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June 13, 2018

Ms. Caroline C. Hunter, Chairman
 Federal Election Commission
 1050 First Street, NE
 Washington, D.C. 20463

Re: MURs 7011 and 7092

Dear Ms. Hunter:

I am in receipt of your letter dated May 8, 2018 regarding the MURs 7011 and 7092 regarding the Federal Election Commission's (the "FEC" or "Commission") investigation regarding HC4President, and Kyle Prall in his capacity as treasurer (hereinafter collectively "HC4P"). Attached to your letter you enclose a Factual and Legal Analysis (the "Analysis") which you contend supports the FEC's basis for concluding that HC4P fraudulently misrepresented its status as an unaffiliated political action committee ("PAC") during the 2016 primary campaign. For the reasons stated herein, we believe the legal and factual basis for your conclusion to be without merit.

In the Analysis, the FEC concludes that HC4P violated 52 U.S.C. § 30124(b) (the "Act"). Analysis p. 9. This conclusion, and the factual and legal bases provided within the Analysis, are in direct conflict with the FEC's own guidance on analyzing claims under the Act.

On February 16, 2018, the FEC published guidance related to the interpretation and application of the Act, noting that the FEC's "historical approach to [applying the Act] has been long on ambiguity and short on discipline."¹ A review of the Commission's Analysis here illustrates an arbitrary and capricious application of the facts to the law and contrary to the guidance issued by the FEC just a few short months ago.

The Policy Statement notes that the FEC "cannot prohibit solicitations under a vague or overbroad concept of the language" nor "turn on the subjective perceptions of listeners." Policy Statement p. 2. That seems to be precisely what the FEC does here. It is worth quoting the stated rationale for the Policy Statement, as contained therein, at length:

"many solicitors feature the names, photographs, and biographies of the candidates they support. They often use red, white and blue logos that may vaguely resemble the red, white and blue logos of other campaigns. If every use of a candidate's photograph and name on a website were deemed to misrepresent the identity of the solicitor, otherwise identified accurately in a disclaimer, then many organizations websites would be at risk of violating the Act. At some level,

¹ A copy of this policy statement (the "Policy Statement") is attached hereto for the record and incorporated by reference.

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citizens must assume responsibility for reading and understanding FEC-compliant disclaimers and, for those donating on websites, performing rudimentary online searches to identify the sponsor of a website. This is one of the purposes of the www.fec.gov website.

Policy Statement p. 2 (emphasis added). In short, the FEC notes that many political websites have similar looks, and that if a PAC publishes the required disclaimer and files the necessary disclosures, a donor has the responsibility to read those disclaimers and disclosures to know which organization is receiving their donation.

We will now examine how the FEC's application of the facts to the law here contrasts with the FEC's stated policy.

HC4P Used A Valid Disclaimer

The Policy Statement notes that "[b]ecause a disclaimer identifies the person paying for a communication and informs the reader whether or not a communication is authorized by a candidate, **no misrepresentation can be presumed when an adequate disclaimer is present.**" Policy Statement p. 3 (emphasis added). That HC4P had compliant disclaimers is not an issue; the FEC admits that HC4P had the following disclaimer on its website:

Paid for by hc4president (hc4president.org) and not authorized by any candidate or candidate's committee – hc4president.org © 2016 All Rights Reserved.

Analysis p. 6. This disclaimer was conspicuous on each webpage of the site, and unequivocally stated that HC4P was "not authorized by any candidate or candidate's committee." This is precisely the language that the FEC (and courts, as discussed herein below) have held to put a potential donor on notice of the nature of the organization. There is no point in requiring such disclaimers if the FEC is going to engage in an ad hoc interpretation of websites.

HC4P Did Not Make Any Explicit Misrepresentations

The Policy Statement creates an exception for a misrepresentation despite an adequate disclaimer, which provides that the presumption against misrepresentation may "be defeated where an *explicit* misrepresentation in the text of a solicitation countermands an otherwise accurate disclaimer." Policy Statement p. 4 (emphasis in original). Rather than show explicit misrepresentations as required by FEC policy, the FEC engages in a subjective analysis of features and syntax contained on HC4P's website it contends could confuse the public (it appears the FEC believes these features would render any donor incapable of understanding the explicit disclaimers noted above).

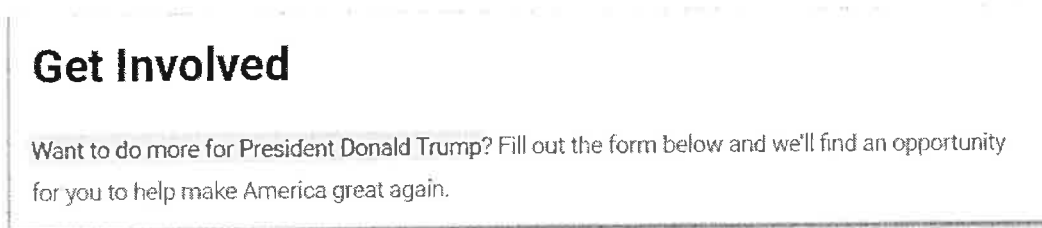
First, you note that "HC4P's website indicates that contributions directly benefit Clinton or HFA, rather than HC4P." Analysis p. 7. Such a legal conclusion would require, under the FEC's guidance, plain misrepresentations by HC4P. Rather than an explicit misrepresentation, the FEC interprets the solicitation to "Donate today and Become an *Official* Supporter" as giving the impression that you are donating to HFA (which is not mentioned anywhere in the solicitations). The Commission concludes that this "suggests that a contribution to HC4P is essentially a donation to Clinton's campaign." Analysis p. 8. The FEC does not elaborate on what it means by a donation to HC4P (which it admits clearly states, as required by law, that it is unaffiliated with Clinton's campaign) is "essentially" a donation to Hillary for America. To reach these conclusions,

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must one actively ignore the plain meaning of the disclaimers, and infer meaning out of words “support” and “stand” far beyond what those words actually mean.²

HC4P was an unauthorized political action committee; people could support its purpose without donating. The solicitation seeks to make a potential donor an official supporter of *HC4P*. That is to the donors due to the aforementioned disclaimers present on every page. Similarly, the use of a candidate’s name in a solicitation such as “Support Hillary Clinton” or “Stand with Hillary” is not a misrepresentation and permitted by law. *Pursuing America’s Greatness v. FEC*, 831 F.3d 500, 510 (DC. Cir. 2016) (noting that prohibition against using candidate’s name unless in opposition to that candidate “draws distinctions” based on content in clear violation of the First Amendment and is thus unconstitutional).

It may be helpful to note what some other, higher profile PACs publish without running afoul of the regulations that seem to be arbitrarily applied here. Great America PAC, which supports President Trump, has the following page:³



If a generality such as “stand with” or “support candidate x” somehow creates confusion, constitution misrepresentation, surely the FEC’s position is that asking someone to “do more for President Donald Trump” would be a violation as well. In reality, none of these statements are misleading, because, like HC4P, Great America PAC published a disclaimer.

Second, the Commission found that statements on the Paypal donation page seeking a “Donation to Hillary Clinton Campaign” and a Google ad containing a banner slogan “Donate to Hillary Clinton” to “explicitly suggest that contributions to HC4P will flow directly to the candidate.” Analysis p. 8. In both these cases, the Commission seeks to hold HC4P responsible for third-party publications.

As noted in previous correspondence, this language to “Donate to Hillary Clinton” was added by Paypal, and was corrected by HC4P as soon as it was discovered. Additionally, a user would have had to navigate through various webpages on HC4P’s website, each of which contained the requisite disclaimer, to view the Paypal portal in question. This creates a causation problem; a user already decided to donate via the HC4P website (with disclaimers) by selecting the donation portal *before* they would ever see this page.

Likewise, the complaint about the appearance of the Google ad illustrates a misunderstanding by the Commission as to how Google prepares advertisements. Ad purchasers,

² For example, one can “support” and “stand with” a particular professional sports team; it would be ludicrous to suggest that someone buying goods online for that team from a sporting good distributor was then confused to believing they were buying directly from the team because it shares a logo.

³ <https://www.greatamericapac.com/signup/>

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such as HC4P, select key words, not the phrases as they appear on the advertisement itself.⁴ Unlike an advertisement that plays on broadcast television or radio, it is not produced by the advertiser. Once the user goes to the website, they can view the aforementioned disclaimer, which would put any individual of ordinary intelligence on notice that the website is not operated by Mrs. Clinton's official campaign.

Third, the FEC claims that HC4P's filing of "all required disclosure reports" and "mere presence of disclaimers is not dispositive here."⁵ The FEC is summarily glossing over the most important fact (the existence of compliant disclaimers and reports). Importantly, this is the only fact discussed that does not involve the FEC inferring intent based on what a third party may interpret "stand with" or "support" might mean. HC4P stated that it was unaffiliated with the campaign; all the other "facts" discussed herein require the FEC to read the minds of Respondents regarding their intent, and of potential donors and how they may be confused.

Fourth, the FEC notes a number of references to Hillary Clinton and various logos which it contends would confuse the public regarding the nature of HC4P. The FEC includes the following logo as support:



Analysis p. 4. On a subpage of the FEC's website titled "Committees,"⁶ the FEC notes that "[t]he **term committee encompasses several different political groups that receive and spend money in federal elections.**" HC4P is a "committee" whose stated purpose is "to help Hillary Clinton become the 45th President." Analysis n. 13. Mrs. Clinton's official campaign logo was well known:



These logos are not confusingly similar and share the types of features all American political ads

⁴ See, e.g. https://support.google.com/adwords/answer/1704371?hl=en&ref_topic=3119131;https://support.google.com/adwords/answer/2453981.

⁵ To describe the statutorily required disclaimers by noting their "mere presence" seems to indicate a bias present in this case. The Congress and FEC determined through law and regulation what was to be required in the disclaimers. If there is any defect in the statutorily required disclaimers, it is not due to HC4P's error.

⁶ <https://www.fec.gov/data/advanced/?tab=committees>

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share – red, white and blue with variations of stars and stripes. There is no misrepresentation here.

Fifth, the FEC next notes the inclusion of a Hillary Clinton produced video within the “the website. As the FEC notes, the video contained Clinton’s official campaign website address, and indicated that the video was produced by his campaign. If users “clicked certain links from a drop-down menu on HC4P homepage, they were taken directly to pages of Hillary for America’s [campaign] website.” Analysis p. 5. It is difficult to see what the FEC’s complaint is here; if a user wanted to donate directly to the Clinton’s campaign, a link was provided that took them off HC4P’s site – and outside HC4P’s donation receiving mechanisms – to Mrs. Clinton’s official website. Rather than create an impression of unity with the official campaign, this clearly represents to a user that the two organizations are separate and distinct.⁷

Finally, the FEC states that “HC4P’s apparent lack of disbursement in support of Clinton’s candidacy further demonstrates HC4P’s fraudulent intent.” Analysis p. 8 (emphasis added). The citation provided by the Commission is not to any *fact*, but to legal authority. There are **no facts in the record to support this conclusion**; the Commission simply invented a salacious accusation and treated it as fact. If the Commission is going to base its “conclusions” on “information in the record,” such information should be “in the record.” As soon as the Commission points Respondents to any facts that support this baseless allegation, Respondents will respond with additional information. Until such time, this accusation, without factual support, is meaningless.

Regarding Prall individually, the FEC believes that “the fact that he directed such similar operations concerning two competing candidates also tends to show that his intent was not to support the election of a particular candidate, but rather lead a venture designed to mislead individuals into donating funds.” Analysis p. 9. The phrase “hedging your bets” means, generally, “to protect yourself from making the wrong choice” and usually involves spreading resources around multiple options. For example, for an investor this may mean investing in multiple automobile manufacturers. A voter, or political activist, may pursue multiple candidates that support his or her ideals, in the hopes that one gets chosen. If Prall’s intent were to “mislead individuals” into making donations, one would think that simply skipping the explicit disclaimer would be more effective. After all, who would read the statement that HC4P was “not authorized by any candidate or candidate’s committee” and reach the conclusion that a donation made to such an organization was, in fact, a donation to the candidate herself?

Application of Similar Campaign Finance Laws Have Been Struck Down

Federal appellate courts have ruled definitively on several regulations related to campaign identification at issue here and noted “FECA and its accompanying regulations do much to limit voter confusion over the source of a message.” *Pursuing America’s Greatness* at 511-512. The Court continued, noting:

Communications from committees must disclose whether they are authorized or unauthorized and who paid for the communication, even in their websites. See 11 C.F.R. § 110.11. Those disclosures must also be “clear and conspicuous” to give readers “adequate notice.” *Id.* § 110.11(c)(1). The FEC’s website also contains a

⁷ Again, the FEC position ignores the fact that the website contained a legally sufficient disclaimer explicitly stating that it was NOT affiliated with any candidate or candidate’s committee.

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publicly searchable list of all political committees and their status as authorized or not.

Id at 512. In granting the political action committee's injunction against the FEC, the Court noted that "[g]iven these tools to avoid voter confusion, the public's interest in protecting First Amendment rights and [the PAC's] ability to exercise those rights outweigh any interest in continued enforcement of section 102.14." *Id*. The FEC notes that HC4P is in compliance with these same rules.

While not specifically relying on 11 C.F.R. 102.14(a), the FEC again seeks to regulate the speech of a political action committee for its use of a candidate's name and imagery and similar types of layout and color scheme, despite acknowledging the existence of a disclaimer that specifically stated such website and materials is "not authorized by any candidate or candidate's committee." Analysis p. 6. Additionally, the FEC notes numerous disclosures made (as required) by HC4P. The logic here is the same – HC4P provided users clear and conspicuous notice of its status as an unaffiliated PAC and made the required disclosures to the FEC, and any user ignoring such disclaimers and concluding that HC4P was part of the official campaign has him or herself to blame for any confusion. It is hard to imagine a federal court which found the FEC's enforcement of §102.14 to violate the PAC's first amendment rights would allow the same rights to be infringed under the guise of a "fraudulent misrepresentation" enforcement that violates the Commission's own guidance.

Based on the foregoing, Respondents believe this matter should be dismissed and the case closed immediately. HC4P's conduct is compliant with the law and cannot be the basis for a misrepresentation finding. Should the FEC continue to pursue this matter, my client believes it has a strong likelihood of prevailing in district court and protecting itself from bad faith prosecution contrary to the FEC's own guidance.

Sincerely,



JOSEPH F. CENTRICH

JFC/yd

cc: Federal Election Commission Office of General Counsel
Ms. Ana Pena-Wallace – Via Email
Mr. Kyle Prall – Via Email



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

POLICY STATEMENT OF COMMISSIONER LEE E. GOODMAN

Section 30124(b) of the Federal Election Campaign Act of 1971, as amended (the “Act”), and 11 C.F.R. § 110.16, prohibit any person from fraudulently misrepresenting that the person is acting for, or on behalf of, a federal candidate or political party under certain circumstances. The Commission’s historical approach to this prohibition has been long on ambiguity and short on discipline. Likewise, the Commission has not acknowledged the level of First Amendment sensitivity appropriate for the core right of political solicitation. Commercial fraud regulations are not appropriate templates for regulation of political solicitations. Yet, Commission precedents have relied upon case law involving the federal mail fraud statute—which does not contain the word “misrepresentation”—for guidance on interpreting the Act.

I believe a clearer, more disciplined legal test is needed to implement this speech prohibition. This statement of policy sets forth what I believe should be the proper analytical framework, based on the text of the Act, its legislative history, federal court cases, and Commission enforcement action in prior MURs, for determining when fraudulent misrepresentation occurs.

The Fraudulent Misrepresentation Doctrine

The Act and Commission regulations set forth two prohibitions with respect to fraudulent misrepresentation. The first prohibits *a candidate* or his or her employees or agents from speaking, writing or otherwise acting on behalf of *another candidate* or political party committee on a matter which is damaging to such other candidate or political party.¹ The second prohibits *other persons* from misrepresenting themselves as speaking, writing, or otherwise acting for or on behalf of *any candidate* or political party for the purpose of soliciting contributions.² The Act further provides that no person shall willfully and knowingly participate in or conspire to participate in any plan or scheme to engage in such behavior.³ The prohibition against other persons misrepresenting candidates to solicit contributions is at issue in this matter.

Of course, because an individual’s or group’s solicitation of contributions constitutes core First Amendment protected activity, the Commission must implement the Act’s prohibition

¹ 52 U.S.C. § 30124(a); 11 C.F.R. § 110.16(a)(1).

² 52 U.S.C. § 30124(b); 11 C.F.R. § 110.16(b).

³ 52 U.S.C. § 30124 (a)(2), (b)(2); *see also* 11 C.F.R. § 110.16 (a)(2), (b)(2).

against “fraudulent misrepresentation” with clarity and precision.⁴ The Commission cannot prohibit solicitations under a vague or overbroad concept of the language that constitutes a “fraudulent misrepresentation.”⁵ Nor can the definition of “misrepresentation” turn on the subjective perceptions of listeners.⁶ The public must have objective standards delineating what constitutes a prohibited “misrepresentation” under the Act in order to avoid chilling political solicitations at the core of the First Amendment protection.

Ambiguous or even confusing solicitations must be judged with First Amendment sensitivity so as not to chill vast realms of legitimate solicitation. Many solicitors feature the names, photographs, and biographies of the candidates they support. They often use red, white and blue logos that may vaguely resemble the red, white and blue logos of other campaigns. If every use of a candidate’s photograph and name on a website were deemed to misrepresent the identity of the solicitor, otherwise identified accurately in a disclaimer, then many organizations’ websites would be at risk of violating the Act. At some level, citizens must assume responsibility for reading and understanding FEC-compliant disclaimers and, for those donating on websites, performing rudimentary online searches to identify the sponsor of a website. This is one of the purposes of the www.fec.gov website.

With these principles in mind, below I set forth what appear to be the essential elements of the violation known as “Fraudulent Misrepresentation.”

⁴ *Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016) (noting FEC’s unique constitutional prerogative “to safeguard the First Amendment when implementing its congressional directives”) (citing *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003); see also *Arizona v. Inter. Tribal Council of Ariz., Inc.*, 570 U.S. 1, 18-19 (2013) (“[B]y analogy to the rule of statutory interpretation that avoids questionable constitutionality— validly conferred discretionary executive authority is properly exercised . . . to avoid serious constitutional doubt.”)).

⁵ *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (“The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . 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”) (internal quotations omitted); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (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.” (citations omitted)); *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (“[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); *id.* at 41 (requiring “precision . . . in an area so closely touching our most precious freedoms.”) (internal quotations omitted).

⁶ In *Buckley*, the Supreme Court observed that restrictions placing a speaker “wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning . . . ‘offers no security for free discussion.’” 424 U.S. at 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). The Court again emphasized this principle in *FEC v. Wisconsin Right to Life, Inc.*, holding that “the proper standard for [evaluating political speech] must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.” 551 U.S. 449, 469 (2007).

A. “Misrepresentation”

1. *Presence of An Adequate Disclaimer*

The Act requires solicitations by federal political committees made through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising to include disclaimers identifying the person responsible for the communication.⁷ For communications that are not authorized by a candidate, the candidate’s authorized committee, or an agent of either, the disclaimers must clearly state: (1) the name and permanent street address, telephone number, or website of the committee and (2) that the communication is not authorized by a candidate or candidate’s committee.⁸ Disclaimers “must be presented in a clear and conspicuous manner.”⁹ Internet websites of political committees that are available to the general public must include disclaimers.¹⁰

Because a disclaimer identifies the person paying for a communication and informs the reader whether or not a communication is authorized by a candidate, no misrepresentation can be presumed when an adequate disclaimer is present.¹¹ The Commission has a long history of finding no misrepresentation where communications contain disclaimers accurately identifying the true sponsor.¹² The Commission has even concluded that disclaimers with technical deficiencies nonetheless controvert allegations of misrepresentation so long as they accurately

⁷ 52 U.S.C. § 30120(a)(3).

⁸ *Id.*; 11 C.F.R. § 110.11(b)(3).

⁹ 11 C.F.R. § 110.11(c)(1). A disclaimer is not considered “clear and conspicuous” if it is difficult to read or if the placement is easily overlooked. *Id.*; *see also* Communications Disclaimer Requirements, 60 Fed. Reg. 52,069, 52,070-71 (Oct. 5, 1995).

¹⁰ 11 C.F.R. § 110(a)(1); *see* U.S.C. § 30120(a).

¹¹ *See* F&LA at 9, MUR 6645 (Conservative Strikeforce, *et al.*) (finding website statements were not made on candidate’s behalf despite use of candidate’s image and name because disclaimers “give the reader . . . adequate notice of the identity of the person or political committee that paid for and, where required, authorized the communication”).

¹² *See, e.g.*, F&LA at 9, MUR 6645 (Conservative Strikeforce); F&LA at 3, MUR 3690 (National Republican Congressional Committee) (determining satirical representation by respondent as speaking on behalf of their opponents coupled with disclaimer identifying the speaker was not a prohibited misrepresentation under Section 30124(a)); Certification (Sept. 12, 1986), MUR 2205 (Foglietta) (agreeing with OGC’s recommendation in the First General Counsel’s Report to find no reason to believe a violation of Section 30124 occurred when advertising material at issue was “clearly printed” as respondent’s material, containing the committee’s name, address and picture).

identify of the solicitor.¹³ By contrast, a disclaimer that explicitly misrepresents the identity of the actual sponsor as the candidate is almost always a misrepresentation under the Act.¹⁴

2. *Misrepresentation Despite Adequate Disclaimer*

A proper disclaimer clearly and accurately identifies the person responsible for the solicitation. Therefore, it affords a strong presumption against finding misrepresentation. That presumption may nonetheless be defeated where an *explicit* misrepresentation in the text of a solicitation countermands an otherwise accurate disclaimer.¹⁵

Pictures of candidates, biographical information and similar logos, however, are not inherently misleading. Nor are general statements of advocacy or common slogans indicating support for particular candidates. Indeed, such images and statements can be expected on websites of individuals and groups soliciting contributions to support candidates for federal office.

3. *Absence of Adequate Disclaimer*

In the absence of an adequate disclaimer or other sufficiently identifying information, however, the Commission has not required the misrepresentation to be explicit to violate the Act's prohibition. The Commission has, in those cases, considered less explicit misrepresentations sufficient to satisfy the misrepresentation element.¹⁶

4. *False Disclaimer Constitutes Misrepresentation*

A disclaimer that falsely claims the solicitation is paid for and/or authorized by a candidate or political party constitutes *per se* misrepresentation under section 30124(b). For

¹³ See F&LA at 7, MUR 7004 (The 2016 Committee, *et al.*) (dismissing, in part, because deficient email disclaimer contained "sufficient information for recipients to understand that the Committee paid for the emails and was not authorized by any candidate or candidate's committee"); F&LA at 11, MUR 6633 (Republican Majority Campaign PAC, *et al.*) (disclaimers, although technically deficient, "nonetheless contained sufficient information for [] recipients to identify Republican Majority as the sender or webhost and payor"); F&LA at 4-5, MUR 3690 (National Republican Congressional Committee) (concluding that a small, inconspicuous disclaimer that violated the Act's requirements for disclaimers nonetheless accurately identified the true sponsor of a postcard sufficient to avoid violation of section 30124); *id.* at n.1 (noting the post cards at issue "display the NRCC post mark and the return address on their face" and that such information "dispel[s] any theory of fraudulent misrepresentation . . . because they notify the readers of the true identity of the senders").

¹⁴ See F&LA at 5, MUR 5443 (www.johnfkerry-2004.com); F&LA at 3, MUR 5505 (<http://testhost.yahoogle.biz>); F&LA at 4, MUR 5495 (www.johnkerry-edwards.org).

¹⁵ See Statement of Reasons of Commissioners Weintraub, McDonald, Thomas and Toner at 1-2, MUR 5089 (Matta Tuchman for Congress) (fictitious letterhead, return address, and letter purporting to speak for the Orange County Democrats countermanded a small disclaimer inconspicuously placed on the flap of an envelope in small letters).

¹⁶ See F&LA at 10, MUR 5951 (Californians for Change) (finding that, in the absence of appropriate disclaimers, a series of implicit misrepresentations "when taken together . . . likely led reasonable people to believe [respondent] was acting on behalf of Sen. Obama").

example, in a series of matters involving a website that mimicked presidential candidate John Kerry's official website, the Commission found that the use of the disclaimer "Paid for and authorized by John Kerry for President, Inc. 2004" on the website and in solicitation emails patently misrepresented the identity of the website's sponsor in violation of section 30124(b).¹⁷

B. "For Or On Behalf Of"

Section 30124(b) prohibits misrepresentations about one subject: the identity of the solicitor. The solicitor cannot misrepresent himself "as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof."¹⁸ The focus of the fraudulent misrepresentation inquiry must be the representation of *identity* of the person soliciting the funds, not the use to which the funds are put.

This prohibition was enacted as Section 309 of the Bipartisan Campaign Reform Act of 2002.¹⁹ The amendment's sponsor, Senator Bill Nelson, stated that the provision "makes it illegal to fraudulently misrepresent any candidate or political party employee or party employee in soliciting contributions" in response to complaints that people had "fraudulently raised donations by posing as political committees or candidates."²⁰

The Commission has enforced section 30124(b) consistent with its legislative focus on posing as a candidate.²¹ For example, in MUR 6641 (CAPE PAC), the Commission found that the third-person statement "Help CAPE PAC re-election Allen West to Congress" did not pretend to be Allen West.²² Therefore, the Commission found no violation of the Act.

Thus, the subject of a misrepresentation prohibited under section 30124(b)(1) must be the identity of the solicitor as the candidate or agent of the candidate or political party and the proper focus of the Commission's misrepresentation inquiry must be the misrepresentation of *identity* of the person soliciting the funds, not the use to which the funds are put.²³

¹⁷ See F&LA at 5, MUR 5543 (www.johnkerry-2004.com) (determining there is a "prima facie case for reason to believe" when unauthorized website claimed it was "[p]aid for and authorized by John Kerry for President, Inc." and copies multiple pages from the campaign's legitimate website); see also F&LA at 4, MUR 5495 (www.johnkerry-edwards.org) (finding reason to believe where email stated it was "[p]aid for by John Kerry for President, Inc."); F&LA at 3, MUR 5505 (<http://testhost.yahoogoogle.biz>) (explicit misrepresentation in email solicitation "[p]aid for by John Kerry for President, Inc." presented "prima facie case for reason to believe").

¹⁸ 52 U.S.C. § 30124(b)(1).

¹⁹ Pub. L. No. 107-155, § 309(b), 116 Stat. 81, 104 (2002).

²⁰ 148 CONG. REC. S3122 (daily ed. March 29, 2001) (statement of Sen. Nelson) (offering amendment to the Bipartisan Campaign Reform Act).

²¹ See generally, Matthew S. Raymer, *Fraudulent Political Fundraising in The Age of Super PACs*, 66 SYRACUSE L. REV. 239, 257-58 (2016).

²² F&LA at 9, MUR 6641 (CAPE PAC).

²³ The Commission has unanimously recommended that Congress consider amending Section 30124 to cover fraudulent misrepresentations regarding the ultimate use to which the solicitor will put the funds. See *Legislative*

C. “For The Purpose of Soliciting Contributions”

The object of a misrepresentation under section 30124(b)(1) targets one purpose of the misrepresentation: soliciting contributions or donations. The solicitor must misrepresent his identity for the purpose of soliciting contributions or donations. Misrepresentations for other purposes are not prohibited by Section 30124(b).²⁴

By the same token, Section 30124(b) does not encompass other transactions that may cause injury or otherwise result in unfairness to contributors.²⁵ In certain instances, a respondent’s alleged injury may be more appropriately addressed through other federal or state anti-fraud statutes.²⁶

D. “Fraudulent” Intent

The Act also requires that the misrepresentation of identity be “fraudulent.” As the Commission observed in MUR 3690,

A violation of Section [30124] requires *fraudulent* misrepresentation. Key elements of fraud are the maker’s intent that the misrepresentation be relied on by the person and in a manner reasonably contemplated, the person’s ignorance of the falsity of the representation, and the person’s rightful or justified reliance. More significantly, a fraudulent misrepresentation requires intent to deceive.²⁷

Recommendations of the Federal Election Commission 2016 at 7, (Dec. 1, 2016), available at <https://transition.fec.gov/pdf/legrec2016.pdf>.

²⁴ Compare 52 U.S.C. § 30124(a)(1) (prohibiting misrepresentations for the purpose of damaging an opposing candidate or political party in any way).

²⁵ Cf. *Schmuck v. United States*, 489 U.S. 705, 710 (1989) (“The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud.”) (internal quotations omitted); *id.* at 723 (“It is mail fraud, not mail and fraud, that incurs liability . . . [t]he mailing must be in furtherance of the fraud.”) (Scalia, J., dissenting).

²⁶ See, e.g. 18 U.S.C. § 1341 (prohibiting use of mails to further a “scheme or artifice to defraud”); 18 U.S.C. § 1343 (prohibiting use of interstate wire communications to further a “scheme or artifice to defraud”). In *Friends of Phil Gramm v. Americans for Phil Gramm In ’84*, the U.S. District Court for the Eastern District of Virginia concluded the pre-BCRA Act does not “categorically preclude a state law cause of action for fraud.” 587 F. Supp. 769, 776 (E.D. Va. 1984) (denying injunction where defendant’s fundraising efforts were “circular”); see also *Galliano v. U.S. Postal Service*, 836 F.2d 1362, 1371 (D.C. Cir. 1988) (Bader Ginsburg, J.) (citing *Friends of Phil Gramm*, 587 F. Supp. 769).

²⁷ F&LA at 3-4, MUR 3690 (National Republican Congressional Committee) (emphasis in original).

According to one federal court interpreting Section 30124, a misrepresentation can be deemed fraudulent “if it was reasonably calculated to deceive persons of ordinary prudence and comprehension.”²⁸

Proving a respondent’s subjective intent can be difficult to prove with direct evidence. At the reason to believe stage, the Commission has been willing, on appropriate facts, to make an inference that a respondent acted with the requisite intent to deceive. However, in making the determination, the Commission considers whether some facts that could lead to an inference of fraudulent intent may be negated by other reasonable inferences. In other words, the facts supporting an inference of fraudulent intent must be *more reasonable* than competing reasonable inferences that could be drawn.

Since section 30124(b)’s passage, the Commission has considered certain evidence that can, in proper circumstances, evince the fraudulent nature of a misrepresentation. Such evidence includes (1) whether the respondent was properly registered and reporting to the Commission, if required;²⁹ (2) whether respondent had knowledge that contributors believed they were contributing to a candidate or party;³⁰ (3) the solicitor’s acceptance of contributions clearly intended for a candidate or party;³¹ (4) false statements that contributions to the respondent would go directly to the represented candidate or party;³² (5) the presence of a false disclaimer;³³

²⁸ See *FEC v. Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Texas Apr. 14, 2010) (“*Novacek*”). The court in *Novacek* and prior Commission legal analyses have defined “fraudulent” by looking to decisions interpreting the federal mail fraud statute, which does not require a misrepresentation of identity. *Id.* (citing *Silverman v. United States*, 213 F.2d 405, 407 (5th Cir. 1954) (“[T]he fact that there is no misrepresentation of a single existing fact makes no difference in the fraudulent nature of the [mail fraud] scheme.”); see also F&LA at 8, MUR 6645 (Conservative Strikeforce, *et al.*); F&LA at 9, MUR 6643 (Patriot Super PAC, *et al.*); F&LA at 9, MUR 6641 (CAPE PAC, *et al.*); F&LA at 9, MUR 6633 (Republican Majority Campaign PAC, *et al.*). A *misrepresentation of identity* is the required *actus reus* under 52 U.S.C. § 30124 and that misrepresentation must be made with *fraudulent* intent. By comparison, the *actus reus* targeted by the federal mail fraud statute, 18 U.S.C. § 1341, is any use of the mails, and that use must be fraudulent, regardless whether there is an actual misrepresentation. This distinction is significant to applying Section 30124(b): the statute prohibits specific types of misrepresentations that are fraudulent.

²⁹ F&LA at 10, MUR 6633 (Republican Majority Campaign) (“Weighing against a finding of reason to believe that the Respondent violated [52 U.S.C. § 30124(b)] is the fact that [the Respondent] is registered with the Commission and complies with its reporting requirements . . .”).

³⁰ See *Novacek*, 739 F. Supp. 2d at 962 (“*Novacek* admits that she knew solicitees were confused as to the entities calling, because they would ask for information about the RNC or the Bush-Cheney ’04 campaign, or would send checks made out to those entities.”).

³¹ F&LA at 5, MUR 5444 (National Democratic Congressional Committee) (solicitor endorsed and deposited a check made payable to a party committee and diverted the funds to his personal use).

³² Compare, e.g., Gen. Counsel’s Brief at 8, MUR 5472 (RVC) (recommending probable cause in part on the basis of the statement “Contributions or gifts to the *Republican Party* are not deductible as charitable contributions”) (emphasis in original), with F&LA at 10, MUR 6641 (CAPE PAC) (finding no reason to believe statements such as “Help CAPE PAC re-elect Allen West to Congress” indicated fraudulent intent).

³³ See F&LA at 5, MUR 5443 (www.johnfkerry-2004.com); F&LA at 3, MUR 5505 (<http://testhost.yahoogoogle.biz>); F&LA at 4, MUR 5495 (www.johnkerry-edwards.org).

and (6) whether the solicitor made other false statements regarding its identity.³⁴ Such evidence is probative of whether a respondent's conduct was reasonably calculated to deceive people into believing they were giving to a candidate or party.

The Commission has found that the inclusion of an adequate disclaimer, absent a countermanding explicit misrepresentation of identity, can negate any inference arising from other evidence indicating a respondent maintained the requisite intent to deceive for purposes of a section 30124 violation.³⁵

Significantly, however, not all misrepresentations are fraudulent. In MUR 3690, the Commission found that a flyer sponsored by a national political party committee purporting (falsely) to be written by a candidate informing constituents of his profligate spending ways in Washington, D.C. – although a misrepresentation – was satire and lacked the requisite fraudulent intent to violate Section 30124.³⁶

Conclusion

I believe this policy statement accurately synthesizes prior cases and sets forth a workable and Constitutional framework for approaching this important speech prohibition in the Act. In the future, a rulemaking or policy statement on this subject may be appropriate. In the absence of a clear Commission policy, I have committed my view to paper for reference by the Commission and the public.

February 16, 2018

³⁴ See F&LA at 8, MUR 5385 (Groundswell Voters PAC) (finding “circumstances present a classic case of fraud because respondents claimed to be a PAC, used a false address, and false IRS registration number).

³⁵ F&LA at 10, MUR 6641 (CAPE PAC, *et al.*) (“The Commission has previously held that the presence of an adequate disclaimer identifying the person or entity that paid for and authorized a communication can defeat an inference that a respondent maintained the requisite intent to deceive for purposes of a section [30124] violation.”) (*citing* MUR 2205 (Foglietta) and MURs 3690, 3700 (National Republican Congressional Committee)).

³⁶ F&LA at 3-4, MUR 3690 (National Republican Congressional Committee) (applying the “fraudulent misrepresentation” prohibition under 52 U.S.C. § 30124(a)(1)).

HOME (HTTPS://WWW.GREATAMERICAPAC.COM/)
AGENDA (HTTPS://WWW.GREATAMERICAPAC.COM/AGENDA/)
NEWSROOM (HTTPS://WWW.GREATAMERICAPAC.COM/NEWS/)
MEDIA (HTTPS://WWW.GREATAMERICAPAC.COM/MEDIA/)
GET INVOLVED (HTTPS://WWW.GREATAMERICAPAC.COM/SIGNUP/)
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