

**FEDERAL ELECTION COMMISSION**

**FIRST GENERAL COUNSEL'S REPORT**

MUR: 7249

DATE COMPLAINT FILED: May 19, 2017

DATE OF NOTIFICATIONS: May 24, 2017

LAST RESPONSE RECEIVED: Jan. 16, 2020

DATE ACTIVATED: September 5, 2017

EXPIRATION OF SOL: May 1, 2022 (earliest)/

July 15, 2022 (latest)

ELECTION CYCLE: 2018

**COMPLAINANT:**

End Citizens United by Erin J. Fyffe

**RESPONDENTS:**

Greg Gianforte

Greg for Montana and Lorna Kuney in her official capacity as treasurer

Gianforte Victory Fund and Chris Marston in his official capacity as treasurer

Montana Republican State Central Committee and

Mike Hopkins in his official capacity as treasurer

NRCC and Keith Davis in his official capacity as treasurer

**RELEVANT STATUTES AND REGULATIONS:**

52 U.S.C. § 30116(a)(1),(8) and (f)

11 C.F.R. § 102.17

11 C.F.R. § 110.1(h)

11 C.F.R. § 110.2(h)

11 C.F.R. § 110.6(b), (c)

**INTERNAL REPORTS CHECKED:**

FEC Disclosure Reports

**FEDERAL AGENCIES CHECKED:**

None

**I. INTRODUCTION**

This matter concerns allegations that federal candidate Greg Gianforte solicited earmarked funds through a joint fundraising committee, the Gianforte Victory Fund and Chris Marston in his official capacity as treasurer ("GVF"), in an effort to circumvent the contribution

1 limits and reporting requirements of the Federal Election Campaign Act of 1971, as amended  
2 (the “Act”). At the time of the Complaint, Gianforte was a candidate in a special election and  
3 GVF had three participating committees: Gianforte’s authorized committee, Greg for Montana  
4 (the “Committee”); the Montana Republican State Central Committee (“MRSCC”); and the  
5 NRCC. The Complaint alleges that contributions to GVF or to MRSCC in response to a  
6 Gianforte solicitation before the special election must be aggregated with donors’ contributions  
7 to the Committee, and that the Committee, GVF, and its participants may have failed to properly  
8 report earmarked contributions.

9 Respondents generally deny the allegations. The NRCC contends that there is no  
10 evidence of any earmarking or misreporting, or that any contributions it received through the  
11 joint fundraising committee were subject to Commission regulations requiring that contributions  
12 be aggregated in this context.<sup>1</sup> Gianforte and the Committee acknowledge that the funds raised  
13 by GVF were raised to benefit Gianforte’s candidacy but assert that there was no legal violation.<sup>2</sup>  
14 GVF filed a response incorporating the responses submitted by Gianforte and the NRCC,<sup>3</sup> and  
15 the MRSCC adopts the responses filed by the other Respondents.<sup>4</sup>

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<sup>1</sup> NRCC Resp. at 2-6 (July 10, 2017).

<sup>2</sup> Gianforte/Committee Resp. at 2-3 (July 13, 2017).

<sup>3</sup> GVF Resp. (July 10, 2017).

<sup>4</sup> MRSCC Resp. at 1 (dated Sept. 30, 2018, and rec’d Jan 16, 2020).

As discussed below, there is insufficient information indicating Respondents accepted excessive contributions as a result of the alleged solicitation that is the focus of the Complaint. Although Gianforte's statement that "if someone wanted to support through a PAC our Victory Fund allows that money to go to all the get-out-the-vote efforts"<sup>5</sup> could suggest that contributions to GVF would exclusively support his election, the record does not indicate that particular donors gave with actual knowledge that their contributions would be used to benefit Gianforte and that the donors retained control over those funds. Accordingly, we recommend that the Commission dismiss the allegations that Greg Gianforte and the Committee received excessive contributions in violation of 52 U.S.C. § 30116(f) and that GVF failed to return excessive contributions in violation of 11 C.F.R. § 102.17(c)(6). Further, because the available information does not indicate that any donors earmarked specific contributions to MRSCC or NRCC in response to Gianforte's solicitation, we recommend that the Commission dismiss the allegation that the Committee, MRSCC and Mike Hopkins in his official capacity as treasurer, and the NRCC and Keith Davis in his official capacity as treasurer, failed to report earmarked contributions in violation of 52 U.S.C. § 30116(a)(8) and 11 C.F.R. § 110.6(c).

## **II. FACTUAL BACKGROUND**

Greg Gianforte was a candidate for Montana's at-large Congressional District in a special election held on May 25, 2017.<sup>6</sup> This election was the only one on the ballot on that date.<sup>7</sup> GVF

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<sup>5</sup> Compl. at 2 (May 19, 2017) (emphasis removed).

<sup>6</sup> Gianforte won the special election. *See 2017 Special Election – May 25, 2017 – Results*, Montana Sec. of State, <http://mtelectionresults.gov/resultsSW.aspx?type=FED&map=CTY>.

<sup>7</sup> *See 2017 Election Calendar*, Montana Sec. of State, <http://sos.mt.gov/elections/calendar>.

1 is a joint fundraising committee, which, at the time of the special election, was comprised of the  
 2 Committee, MRSCC, and NRCC.<sup>8</sup>

3 According to a news report cited in the Complaint, during the week of May 1, 2017,  
 4 Gianforte held a national fundraising call during which he answered questions about his policy of  
 5 not accepting contributions from “corporate-sponsored PACs.”<sup>9</sup> During the call, he reportedly  
 6 made the following statements:

7 We do not accept any industry PAC money, although if someone  
 8 wanted to support through a PAC our Victory Fund allows that  
 9 money to go to all the get-out-the-vote efforts. And the reason for  
 10 that is I came off the governor's race last year having made a big  
 11 deal about not taking PAC money, and it would be a self-inflicted  
 12 wound. We are starting to lessen that by taking political PAC  
 13 money. That's why we took the leadership PAC money from  
 14 members in the House but not industry PAC money directly to the  
 15 campaign.<sup>10</sup>

16  
 17 According to that same media report, Gianforte's campaign spokesperson issued a  
 18 clarification of the candidate's statement saying that neither the Committee nor GVF would  
 19 accept contributions from “corporate-sponsored PACs”: “Greg was simply stating that they can  
 20 support the party if they want (that's what he meant by ‘victory fund’ — not the JFA).”<sup>11</sup>

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<sup>8</sup> See GVF Resp. (July 10, 2017) (listing the member committees of the joint fundraising committee). The response refers to GVF as the “JFC.”

<sup>9</sup> Compl. at 2.

<sup>10</sup> *Id.* at 2 and Attach. (quoting and attaching Simone Pathé, *Montana Candidate's Comments Raise Questions About Corporate Money*, ROLL CALL (May 11, 2017), <http://www.rollcall.com/news/montana-gianforte-quist-pacs> (explaining that “[t]he PAC pledge has long been a source of political attacks in Montana” and discussing Montana candidates' different approaches to accepting contributions from “corporate,” “labor,” and “ideological” “PACs”)).

<sup>11</sup> *Id.* at 2. The reference to the “JFA” in the Complaint is apparently a reference to the joint fundraising committee, GVF. The NRCC Response similarly explains that Gianforte's use of the term “victory fund” referred to the Republican Party's grassroots and get-out-the-vote efforts as “victory programs,” “victory plans,” and “victory funds.” NRCC Resp. at 1-2 (July 10, 2017) (describing the history of the term). The NRCC also explained that Democratic Party committees use the term “coordinated campaigns” for similar programs. *Id.* at 2.

The Gianforte Response states that “by definition,” GVF “was established to benefit the Gianforte campaign, by raising money for the candidate committee, Greg for Montana, for the Montana GOP for its efforts in support of Greg Gianforte and for the NRCC for its efforts in support of Greg Gianforte.”<sup>12</sup> In addition, it asserts that while contributors to GVF were permitted to designate their contributions for a specific participant, each participant committee accepted only federally permissible funds.<sup>13</sup> Copies of GVF’s fundraising solicitations (attached to the Gianforte Response) for events scheduled on May 11, May 12, and May 15, 2017, include disclaimers and the required “fundraising notice” listing the contribution limits and allocation formulas for distribution of funds GVF received.<sup>14</sup> Those notices informed donors that “[c]ontributions that exceed a donor’s contribution limit to a participating Committee shall be reallocated to the remaining Committees according to this allocation formula to the extent permitted by FECA.”<sup>15</sup>

GVF’s reports filed with the Commission show that it made three distributions of “net proceeds” to the Committee, the MRSCC, and the NRCC after the May fundraising call, on May 2, May 23, and June 29, 2017, in the following amounts:<sup>16</sup>

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<sup>12</sup> Gianforte/Committee Resp. at 2 (July 13, 2017).

<sup>13</sup> *Id.* at 2-3 (specifying that the Montana GOP and NRCC were required to raise federally permissible funds for federal election activities).

<sup>14</sup> *Id.* at Exs. B – D.

<sup>15</sup> *See Id.* The Gianforte Response also included a motion to dismiss the matter. However, neither the Act nor the Commission’s implementing regulations contain a provision for the Commission to consider a motion to dismiss during the enforcement process, and historically, the Commission has not entertained such motions filed in enforcement matters. We recommend that the Commission treat the motion as a request that the Commission not proceed in the matter. *See, e.g.*, MUR 6440 (Guinta), MURs 6391/6471 (CHGO), MUR 6023 (Loeffler/McCain); *cf.* 11 C.F.R. § 111.15 (setting forth procedures for motions to quash or modify a subpoena).

<sup>16</sup> The NRCC states that the distributions it received from GVF on May 2 and 23 only included contributions raised in April 2017, before Gianforte’s May 2017 donor call described above. NRCC Resp. at 3. A review of the NRCC’s disclosure reports indicates that GVF’s transfers included funds derived from two contributions received

DATE OF GVF DISBURSEMENT	COMMITTEE	AMOUNT
5/2/2017	Committee	\$120,039.70
5/2/2017	MRSCC	\$40,643.68
5/2/2017	NRCC	\$19,187.34
5/23/2017	Committee	\$687.22
5/23/2017	MRSCC	\$102,660.51
5/23/2017	NRCC	\$19,187.34
6/29/2017	Committee	\$12,837.54
6/29/2017	MRSCC	\$25,085.45
6/29/2017	NRCC	\$3,158.21

### III. LEGAL ANALYSIS

#### A. Allegations that Gianforte and the Committee Received Excessive Contributions as a Result of the May 2017 Fundraising Call Should be Dismissed

The Act prohibits contributions to any candidate or political committee in excess of the Act's limits.<sup>17</sup> The Act also prohibits political committees from knowingly accepting excessive contributions.<sup>18</sup> In 2017, at the time of the events in question, individual contribution limits were \$2,700 per election to a federal candidate, \$10,000 per year to a party committee's federal account, and \$33,900 per year to the federal account of a political committee established and maintained by a national political party.<sup>19</sup>

The Act and Commission regulations permit candidates and political committees to engage in joint fundraising activities by establishing a separate political committee to act as their

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after the first week of May 2017, and the NRCC's share of those particular contributions may have been transmitted on June 29, 2017. *See* NRCC, Amended 2017 July Monthly Rpt. at 1553 (Aug. 9, 2017).

<sup>17</sup> 52 U.S.C. § 30116(a)(1)(A), (B), and (D).

<sup>18</sup> *Id.* § 30116(f); 11 C.F.R. § 110.9.

<sup>19</sup> Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 82 Fed. Reg. 10904, 10906 (Feb. 16, 2017).

1 joint fundraising representative,<sup>20</sup> but the Act's contribution limits still apply to each contributor  
 2 and recipient committee participating in the joint fundraising committee.<sup>21</sup> Participating  
 3 committees must enter into a written agreement that identifies the representative and states the  
 4 formula for the allocation of fundraising proceeds and expenses.<sup>22</sup> Commission regulations also  
 5 require that the representative establish a separate depository account to be used solely for the  
 6 receipt and disbursement of joint fundraising proceeds and deposit those proceeds in this account  
 7 within ten days of receipt.<sup>23</sup>

8 All solicitations in connection with a joint fundraising effort must include a notice that  
 9 identifies all participating committees, describes the allocation formula, informs contributors that  
 10 they may choose to designate their contributions for a particular committee, and states that the  
 11 allocation formula may change if a contributor makes a contribution that is excessive relative to  
 12 any participant.<sup>24</sup> The joint fundraising representative is responsible for screening all

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<sup>20</sup> See 52 U.S.C. § 30102(e)(3)(ii); 11 C.F.R. § 102.17(a)(1)(i).

<sup>21</sup> A contributor may make a contribution to the joint fundraising committee that “represents the total amount that the contributor could contribute to all of the participants under the applicable [contribution] limits.” 11 C.F.R. § 102.17(c)(5). In *McCutcheon v. FEC*, a challenge to the aggregate contribution limits for individuals, several dissenting Justices expressed concern that, in the absence of the aggregate limits, donors, candidates, and political parties could use the joint fundraising mechanism and intraparty transfer rules to circumvent federal contribution limits. 134 S.Ct. 1434, 1465-1479 (Breyer, J., dissenting, joined by Ginsburg, J., Sotomayor, J., and Kagan, J.). Although the Court found these arguments insufficient to justify upholding the aggregate limits, the plurality stated “[a] joint fundraising committee is simply a mechanism for individual committees to raise funds collectively, not to circumvent base limits or earmarking rules.” *Id.* at 1455 (citing 11 C.F.R. § 102.17(c)(5)). The plurality commented that section 110.1(h) was one of the regulations that the Commission added since *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), that reduces “the opportunities for circumvention of the base limits via ‘unearmarked contributions to political committees likely to contribute’ to a particular candidate.” *Id.* at 1447 (citing *Buckley*, 424 U.S. at 38).

<sup>22</sup> 11 C.F.R. § 102.17(c)(1). The fundraising representative must retain a copy of the agreement for three years and make it available to the Commission upon request. *Id.*

<sup>23</sup> *Id.* § 102.17(c)(3)(i)-(ii). Each participant committee must amend its Statement of Organization to include the account as an additional depository. *Id.* § 102.17(c)(3)(i).

<sup>24</sup> *Id.* § 102.17(c)(2)(i).

1 contributions to ensure they comply with the Act's source prohibitions and amount limitations,  
 2 collecting contributions, paying fundraising costs, and distributing net proceeds to each  
 3 participant.<sup>25</sup> If application of the joint fundraising committee's allocation formula results in a  
 4 violation of the contribution limits, the joint fundraising committee may reallocate the excess  
 5 funds to the other participant committees.<sup>26</sup>

6 Under the Commission's regulations set forth in 11 C.F.R. § 110.1(h) and 110.2(h), an  
 7 individual or a multicandidate committee may contribute to a candidate and his or her authorized  
 8 committee with respect to a particular election and another political committee supporting the  
 9 same candidate in the same election as long as: (1) the other political committee is not an  
 10 authorized committee of the candidate; (2) "the contributor does not give with the knowledge  
 11 that a substantial portion will be contributed to, or expended on behalf of, that candidate for the  
 12 same election"; and (3) "the contributor does not retain control of the funds."<sup>27</sup> The Commission  
 13 has advised that "[t]his section governs the circumstances under which contributions to a  
 14 candidate and his or her authorized campaign committee must be aggregated with contributions  
 15 to other political committees for purposes of the contribution limits of § 110.1."<sup>28</sup> If contributor

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<sup>25</sup> *Id.* § 102.17(b)(1), (c)(4)(i). The joint fundraising representative must report all funds received in the reporting period they are received and all disbursements in the reporting period they are made and after the joint fundraising representative distributes the net proceeds, the participating committee must report its share received as a transfer-in from the fundraising representative and file a memo entry on Schedule A itemizing its share of gross receipts as contributions from the original contributors as required by 11 C.F.R. § 104.3(a). *See id.* § 102.17(c)(3)(ii), (8)(i)-(ii); *see also* 52 U.S.C. § 30104(a)(1), (b); 11 C.F.R. § 104.1(a) (requiring committee treasurers to file reports of receipts and disbursements).

<sup>26</sup> 11 C.F.R. § 102.17(c)(6)(i). However, designated contributions may not be reallocated without the written permission of the contributor. *Id.* § 102.17(c)(6)(ii). Should reallocation still result in a violation of the Act's limits, the joint fundraising committee is required to return the excessive contribution. *Id.* § 102.17(c)(6)(i).

<sup>27</sup> 11 C.F.R. §§ 110.1(h)(2)-(3), 110.2(h)(2)-(3).

<sup>28</sup> Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 Fed. Reg. 760, 765 (Jan. 9, 1987).



1 knowledge and control exists, those contributions must be aggregated with that donor's other  
 2 contributions to the same candidate and count against their individual limits.<sup>29</sup>

3 The Commission has not previously applied the foregoing aggregation rules to joint  
 4 fundraising committees. But in applying those rules to committees other than joint fundraising  
 5 committees, the Commission has required that the contributor have "actual knowledge" of the  
 6 committee's plans to use his or her contribution to contribute to or expend funds on behalf of a  
 7 particular candidate if a contribution to an unauthorized committee is to be aggregated with an  
 8 individual's other contributions to that candidate.<sup>30</sup> In the case of the designation of a  
 9 contribution made to a joint fundraising committee, the contributions must be further examined if  
 10 a contributor previously contributed to that participant and to ensure that they do not exceed any  
 11 limits.<sup>31</sup>

12 The Complaint alleges that Gianforte's statements to donors during the May 2017 call  
 13 made donors aware that their contributions would be used to support MRSCC and NRCC's get-

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<sup>29</sup> See *id.*; see also Factual & Legal Analysis ("F&LA") at 9, MUR 5732 (Matt Brown for U.S. Senate); F&LA at 4-10, MUR 5881 (Citizens Club for Growth).

<sup>30</sup> See MURs 5732 (Matt Brown for U.S. Senate), 5678 (Liffrig for Senate), 5445 (Davis), and 5019 (Keystone Federal PAC) (although contributors were likely aware that the political committee would contemporaneously contribute to the candidates' committees, there was no evidence that the contributors actually knew that a portion of their contributions would be given to specific candidates); see also MUR 5881 (Citizens Club for Growth) (rejecting claim that contributors had actual knowledge based on text of solicitations). But see MURs 4633/4634 (Triad Management Services) (Commission found reason to believe and opened an investigation where circumstances, including proximity in timing and similarity in contribution amounts, as well as information about communications between contributors and the respondent, raised substantial questions of whether contributors had knowledge that the PACs would use their contributions to support specific candidates). Thus, according to the Commission's more recent analyses, a donor's contribution to an unauthorized committee may result in an excessive contribution to a candidate where the contributor actually knows that a substantial portion of his contribution will go to the candidate, even if it has not been earmarked.

<sup>31</sup> 11 C.F.R. § 102.17(c)(5). Commission regulations require the participant committees to make their contributor records available to the joint fundraising committee for this purpose. *Id.* § 102.17(c)(4).

1 out-the-vote (“GOTV”) efforts on behalf of Gianforte’s campaign.<sup>32</sup> Therefore, according to the  
2 Complaint, those donors’ contributions to GVF should have been aggregated with any other  
3 contributions they had already made to the Committee, and the Committee may have accepted  
4 excessive contributions.<sup>33</sup> Indeed, the special election was the only election on the ballot in May  
5 2017, and the Committee and MRSCC’s Responses state that the purpose of GVF was to raise  
6 funds for each participant’s efforts in supporting Gianforte’s candidacy and mention no other  
7 candidates.<sup>34</sup>

8         However, while a donor could have interpreted Gianforte’s statements in the May 2017  
9 donor call to mean that making contributions to the GVF would benefit Gianforte’s candidacy by  
10 financing his GOTV efforts, Gianforte’s statements alone do not indicate that there is reason to  
11 believe that any donors made excessive contributions as a result of those statements. *First*, the  
12 available information does not identify any particular contributor who possibly made an  
13 excessive contribution. *Second*, assuming the actual knowledge requirement the Commission  
14 has applied in other contexts also applies here, we have identified no information about specific  
15 donors who may have directed their contributions as a result of the May 2017 donor call. Thus, it  
16 is difficult to discern whether these are circumstances in which any individual donor had  
17 knowledge of how his or her contribution would be used. *Third*, the fundraising call itself  
18 appeared to target corporate-sponsored political committees, but the reports GVF has filed with  
19 the Commission do not reflect that it received any contributions from such committees during the

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<sup>32</sup> Compl. at 3.

<sup>33</sup> *Id.*

<sup>34</sup> Gianforte/Committee Resp. at 2; MRSCC Resp. at 1.

relevant time period.<sup>35</sup> *Fourth*, there is no information suggesting any donors exercised control over contributions made in response to Gianforte's statements — which is a required element under sections 110.1(h) and 110.2(h).

In sum, although the circumstances here suggest that Gianforte's statements during the donor call either constituted a solicitation by making donors aware that a portion of their contributions would go to benefit Gianforte's campaign, or came close to constituting such a solicitation, there is insufficient information indicating that donors had knowledge that a substantial portion of their contributions would be contributed to or expended on behalf of Gianforte and that they retained control over those funds.<sup>36</sup> Accordingly, we recommend that the Commission dismiss the allegations that Gianforte and the Committee violated 52 U.S.C. § 30116(f) by accepting excessive contributions and that the GVF failed to return excessive contributions in violation of 11 C.F.R. § 102.17(c)(6).

### **B. Allegations that Respondents Failed to Report Earmarked Contributions Should be Dismissed**

The Act provides that “all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate.”<sup>37</sup> The term “earmarked means a designation,

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<sup>35</sup> Our review of GVF's disclosure reports shows that GVF may have received contributions in response to the Gianforte's solicitation during the donor call given that at least fifteen contributors who had previously contributed to the Committee donated to GVF after the first week of May 2017. None of those contributions were from separate segregated funds.

<sup>36</sup> See 11 C.F.R. §§ 110.1(h)(2)-(3) and 110.2(h)(2)-(3); *see also* MURs 5881 (Citizens Club for Growth), 5732 (Matt Brown for U.S. Senate), 5678 (Liffrig for Senate), and 5019 (Keystone Federal PAC) (finding that an inference about a contributor's belief regarding how their funds would be used was insufficient to find that the contributor had “actual knowledge” of a committee's plans for the funds).

<sup>37</sup> 52 U.S.C. § 30116(a)(8).

instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made or expended on behalf of, a clearly identified candidate or a candidate's authorized committee.”<sup>38</sup> Commission regulations require both the intermediary and recipient committees to disclose information concerning the earmarked contribution.<sup>39</sup>

In past matters, the Commission has found that contributions were earmarked where there was “clear documented evidence” that donors provided instructions to the recipient committee.<sup>40</sup> But in cases where there was no such designation or instruction, the Commission has rejected earmarking allegations, even where the donor had reason to assume that the funds would be used to benefit a particular candidate.<sup>41</sup> The Commission has likewise rejected arguments solely based on unsubstantiated reports of “a deal” made between a party committee and a contributor or on the timing of the contributions.<sup>42</sup>

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<sup>38</sup> 11 C.F.R. § 110.6(b)(1).

<sup>39</sup> 11 C.F.R. § 110.6(c) (requiring the intermediary committee to report the original source of the contribution and the recipient candidate, and for recipient committees to disclose each intermediary forwarding contributions exceeding \$200 in an election cycle).

<sup>40</sup> See F&LA at 6, MUR 5732 (Matt Brown for Senate) (citing MURs 4831/5274 (Nixon) where there was clear documentation in the form of checks with memo lines that stated “Nixon,” “J. Nixon Fund,” among other written designations).

<sup>41</sup> See, e.g., MUR 5732 (Matt Brown for Senate) (finding no evidence of earmarking where there were no cover letters or other instructions accompanying checks or credit card transactions specifying how the contributions should be used); MUR 5520 (Republican Party of Louisiana/Tauzin) (“wink and nod arrangement” with no other instruction by donor insufficient to find earmarking occurred); MUR 5445 (Davis) (finding no earmarking where donor who had already contributed the maximum to Davis also made contributions to six non-candidate committee where there was no designation even though recipient committees contributed to Davis within nine days); MUR 5125 (Perry) (finding no earmarking because complaint contained only bare allegations of earmarking, but showed no designation, instruction, or encumbrance).

<sup>42</sup> See F&LA at 7-8, MUR 5732 (Matt Brown for Senate) (citing MURs 5445 and 4643).

More recently, in *McCutcheon*, the plurality observed that the Commission's earmarking regulations at section 110.6(b)(1) define earmarking "broadly"<sup>43</sup> and apply to "implicit" agreements as well as explicit ones.<sup>44</sup> The plurality stated that a donor cannot "even imply that he would like his money to be contributed" to a particular candidate.<sup>45</sup>

Even under a broader reading of the Commission's earmarking rules, consistent with the *McCutcheon* plurality's guidance, however, the record does not contain specific facts indicating that the MRSCC and NRCC received earmarked contributions for the Gianforte campaign as a result of the May 2017 donor call. Here, the Complaint makes only general allegations without identifying any particular contributions that were purportedly earmarked and not reported properly.<sup>46</sup> And we are not aware of any donor who made either an explicit or implicit agreement that required the MRSCC or NRCC to use any contributed funds for Gianforte's election. We therefore recommend that the Commission dismiss the allegation that the Committee, the MRSCC and the NRCC violated 52 U.S.C. § 30116(8) and 11 C.F.R. § 110.6(c) by failing to report earmarked contributions.

### III. RECOMMENDATIONS

1. Dismiss the allegation that Greg Gianforte and Greg for Montana and Lorna Kuney in her official capacity as treasurer violated 52 U.S.C. § 30116(f).
2. Dismiss the allegation that Gianforte Victory Fund and Chris Marston in his official capacity as treasurer failed to return excessive contributions in violation of 11 C.F.R. § 102.17(c)(6).

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<sup>43</sup> 134 S.Ct. at 1447.

<sup>44</sup> *Id.* at 1455, 1459 ("Many of the scenarios that the Government and the dissent hypothesize involve at least implicit agreements to circumvent the base limits — agreements that are already prohibited by the earmarking rules. *See* 11 C.F.R. § 110.6.").

<sup>45</sup> *Id.* at 1453.

<sup>46</sup> Compl. at 3.

3. Dismiss the allegation that Greg for Montana and Lorna Kuney in her official capacity as treasurer, Montana Republican State Central Committee and Mike Hopkins in his official capacity as treasurer, and NRCC and Keith Davis in his official capacity as treasurer, violated 52 U.S.C. § 30116(a)(8) and 11 C.F.R. § 110.6(c).
4. Approve the attached Factual and Legal Analysis.
5. Approve the appropriate letters.
6. Close the file.

Lisa J. Stevenson  
Acting General Counsel

February 6, 2020  
Date

BY: Charles Kitcher  
Charles Kitcher  
Acting Associate General Counsel for  
Enforcement

Jin Lee  
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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** Greg Gianforte **MUR 7249**  
 Greg for Montana and  
 Lorna Kuney in her official capacity as treasurer  
 Gianforte Victory Fund and Chris Marston in his  
 official capacity as treasurer  
 Montana Republican State Central Committee and  
 Mike Hopkins in his official capacity as treasurer  
 NRCC and Keith Davis in his official capacity as  
 treasurer

**I. INTRODUCTION**

This matter was generated by a complaint filed with the Federal Election Commission by End Citizens United.<sup>1</sup> It concerns allegations that federal candidate Greg Gianforte solicited earmarked funds through a joint fundraising committee, the Gianforte Victory Fund (“GVF”), in an effort to circumvent the contribution limits and reporting requirements of the Federal Election Campaign Act of 1971, as amended (the “Act”). At the time of the Complaint, Gianforte was a candidate in a special election and GVF had three participating committees: Gianforte’s authorized committee, Greg for Montana (the “Committee”); the Montana Republican State Central Committee (“MRSCC”); and the NRCC. The Complaint alleges that contributions to GVF or to MRSCC in response to a Gianforte solicitation before the special election must be aggregated with donors’ contributions to the Committee, and that the Committee, GVF, and its participants may have failed to properly report earmarked contributions.

Respondents generally deny the allegations. The NRCC contends that there is no evidence of any earmarking or misreporting, or that any contributions it received through the

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<sup>1</sup> See 52 U.S.C. § 30109(a)(1).

1 joint fundraising committee were subject to Commission regulations requiring that contributions  
2 be aggregated in this context.<sup>2</sup> Gianforte and the Committee acknowledge that the funds raised  
3 by GVF were raised to benefit Gianforte's candidacy but assert that there was no legal violation.<sup>3</sup>  
4 GVF filed a response incorporating the responses submitted by Gianforte and the NRCC,<sup>4</sup> and  
5 the MRSCC adopts the responses filed by the other Respondents.<sup>5</sup>

6 As discussed below, there is insufficient information indicating Respondents accepted  
7 excessive contributions as a result of the alleged solicitation that is the focus of the Complaint.  
8 Although Gianforte's statement that "if someone wanted to support through a PAC our Victory  
9 Fund allows that money to go to all the get-out-the-vote efforts"<sup>6</sup> could suggest that  
10 contributions to GVF would exclusively support his election, the record does not indicate that  
11 particular donors gave with actual knowledge that their contributions would be used to benefit  
12 Gianforte or that the donors retained control over those funds. Accordingly, the Commission  
13 dismisses the allegations that Greg Gianforte and the Committee and Lorna Kuney in her official  
14 capacity as treasurer received excessive contributions in violation of 52 U.S.C. § 30116(f) and  
15 that GVF and Chris Marston in his official capacity as treasurer failed to return excessive  
16 contributions in violation of 11 C.F.R. § 102.17(c)(6). Further, because the available  
17 information does not indicate that any donors earmarked specific contributions to MRSCC or  
18 NRCC in response to Gianforte's solicitation, the Commission also dismisses the allegation that

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<sup>2</sup> NRCC Resp. at 2-6 (July 10, 2017).

<sup>3</sup> Gianforte/Committee Resp. at 2-3 (July 13, 2017).

<sup>4</sup> GVF Resp. (July 10, 2017).

<sup>5</sup> MRSCC Resp. at 1 (dated Sept. 30, 2018, and rec'd Jan. 16, 2020).

<sup>6</sup> Compl. at 2 (May 19, 2017) (emphasis removed).



the Committee, MRSCC and Mike Hopkins in his official capacity as treasurer, and the NRCC and Keith Davis in his official capacity as treasurer, failed to report earmarked contributions in violation of 52 U.S.C. § 30116(a)(8) and 11 C.F.R. § 110.6(c).

## II. FACTUAL BACKGROUND

Greg Gianforte was a candidate for Montana's at-large Congressional District in a special election held on May 25, 2017.<sup>7</sup> This election was the only one on the ballot on that date.<sup>8</sup> GVF is a joint fundraising committee, which, at the time of the special election, was comprised of the Committee, MRSCC, and NRCC.<sup>9</sup>

According to a news report cited in the Complaint, during the week of May 1, 2017, Gianforte held a national fundraising call during which he answered questions about his policy of not accepting contributions from "corporate-sponsored PACs."<sup>10</sup> During the call, he reportedly made the following statements:

We do not accept any industry PAC money, although if someone wanted to support through a PAC our Victory Fund allows that money to go to all the get-out-the-vote efforts. And the reason for that is I came off the governor's race last year having made a big deal about not taking PAC money, and it would be a self-inflicted wound. We are starting to lessen that by taking political PAC money. That's why we took the leadership PAC money from members in the House but not industry PAC money directly to the campaign.<sup>11</sup>

<sup>7</sup> Gianforte won the special election. *See 2017 Special Election – May 25, 2017 – Results*, Montana Sec. of State, <http://mtelectionresults.gov/resultsSW.aspx?type=FED&map=CTY>.

<sup>8</sup> *See 2017 Election Calendar*, Montana Sec. of State, <http://sos.mt.gov/elections/calendar>.

<sup>9</sup> *See GVF Resp.* (July 10, 2017) (listing the member committees of the joint fundraising committee). The response refers to GVF as the "JFC."

<sup>10</sup> Compl. at 2.

<sup>11</sup> *Id.* at 2 and Attach. (quoting and attaching Simone Pathé, *Montana Candidate's Comments Raise Questions About Corporate Money*, ROLL CALL (May 11, 2017), <http://www.rollcall.com/news/montana-gianforte-quist-pacs> (explaining that "[t]he PAC pledge has long been a source of political attacks in Montana" and discussing Montana candidates' different approaches to accepting contributions from "corporate," "labor," and "ideological" "PACs")).

1 According to that same media report, Gianforte’s campaign spokesperson issued a  
 2 clarification of the candidate’s statement saying that neither the Committee nor GVF would  
 3 accept contributions from “corporate-sponsored PACs”: “Greg was simply stating that they can  
 4 support the party if they want (that’s what he meant by ‘victory fund’ — not the JFA).”<sup>12</sup>

5 The Gianforte Response states that “by definition,” GVF “was established to benefit the  
 6 Gianforte campaign, by raising money for the candidate committee, Greg for Montana, for the  
 7 Montana GOP for its efforts in support of Greg Gianforte and for the NRCC for its efforts in  
 8 support of Greg Gianforte.”<sup>13</sup> In addition, it asserts that while contributors to GVF were  
 9 permitted to designate their contributions for a specific participant, each participant committee  
 10 accepted only federally permissible funds.<sup>14</sup> Copies of GVF’s fundraising solicitations (attached  
 11 to the Gianforte Response) for events scheduled on May 11, May 12, and May 15, 2017, include  
 12 disclaimers and the required “fundraising notice” listing the contribution limits and allocation  
 13 formulas for distribution of funds GVF received.<sup>15</sup> Those notices informed donors that  
 14 “[c]ontributions that exceed a donor’s contribution limit to a participating Committee shall be  
 15 reallocated to the remaining Committees according to this allocation formula to the extent  
 16 permitted by FECA.”<sup>16</sup>

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<sup>12</sup> *Id.* at 2. The reference to the “JFA” in the Complaint is apparently a reference to the joint fundraising committee, GVF. The NRCC Response similarly explains that Gianforte’s use of the term “victory fund” referred to the Republican Party’s grassroots and get-out-the-vote efforts as “victory programs,” “victory plans,” and “victory funds.” NRCC Resp. at 1-2 (July 10, 2017) (describing the history of the term). The NRCC also explained that Democratic Party committees use the term “coordinated campaigns” for similar programs. *Id.* at 2.

<sup>13</sup> Gianforte/Committee Resp. at 2 (July 13, 2017).

<sup>14</sup> *Id.* at 2-3 (specifying that the Montana GOP and NRCC were required to raise federally permissible funds for federal election activities).

<sup>15</sup> *Id.* at Exs. B – D.

<sup>16</sup> *See id.* The Gianforte Response also included a motion to dismiss the matter. However, neither the Act nor the Commission’s implementing regulations contain a provision for the Commission to consider a motion to

GVF's reports filed with the Commission show that it made three distributions of "net proceeds" to the Committee, the MRSCC, and the NRCC after the May fundraising call, on May 2, May 23, and June 29, 2017, in the following amounts:<sup>17</sup>

DATE OF GVF DISBURSEMENT	COMMITTEE	AMOUNT
5/2/2017	Committee	\$120,039.70
5/2/2017	MRSCC	\$40,643.68
5/2/2017	NRCC	\$19,187.34
5/23/2017	Committee	\$687.22
5/23/2017	MRSCC	\$102,660.51
5/23/2017	NRCC	\$19,187.34
6/29/2017	Committee	\$12,837.54
6/29/2017	MRSCC	\$25,085.45
6/29/2017	NRCC	\$3,158.21

### III. LEGAL ANALYSIS

#### A. The Commission Dismisses the Allegations that Gianforte and the Committee Received Excessive Contributions as a Result of the May 2017 Fundraising Call

The Act prohibits contributions to any candidate or political committee in excess of the Act's limits.<sup>18</sup> The Act also prohibits political committees from knowingly accepting excessive contributions.<sup>19</sup> In 2017, at the time of the events in question, individual contribution limits were \$2,700 per election to a federal candidate, \$10,000 per year to a party committee's federal

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dismiss during the enforcement process, and historically, the Commission has not entertained such motions filed in enforcement matters. Therefore, we treat the motion as a request that the Commission not proceed in the matter. *See, e.g.*, MUR 6440 (Guinta), MURs 6391/6471 (CHGO), MUR 6023 (Loeffler/McCain); *cf.* 11 C.F.R. § 111.15 (setting forth procedures for motions to quash or modify a subpoena).

<sup>17</sup> The NRCC states that the distributions it received from GVF on May 2 and 23 only included contributions raised in April 2017, before Gianforte's May 2017 donor call described above. NRCC Resp. at 3. A review of the NRCC's disclosure reports indicates that GVF's transfers included funds derived from two contributions received after the first week of May 2017, and the NRCC's share of those particular contributions may have been transmitted on June 29, 2017. *See* NRCC, Amended 2017 July Monthly Rpt. at 1553 (Aug. 9, 2017).

<sup>18</sup> 52 U.S.C. § 30116(a)(1)(A), (B), and (D).

<sup>19</sup> *Id.* § 30116(f); 11 C.F.R. § 110.9.

1 account, and \$33,900 per year to the federal account of a political committee established and  
 2 maintained by a national political party.<sup>20</sup>

3 The Act and Commission regulations permit candidates and political committees to  
 4 engage in joint fundraising activities by establishing a separate political committee to act as their  
 5 joint fundraising representative,<sup>21</sup> but the Act's contribution limits still apply to each contributor  
 6 and recipient committee participating in the joint fundraising committee.<sup>22</sup> Participating  
 7 committees must enter into a written agreement that identifies the representative and states the  
 8 formula for the allocation of fundraising proceeds and expenses.<sup>23</sup> Commission regulations also  
 9 require that the representative establish a separate depository account to be used solely for the  
 10 receipt and disbursement of joint fundraising proceeds and deposit those proceeds in this account  
 11 within ten days of receipt.<sup>24</sup>

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<sup>20</sup> Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 82 Fed. Reg. 10904, 10906 (Feb. 16, 2017).

<sup>21</sup> See 52 U.S.C. § 30102(e)(3)(ii); 11 C.F.R. § 102.17(a)(1)(i).

<sup>22</sup> A contributor may make a contribution to the joint fundraising committee that “represents the total amount that the contributor could contribute to all of the participants under the applicable [contribution] limits.” 11 C.F.R. § 102.17(c)(5). In *McCutcheon v. FEC*, a challenge to the aggregate contribution limits for individuals, several dissenting Justices expressed concern that, in the absence of the aggregate limits, donors, candidates, and political parties could use the joint fundraising mechanism and intraparty transfer rules to circumvent federal contribution limits. 134 S.Ct. 1434, 1465-1479 (Breyer, J., dissenting, joined by Ginsburg, J., Sotomayor, J., and Kagan, J.). Although the Court found these arguments insufficient to justify upholding the aggregate limits, the plurality stated “[a] joint fundraising committee is simply a mechanism for individual committees to raise funds collectively, not to circumvent base limits or earmarking rules.” *Id.* at 1455 (citing 11 C.F.R. § 102.17(c)(5)). The plurality commented that section 110.1(h) was one of the regulations that the Commission added since *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), that reduces “the opportunities for circumvention of the base limits via ‘unearmarked contributions to political committees likely to contribute’ to a particular candidate.” *Id.* at 1447 (citing *Buckley*, 424 U.S. at 38).

<sup>23</sup> 11 C.F.R. § 102.17(c)(1). The fundraising representative must retain a copy of the agreement for three years and make it available to the Commission upon request. *Id.*

<sup>24</sup> *Id.* § 102.17(c)(3)(i)-(ii). Each participant committee must amend its Statement of Organization to include the account as an additional depository. *Id.* § 102.17(c)(3)(i).

All solicitations in connection with a joint fundraising effort must include a notice that identifies all participating committees, describes the allocation formula, informs contributors that they may choose to designate their contributions for a particular committee, and states that the allocation formula may change if a contributor makes a contribution that is excessive relative to any participant.<sup>25</sup> The joint fundraising representative is responsible for screening all contributions to ensure they comply with the Act’s source prohibitions and amount limitations, collecting contributions, paying fundraising costs, and distributing net proceeds to each participant.<sup>26</sup> If application of the joint fundraising committee’s allocation formula results in a violation of the contribution limits, the joint fundraising committee may reallocate the excess funds to the other participant committees.<sup>27</sup>

Under the Commission’s regulations set forth in 11 C.F.R. § 110.1(h) and 110.2(h), an individual or a multicandidate committee may contribute to a candidate and his or her authorized committee with respect to a particular election and another political committee supporting the same candidate in the same election as long as: (1) the other political committee is not an authorized committee of the candidate; (2) “the contributor does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of, that candidate for the

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<sup>25</sup> *Id.* § 102.17(c)(2)(i).

<sup>26</sup> *Id.* § 102.17(b)(1), (c)(4)(i). The joint fundraising representative must report all funds received in the reporting period they are received and all disbursements in the reporting period they are made and after the joint fundraising representative distributes the net proceeds, the participating committee must report its share received as a transfer-in from the fundraising representative and file a memo entry on Schedule A itemizing its share of gross receipts as contributions from the original contributors as required by 11 C.F.R. § 104.3(a). *See id.* § 102.17(c)(3)(ii), (8)(i)-(ii); *see also* 52 U.S.C. § 30104(a)(1), (b); 11 C.F.R. § 104.1(a) (requiring committee treasurers to file reports of receipts and disbursements).

<sup>27</sup> 11 C.F.R. § 102.17(c)(6)(i). However, designated contributions may not be reallocated without the written permission of the contributor. *Id.* § 102.17(c)(6)(ii). Should reallocation still result in a violation of the Act’s limits, the joint fundraising committee is required to return the excessive contribution. *Id.* § 102.17(c)(6)(i).

1 same election”; and (3) “the contributor does not retain control of the funds.”<sup>28</sup> The Commission  
 2 has advised that “[t]his section governs the circumstances under which contributions to a  
 3 candidate and his or her authorized campaign committee must be aggregated with contributions  
 4 to other political committees for purposes of the contribution limits of § 110.1.”<sup>29</sup> If contributor  
 5 knowledge or control exists, those contributions must be aggregated with that donor’s other  
 6 contributions to the same candidate and count against their individual limits.<sup>30</sup>

7 The Commission has not previously applied the foregoing aggregation rules to joint  
 8 fundraising committees. But in applying those rules to committees other than joint fundraising  
 9 committees, the Commission has required that the contributor have “actual knowledge” of the  
 10 committee’s plans to use his or her contribution to contribute to or expend funds on behalf of a  
 11 particular candidate if a contribution to an unauthorized committee is to be aggregated with an  
 12 individual’s other contributions to that candidate.<sup>31</sup> In the case of the designation of a  
 13 contribution made to a joint fundraising committee, the contributions must be further examined if

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<sup>28</sup> 11 C.F.R. §§ 110.1(h)(2)-(3), 110.2(h)(2)-(3).

<sup>29</sup> Contribution and Expenditure Limitations and Prohibitions; Contributions by Persons and Multicandidate Political Committees, 52 Fed. Reg. 760, 765 (Jan. 9, 1987).

<sup>30</sup> *See id.*; *see also* Factual & Legal Analysis (“F&LA”) at 9, MUR 5732 (Matt Brown for U.S. Senate); F&LA at 4-10, MUR 5881 (Citizens Club for Growth).

<sup>31</sup> *See* MURs 5732 (Matt Brown for U.S. Senate), 5678 (Liffrig for Senate), 5445 (Davis), and 5019 (Keystone Federal PAC) (although contributors were likely aware that the political committee would contemporaneously contribute to the candidates’ committees, there was no evidence that the contributors actually knew that a portion of their contributions would be given to specific candidates); *see also* MUR 5881 (Citizens Club for Growth) (rejecting claim that contributors had actual knowledge based on text of solicitations). *But see* MURs 4633/4634 (Triad Management Services) (Commission found reason to believe and opened an investigation where circumstances, including proximity in timing and similarity in contribution amounts, as well as information about communications between contributors and the respondent, raised substantial questions of whether contributors had knowledge that the PACs would use their contributions to support specific candidates).

1 a contributor previously contributed to that participant and to ensure that they do not exceed any  
2 limits.<sup>32</sup>

3 The Complaint alleges that Gianforte's statements to donors during the May 2017 call  
4 made donors aware that their contributions would be used to support MRSCC and NRCC's get-  
5 out-the-vote ("GOTV") efforts on behalf of Gianforte's campaign.<sup>33</sup> Therefore, according to the  
6 Complaint, those donors' contributions to GVF should have been aggregated with any other  
7 contributions they had already made to the Committee, and the Committee may have accepted  
8 excessive contributions.<sup>34</sup> Indeed, the special election was the only election on the ballot in May  
9 2017, and the Committee and MRSCC's Responses state that the purpose of GVF was to raise  
10 funds for each participant's efforts in supporting Gianforte's candidacy and mention no other  
11 candidates.<sup>35</sup>

12 While a donor could have inferred from Gianforte's statements on the May 2017 phone  
13 call that making contributions through the GVF to the MRSCC and NRCC would benefit  
14 Gianforte's candidacy by financing his GOTV efforts, such statements alone are insufficient to  
15 find reason to believe that any donors made excessive contributions as a result of those  
16 statements. *First*, the available information does not identify any particular contributors who  
17 may have had actual knowledge of any plan by the MRSCC or NRCC to use a portion of their  
18 contributions to support Gianforte's candidacy. *Second*, the fundraising call itself appeared to  
19 target corporate-sponsored political committees, but the reports GVF has filed with the

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<sup>32</sup> 11 C.F.R. § 102.17(c)(5). Commission regulations require the participant committees to make their contributor records available to the joint fundraising committee for this purpose. *Id.* § 102.17(c)(4).

<sup>33</sup> Compl. at 3.

<sup>34</sup> *Id.*

<sup>35</sup> Gianforte/Committee Resp. at 2; MRSCC Resp. at 1.

Commission do not reflect that it received any contributions from such committees during the relevant time period.<sup>36</sup> *Third*, there is no information suggesting any donors exercised control over contributions that they made in response to Gianforte’s statements.

In sum, there is insufficient information indicating that donors had knowledge that a substantial portion of their contributions to the MRSCC and NRCC through the GVF would be contributed to or expended on behalf of Gianforte or that they retained control over those funds.<sup>37</sup> Accordingly, the Commission dismisses the allegations that Gianforte and the Committee violated 52 U.S.C. § 30116(f) by accepting excessive contributions and that the GVF failed to return excessive contributions in violation of 11 C.F.R. § 102.17(c)(6).

**B. The Commission Dismisses the Allegations that Respondents Failed to Report Earmarked Contributions**

The Act provides that “all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate.”<sup>38</sup> The term “earmarked means a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made or expended on behalf of, a

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<sup>36</sup> Our review of GVF’s disclosure reports shows that GVF may have received contributions in response to the Gianforte’s solicitation during the donor call given that at least fifteen contributors who had previously contributed to the Committee donated to GVF after the first week of May 2017. None of those contributions were from separate segregated funds.

<sup>37</sup> See 11 C.F.R. §§ 110.1(h)(2)-(3) and 110.2(h)(2)-(3); *see also* MURs 5881 (Citizens Club for Growth), 5732 (Matt Brown for U.S. Senate), 5678 (Liffrig for Senate), and 5019 (Keystone Federal PAC) (finding that an inference about a contributor’s belief regarding how their funds would be used was insufficient to find that the contributor had “actual knowledge” of a committee’s plans for the funds).

<sup>38</sup> 52 U.S.C. § 30116(a)(8).



clearly identified candidate or a candidate’s authorized committee.”<sup>39</sup> Commission regulations require both the intermediary and recipient committees to disclose information concerning the earmarked contribution.<sup>40</sup>

In past matters, the Commission has found that contributions were earmarked where there was “clear documented evidence” that donors provided instructions to the recipient committee.<sup>41</sup> But in cases where there was no such designation or instruction, the Commission has rejected earmarking allegations, even where the donor had reason to assume that the funds would be used to benefit a particular candidate.<sup>42</sup> The Commission has likewise rejected arguments solely based on unsubstantiated reports of “a deal” made between a party committee and a contributor or on the timing of the contributions.<sup>43</sup>

More recently, in *McCutcheon*, the plurality observed that the Commission’s earmarking regulations at section 110.6(b)(1) define earmarking “broadly”<sup>44</sup> and apply to “implicit”

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<sup>39</sup> 11 C.F.R. § 110.6(b)(1).

<sup>40</sup> *Id.* § 110.6(c) (requiring the intermediary committee to report the original source of the contribution and the recipient candidate, and for recipient committees to disclose each intermediary forwarding contributions exceeding \$200 in an election cycle).

<sup>41</sup> *See* F&LA at 6, MUR 5732 (Matt Brown for Senate) (citing MURs 4831/5274 (Nixon) where there was clear documentation in the form of checks with memo lines that stated “Nixon,” “J. Nixon Fund,” among other written designations).

<sup>42</sup> *See, e.g.*, MUR 5732 (Matt Brown for Senate) (finding no evidence of earmarking where there were no cover letters or other instructions accompanying checks or credit card transactions specifying how the contributions should be used); MUR 5520 (Republican Party of Louisiana/Tauzin) (“wink and nod arrangement” with no other instruction by donor insufficient to find earmarking occurred); MUR 5445 (Davis) (finding no earmarking where donor who had already contributed the maximum to Davis also made contributions to six non-candidate committee where there was no designation even though recipient committees contributed to Davis within nine days); MUR 5125 (Perry) (finding no earmarking because complaint contained only bare allegations of earmarking, but showed no designation, instruction, or encumbrance).

<sup>43</sup> *See* F&LA at 7-8, MUR 5732 (Matt Brown for Senate) (citing MURs 5445 and 4643).

<sup>44</sup> 134 S.Ct. at 1447.

1 agreements as well as explicit ones.<sup>45</sup> The plurality stated that a donor cannot “even imply that  
2 he would like his money to be contributed” to a particular candidate.<sup>46</sup>

3 Even under a broader reading of the Commission’s earmarking rules, consistent with the  
4 *McCutcheon* plurality’s guidance, however, the record does not contain specific facts indicating  
5 that the MRSCC and NRCC received earmarked contributions for the Gianforte campaign as a  
6 result of the May 2017 donor call. Here, the Complaint makes only general allegations without  
7 identifying any particular contributions that were purportedly earmarked and not reported  
8 properly.<sup>47</sup> And we are not aware of any donor who made either an explicit or implicit  
9 agreement that required the MRSCC or NRCC to use any contributed funds for Gianforte’s  
10 election. Therefore, the Commission dismisses the allegation that the Committee, the MRSCC  
11 and the NRCC violated 52 U.S.C. § 30116(8) and 11 C.F.R. § 110.6(c) by failing to report  
12 earmarked contributions.

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<sup>45</sup> *Id.* at 1455, 1459 (“Many of the scenarios that the Government and the dissent hypothesize involve at least implicit agreements to circumvent the base limits — agreements that are already prohibited by the earmarking rules. *See* 11 C.F.R. § 110.6.”).

<sup>46</sup> *Id.* at 1453.

<sup>47</sup> Compl. at 3.

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# FEDERAL ELECTION COMMISSION

## FACTUAL AND LEGAL ANALYSIS

**RESPONDENTS:** Greg Gianforte **MUR 7249**  
Greg for Montana and  
Lorna Kuney in her official capacity as treasurer  
Gianforte Victory Fund and Chris Marston in his  
official capacity as treasurer  
Montana Republican State Central Committee and  
Mike Hopkins in his official capacity as treasurer  
NRCC and Keith Davis in his official capacity as  
treasurer

### I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by End Citizens United.<sup>1</sup> It concerns allegations that federal candidate Greg Gianforte solicited earmarked funds through a joint fundraising committee, the Gianforte Victory Fund (“GVF”), in an effort to circumvent the contribution limits and reporting requirements of the Federal Election Campaign Act of 1971, as amended (the “Act”). At the time of the Complaint, Gianforte was a candidate in a special election and GVF had three participating committees: Gianforte’s authorized committee, Greg for Montana (the “Committee”); the Montana Republican State Central Committee (“MRSCC”); and the NRCC. The Complaint alleges that contributions to GVF or to MRSCC in response to a Gianforte solicitation before the special election must be aggregated with donors’ contributions to the Committee, and that the Committee, GVF, and its participants may have failed to properly report earmarked contributions.

Respondents generally deny the allegations. The NRCC contends that there is no evidence of any earmarking or misreporting, or that any contributions it received through the

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<sup>1</sup> See 52 U.S.C. § 30109(a)(1).

1 joint fundraising committee were subject to Commission regulations requiring that contributions  
2 be aggregated in this context.<sup>2</sup> Gianforte and the Committee acknowledge that the funds raised  
3 by GVF were raised to benefit Gianforte's candidacy but assert that there was no legal violation.<sup>3</sup>  
4 GVF filed a response incorporating the responses submitted by Gianforte and the NRCC,<sup>4</sup> and  
5 the MRSCC adopts the responses filed by the other Respondents.<sup>5</sup>

6 As discussed below, there is no information indicating donors retained control over funds  
7 contributed to the Respondents. Accordingly, the Commission finds no reason to believe that  
8 Greg Gianforte and the Committee and Lorna Kuney in her official capacity as treasurer received  
9 excessive contributions in violation of 52 U.S.C. § 30116(f) and that GVF and Chris Marston in  
10 his official capacity as treasurer failed to return excessive contributions in violation of 11 C.F.R.  
11 § 102.17(c)(6). Further, because the available information does not indicate that any donors  
12 earmarked specific contributions to MRSCC or NRCC in response to Gianforte's solicitation, the  
13 Commission also finds no reason to believe that the Committee, MRSCC and Mike Hopkins in  
14 his official capacity as treasurer, and the NRCC and Keith Davis in his official capacity as

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<sup>2</sup> NRCC Resp. at 2-6 (July 10, 2017).

<sup>3</sup> Gianforte/Committee Resp. at 2-3 (July 13, 2017).

<sup>4</sup> GVF Resp. (July 10, 2017).

<sup>5</sup> MRSCC Resp. at 1 (dated Sept. 30, 2018, and rec'd Jan. 16, 2020).

treasurer, failed to report earmarked contributions in violation of 52 U.S.C. § 30116(a)(8) and 11 C.F.R. § 110.6(c).

## II. FACTUAL BACKGROUND

Greg Gianforte was a candidate for Montana’s at-large Congressional District in a special election held on May 25, 2017.<sup>6</sup> This election was the only one on the ballot on that date.<sup>7</sup> GVF is a joint fundraising committee, which, at the time of the special election, was comprised of the Committee, MRSCC, and NRCC.<sup>8</sup>

According to a news report cited in the Complaint, during the week of May 1, 2017, Gianforte held a national fundraising call during which he answered questions about his policy of not accepting contributions from “corporate-sponsored PACs.”<sup>9</sup> During the call, he reportedly made the following statements:

We do not accept any industry PAC money, although if someone wanted to support through a PAC our Victory Fund allows that money to go to all the get-out-the-vote efforts. And the reason for that is I came off the governor’s race last year having made a big deal about not taking PAC money, and it would be a self-inflicted wound. We are starting to lessen that by taking political PAC money. That’s why we took the leadership PAC money from members in the House but not industry PAC money directly to the campaign.<sup>10</sup>

<sup>6</sup> Gianforte won the special election. *See 2017 Special Election – May 25, 2017 – Results*, Montana Sec. of State, <http://mtelectionresults.gov/resultsSW.aspx?type=FED&map=CTY>.

<sup>7</sup> *See 2017 Election Calendar*, Montana Sec. of State, <http://sos.mt.gov/elections/calendar>.

<sup>8</sup> *See GVF Resp.* (July 10, 2017) (listing the member committees of the joint fundraising committee). The response refers to GVF as the “JFC.”

<sup>9</sup> Compl. at 2.

<sup>10</sup> *Id.* at 2 and Attach. (quoting and attaching Simone Pathé, *Montana Candidate’s Comments Raise Questions About Corporate Money*, ROLL CALL (May 11, 2017), <http://www.rollcall.com/news/montana-gianforte-quist-pacs> (explaining that “[t]he PAC pledge has long been a source of political attacks in Montana” and discussing Montana candidates’ different approaches to accepting contributions from “corporate,” “labor,” and “ideological” “PACs”)).

1 According to that same media report, Gianforte’s campaign spokesperson issued a  
 2 clarification of the candidate’s statement saying that neither the Committee nor GVF would  
 3 accept contributions from “corporate-sponsored PACs”: “Greg was simply stating that they can  
 4 support the party if they want (that’s what he meant by ‘victory fund’ — not the JFA).”<sup>11</sup>

5 The Gianforte Response states that “by definition,” GVF “was established to benefit the  
 6 Gianforte campaign, by raising money for the candidate committee, Greg for Montana, for the  
 7 Montana GOP for its efforts in support of Greg Gianforte and for the NRCC for its efforts in  
 8 support of Greg Gianforte.”<sup>12</sup> In addition, it asserts that while contributors to GVF were  
 9 permitted to designate their contributions for a specific participant, each participant committee  
 10 accepted only federally permissible funds.<sup>13</sup> Copies of GVF’s fundraising solicitations (attached  
 11 to the Gianforte Response) for events scheduled on May 11, May 12, and May 15, 2017, include  
 12 disclaimers and the required “fundraising notice” listing the contribution limits and allocation  
 13 formulas for distribution of funds GVF received.<sup>14</sup> Those notices informed donors that  
 14 “[c]ontributions that exceed a donor’s contribution limit to a participating Committee shall be  
 15 reallocated to the remaining Committees according to this allocation formula to the extent  
 16 permitted by FECA.”<sup>15</sup>

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<sup>11</sup> *Id.* at 2. The reference to the “JFA” in the Complaint is apparently a reference to the joint fundraising committee, GVF. The NRCC Response similarly explains that Gianforte’s use of the term “victory fund” referred to the Republican Party’s grassroots and get-out-the-vote efforts as “victory programs,” “victory plans,” and “victory funds.” NRCC Resp. at 1-2 (July 10, 2017) (describing the history of the term). The NRCC also explained that Democratic Party committees use the term “coordinated campaigns” for similar programs. *Id.* at 2.

<sup>12</sup> Gianforte/Committee Resp. at 2 (July 13, 2017).

<sup>13</sup> *Id.* at 2-3 (specifying that the Montana GOP and NRCC were required to raise federally permissible funds for federal election activities).

<sup>14</sup> *Id.* at Exs. B – D.

<sup>15</sup> *See id.* The Gianforte Response also included a motion to dismiss the matter.

The NRCC’s response notes that the Complaint may be “premised on a simple misunderstanding” of the term “Victory Fund,” explaining “Historically, the Republican party committees have referred to their grassroots and get-out-the-vote efforts as ‘victory programs’ or ‘victory plans,’ and these victory programs (or plans) are paid for with ‘victory funds.’”<sup>16</sup> Thus, the NRCC suggests that Mr. Gianforte’s reference to the “Victory Fund” may have been a reference to general grassroots and get-out-the-vote efforts, rather than a specific reference to GVF. Further, the NRCC avers that the joint fundraising agreement states “The Committees specifically agree that each Committee’s share of net proceeds is not earmarked for any other particular candidate or use and that each Committee shall use its share of net proceeds in its sole discretion.”<sup>17</sup>

GVF’s reports filed with the Commission show that it made three distributions of “net proceeds” to the Committee, the MRSCC, and the NRCC after the May fundraising call, on May 2, May 23, and June 29, 2017, in the following amounts:<sup>18</sup>

DATE OF GVF DISBURSEMENT	COMMITTEE	AMOUNT
5/2/2017	Committee	\$120,039.70
5/2/2017	MRSCC	\$40,643.68
5/2/2017	NRCC	\$19,187.34
5/23/2017	Committee	\$687.22
5/23/2017	MRSCC	\$102,660.51
5/23/2017	NRCC	\$19,187.34
6/29/2017	Committee	\$12,837.54
6/29/2017	MRSCC	\$25,085.45

<sup>16</sup> NRCC Resp. at 2 (Jul. 10, 2017).

<sup>17</sup> NRCC Resp. at 2 (Jul. 10, 2017).

<sup>18</sup> The NRCC states that the distributions it received from GVF on May 2 and 23 only included contributions raised in April 2017, before Gianforte’s May 2017 donor call described above. NRCC Resp. at 3. A review of the NRCC’s disclosure reports indicates that GVF’s transfers included funds derived from two contributions received after the first week of May 2017, and the NRCC’s share of those particular contributions may have been transmitted on June 29, 2017. *See* NRCC, Amended 2017 July Monthly Rpt. at 1553 (Aug. 9, 2017).

6/29/2017	NRCC	\$3,158.21
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### III. LEGAL ANALYSIS

#### A. The Commission Finds No Reason to Believe that Gianforte and the Committee Received Excessive Contributions as a Result of the May 2017 Fundraising Call

The Act prohibits contributions to any candidate or political committee in excess of the Act's limits.<sup>19</sup> The Act also prohibits political committees from knowingly accepting excessive contributions.<sup>20</sup> In 2017, at the time of the events in question, individual contribution limits were \$2,700 per election to a federal candidate, \$10,000 per year to a party committee's federal account, and \$33,900 per year to the federal account of a political committee established and maintained by a national political party.<sup>21</sup>

The Act and Commission regulations permit candidates and political committees to engage in joint fundraising activities by establishing a separate political committee to act as their joint fundraising representative.<sup>22</sup> A contributor may make a contribution to the joint fundraising committee that "represents the total amount that the contributor could contribute to all of the participants under the applicable [contribution] limits."<sup>23</sup>

All solicitations in connection with a joint fundraising effort must include a notice that identifies all participating committees, describes the allocation formula, informs contributors that they may choose to designate their contributions for a particular committee, and states that the

<sup>19</sup> 52 U.S.C. § 30116(a)(1)(A), (B), and (D).

<sup>20</sup> *Id.* § 30116(f); 11 C.F.R. § 110.9.

<sup>21</sup> Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 82 Fed. Reg. 10904, 10906 (Feb. 16, 2017).

<sup>22</sup> *See* 52 U.S.C. § 30102(e)(3)(ii); 11 C.F.R. § 102.17(a)(1)(i).

<sup>23</sup> 11 C.F.R. § 102.17(c)(5).



allocation formula may change if a contributor makes a contribution that is excessive relative to any participant.<sup>24</sup> The joint fundraising representative is responsible for screening all contributions to ensure they comply with the Act's source prohibitions and amount limitations, collecting contributions, paying fundraising costs, and distributing net proceeds to each participant.<sup>25</sup> If application of the joint fundraising committee's allocation formula results in a violation of the contribution limits, the joint fundraising committee may reallocate the excess funds to the other participant committees.<sup>26</sup>

The Complaint alleges that Gianforte's statements to donors during the May 2017 call made donors aware that their contributions would be used to support MRSCC and NRCC's get-out-the-vote ("GOTV") efforts on behalf of Gianforte's campaign.<sup>27</sup> Therefore, according to the Complaint, those donors' contributions to GVF should have been aggregated with any other contributions they had already made to the Committee, and the Committee may have accepted excessive contributions.<sup>28</sup> Indeed, the special election was the only election on the ballot in May 2017, and the Committee and MRSCC's Responses state that the purpose of GVF was to raise

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<sup>24</sup> *Id.* § 102.17(c)(2)(i).

<sup>25</sup> *Id.* § 102.17(b)(1), (c)(4)(i). The joint fundraising representative must report all funds received in the reporting period they are received and all disbursements in the reporting period they are made and after the joint fundraising representative distributes the net proceeds, the participating committee must report its share received as a transfer-in from the fundraising representative and file a memo entry on Schedule A itemizing its share of gross receipts as contributions from the original contributors as required by 11 C.F.R. § 104.3(a). *See id.* § 102.17(c)(3)(ii), (8)(i)-(ii); *see also* 52 U.S.C. § 30104(a)(1), (b); 11 C.F.R. § 104.1(a) (requiring committee treasurers to file reports of receipts and disbursements).

<sup>26</sup> 11 C.F.R. § 102.17(c)(6)(i). However, designated contributions may not be reallocated without the written permission of the contributor. *Id.* § 102.17(c)(6)(ii). Should reallocation still result in a violation of the Act's limits, the joint fundraising committee is required to return the excessive contribution. *Id.* § 102.17(c)(6)(i).

<sup>27</sup> Compl. at 3.

<sup>28</sup> *Id.*

1 funds for each participant's efforts in supporting Gianforte's candidacy and mention no other  
2 candidates.<sup>29</sup>

3 While a donor could have inferred from Gianforte's statements on the May 2017 phone  
4 call that making contributions through the GVF to the MRSCC and NRCC would benefit  
5 Gianforte's candidacy by financing GOTV efforts in support of his candidacy, such statements  
6 alone are insufficient to find reason to believe that any donors made excessive contributions as a  
7 result of those statements. The joint fundraising agreement sets forth the allocation formula for  
8 dispersing funds between participating committees, and makes clear that each Committee is free  
9 "use its share of net proceeds in its sole discretion."<sup>30</sup> The Complaint does not allege, and  
10 Commission has no evidence that contributors retained control over the use of funds once they  
11 were provided to the joint fundraising representative and disbursed to the NRCC or MRSCC.

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13  
14 Accordingly, the Commission finds no reason to believe that Gianforte and the  
15 Committee violated 52 U.S.C. § 30116(f) by accepting excessive contributions and that the GVF  
16 failed to return excessive contributions in violation of 11 C.F.R. § 102.17(c)(6).

17 **B. The Commission Finds No Reason to Believe that Respondents Failed to**  
18 **Report Earmarked Contributions**

19 The Act provides that "all contributions made by a person, either directly or indirectly, on  
20 behalf of a particular candidate, including contributions which are in any way earmarked or  
21 otherwise directed through an intermediary or conduit to such candidate, shall be treated as

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<sup>29</sup> Gianforte/Committee Resp. at 2; MRSCC Resp. at 1.

<sup>30</sup> NRCC Resp. at 2 (July 10, 2017).

1 contributions from such person to such candidate.”<sup>31</sup> The term “earmarked means a designation,  
2 instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which  
3 results in all or any part of a contribution or expenditure being made or expended on behalf of, a  
4 clearly identified candidate or a candidate’s authorized committee.”<sup>32</sup> Commission regulations  
5 require both the intermediary and recipient committees to disclose information concerning the  
6 earmarked contribution.<sup>33</sup>

7 The record does not contain specific facts indicating that the MRSCC and NRCC  
8 received earmarked contributions for the Gianforte campaign as a result of the May 2017 donor  
9 call. Here, the Complaint makes only general allegations without identifying any particular  
10 contributions that were purportedly earmarked and not reported properly.<sup>34</sup> And we are not  
11 aware of any donor who made an agreement that required the MRSCC or NRCC to use any  
12 contributed funds for Gianforte’s election. Therefore, the Commission finds no reason to believe  
13 that the Committee, the MRSCC and the NRCC violated 52 U.S.C. § 30116(8) and 11 C.F.R. §  
14 110.6(c) by failing to report earmarked contributions.

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<sup>31</sup> 52 U.S.C. § 30116(a)(8).

<sup>32</sup> 11 C.F.R. § 110.6(b)(1).

<sup>33</sup> *Id.* § 110.6(c) (requiring the intermediary committee to report the original source of the contribution and the recipient candidate, and for recipient committees to disclose each intermediary forwarding contributions exceeding \$200 in an election cycle).

<sup>34</sup> Compl. at 3.