) (same); MUR 4796 (DeLuca Liquor and Wine) (same); MUR 2195 (Eklutna) (same).

a mechanism, whereas it is the original source who has made the gift by arranging for his money to finance the donation."[59] The matters addressed in our 2016 LLC Statement, however, presented an issue of first impression: whether, or under what circumstances, a corporation—which had been banned from making contributions altogether prior to *Citizens United*—could itself be considered a straw donor under section 30122. The answer to this new question was not obvious because prior Commission precedent, addressed in greater detail below, had "treat[ed] funds deposited in a corporate account as the corporation's funds, even if the corporation's owner could legally convert them into his or her own personal funds."[60]

In our LLC Statement, we ultimately concluded that, "[u]nder certain circumstances, closely held corporations and corporate LLCs may be considered straw donors under section 30122."[61] Looking to the text of the Act, we reasoned that "[s]ection 30122 prohibits a *person* from making a contribution in the name of another *person*, and the Act's definition of 'person' includes corporations."[62]

We further explained that the appropriate analytical focus in such matters is "whether funds 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. . . . If they were, then the true source of the funds is the person who funneled them through the corporate entity for this purpose."[63] Such an inquiry will often be fact-intensive: "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."[64]

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[59] *United States v. O'Donnell*, 608 F.3d 546, 550 (9th Cir. 2010) (distinguishing between "providing [a gift] from one's own resources rather than simply conveying").

[60] LLC Statement at 9.

[61] *Id.* at 12.

[62] *Id.* (citing 52 U.S.C. § 30101(11)).

[63] *Id.* The Act rests upon a "purpose-laden definition of 'contribution.'" *See Van Hollen v. FEC*, 811 F.3d 486, 493 (D.C. Cir. 2016). A thing of value, in order to be a contribution, must be given or made for the *purpose of influencing an election* for Federal office. 52 U.S.C. § 30101(8)(A). The Commission has found violations of sections 30112 and 30118 when a corporation reimburses or advances funds to straw donors for the purpose of making contributions with those funds in the straw donor's name. The straw donor, then, just becomes "a mechanism, whereas it is the original source who has made the gift by arranging for his money to finance the donation." *O'Donnell*, 608 F.3d at 550. The *purpose* of the transfer of funds has always been the determining factor. Moreover, at least when applied to corporate contributions to Super PACs, section 30122 only furthers a disclosure interest since amount limitations and certain source prohibitions are not implicated by such contributions. Thus, determining whether there exists a purpose to evade disclosure is the relevant inquiry in these types of matters.

[64] LLC Statement at 12.

We continued that "[b]ecause 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."[65]

B. PRIOR TO OUR LLC STATEMENT, THE PUBLIC HAD NO NOTICE THAT CLOSELY HELD CORPORATIONS AND CORPORATE LLCS COULD VIOLATE SECTION 30122.

When Congress enacted section 30122, corporations were banned from making any contributions. Thus, Congress likely did not contemplate that corporations could violate the prohibition against giving in the name of another by acting as straw donors for contributions.[66] Moreover, before *Citizens United*, nearly every alleged straw-donor scheme addressed by the Commission involved *excessive and/or prohibited contributions*.[67] Here, by contrast, respondents' contributions did not implicate the Act's amount limitations and corporate source prohibitions because the contributions were made to Super PACs, which may accept contributions in unlimited amounts from corporations.[68] Accordingly, the alleged section 30122 violations considered here (and in our prior LLC Statement) differ substantially from those historically considered by the Commission.

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[65] *Id.*; *see also Citizens United v. FEC*, 558 U.S. 310, 365 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity.").

Furthermore, the Commission is not required to provoke legal and constitutional controversies in its administration and enforcement of the law. Indeed the prudent and preferred course is to avoid such issues. Therefore, where the Commission has two reasonable ways of interpreting the law, its regulations, and enforcement practices, one of which avoids legal and constitutional doubt and another which creates serious legal and constitutional doubt, the Commission is well within its discretion to take the safer course. *Van Hollen*, 811 F.3d at 501 (recognizing the Commission's "unique prerogative to safeguard the First Amendment when implementing its congressional directives" by "balanc[ing] the competing values that lie at the heart of campaign finance law"); LLC Statement at n.69 (providing extensive citation).

[66] *Id.* at 9.; *see also Ctr. for Individual Freedom v. Van Hollen*, 694 F.3d 108, 110-11 (D.C. Cir. 2012 (concluding that provision of the Act is "anything but clear . . . in light of the Supreme Court's decision in *Citizens United*").

[67] *See, e.g.*, MUR 4646 (Amy Robin Habie) (finding violation of then-section 441f when individuals reimbursed others' contributions to candidates in amounts exceeding Act's limits); MUR 4796 (DeLuca Liquor and Wine, Ltd., *et al.*) (finding violation of then-section 441f when others' contributions with corporate funds); MUR 4484 (Bainum) (finding violation of then-section 441f when individual made contributions to candidates in name of infant son in amounts exceeding the Act's limits); MUR 4297 (Ortho Pharmaceutical) (finding violation of then-section 441f when incorporated federal contractor reimbursed contributions to candidates).

[68] *See, e.g.*, Advisory Opinion 2010-11 (Commonsense Ten) (concluding that certain political committees that do not make contributions to candidates may accept contributions in unlimited amounts from individuals, corporations, and labor organizations).

Perhaps most significantly, until our LLC Statement, "Commission precedent treat[ed] funds deposited in a corporate account as the corporation's funds, even if the corporation's owners could legally convert them into his or her own personal funds."[69] Thus, when funds from a corporate account had been contributed to a political committee, the Commission concluded that the corporation—not the individual(s) owning the corporation—made the contribution. In *FEC v. Kalogianis*, for example, the Commission alleged that a former candidate had violated then-section 441b[70] by loaning funds from his own closely held corporations to his campaign.[71] Likewise, in MUR 3191 (Christmas Farm Inn, Inc.), the Commission found that a candidate violated then-section 441b when the candidate loaned his campaign funds initially drawn on his closely held corporation's account.[72] The Commission rejected the argument that the funds were personal funds,[73] because "[a] subchapter S Corporation retains as its own any income taxed to individual shareholders until such time as a distribution or dividend is declared."[74]

Similar reasoning animated the Commission's decisions in its 1998 LLC rulemaking. There, the Commission considered but rejected a proposal to deem contributions by closely held corporate LLCs as contributions from their individual owners.[75] The Commission ultimately decided to treat corporate LLCs as distinct from their individual owners, including single-member corporate LLCs.[76]

Given the Commission's historical treatment of contributions made from funds deposited into a corporate account as corporate contributions, it would be reasonable for respondents to conclude that contributions made by their closely held corporations and corporate LLCs were lawful and not contributions in the name of another. Thus, since respondents' conduct occurred before our LLC Statement, which constituted the Commission's first notice to the public after

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69 LLC Statement at 9.

70 This section has since been recodified as 52 U.S.C. § 30118.

71 *See generally FEC v. Kalogianis*, 2007 WL 4247795 (M.D. Fla Nov. 30, 2007) (unreported).

72 Conciliation Agreement at 2, 4, 8 (June 23, 1995), MUR 3191 (Christmas Farm Inn, Inc.). The candidate had cashed checks from a corporate account into his personal checking account, and then made personal checks out to his campaign committee. Factual & Legal Analysis at 3-4 (Oct. 7, 1991), MUR 3191 (Christmas Farm Inn, Inc.). The committee reported the receipts as loans from the candidate. Statement of Reasons of Commissioner Joan D. Aikens and Commissioner Lee Ann Elliott at 2 (Sept. 12, 1995), MUR 3191 (Christmas Farm Inn, Inc.).

73 *See* 11 C.F.R. § 110.10 ("[C]andidates . . . may make unlimited expenditures from personal funds as defined in 11 CFR 100.33.").

74 FLA at 3-4, MUR 3191 (Christmas Farm Inn, Inc.). In MUR 6102 (Georgianna Oliver), the Commission considered an allegation that a candidate loaned corporate funds to her own campaign. *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Cynthia L. Bauerly, Caroline C. Hunter and Donald F. McGahn II at 1 (Sept. 28, 2009), MUR 6102 (Georgianna Oliver). The Commission drew heavily on principles of corporate law, but dismissed the case on the grounds that the candidate had, according to sworn testimony, followed corporate bylaws in distributing the funds. *Id.* at 6.

75 *See* Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 63 Fed. Reg. 70065, 70066 (Dec. 18, 1998). "Alternative A" proposed attributing all LLC contributions, including corporate LLCs, to the LLC and its individual owners, but the Commission rejected Alternative A.

76 *See* 11 C.F.R. § 110.1(g).

Citizens United that closely held corporations and corporate LLCs could be deemed straw donors under section 30122 under certain circumstances, we conclude that the respondents here did not have adequate notice that their alleged conduct could potentially violate section 30122.

III. THESE MATTERS WARRANT THE EXERCISE OF PROSECUTORIAL DISCRETION

For the same reasons set forth in our prior LLC Statement, we conclude here that "because Respondents did not have prior notice of the legal interpretation discussed above, . . . applying section 30122 to Respondents would be inconsistent with due process principles."[77] 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."[78]

This concern is particularly acute where First Amendment rights are at stake.[79] To decide otherwise would not only create due process concerns but would risk chilling vitally important political speech that is strictly protected by the First Amendment.[80] Indeed, these "vagueness and notice concerns carry special weight" in the Commission's enforcement decisions:[81] As the Court of Appeals for the District of Columbia has recognized, "[u]nique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity—'the behavior of individuals and groups only insofar

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77 LLC Statement at 13.

78 *FCC v. Fox Television Stations*, 567 U.S. 239, 253 (2012); *see also* Statement of Reasons of Vice Chairman Donald F. McGahn II and Commissioners Caroline C. Hunter and Matthew S. Petersen 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.").

79 *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976) ("[V]ague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone. . . than if the boundaries of the forbidden areas were clearly marked.") (internal quotations omitted); *Citizens United*, 58 U.S. at 324 ("Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'") (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)); *Fox Television Stations*, 567 U.S. at 253 ("[T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."); *see also* LLC Statement n.69 and authorities therein.

80 *Citizens United*, 558 U.S. at 329 (rejecting "intricate case-by-case determinations to verify whether political speech is banned"); *see also Connally*, 269 U.S. at 391 ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process."); *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) ("Living under a rule of law entails various suppositions, one of which is that [all persons] are entitled to be informed as to what the State commands or forbids.") (internal quotes omitted); *United States v. Williams*, 553 U.S. 285, 304 (2008) (clarity in regulation is essential to due process protected by the Fifth Amendment).

81 *Campaign Legal Center*, 2018 WL 2739920, at *8.

as they act, speak and associate for political purposes.'"[82] Thus, the "Commission has [a] 'unique prerogative to safeguard the First Amendment when implementing its congressional directives,'"[83] particularly in the enforcement process. These considerations counsel in favor of exercising prosecutorial discretion: Proceeding in enforcement actions against respondents would be unfair to them, chill speech, and ultimately constitute an ineffective use of Commission resources, given the likelihood that courts would look unfavorably upon enforcement actions here in light of the due process, notice, and First Amendment concerns.[84]

Further, several of these matters include other facts that counsel in favor of an exercise of prosecutorial discretion. For example, Garipalli asked Coalition for Progress to update its disclosure reports to reflect that he, and not DE First, made a contribution.[85] Similarly, Schwartz acknowledged his role as "manager and representative" of TH Holdings, and represented that he "sufficiently capitalized" TH Holdings.[86] Both TH Holdings and Tierranueva can point to public records of financial activity preceding their contributions, undermining the theory that they were formed merely as shells to transmit contributions.[87] Likewise, Heather Oaks "was formed and capitalized as a subsidiary of a longstanding business entity" with future business plans.[88]

Last, several complaints included allegations that the closely held corporation or corporate LLCs failed to register and report as political committees in violation of the Act. For purposes of section 30122, however, persons are not generally considered both a political committee *and* a straw donor: Because the straw donor is a mere mechanism or instrumentality, it does not satisfy the statutory threshold for the definition of political committee at 52 U.S.C. § 30101(4)(A).[89] Each complaint focuses heavily on whether the entity was a straw donor, and OGC recommended—and we agreed—that section 30122 provided the relevant statutory framework for our analysis. Because the Commission concluded that the relevant inquiry was

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82 *Id.* (quoting *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003)).

83 *Id.* at *9 (quoting *Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016)).

84 *See id.* at *5, *8. Further, under *Heckler*, the likelihood of success is a relevant factor in agency enforcement decision-making. 470 U.S. at 831. Given the fair notice and due process concerns noted above we question whether Commission enforcement in these circumstances would withstand legal challenge.

85 Joint Response of Garipalli & DE First Holdings at 4, MUR 7017 (DE First Holdings, *et al.*); Joint Response of Garipalli & DE First Holdings at 4, MUR 7014 (DE First Holdings, *et al.*).

86 Joint Response of Schwartz & TH Holdings at 1, MUR 6968 (Tread Standard, *et al.*).

87 *Id.*; FGCR at 11, MUR 6968 (Tread Standard LLC, *et al.*).

88 Response of Heather Oaks at 4, MUR 6995 (Right to Rise, *et al.*).

89 *See United States v. O'Donnell*, 608 F.3d at 550 ("In a straw donor situation, the person who actually transmits the money acts merely as a mechanism, whereas it is the original source who has made the gift by arranging for his money to finance the donation. To identify the individual who has made the contribution, we must look past the intermediary's essentially ministerial role to the substance of the transaction."); FGCR at 12, MUR 6968 (Tread Standard LLC, *et al.*) (arguing that a conduit "just conveying the funds of the true contributors" would not be a political committee); FGCR at 15-16, MUR 7014/7017/7019/7090 (DE First Holdings, *et al.*) (same).

under section 30122, it was not necessary to analyze further the political committee status allegations.

IV. CONCLUSION

For the foregoing reasons, we concluded that the complaints in MURs 6968, 6995, 7014, 7017, 7019, and 7090 should be dismissed in an exercise of prosecutorial discretion.[90] Accordingly, we voted to close the files.

[90] *See Heckler v. Chaney*, 470 U.S. 821 (1985); *CREW v. FEC*, No. 17-5049, 2018 WL 2993249 (D.C. Cir. June 15, 2018).

Caroline C. Hunter
Chair

7/2/2018
Date

Matthew S. Petersen
Commissioner

7/2/2018
Date

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of	)	
	)	
W Spann LLC, *et al.*	)	MUR 6485
F8, LLC, *et al.*	)	MURs 6487 & 6488
Specialty Investments Group, Inc., *et al.*	)	MUR 6711
SPM Holdings LLC, *et al.*	)	MUR 6930

STATEMENT OF REASONS OF
CHAIRMAN MATTHEW S. PETERSEN
AND COMMISSIONERS CAROLINE C. HUNTER AND LEE E. GOODMAN

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.[1] Of the many issues resulting from the decision, amongst the most difficult has been determining how the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations apply to contributions from closely held corporations or limited liability companies taxed as corporations ("corporate LLCs"). In the 2012 election cycle—the first presidential cycle following *Citizens United*—the Commission received complaints alleging that certain contributions made to Super PACs by closely held corporations or corporate LLCs violated the Act's prohibition against making contributions in the name of another.[2]

Historically, the Act's giving-in-the-name-of-another prohibition focused on the "true source" of a contribution; in other words, whether a person passed funds through a straw donor to make a contribution. Until recently, however, federal law prohibited all corporate contributions, so the inquiry generally looked at whether a corporation (or some other person) paid or reimbursed individuals for making contributions in their names. Thus, application of the true source analysis to determine whether a corporation may be considered a straw donor for an

[1] *Citizens United v. FEC*, 558 U.S. 310 (2010). *Citizens United* triggered a cascade of changes to campaign finance law. First, it compelled the U.S. Court of Appeals for the District of Columbia to hold unconstitutional the Act's contribution limits as applied to individuals' contributions to political committees that only made independent expenditures. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). This, in turn, compelled the Commission to determine that corporations and labor organizations could also make contributions to similar political committees, now known colloquially as Super PACs. *See* Advisory Opinion 2010-11 (Commonsense Ten); Advisory Opinion 2010-09 (Club for Growth). Consistent with these authorities, Super PACs may not make contributions to candidates, nor may they accept contributions from foreign nationals or government contractors.

[2] 52 U.S.C. § 30122 (formerly 2 U.S.C. § 441f).

individual's contribution is an issue of first impression before the Commission. As we approached these matters, we kept this consideration in mind as well as the following:

- The Commission has considered the giving-in-the-name-of-another prohibition almost exclusively in situations where excessive and/or prohibited contributions were funneled through straw donors—unlike here, where the Act's amount limitations and corporate source prohibitions are not implicated because Super PACs received the contributions.

- Longstanding Commission precedent has treated funds deposited into a corporate account and then used for contributions as the funds of that corporation and, thus, has held that the corporation made those contributions. Likewise, the Commission has consistently refused to consider the corporation's owner as the maker of such contributions.

- The Commission has previously considered but rejected an attribution rule that would deem the individual owners of corporate LLCs as the makers of those LLCs' contributions. The Commission has not revised this regulation since *Citizens United.*

- The speech rights recognized in *Citizens United* would be hollow if closely held corporations and corporate LLCs were presumed to be straw donors—thus, triggering investigations and potential punishment—each time they made contributions.

In light of these considerations, it was necessary to examine a sufficient number of factual scenarios to ensure a sound application of the Act and to provide clear public guidance on the appropriate standard that we will apply in future matters. Indeed, with the benefit of varying fact patterns, the Office of General Counsel ("OGC") significantly refined its analysis for considering these types of matters.

We conclude that, to vindicate the purpose underlying section 30122 without violating First Amendment rights, the 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.

Because, as noted above, the question whether closely held corporations and corporate LLCs may be straw donors under section 30122 is one of first impression, and because past Commission decisions regarding funds deposited into corporate accounts may be confusing in light of recent legal developments, principles of due process, fair notice, and First Amendment clarity counsel against applying a standard to persons and entities that were not on notice of the governing norm.[3] For this reason, we concluded that MURs 6485, 6487, 6488, and 6711 should

[3] *See Citizens United*, 558 U.S. at 324 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)) ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'"); *id.* at 329 ("We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned,

be dismissed in an exercise of the Commission's prosecutorial discretion, and we agreed with OGC's recommendation to find no reason to believe a violation occurred in MUR 6930 based on a rationale similar to the one we adopt here.[4] Accordingly, we voted to close the files in each matter.

I. FACTUAL BACKGROUND

Each of these matters arose from Super PAC disclosures of contributions received from closely held corporations or corporate LLCs.

A. MUR 6485 (W Spann)

In MUR 6485,[5] Edward Conard sought to make a large contribution to Restore Our Future, a Super PAC supporting Mitt Romney's presidential candidacy.[6] Concerned that disclosure of the contribution would "jeopardize the safety . . . of his family," Conard retained legal counsel to advise him on whether he could "create an entity for the sole purpose of making a [contribution] . . . [which] would not require full public disclosure of his name in connection with the contribution."[7] Counsel advised him that he could do so through a corporate LLC.[8] Counsel warned that "the FEC might seek to look through the contributing entity to the underlying contributor," but did not otherwise "consider [the giving-in-the-name-of-another prohibition] when conducting [its] research."[9] Pursuant to that advice, Conard authorized the formation of W Spann LLC in March 2011.[10] On April 28, 2011, Conard further authorized W Spann to make the contribution to Restore Our Future, and in May 2011 W Spann LLC was dissolved.[11] Soon after, when the contribution "attracted significant media attention,"[12] Conard

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especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject."); *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("[L]aws . . . must give fair notice of conduct that is forbidden or required. . . . [T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.") (internal cites omitted).

4 *Heckler v. Chaney*, 470 U.S. 821 (1985).

5 Complaint (Aug. 5, 2011), MUR 6485 (W Spann).

6 Conard Response at 2 (Oct. 3, 2011), MUR 6485 (W Spann).

7 *Id.* at 2-3; Declaration of Kimberly E. Cohen ¶ 4 (Oct. 3, 2011) ("Cohen Decl.").

8 Conard Resp. at 3; Cohen Decl. ¶¶ 7-8.

9 Cohen Decl. ¶ 8; Conard Resp. at 2, 4.

10 Conard Resp. at 4; Cohen Decl. ¶ 9.

11 Conard Resp. at 4-5.

12 First General Counsel's Report at 5 (Aug. 28, 2012), MUR 6485 (W Spann).

released a statement acknowledging that he formed and funded W Spann LLC.[13] In that same statement, Conard asked that Restore Our Future amend its reports to identify him as the contributor.[14] Conard thus quickly corrected the record well over one year before the 2012 election. In its analysis of these circumstances, OGC treated Conard's statements as evidence of the section 30122 violation.[15]

B. MURs 6487 and 6488 (F8/Eli Publishing)

MURs 6487 and 6488 also involve contributions that Restore Our Future received from two limited liability companies, F8 LLC and Eli Publishing LLC.[16] In 1997, Steven Lund founded Eli Publishing "for the purpose of publishing a range of specialty books."[17] As of June 2012, Eli Publishing had "publish[ed] one book with the intent to publish additional books" and continued to earn revenues.[18] F8 was formed in 2008 and, in its response, described itself as having a "commercial" purpose.[19] Eli Publishing and F8 each made contributions of $1 million to Restore Our Future on March 31, 2011.[20] In response to media inquiries, Lund stated that "he made the contribution 'through a corporation he created to publish a book years ago because donating through a corporation has accounting advantages.'"[21] He also stated that he was not trying to hide his donations.[22] OGC interpreted Lund's public statements as dispositive admissions.[23]

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[13] Conard Resp. at 5; Conard Media Statement (Aug. 5, 2011).

[14] Conard Resp. at 5; Conard Media Statement; 2011 Mid-Year Report at 11, Restore Our Future (Amend. Aug. 15, 2011).

[15] FGCR at 7-8, MUR 6485 (W Spann).

[16] Complaint at 4 (Aug. 11, 2011), MUR 6487 (F8); Complaint at 4 (Aug. 11, 2011), MUR 6488 (Eli Publishing).

[17] Steven J. Lund, *et al*. Joint Response at 2 (Oct. 6, 2011), MUR 6488 (Eli Publishing).

[18] *Id.*; First General Counsel's Report at 4 (June 6, 2012), MURs 6487/6488 (F8/Eli Publishing).

[19] F8 Response at 2 (Oct. 7, 2011), MUR 6487 (F8). F8's registered agent (and one of its managers) is Jeremy Blickenstaff, who is reportedly Lund's son-in-law. *See* FGCR at 4-5, MURs 6487/6488 (F8/Eli Publishing) (citing materials available at the Utah Division of Corporations and Commercial Code).

[20] 2011 Mid-Year Report at 16, Restore Our Future (Amend. Aug. 15, 2011).

[21] Complaint at 3, MUR 6488 (Eli Publishing).

[22] FGCR at 10, MURs 6487/6488 (F8/Eli Publishing).

[23] *See id.* at 8-11 (starting the analysis of Lund's liability with the fact that Lund "neither denies the truth or authenticity of [his] reported statements"; describing his statements as "inherently reliable as admissions"; asserting that his statements "indicate that Lund effectively admitted that he was the true source of the contribution by Eli Publishing," and concluding that "these statements are more than adequate by themselves to conclude there is reason to believe the contribution in the name of Eli Publishing may have violated" section 30122).

C. MUR 6711 (Specialty Investments Group)

MUR 6711 centers on contributions made by a corporation, Specialty Investments Group (SIG), and its subsidiary, Kingston Pike Development, LLC (KPD) to FreedomWorks for America.[24] William Rose formed both entities in September 2012.[25] In a joint response, Rose, SIG, and KPD assert that SIG and KPD "were formed for the purpose of engaging in the real estate business" and SIG "received private capital and made investments in properties and projects, many of which Mr. Rose has worked on for several years."[26] Between October 1, 2012, and November 1, 2012, FreedomWorks disclosed that it received $12,075,000 from SIG and KPD.[27] Based on anonymous sources quoted in a news article, the complainant alleges that the funds underlying these contributions originated with Richard Stephenson, a member of the FreedomWorks board of directors, and his family.[28] In his response, Rose stated—consistent with statements made to the press soon after making the contributions—that he "made contributions on behalf of SIG and KPD," that these contributions were done lawfully, and that they were correctly disclosed by FreedomWorks (as contributions from SIG and KPD).[29] OGC recommended that the Commission find reason to believe and investigate, in part, because of a concern that Rose may *not* have exercised direction and control over the contributions.[30]

D. MUR 6930 (Michel)

Last, in MUR 6930, Prazrakrel ("Pras") Michel formed SPM Holdings, LLC, to be the owner and repository of his assets, including his house, and the recipient of his income from

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[24] Complaint at 2 (Dec. 20, 2012), MUR 6711 (Specialty Investments Group).

[25] *Id.* at 1-2; William S. Rose Jr., *et al*. Joint Response at 2 (Feb. 25, 2013), MUR 6711 (Specialty Investments Group). Rose served as Chairman of the Board, President, and CEO of SIG; Rose was the sole manager of Kingston Pike Development. *Id.*

[26] *Id.* at 2-3. More specifically, Rose, SIG, and KPD state that "Rose, acting on behalf of SIG or one of its subsidiaries, has purchased, offered to purchase, and/or negotiated real estate investments valued at over $50 million." *Id.* at 3. An appendix included in the response identifies numerous real estate transactions. *Id.*, App. A. OGC also attached to its First General Counsel's Report a press release that Rose issued in November 2012 in which he "asserted that SIG is a legitimate real estate development business," but also acknowledged "social[] and political purposes." First General Counsel's Report at 8, Attach. 2 (June 6, 2014), MUR 6711 (Specialty Investments Group).

[27] 2012 Pre-General Report at 145-47, FreedomWorks for America (Amend. June 10, 2013); 2012 Post-General Report at 96, 168-71, FreedomWorks for America (Amend. May 21, 2013).

[28] Amended Complaint at 2-3 (Apr. 23, 2013), MUR 6711 (Specialty Investments Group) (citing Amy Gardner, *FreedomWorks Tea Party Group Nearly Falls Apart in Fight Between Old and New Guard*, WASH. POST (Dec. 25, 2012)). Complainant bases its allegations against Richard Stephenson on unsourced statements in a news article. *Id.* Specifically, that article reports that Brandon "told colleagues" Stephenson would be making a $10 to $12 million contribution, and that employees who attended a FreedomWorks retreat at which a budget was prepared saw Stephenson attend the same retreat and "dictate[] some of the terms of how the money would be spent." *Id.*

[29] Rose Joint Resp. at 3.

[30] FGCR at 15, MUR 6711 (Specialty Investments Group).

various endeavors.[31] Within months of forming SPM, he used the last of his personal funds not held by SPM to make $350,000 in contributions to a political committee called Black Men Vote.[32] Michel did not have sufficient funds outside of SPM to respond to an immediate call for more contributions to Black Men Vote, so he directed SPM to make contributions totaling another $875,000 to Black Men Vote.[33] The contributions from SPM were disclosed by Black Men Vote as contributions made by SPM. Like Conard, Lund, and Rose, Michel readily acknowledged that he directed that the contributions be made and were in some respects his contributions.[34] But in contrast to its treatment of Conard's, Lund's, and Rose's public acknowledgements as evidence of their section 30122 violations, OGC concluded that Michel's public acknowledgement was evidence that he did *not* violate section 30122. According to OGC, Michel's post-contribution acknowledgment demonstrated that he was not trying to hide anything. Therefore, OGC recommended that the Commission find no reason to believe that Michel violated section 30122.[35]

* * *

OGC recommended that we find reason to believe that W Spann and Edward Conard; Eli Publishing, Steven Lund, F8, and Unknown Respondents; and William Rose, SIG, KPD, FreedomWorks, Richard Stephenson, and Adam Brandon violated section 30122.[36] OGC recommended that we find no reason to believe that SPM Holdings LLC, SPM 2012 Holdings LLC, or Pras Michel violated section 30122.[37] As to this last matter, our colleagues rejected OGC's analysis and recommendation.

II. LEGAL ANALYSIS

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31 First General Counsel's Report at 3 (Nov. 11, 2015), MUR 6930 (Michel).

32 *Id.*

33 *Id.*

34 *Id.* at 4.

35 *Id.* at 9. Because we voted to accept OGC's recommendation to find no reason to believe a violation of the Act occurred in MUR 6930, this Statement of Reasons explains our reasoning in that case to the extent it supplements and refines the analysis set forth in the First General Counsel's Report.

36 FGCR at 19, MUR 6485 (W Spann); FGCR at 16-17, MURs 6487/6488 (F8/Eli Publishing); FGCR at 20, MUR 6711 (Specialty Investments Group).

In each of these cases, the complainant also alleged that respondents violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register as political committees and file disclosure reports with the Commission. Compl. at 5-7, MUR 6485 (W Spann); Compl. at 4-7, MUR 6487 (F8); Compl. at 4-7, MUR 6488 (Eli Publishing); Compl. at 6-9, MUR 6711 (Specialty Investments Group); Complaint at 6-9 (Apr. 9, 2015), MUR 6930 (Michel). Because OGC did not recommend that we find reason to believe with respect to those allegations, and because we conclude the applicable statutory provisions addressing these circumstances is section 30122, we do not discuss those allegations here. Similarly, OGC did not recommend reason to believe findings with respect to Restore Our Future. FGCR at 19, MUR 6485 (W Spann); FGCR at 16-17, MURs 6487/6488 (F8/Eli Publishing).

37 FGCR at 12, MUR 6930 (Michel).

Under section 30122, "[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."[38] Commission regulations also prohibit "knowingly help[ing] or assist[ing] any person in making a contribution in the name of another."[39] The Act defines "person" to include partnerships, corporations, and other organizations.[40]

In numerous matters, the Commission has found that a corporation violates sections 30122 and 30118[41] when it reimburses, or advances funds to, straw donors for the purpose of making contributions ostensibly made by the straw donors to federal candidates.[42] In these schemes, an individual "who actually transmits the money acts merely as a mechanism, whereas it is the original source who has made the gift by arranging for his money to finance the donation."[43] But until recently, corporations could not make *any* contributions, and Super PACs did not exist.[44] Thus, the Commission has never addressed the inverse of the conventional corporate straw-donor scheme—that is, whether, or under what circumstances, a closely held corporation or corporate LLC may be considered a straw donor under section 30122.

As noted above, OGC refined its analysis over the course of these matters. For example, in MUR 6485 (W Spann), OGC concluded that corporations can be straw donors under section 30122, stating: "The Act and Commission regulations thus focus on the 'true' source

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[38] 52 U.S.C. § 30122.

[39] *Id.*; 11 C.F.R. § 110.4(b)(1)(iii). Commission regulations provide illustrative examples of activities that would constitute a violation of the Act by making a contribution in the name of another:

> (i) Giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made, or
>
> (ii) Making a contribution of money or anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source.

11 C.F.R. § 110.4(b)(2).

[40] 52 U.S.C. § 30101(11); 11 C.F.R. § 100.10.

[41] Section 30118 prohibits, in general, contributions or expenditures by corporations, national banks, and labor organizations.

[42] *See, e.g.*, MUR 6143 (Galen Capital Group) (finding violation of then-section 441f when corporation reimbursed individuals for contributions made); MUR 5666 (MZM) (same); MUR 4879 (Beaulieu of America) (same); MUR 4876 (Cadeau Express) (same); MUR 4871 (Broadcast Music) (same); MUR 4796 (DeLuca Liquor and Wine) (same); MUR 2195 (Eklutna) (same).

[43] *U.S. v. O'Donnell*, 608 F.3d 546, 550 (9th Cir. 2010) (distinguishing between "providing [a gift] from one's own resources rather than simply conveying").

[44] *See supra* note 1.

responsible for making the contribution. The determination of the true source of the contribution turns on consideration of who 'exercise[d] direction or control' over the funds distributed to the recipient."[45] Based on that analysis, OGC recommended that we find reason to believe the respondents violated section 30122. Later, in MUR 6930 (Michel), OGC omitted "direction or control," presumably because "direction or control" is necessarily present in all closely held corporations.[46] Instead, OGC explained that the Commission must "look to the structure of the transaction itself and the arrangement between the parties to determine who in fact 'made' a given contribution."[47] Accordingly, in that matter, despite the owner's sole direction or control over the funds at issue, OGC recommended that the Commission find Pras Michel was not the "true source" of his LLC's contribution because "it does not appear that Michel sought to elude the reporting provisions of the Act by using SPM as a mere pass through intermediary for the funds that SPM contributed in its name to Black Men Vote."[48] OGC then revised its legal analysis in MUR 6485 to clarify "direction or control" is not the dispositive analysis.[49]

* * *

Upon thorough consideration of these matters, we conclude that closely held corporations and corporate LLCs may be considered straw donors in violation of section 30122 under certain circumstances. However, pursuing enforcement against the Respondents in these matters would be manifestly unfair because Commission precedent does not provide adequate notice regarding the application of section 30122 to closely held corporations and corporate LLCs or the proper standards for its application.[50]

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45 FGCR at 6, MUR 6485 (W Spann).

46 Instead of a "direction or control" inquiry, OGC observed: "We recognize that Michel exercised sole authority over the disposition of SPM's resources, including its decision to make the contributions at issue here. By definition a single-member LLC acts only by the will of that member. But absent further regulation in this area, the mere involvement of such an entity in a contribution does not alone resolve the true-source inquiry under Section 30122." FGCR at 10, MUR 6930 (Michel).

47 *Id.* at 7-8.

48 *Id.* at 2. Our colleagues voted against accepting OGC's analysis but as of the date we voted on this matter they had not articulated for us or the public an alternative analysis or standard. Commission Certification, MUR 6930 (Michel) (Feb. 23, 2016). More recently, our colleagues have explained their view that there was no significant distinction between Mr. Conard's and Mr. Michel's activities. *See* Statement of Reasons of Vice Chairman Steven Walther and Commissioners Ellen Weintraub and Ann Ravel at n.2 (April 1, 2016), MURs 6487, 6488, 6485, 6711, 6930 (W Spann *et al.*). Under the analysis of our colleagues, section 30122 makes all closely held corporations or corporate LLC contributions unlawful, even if the LLC was formed for and conducted other legitimate business activities. As we explain in this Statement, in our view this would be drastic and would countermand *Citizens United* with respect to the First Amendment rights of these entities.

49 Supplement to the First General Counsel's Report at 1 (Feb. 23, 2016), MUR 6485 (W Spann).

50 The Commission's interpretation applying section 30122 to closely held corporations and corporate LLCs as straw donors in a case of first impression necessarily requires the Commission to set standards and draw lines distinguishing permissible versus proscribed conduct. The Commission has several procedures available for drawing such lines. They include notice and comment rulemaking, interpretative guidance, and statements interpreting the Act in the enforcement context. As noted above, when we voted in these matters, our colleagues

A. Whether Corporations May Be Considered Straw Donors in Violation of Section 30122 is an Issue of First Impression.

When Congress enacted the prohibition against contributions in the names of others, corporations could not make any contributions under the Act. Thus, Congress likely did not contemplate that corporations could violate the prohibition against giving in the name of another by acting as straw donors for contributions. This conclusion is buttressed by the fact that, until these matters, the Commission has considered alleged violations of section 30122 almost exclusively in contexts where individuals were the purported straw donors.

Moreover, before *Citizens United*, nearly every alleged straw-donor scheme addressed by the Commission involved *excessive and/or prohibited contributions*.[51] Here, by contrast, the Act's amount limitations and corporate source prohibitions are not implicated because the contributions at issue were given to Super PACs, which only engage in independent speech and do not make contributions to candidates. Accordingly, the alleged section 30122 violations in these matters differ substantially from those previously considered by the Commission and present an issue of first impression.

B. Corporations Exercising Newfound Rights Under *Citizens United* Could Have Been Misled Or Confused By Commission Precedent Regarding Funds Deposited Into Corporate Accounts And the Commission's Regulation on LLC Contributions.

Even more significant is that Commission precedent treats funds deposited in a corporate account as the corporation's funds, even if the corporation's owner could legally convert them into his or her own personal funds. Consequently, when such funds have been contributed to a political committee, the Commission has concluded that the corporation—not the individual(s) owning the corporation—made the contribution. In *FEC v. Kalogianis*, for example, the Commission alleged that a former candidate had violated then-section 441b[52] by loaning funds from his own closely held corporations to his campaign.[53] In ruling for the Commission that the loan violated the ban on corporate contributions, the court rejected the candidate's argument that

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articulated no uniform standards for applying the Act. Further discussions within the Commission failed to define any standard and indicated notice and comment rulemaking would not be constructive. More recently – and for the first time – our colleagues set forth a rationale without lines that presumes the unlawfulness of all corporate LLC contributions. *See supra* note 48. In the absence of any consensus regarding how to draw lines distinguishing lawful contributions versus unlawful contributions by closely held corporations and corporate LLCs, we have proceeded to announce our view of the proper standard here as part of our interpretation of the Act.

[51] *See, e.g.*, *supra* note 42; MUR 4646 (Amy Robin Habie) (finding violation of then-section 441f when individuals reimbursed others' contributions to candidates in amounts exceeding Act's limits); MUR 4484 (Bainum) (finding violation of then-section 441f when individual made contributions to candidates in name of infant son in amounts exceeding the Act's limits); MUR 4297 (Ortho Pharmaceutical) (finding violation of then-section 441f when incorporated federal contractor reimbursed contributions to candidates).

[52] This section has since been recodified as 52 U.S.C. § 30118.

[53] *FEC v. Kalogianis*, No. 06-68 at 6, 8-9 (M.D. Fla Nov. 30, 2007), *available at* http://www fec.gov/law/litigation/kalogianis_order.pdf.

"a contribution of corporate money by the sole shareholder of a corporation and a contribution by the shareholder of the shareholder's money warrant equivalent treatment because in each instance the contribution is necessarily the shareholder's money."[54]

Likewise, in MUR 3191 (Christmas Farm Inn, Inc.), the Commission found that a candidate violated then-section 441b when the candidate loaned his campaign funds initially drawn on his closely held corporation's account.[55] The Commission rejected the argument that the funds were personal funds,[56] because "[a] subchapter S Corporation retains as its own any income taxed to individual shareholders until such time as a distribution or dividend is declared."[57] And in MUR 4313 (Coalition for Good Government), the respondent created a corporation to run a television ad and deposited his personal funds into the corporation's account for the purpose of funding the ad.[58] Under these circumstances, OGC reasoned that:

> [O]nce a decision is made and carried out to conduct business using the corporate form, any funds taken from the corporation's accounts are to be deemed corporate in nature, *whether or not they originated as, or could be converted into, the personal funds of a shareholder*. . . . In the present matter, when the Coalition was incorporated it took on a legal identity separate from that of Mr. Jones and was subject to regulation as such. . . . Thus, given the Coalition's corporate status, and the fact that the funds for the television spot came from the Coalition's account, the expenditures made for the advertisement were made with corporate funds.[59]

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[54] *Id.* at 8 (holding that "precedent precludes this interpretation of the statute").

[55] Conciliation Agreement at 2, 4, 8 (June 23, 1995), MUR 3191 (Christmas Farm Inn, Inc.). The candidate had cashed checks from a corporate account into his personal checking account, and then made personal checks out to his campaign committee. Factual & Legal Analysis at 3-4 (Oct. 7, 1991), MUR 3191 (Christmas Farm Inn, Inc.). The committee reported the receipts as loans from the candidate. Statement of Reasons of Commissioner Joan D. Aikens and Commissioner Lee Ann Elliott at 2 (Sept. 12, 1995), MUR 3191 (Christmas Farm Inn, Inc.).

[56] *See* 11 C.F.R. § 110.10 ("[C]andidates . . . may make unlimited expenditures from personal funds as defined in 11 CFR 100.33.").

[57] FLA at 3-4, MUR 3191 (Christmas Farm Inn, Inc.). In MUR 6102 (Georgianna Oliver), the Commission considered an allegation that a candidate loaned corporate funds to her own campaign. *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Cynthia L. Bauerly, Caroline C. Hunter and Donald F. McGahn II at 1 (Sept. 28, 2009), MUR 6102 (Georgianna Oliver). The Commission drew heavily on principles of corporate law, but dismissed the case on the grounds that the candidate had, according to sworn testimony, followed corporate bylaws in distributing the funds. *Id.* at 6.

[58] First General Counsel's Report at 33 (Oct. 18, 1996), MUR 4313 (Coalition for Good Government).

[59] *Id.* at 34 (citing MUR 3191 (Christmas Farm Inn, Inc.) and MUR 3119 (Chandler for Congress)) (emphasis added).

These authorities reflect Commission reliance on "well established principle[s] of corporate law"[60] to find that once funds are deposited in a corporate account, they become the corporation's funds and are no longer those of the corporation's owner. Thus afterwards, any contributions of such funds are considered corporate in nature[61] because a corporation, even a closely held one, or a corporate LLC, has "a legal identity separate from that of [the owner] and [is] subject to regulation as such."[62]

The Commission has applied similar logic in the rulemaking context. In its 1998 LLC rulemaking, the Commission considered but rejected a proposal to deem contributions by closely held corporate LLCs as contributions from their individual owners.[63] The Commission ultimately decided to treat corporate LLCs as distinct from their individual owners, including single-member corporate LLCs. The resulting regulation—which was the only one specific to LLCs that Respondents could have consulted when they undertook their activities—thus requires partnership LLCs to attribute their contributions to their individual members but provides no similar instruction to corporate LLCs.[64]

Given the Commission's historical treatment of contributions made from funds deposited into a corporate account as corporate contributions, it would be reasonable for Respondents to conclude that contributions made by their closely held corporations and corporate LLCs were lawful and not contributions in the name of another. Thus, Respondents were not provided adequate notice that their conduct could potentially violate section 30122.

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60 Plaintiff Federal Election Commission's Motion for Summary Judgment, *FEC v. Kalogianis*, No. 06-68 (Feb. 28, 2007) at 18, *available at* http://www fec.gov/law/litigation/kalogianis_fec_summary_judgment_motion.pdf.

61 *See, e.g.*, FGCR at 8, 34, MUR 4313 (Coalition for Good Government) ("[A]ny corporation acquires, by the act of incorporation, a legal identity separate from its investors, and is subject to regulation as such . . . . The fact that Mr. Jones invested his personal property in the [corporation] does not mean that its funds could still be viewed as his personal funds for purposes of the Act . . . . Thus, given the Coalition's corporate status, and the fact that the funds for the television spot came from the Coalition's account, the expenditures made for the advertisement were made with corporate funds."); Conciliation Agreement at 2-3 (Dec. 20, 2002), MUR 4313 (Coalition for Good Government) (identifying the incorporated entity as the person making the expenditures).

62 FGCR at 8, MUR 4313 (Coalition for Good Government). OGC argues that MUR 4313 (Coalition for Good Government) is distinguishable on the grounds that "section 441b [now section 30118] was designed to remedy different harms and, more significantly, MUR 4313 involved an independent expenditure, not a contribution. Accordingly, the respondents . . . could never have been liable for making a contribution in the name of another under section [30122]." FGCR at 9 n.3, MUR 6485 (W Spann). These arguments miss the mark. The significance of MUR 4313 is the underlying rationale that "any funds taken from the corporation's accounts are to be deemed corporate" funds. FGCR at 34, MUR 4313 (Coalition for Good Government). That rationale is in no way conditioned upon the purpose of section 441b or that the funds were used to make an expenditure, as opposed to a contribution. In any event, *Kalogianis* and MUR 3191 (Christmas Farm Inn, Inc.), discussed above, did involve contributions, and the Commission refused to attribute the contributions to the individuals controlling and funding the corporations in those cases.

63 *See Treatment of Limited Liability Companies Under the Federal Election Campaign Act*, 63 Fed. Reg. 70065, 70066 (Dec. 18, 1998). "Alternative A" proposed attributing all LLC contributions, including corporate LLCs, to the LLC and its individual owners, but the Commission rejected Alternative A.

64 11 C.F.R. § 110.1(g).

C. Because (1) the Issue in These Matters is One of First Impression and (2) Commission Precedent Treated Funds from a Corporation as the Corporation's Contribution, Applying Section 30122 Against Respondents Would Be Unfair.

Under certain circumstances, closely held corporations and corporate LLCs may be considered straw donors under section 30122. Section 30122 prohibits a *person* from making a contribution in the name of another *person*, and the Act's definition of "person" includes corporations.[65] Yet, our conclusion that section 30122 applies to closely held corporations and corporate LLCs is only the beginning of the analysis: The conclusion must be squared with longstanding Commission precedent, discussed above, that has treated contributions drawn from corporate accounts—even those of closely held corporations—as corporate contributions rather than contributions from individual owners. In considering the appropriate interpretations of the legal standard to apply in future matters involving similar allegations, we bear in mind not only the statutory text and the disclosure interests at issue but also the profound First Amendment rights at stake. Thus, our interpretation must faithfully implement the Act's language in a way that preserves the associational and free speech rights of closely held corporations and corporate LLCs. After all, "political speech does not lose First Amendment protection simply because its source is a corporation."[66] For this reason, the Commission's approach may not merely presume that contributions from closely held corporations or corporate LLCs are actually contributions in the name of another.

As Commissioners, we are obligated to "safeguard the First Amendment when implementing" the Act.[67] Consistent with this command, we conclude that, when enforcing section 30122 in similar future matters, the proper focus will be on whether funds 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.[68] If they were, then the true source of the funds is the person who funneled them through the corporate entity for this purpose. 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

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65 52 U.S.C. § 30101(11).

66 *Citizens United*, 558 U.S. at 342 (internal quotes omitted).

67 *Van Hollen v. FEC*, No. 15-5016, Slip Op. at 27 (D.C. Cir. Jan 21, 2016).

68 At least when applied to corporate contributions to Super PACs, section 30122 does not guard against circumvention of amount limitations or certain source prohibitions but rather addresses only disclosure. Thus, determining whether there exists a purpose to evade disclosure is the relevant inquiry in these types of matters.

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.[69]

As explained earlier, this 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.[70] The Supreme Court has observed that "[a] fundamental principle in our

[69] The Commission is not required to provoke legal and constitutional controversies in its administration and enforcement of the law. Indeed the prudent and preferred course is to avoid such issues. Therefore, where the Commission has two reasonable ways of interpreting the law, its regulations, and enforcement practices, one of which avoids legal and constitutional doubt and another which creates serious legal and constitutional doubt, the Commission is well within its discretion to take the safer course. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Although [a regulatory agency's interpretations of its own statute] are normally entitled to deference, where, as here, an otherwise acceptable construction would raise serious constitutional problems . . . courts [must] construe the statute to avoid such problems unless such construction is plainly contrary to Congress' intent." (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available."))). *See also Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring, in part) (noting that "[where statutory intent is unclear], it is our practice to construe the text in such fashion as to avoid serious constitutional doubt"). As a result, given the numerous legal and constitutional concerns raised above, we clearly would be within our discretion to dismiss this case and, in light of those concerns, we would exercise that discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement. The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'") (internal citations omitted)). *See also United States v. Batchelder*, 442 U.S. 114, 123-24 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869).

[70] Even if we had applied the legal interpretation articulated above to a matter like MUR 6485 (W Spann)—which involved an LLC being created for the express purpose of making a contribution without disclosing the donor behind the organization—other factors still would have counseled in favor of dismissal. First, Conard acted pursuant to legal advice. Furthermore, within days of the contribution being called into question, Conard asked the recipient Super PAC to disclose him as the donor. The Super PAC did so immediately. Thus, less than three weeks after the initial report was filed, five months before the first presidential primary was held, and over a year before the 2012 general election, Conard's identity and status as contributor were disclosed to the public. Accordingly, little to no informational harm was suffered by the public.

legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[71] This concern is particularly acute where First Amendment rights are at stake.[72] To decide otherwise would not only create due process concerns but would risk chilling vitally important political speech that is strictly protected by the First Amendment.[73]

III. CONCLUSION

For the foregoing reasons, we concluded that MURs 6485, 6487, 6488 and 6711 should be dismissed in an exercise of the Commission's prosecutorial discretion and voted to approve OGC's recommendation to find no reason to believe a violation occurred in MUR 6930.[74] Accordingly, we voted to close the files.

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[71] *Fox Television Stations*, 132 S. Ct. at 2317; *see also* Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen 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.").

[72] *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976) ("[V]ague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone. . . than if the boundaries of the forbidden areas were clearly marked.") (internal quotations omitted); *Citizens United*, 58 U.S. at 324 ("Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.") (citing *Connally*, 269 U.S. at 391); *Fox Television Stations*, 132 S. Ct. at 2317 (2012) ("[T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity dos not chill protected speech.").

[73] *See supra* notes 3 and 72 (the First Amendment cannot tolerate vague or unduly complex rules, or standards decided after the fact on a case-by-case basis); *see also Connally*, 269 U.S. at 391 ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process."); *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) ("Living under a rule of law entails various suppositions, one of which is that [all persons] are entitled to be informed as to what the State commands or forbids.") (internal quotes omitted); *United States v. Williams*, 553 U.S. 285, 304 (2008) (clarity in regulation is essential to due process protected by the Fifth Amendment).

[74] *Heckler v. Chaney*, 470 U.S. 821 (1985).

Matthew S. Petersen
Chairman

APR. 1, '16
Date

Lee E. Goodman
Commissioner

April 11, 2016
Date

Caroline C. Hunter
Commissioner

April 1, 2016
Date