

# JONES DAY

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October 26, 2016

## VIA EMAIL

Jeff Jordan, Esquire  
Assistant General Counsel  
Complaints Examination & Legal Administration  
Office of the General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, D.C. 20463

Re: MUR 7101  
ESAFund

Dear Mr. Jordan:

Please find attached the response of our clients, ESAFund and Nancy Watkins, as Treasurer, to the notification from the Federal Election Commission that a complaint was filed against them in the above-referenced matter. An executed designation of counsel is also attached for your records.

Please do not hesitate to contact me with any questions.

Respectfully submitted,

  
William J. McGinley

Attachment

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the matter of )  
 ) MUR 7101  
ESAFund )  
and Nancy Watkins, as Treasurer )

**RESPONSE OF ESAFUND AND NANCY WATKINS, AS TREASURER  
TO THE COMPLAINT**

This responds on behalf of our clients, ESAFund (the "Committee") and Nancy Watkins, as Treasurer, (collectively, "Respondents") to the notification from the Federal Election Commission ("Commission" or "FEC") in the above-referenced matter. Because the Complaint fails to state a violation of the law and is instead premised on Complainants' wishful but faulty construction of the law and regulations regarding independent expenditure-only committees, the Commission should find no reason to believe that a violation has occurred, dismiss the complaint, and close the file.

ESAFund is registered with the Federal Election Commission as an independent expenditure-only political action committee. Accompanying its Statement of Organization, the Committee filed a brief statement noting that, "[t]his committee intends to make independent expenditures and, consistent with the U.S. Court of Appeals for the District of Columbia Circuit decision in *SpeechNow v. FEC*, it therefore intends to raise funds in unlimited amounts. This committee will not use those funds to make contributions, whether direct, in-kind, or via coordinated communications, to federal candidates or committees." ESAFund's Statement of Organization is available at <http://docquery.fec.gov/pdf/335/10030432335/10030432335.pdf>. This statement tracks the model language that the FEC's Reports Analysis Division prescribes for independent

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expenditure-only committees seeking to register with the Commission. RAD's guidance is available at <http://www.fec.gov/rad/pacs/FederalElectionCommission-RAD-PACs.shtml>.

Since its inception, ESACFund has raised funds in unlimited amounts, as clearly permitted under the law. See *SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc) ("SpeechNow"); see also *EMILY's List v. FEC*, 581 F.3d 1, 10 (D.C. Cir. 2009) ("... individual citizens may spend money without limit (apart from the limit on their own contributions to candidates or parties) in support of the election of particular candidates"). Indeed, several FEC Advisory Opinions have confirmed this construction of the law, including Advisory Opinion 2010-11 (Commonsense Ten) (concluding that a committee may solicit and accept unlimited contributions for the purpose of making independent expenditures in compliance with the Federal Election Campaign Act of 1971 ("FECA"), as amended).

Complainants do not dispute this recitation of the law. Indeed, acknowledging that current law, regulations and agency guidance permit such activity, Complainants "do not ask the FEC for civil penalties or other sanctions for past conduct, but rather only declaratory and/or injunctive relief against future acceptance of excessive contributions." Complaint of Representative Ted Lieu et al. at p. 3. In short, Complainants concede that ESAC Fund and the other Respondents have not violated the law. For this reason alone, the Commission should dismiss the Complaint on the basis that it does not state a violation of the law with respect to ESACFund or any of the other Respondents.

Instead, Complainants improperly use the enforcement proceeding process to argue that the Commission should remake the law regarding SuperPACs as they wish it

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to be, ignoring both case law<sup>1</sup> and existing Commission guidance to do so. This, of course, is inappropriate. The enforcement process is not the proper forum for Complainants' to litigate their policy concerns. In fact, it is quite perplexing that members of both houses of Congress would join in authoring a Complaint asking the Commission to change the law when in fact that is wholly within their purview as legislators. Therefore, the Commission should recognize this Complaint for the press stunt to which it amounts and dismiss it promptly.

For the foregoing reasons, Respondents respectfully request that the Commission find that there is no reason to believe a violation occurred, dismiss the matter, and close the file.

Please do not hesitate to contact us with any questions.

Respectfully submitted,



William J. McGinley  
Megan Sowards Newton

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October 26, 2016

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<sup>1</sup> Complainants' argument that the doctrine of "intercircuit nonacquiescence" permits the Commission to apply contribution limits to independent expenditure committees operating outside of the D.C. Circuit is also misplaced. Indeed, there are serious constitutional questions posed by applying the doctrine of intercircuit nonacquiescence in the context of campaign finance law, as the D.C. Circuit noted in *Johnson v. U.S. Railroad Retirement Board*, 969 F.2d 1082, 1091 (D.C. Cir 1992).



FEDERAL ELECTION COMMISSION  
999 E Street, N.W.  
Washington, D.C. 20463

**Statement of Designation of Counsel**

**MUR 7101**

**Name of Counsel:** William J. McGinley  
Megan Sowards Newton

**Firm:** Jones Day  
51 Louisiana Avenue, NW  
Washington, DC 20001

**Telephone:** (202) 879-3939

**Fax:** (202) 626-1700

The above named individuals are hereby designated as counsel and are authorized to receive any notifications and other communications from the Commission and to act on behalf of ESAFund and Ms. Nancy Watkins, as treasurer, before the Commission.

10/26/2016  
Date

  
Nancy Watkins, Treasurer  
Signature

**Name (Print):** ESAFund  
And Nancy Watkins, as Treasurer

**Address:** 610 S. Boulevard  
Tampa, FL 33606

Information is being sought as part of an investigation being conducted by the Federal Election Commission and the confidentiality provisions of 2 U.S.C. § 437g(a)(12)(A) apply. This section prohibits making public any investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.

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