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December 14, 2017

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Jeff S. Jordan, Assistant General Counsel
Office of Complaints Examination
and Legal Administration
999 E. Street, NW
Washington, DC 20463**Re: MUR 7291**

Dear Mr. Jordan:

We write as counsel to Hillary for America (the "Committee" or "HFA"), the authorized committee of Secretary Hillary Clinton, and Jose Villarreal in his official capacity as Treasurer (together "Respondents") in response to the complaint filed by the Campaign Legal Center ("Complainant") on October 27, 2017 (the "Complaint").

The Committee retained Perkins Coie LLP to provide legal services and paid Perkins Coie for these services. In accordance with the Federal Election Campaign Act of 1971, as amended (the "Act"), the Committee disclosed the identity of the payee (Perkins Coie), the amount of the disbursements, and the purpose of the disbursements ("Legal Services") in its filings with the Federal Election Commission ("FEC" or "Commission"). The Committee fully complied with its reporting and disclosure obligations.

Yet, the Complaint incorrectly alleges that the Committee should have also disclosed the payments that Perkins Coie made to its sub-vendors. Respectfully, this claim is without any legal basis at all. For more than thirty years, the FEC has consistently held that:

[N]either the Act nor the Commission's regulations require authorized committees to report expenditures or disbursements to their vendors' sub-vendors. To the contrary, the Commission has concluded that a committee need not separately report its consultant's payments to other persons – such as those payments for services or goods used in the performance of the consultant's contract with the committee.¹

¹ First General Counsel's Report, Matter Under Review 6510, at 16 (Mar. 8, 2013).

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The law could not be more clear: authorized committees disclose payments to their vendors, *not* to their vendors' sub-vendors. The Committee fully complied with its obligations. Accordingly, the Complaint should be dismissed and the file should be closed.

BACKGROUND

Respondents retained Perkins Coie LLP (the "Firm") to serve as the Committee's counsel and to provide comprehensive legal services in connection with the 2016 election. The Committee has a standard contractual relationship with the Firm for the provision of legal services. At all times, the Committee properly disclosed payments made to the Firm. The Committee reported 37 payments to the Firm during the 2016 election cycle, totaling \$5,631,421.² The reported purpose of each disbursement was properly disclosed as "Legal Services."

As the Firm described in a letter dated October 24, 2017, the Firm contracted with the research firm Fusion GPS in April of 2016 to "assist in its representation of the DNC and Hillary for America."³ The Firm retained Fusion GPS through a standard commercial agreement. As part of its engagement, Fusion GPS "perform[ed] a variety of research services during the 2016 election cycle."⁴ The research conducted by Fusion GPS was for the purpose of supporting the Firm's representation of Respondents. The Firm was substantially involved in overseeing and directing the services provided by Fusion GPS, to ensure that its activities supported the Firm's provision of legal services and ultimately served the Committee's legal objectives and needs. Fusion GPS is a research and strategic intelligence firm that provides services to a wide range of clients. Fusion GPS was co-founded in 2011 by several former investigative reporters and journalists. The Committee did not contract with Fusion GPS or make any payments to Fusion GPS. The Committee properly disclosed this activity on its filings with the FEC.

DISCUSSION

I. Law Firms Often Retain Sub-Vendors To Support Their Legal Representation of Clients

It is common for law firms to retain third parties to support their representation of clients. For instance, firms regularly contract with experts, document review specialists, e-discovery services, private transcription services, interpreters, and investigators, among other third parties.⁵

² See Federal Election Commission, *Hillary for America, 2015-2016 Reports*, <https://www.fec.gov/data/committee/C00575795/?tab=filings&cycle=2016#reports>.

³ Letter from Matthew J. Gehringer to William W. Taylor, III, Oct. 24, 2017 (Exh. 1).

⁴ *Id.*

⁵ See generally Donna Lee Elm, Sean Broderick, *Third-Party Case Services and Confidentiality*, Crim. Just., Spring 2014, at 15, 17-18.

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The academic literature and current industry practices show that these relationships are “common” and advantageous for clients.⁶ For example, the American Bar Association has clearly recognized the standard practice of firms retaining third parties to assist in their representation of clients.⁷

Law firms have a particularized need for sub-vendors that can assist in the development of detailed factual records.⁸ For example, it is widely recognized that attorneys “regularly retain private investigators in their practices.”⁹ For attorneys representing political entities, the analogue to a private investigator is a specialized firm that can provide comprehensive research services. These firms can assist lawyers in assessing their own political clients’ vulnerabilities or those of their clients’ political opponents. Lawyers need these services, along with many other resources, such as research libraries reflecting statements and activities by political candidates or past political advertisements, to properly serve their clients; as a result, lawyers representing political organizations regularly contract with sub-vendors to provide them with these essential service. Here, the Firm retained Fusion GPS to assist in its representation of the Committee. For the client, in this case the Committee, these sub-vendor costs are part of the overall scope of “legal services” that the client had retained its law firm to provide.

II. Payments by Political Committees’ Vendors to Bona Fide Sub-Vendors Are Not Disclosed on FEC Reports

a. *The Act Does Not Provide for the Disclosure of Payments by Campaign Vendors to Bona Fide Sub-Vendors*

Over the last three decades, the Commission has said over and over again that political committees are not required to disclose payments by their vendors to their vendors’ *bona fide* sub-vendors. In a 1983 advisory opinion, the FEC concluded that payments by a vendor “to other persons, which are made to purchase services or products used in performance of [the vendor’s] contract with the Committee [] do not have to be separately reported.”¹⁰ As noted in the introduction, the Office of General Counsel (“OGC”) reiterated in 2013 that “neither the Act nor

⁶ *Id.*; see also Sumedha Ahuja, *A Balanced Approach to Patent Process Outsourcing: Its Challenges and Rewards*, 40 AIPLA Q.J. 483, 500-01 (2012); Lisa Stansky, *Staking Out A Detective*, ABA J., Sept. 2001, at 68 (“investigators often are more successful than lawyers at gathering information from people”); Jonny J. Frank & Bart M. Schwartz, *Private Eyes: Using Investigators in Criminal Defense Matters*, Crim. Just., Fall 1996, at 21 (“effective investigative firm can assist counsel” in various respects).

⁷ See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 (2008).

⁸ See ABA J., Sept. 2001, at 68; Jonny J. Frank & Bart M. Schwartz, *Private Eyes: Using Investigators in Criminal Defense Matters*, Crim. Just., Fall 1996, at 21 (“effective investigative firm can assist counsel” in various respects).

⁹ Douglas R. Richmond, *Watching over, Watching Out: Lawyers’ Responsibilities for Nonlawyer Assistants*, 61 U. Kan. L. Rev. 441, 482-83 (2012).

¹⁰ FEC Adv. Op. 1983-25 (Mondale for President).

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the Commission's regulations require authorized committees to report expenditures or disbursements to their vendors' sub-vendors" and a committee "need not separately report its consultant's payments to other persons – such as those payments for services or goods used in the performance of the consultant's contract with the committee."¹¹ Two years later, OGC repeated that "where a committee vendor makes a payment to a sub-vendor for services or goods used in the performance of the vendor's contract with the committee, a committee need not separately report its vendor's payment."¹² The full Commission affirmed both OGC reports unanimously.¹³

This issue was just recently before the Commission again in 2013, during a rulemaking on "ultimate payees," and the Commission did not alter its previous guidance. The Commission ruled that committees should report disbursements to ultimate payees *only* in the three following instances, none of which are applicable here: (1) committee reimbursement of an individual who used personal funds to pay more than \$200 to a single vendor; (2) committee payment of credit card bills that include charges of more than \$200 to a single vendor; and (3) unreimbursed candidate payments with personal funds to vendors without receiving reimbursement.¹⁴ The interpretive rule expressly addressed campaign vendor payments to sub-vendors, stating that it is **"only addressing the three issues . . . and is not extending the clarification to situations in which a vendor, acting as the committee's agent, purchases goods and services on the committee's behalf from subvendors."**¹⁵ Again, the Commission reaffirmed the longstanding rule that committees do not disclose their vendors' payments to sub-vendors for services rendered on behalf of a committee.¹⁶

b. The Only Exception to the General Rule That Sub-Vendor Payments Are Not Disclosed Is Wholly Inapplicable

The Commission has recognized a very limited exception to this general rule for extreme cases where the purported campaign vendor does not have a *bona fide* contractual relationship with the purported sub-vendor. In one case from the 1990s, the Commission determined that a Senate candidate violated federal reporting law when it disguised a payment to David Duke's consulting firm by funneling the payment through an intermediary.¹⁷ There, the Senate campaign already

¹¹ First General Counsel's Report, Matter Under Review 6510, at 16 (Mar. 8, 2013).

¹² First General Counsel's Report, Matter Under Review 6894, at 3 (Aug. 26, 2015).

¹³ Certification, Matter Under Review 6894 (Oct. 27, 2015); Certification, Matter Under Review 6510 (July 9, 2013).

¹⁴ *Reporting Ultimate Payees of Political Committee Disbursements*, 78 Fed. Reg. 40625 (Jul 8, 2013).

¹⁵ *Id.* at 40626 (emphasis added).

¹⁶ See First General Counsel's Report, Matter Under Review 6510, at 16 n.13 (Mar. 8, 2013) (citing interpretative rule); First General Counsel's Report, Matter Under Review 6894, at 3 n.9 (Aug. 26, 2015) (same).

¹⁷ Conciliation Agreement, Matter Under Review 4872 (Feb. 15, 2002).

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had a contract in place with Duke's firm (the purported sub-vendor) and, only after the fact, decided to funnel the payment to Duke's firm through another firm.¹⁸ The purported vendor did not have any "involvement whatsoever" with the services provided by the vendor.¹⁹ In that enforcement action, the Commission found that the purported vendor's only role "was to serve as a conduit for payment . . . so as to conceal the transaction with [the ultimate payee]."²⁰

Just last year, the Commission voted to dismiss a complaint alleging an undisclosed sub-vendor payment, demonstrating the very limited nature of the exception discussed above. At issue in the matter was an apparent effort by Charles Boustany for Congress to conceal a payment made through several layers of intermediaries—including at least one that was closely linked to the committee—in order to obtain the endorsement of United Ballot PAC. There, (1) the committee had used entities "merely to serve as conduits for payment so as to conceal the transaction through which the committee obtained United Ballot's endorsement," (2) the committee's use of multiple intermediaries supported an inference that the payments were structured to conceal the committee's connection to the ultimate payee, (3) one intermediary was wholly owned by the committee's campaign manager, (4) several intermediaries were closely related, and (5) respondents did not provide any information refuting that conduits were used to conceal the disbursement's purpose.²¹ Yet three commissioners voted against finding a violation of FECA because of the general rule that "the Act does not require committees to disclose the 'ultimate payees' (that is, final recipients) of the disbursements at issue."²² Discussing the 2013 interpretive rule, the commissioners stated that "committees are required to disclose the ultimate payee **only in certain, limited contexts**."²³ Only in very narrow, limited circumstances is there an obligation to disclose a vendor's payments to a sub-vendor, none of which are present in this case.

c. Statements of Purpose Must Explain Why a Disbursement Was Made

FECA and the Commission's accompanying regulations require committees to report the purpose of each expenditure in excess of \$200 that they itemize on their periodic FEC reports.²⁴ The "purpose" of an expenditure means "a brief statement or description of why the disbursement was made."²⁵ Examples of specific purposes that meet this requirement include

¹⁸ *Id.* at 4.

¹⁹ *Id.* at 3-4.

²⁰ *Id.* at 4.

²¹ First General Counsel's Report, Matter Under Review 6698, at 2 (Sept. 3, 2014).

²² Statement of Reasons of Commissioners Petersen, Hunter & Goodman, Matter Under Review 6698, at 1 (Dec. 5, 2016).

²³ *Id.* at 3 (emphasis added).

²⁴ 52 U.S.C. § 30104(b); 11 C.F.R. §§ 104.3(a), (b).

²⁵ 11 C.F.R. § 104.3(b)(3)(i)(A).

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“dinner expenses, media, salary, polling, travel,” among others.²⁶ The Commission has explicitly stated that “legal services” is an appropriate description of purpose under FEC guidelines.²⁷ In contrast to the Commission’s instruction to report the specific purpose of “consulting services,” the FEC has always indicated that the range of diverse legal services provided by attorneys can be disclosed as “legal services.”²⁸ For example, when attorneys litigate, provide advice about trademark issues, engage in vetting of staff and consultants, draft complaints or responses to administrative matters, or help candidates prepare for debates, all of these services are properly described as “legal services.” Unlike in other circumstances (for example, where the Commission has advised committees to distinguish between “internet consulting” and “polling consulting”) never has the Commission indicated that a committee should further specify the specific type of legal work being performed on its FEC reports.²⁹

III. Under Clear and Well-Established Precedent, Respondents Complied with the Act

a. The Committee Complied with its Obligations to Disclose Payments by the Firm to Fusion GPS, as the Services Were Provided by a Bona Fide Sub-Vendor in Connection with the Firm’s Provision of Legal Services to the Committee

Respondents properly reported its disbursements to the Firm. Because the Firm provided legal services directly to the Committee and retained a sub-vendor, Fusion GPS, to “assist in its representation of” Respondents,³⁰ it was lawful and appropriate for the Committee to have disclosed disbursements to the Firm, and no further itemization was required

The Firm’s relationship with Fusion GPS was that of a legitimate vendor with a bona fide sub-vendor. As is common in the legal profession, the Firm contracted with a third party to provide services in support of its representation of the Committee. The arrangement between the Firm and Fusion GPS was consistent with standard industry practice, which commonly involves the retention of outside experts and investigators to advance a client’s legal representation.³¹ The

²⁶ *Id.* § (B).

²⁷ Federal Election Commission, *Purposes of disbursements*, <https://www.fec.gov/help-candidates-and-committees/purposes-disbursement/>; *Statement of Policy: “Purpose of Disbursement” Entries for Filings With the Commission*, 72 Fed. Reg. 887 (Jan. 9, 2007).

²⁸ *See id.*

²⁹ *Id.*

³⁰ Letter from Matthew J. Gehringer to William W. Taylor, III, Oct. 24, 2017 (Exh. 1).

³¹ *See generally* Donna Lee Elm, Sean Broderick, *Third-Party Case Services and Confidentiality*, Crim. Just., Spring 2014, at 15, 17-18; Sumedha Ahuja, *A Balanced Approach to Patent Process Outsourcing: Its Challenges and Rewards*, 40 AIPLA Q.J. 483, 500-01 (2012); Lisa Stansky, *Staking Out A Detective*, ABA J., Sept. 2001, at 68 (“investigators often are more successful than lawyers at gathering information from people”); Jonny J. Frank & Bart M. Schwartz, *Private Eyes: Using Investigators in Criminal Defense Matters*, Crim. Just., Fall 1996, at

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Committee had an engagement letter with the Firm for the provision of legal services, and the Firm in turn had an engagement letter with Fusion GPS to support the Firm in its representation of the Committee. In addition, the Firm supervised and oversaw the work by Fusion GPS. There was no direct contractual relationship or supervision of work directly between the Committee and Fusion GPS. Thus, the relationship between the Firm and Fusion GPS was indistinguishable from the many transactions between vendors and bona fide sub-vendors in which the Commission has found no obligation to disclose payments to sub-vendors.³²

Because the Firm retained Fusion GPS in order to support its provision of legal services to the Committee, Respondents correctly followed the Commission's guidance regarding how its payments should be reported. In keeping with the Commission's rule regarding the disclosure of payments to sub-vendors, the services rendered by Fusion GPS were "in connection with services [the Firm] provided to the Committee," namely providing legal services to the Committee.³³ The facts in this case are materially indistinguishable from those in *Mondale*, where (1) the vendor had a legal existence as a corporation that was separate from the committee; (2) the vendor's principals did not hold staff positions with the campaign; (3) the committee conducted arms-length negotiations with the vendor that resulted in a final contract; (4) the vendor expected to serve other clients; and (5) the committee had no interest in these contracts.³⁴ While the Complaint tries to twist the fact that the Firm serves as General Counsel to the Committee, that the Firm oversees all of the Committee's legal advice does not change the fundamental nature of the relationships: no one at the Firm served on the staff of the Committee and the Firm is plainly a completely separate entity in line with the core principles of the *Mondale* opinion. This matter is ultimately indistinguishable from multiple enforcement proceedings dismissed by the Commission because the sub-vendor's services to the Firm were "in connection with services the vendor provided to the Committee."³⁵

b. The Committee Properly Reported the Purpose of the Expenditures

The Committee complied with its duty to report the purpose of each expenditure in excess of \$200.³⁶ As discussed above, all of the services provided by Fusion GPS were to "assist in [the

21("effective investigative firm can assist counsel" in various respects); Douglas R. Richmond, *Watching over, Watching Out: Lawyers' Responsibilities for Nonlawyer Assistants*, 61 U. Kan. L. Rev. 441, 482-83 (2012).

³² See FEC Adv. Op. 1983-25 (*Mondale for President*); First General Counsel's Report, Matter Under Review 6510, at 16-17 (Mar. 8, 2013); First General Counsel's Report, Matter Under Review 6894, at 3 (Aug. 26, 2015).

³³ See, e.g., First General Counsel's Report, Matter Under Review 6894 (Aug. 26, 2015).

³⁴ FEC Adv. Op. 1983-25 (*Mondale*).

³⁵ First General Counsel's Report, Matter Under Review 6894 (Aug. 26, 2015); First General Counsel's Report, Matter Under Review 6510, at 16-17 (Mar. 8, 2013).

³⁶ 52 U.S.C. § 30104(b); 11 C.F.R. §§ 104.3(a), (b).

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Firm's] representation of the" Committee.³⁷ Thus, all of the relevant expenditures were made for "Legal Services," which is the description that the Committee used in disclosing these expenditures.³⁸ Given that the Commission has specified that "legal services" is a correct description of purpose for the vast range of different services provided by attorneys, the Committee's purpose description was correct.³⁹ Thus, Respondents acted consistently with FEC guidance by disclosing all of the activity at issue in this Complaint as "legal services." As the Commission has never indicated that a committee must disclose the specific type of legal services provided, the Committee fully complied with its reporting obligation.⁴⁰

To evaluate the Committee's purpose descriptions, the Complaint references the FEC's statement that "[a]s a rule of thumb, filers should consider the following question: 'Could a person not associated with the committee easily discern why the disbursement was made when reading the name of the recipient and the purpose?'" Here, the answer to that question is plainly "yes." The Firm sub-contracted with Fusion GPS to assist it in providing legal consulting and services to the Committee. Fusion GPS's research was a bona fide part of those services. The Committee paid the Firm for its legal consulting of many varied kinds. Anyone reviewing the Committee's FEC reports would obviously understand that the Committee was paying the Firm for legal services and thus, the Committee wholly satisfied its reporting obligations.

CONCLUSION

For the foregoing reasons, Respondents respectfully request the Commission promptly find no reason to believe any violation occurred, dismiss the matter and close the file.

³⁷ Letter from Matthew J. Gehringer to William W. Taylor, III, Oct. 24, 2017 (Exh. 1).

³⁸ See Federal Election Commission, *Hillary for America, 2015-2016 Reports*, <https://www.fec.gov/data/committee/C00575795/?tab=filings&cycle=2016#reports>.

³⁹ Federal Election Commission, *Purposes of disbursements*, <https://www.fec.gov/help-candidates-and-committees/purposes-disbursement/>; *Statement of Policy: "Purpose of Disbursement" Entries for Filings With the Commission*, 72 Fed. Reg. 887 (Jan. 9, 2007).

⁴⁰ See Statement of Reasons of Commissioners Petersen, Hunter & Goodman, Matter Under Review 6698, at 5 (Dec. 5, 2016).

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We appreciate the Commission's consideration of this response.

Very truly yours,

A handwritten signature in blue ink, appearing to read "ME", with a long horizontal flourish extending to the right.

Marc E. Elias
Counsel to Hillary for America

Enclosure



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October 24, 2017

VIA EMAIL

William W. Taylor, III
Zuckerman Spaeder LLP
1800 M Street, NW
Suite 1000
Washington, DC 20036

RE: FUSION GPS

Dear Mr. Taylor:

I write on behalf of Perkins Coie LLP as its General Counsel. We understand that your client, Fusion GPS, has received a number of requests for information regarding the identity of clients who engaged Fusion GPS to conduct research during the 2016 Presidential campaign. We further are aware that Fusion GPS is currently engaged in litigation in the United States District Court for the District of Columbia in an effort to prevent the compelled disclosure of its bank records which would reveal confidential client information.

We recognize the important principle of client confidentiality, and we appreciate your efforts to fulfill your obligation to maintain client confidentiality. In the circumstances, however, we believe it is appropriate to release Fusion GPS from this obligation as it relates to the identity of Perkins Coie. Further, given the interest in this issue, we believe it would be appropriate for all parties who hired Fusion GPS in connection with the 2016 presidential campaign to release Fusion GPS from this obligation as well. Finally, now that the appropriate client representatives have been informed of the specifics of our engagement with Fusion GPS, and with their consent, Perkins Coie therefore authorizes you to disclose the following:

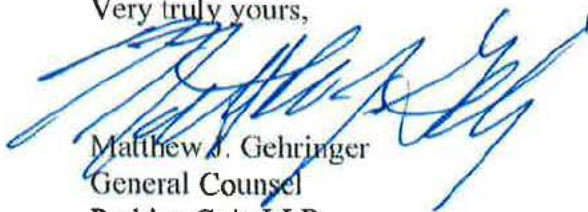
-- Fusion GPS approached Perkins Coie in early March of 2016 and, aware that Perkins Coie represented the Democratic National Committee ("DNC") and HFACC, Inc. ("Hillary for America") with respect to the 2016 elections, expressed interest in an engagement with the Firm in connection with the 2016 presidential election to continue research regarding then-Presidential candidate Donald Trump, research that Fusion GPS had conducted for one or more other clients during the Republican primary contest.

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-- To assist in its representation of the DNC and Hillary for America, Perkins Coie engaged Fusion GPS in April of 2016, to perform a variety of research services during the 2016 election cycle. By its terms, the engagement concluded prior to the November 2016 Presidential election.

Nothing in this consent to the disclosure above authorizes Fusion GPS to disclose or waive any privilege with respect to communications or other information otherwise protected by this Firm's or its clients' attorney-client privilege and work product protections, nor does this authorization constitute a waiver of any applicable privilege of this Firm or its clients.

Very truly yours,



Matthew J. Gehringer
General Counsel
Perkins Coie LLP

MJG:jmg