Berke | Farah LLP
Attorneys at Law

1200 New Hampshire Ave. NW • Suite 800 • Washington, DC 20036 • cberke@berkefarah.com • 202.517.0585
www.berkefarah.com

April 26, 2016

Jeff S. Jordan
Assistant General Counsel
Federal Election Commission
Office of Complaints Examination
and Legal Administration
Attn: Donna Rawls, Paralegal
999 E Street NW
Washington, DC 20436

Re: MUR 7015

Dear Mr. Jordan:

This response is submitted on behalf of Mr. Andrew Duncan ("Respondent") with respect to a complaint designated as MUR 7015 that was filed with the Federal Election Commission ("Commission") by the Campaign Legal Center et al ("Complaint"). This response is timely submitted by April 27, 2016, the extension date granted to Respondent. For the reasons discussed herein, the Commission should determine on the face of the Complaint that no law or regulation was violated by Respondent, and that the Complaint should be promptly dismissed.

Factual Analysis

The Complaint alleges that the Respondent may have violated 52 U.S.C. 30122 by making a contribution to the political committee Conservative Solutions PAC (ID C00541292), an Independent Expenditure-Only Committee ("IEOPC") in the name of another person, namely IGX, LLC. Based on reports filed with the Commission, Conservative Solutions PAC reported on its 2015 Year End Report that IGX, LLC contributed $500,000 to it on October 26, 2015.[1] The contribution was drawn from the IGX,

[1] Conservatives Solutions PAC 2015 Year End Report filed with the Commission on Jan. 1, 2016, at p. 26 line A. (http://docquery.fec.gov/pdf/194/201601319004988194/201601319004988194.pdf) (visited on Apr. 20, 2016). It should be noted for the record that Conservative Solutions PAC also reported receipt of additional itemized contributions from LLCs, partnerships and/or corporations for the filing period.

LLC bank account. IGX, LLC is a limited liability company that was organized in the State of Delaware on May 13, 2015. It was organized as an investment vehicle for film/entertainment and technology endeavors, and was not organized for any political purpose. Its establishment and operation predated the contribution by over five months. Since the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), corporations and other entities, including LLCs, are generally permitted to make unlimited contributions to IEOPCs.

At no time did Respondent make a contribution to Conservative Solutions PAC. Respondent is employed by IGX, LLC and is the member/owner. His employment with IGX, LLC is publicly known.[2] The Complaint is predicated strictly upon an *Associated Press* story that was then repeated by other media reports that included the false statement that Respondent "had used IGX to mask the donation because he was worried about reprisals" – a statement that was written by the reporter and was not a quote from or directly attributed to Respondent.[3] At no time did Respondent state or suggest to the media that the true source of the contribution from IGX, LLC was from anyone or any entity other than IGX, LLC – as indeed that was the case. In a subsequent media interview, Respondent clarified on the record that "[i]n no way was I trying to mask this contribution."[4]

here is also nothing in the Complaint to suggest that Conservative Solutions PAC raised any questions regarding the contribution from IGX, LLC, nor is there anything to suggest that it should have done so. There do not appear to be any Requests for Additional Information from the Commission's Reports and Analysis division regarding the contribution (nor any others from LLCs, partnerships, or corporations included for that period).[5] Most importantly, there is no evidence that IGX, LLC was not the actual source of the funds contributed to Conservative Solutions PAC.

Legal Analysis

The Complaint misstates how the Federal Election Campaign Act ("the Act") and regulations promulgated thereunder have been applied to IEOPCs. The Complaint cites regulations that were promulgated prior to the Supreme Court's decisions in *Citizens United v FEC*, 558 U.S. 310 (2010) and *Speech Now v. FEC*, 599 F. 3d 686 (D.C. Cir. 2010). Those decisions permitted the legal establishment of IEOPCs, political committees which may accept unlimited contributions from corporations and other entities, including LLCs.

---

[2] *See e.g.*, Marco Rubio for President (ID C00458844) Quarterly Report (Q3) filed with the Commission on Oct. 30, 2015(http://docquery.fec.gov/cgi-bin/fecimg/?201510309003256347)(visited on Apr. 20, 2016).

[3] Jack Gillum et al, "Big bucks, shadowy companies: Election mystery money returns, *Associated Press*, Feb. 3, 2016 (http://bigstory.ap.org/article/3143e929c77641438ebca8163d1d19e2/shadowy-companies-big-bucks-election-mystery-money-returns)(visited on Apr. 21, 2016).

[4] Alex Leary, "Jeb Bush, Marco Rubio pushed boundaries of campaign finance with unlimited donations, secrecy," *Tampa Bay Times*, Apr. 8, 2016 (http://www.tampabay.com/news/politics/stateroundup/jeb-bush-marco-rubio-pushed-boundaries-of-campaign-finance-with-unlimited/2272444) (visited on Apr. 22, 2016).

[5] *See* http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do?candidateCommitteeId=C00541292&tabIndex=3.

Non-IEOPC committees may not accept contributions from corporations, but may accept non-corporate treated LLC or partnership contributions when allocating the contribution to one or more of their member(s)/partner(s).[6] The regulations cited in the Complaint have only been applied by the Commission to non-IEOPCs (although the actual source of funds would naturally be reported in either instance).

As former FEC Chairman Bradley Smith has recently stated, the Commission has long taken the position that any contribution from a corporate bank account is treated as a contribution from the corporation, even where the funds were actually from an individual:

> Historically, treating LLC donations as corporate donations has worked in favor of "strict" enforcement of straw donor prohibition rules. By keeping the corporation and the individual separate, the Commission could easily identify violations of the rules prohibiting contributions in the name of another. For example, in *United States v. Danielczyk*, 683 F.3d 611, 614 (4th Cir. 2012) cert denied, 133 S. Ct. 1459 (2013), a corporation reimbursed employees who gave to then-Senator Hillary Clinton's 2008 campaign. But because the money was really coming from the LLC, not the individual "contributors," and because corporations are barred from contributing to candidates, the violation was clear. In this case, FEC rules regarding LLCs prevented illegal corporate donations. While this is the opposite result from the current debate (whether LLCs can make legal corporate donations to super PACs), it was more than reasonable to believe that the FEC's rules regarding how to treat these groups would remain constant, regardless of result.[7]

Here, there is no suggestion that the contribution did not actually come from the bank account of IGX, LLC.

Under its regulations, the Commission has historically looked to whether LLC contributions may be deemed impermissible corporate contributions to non-IEPOCs by determining whether the LLC is taxed as a corporation. If not, the contribution may be accepted if otherwise permissible. The Commission has, to date, taken the same position with respect to LLC contributions to IEOPCs. A change in position would require formal action by the consensus of the Commission, and there by no means exists a consensus within the Commission as currently constituted. Absent such formal action based on Commission consensus, such questions remain cases of first impression that would be unjust to a prospective contributor if an arbitrary conclusion were to be otherwise drawn. A recent Statement of Reasons ("SOR") of

[6] *See* 11 C.F.R. §§110.1(e) and (g); 11 C.F.R. §114.2(b).
[7] *See* "LLCs and Politics at the FEC" by Bradley Smith, April 12, 2016, Center for Competitive Politics. http://www.campaignfreedom.org/2016/04/12/llcs-and-politics-at-the-fec/

Commissioners Petersen, Hunter and Goodman is further illustrative on this point. The SOR concluded 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 application of section 30122 to closely held corporate LLCs or the proper standards for its application.[8]

In a footnote to the section above, the SOR further stated:

> 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, interpretive guidance, and statements interpreting the Act in the enforcement context...our colleagues articulated no uniform standards for applying the [Federal Election Campaign] Act...[9]

The Commission has thus admittedly not provided formal due process and promulgated any new regulations that address otherwise legal contributions from LLCs and corporations,[10] and in light of that absence, the Commission should recognize that its regulations on LLCs were written to prevent *illegal* contributions - not to restrict otherwise legal contributions.[11] In sum, the SOR is stating the Commission has never applied the regulations this way, and if it were to apply the regulations this way, it would need to only apply the regulations this way after regulations were promulgated with a consensus of the Commission. As Chairman Smith has said: "... justice and fundamental fairness require that the regulated community know what is prohibited before facing the stiff penalties imposed including, not incidentally, the cost of an invasive investigation."[12]

Conclusion

Respondent made no contribution to Conservative Solutions PAC. IGX, LLC made a legal contribution to Conservative Solutions PAC from its bank account. There is no suspicion or concern that

---

[8] *See* Statement of Reasons of Commissioners Peterson, Hunter and Goodman, April 1, 2016 in MURs 6485, 6487, 6488, 6711 and 6930. *http://eqs.fec.gov/eqsdocsMUR/16044391107.pdf*

[9] *Id.*

[10] It should be further noted that even if the SOR were to reflect a consensus position of the Commission, and the SOR reflected the conclusion of the procedure articulated above (which it of course does not), it was only issued this calendar month - some six months after the IGX, LLC contribution.

[11] *See e.g.* http://www.fec.gov/pdf/candgui.pdf (visited on April 22, 2016) ("This requirement will prevent the recipient committee from inadvertently accepting an illegal contribution.")(emphasis supplied).

[12] *See* "LLCs and Politics at the FEC" by Bradley Smith, April 12, 2016, Center for Competitive Politics. http://www.campaignfreedom.org/2016/04/12/llcs-and-politics-at-the-fec/

the contribution was from any other source than the source reported to the Commission by Conservative Solutions PAC. The SOR cited herein makes clear that absent some facts that give rise to a suspicion or concern that the contribution from an LLC or corporation is from a source other than the donor entity whose name appears on the contribution entity, there is no violation of law or regulation.[13] The law and the facts thus demonstrate that there is no basis for a finding of reason to believe that a violation or law has occurred. Accordingly, the Complaint should be promptly dismissed.

Should you have any questions regarding this matter, I may be reached at (202) 517-0585.

Very truly yours,

Elliot S. Berke

18044441846

[13] *See* Statement of Reasons of Commissioners Peterson, Hunter and Goodman, April 1, 2016 in MURs 6485, 6487, 6488, 6711 and 6930. *http://eqs.fec.gov/eqsdocsMUR/16044391107.pdf*