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D. +1.202.434.1609
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Attorney
Office of General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463**Re: MURs 7291 and 7449**

Dear Ms. Robinson:

We write as counsel to (1) DNC Services Corporation/Democratic National Committee and William Derrough, in his official capacity as treasurer ("DNC"), and (2) Hillary for America and Elizabeth Jones, in her official capacity as treasurer ("HFA") (together, the "Committees"), in response to the Federal Election Commission's ("Commission" or "FEC") letters dated August 9, 2019, pertaining to MURs 7291 and 7449. The Committees provide the following response and discussion.

RESPONSE TO COMMISSION QUESTIONS AND REQUEST FOR DOCUMENTS

As the undersigned counsel discussed with the Commission,¹ the Committees will not submit responses to the Commission's requests for the production of documents at this time. The Committees will revisit these requests after the Commission reviews this response.

BACKGROUND

The Committees retained Perkins Coie LLP (the "Firm") to serve as their counsel and to provide comprehensive legal services. Each Committee has a standard contractual relationship with the Firm for the provision of legal services. At all times, the Committees properly disclosed payments

¹ Telephone call with Anne Robinson and Mark Allen, Aug. 21, 2019.

Federal Election Commission
 October 23, 2019
 Page 2

made to the Firm, generally reporting the purpose of those disbursements as “Legal Services” (in the case of HFA) or “Legal and Compliance Consulting” (in the case of the DNC).²

As the Firm described in a letter dated October 24, 2017, the Firm contracted with Fusion GPS in April 2016 to “assist in its representation of the DNC and Hillary for America.”³ The Firm retained Fusion GPS through a standard contractual 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 the Committees. The Firm was solely responsible for overseeing and directing the services provided by Fusion GPS; its activities supported the Firm’s provision of legal services and ultimately served the Committee’s legal objectives and needs. The Firm billed each Committee for the work that it did in connection with conducting and managing the Fusion GPS research, in addition to the costs for the Fusion GPS work itself. 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. Neither HFA nor the DNC contracted with Fusion GPS or made any payments to Fusion GPS.

The Commission found that there is reason to believe the Committees violated 52 U.S.C. § 30104(b)(5)(A) and (b)(6)(B)(v) and 11 C.F.R. § 104.3(b)(3)(i) when each reported the purpose of funds paid to the Firm as “legal services” or “legal or compliance services.”⁵

DISCUSSION

I. The Committees Properly Reported the Purpose of the Expenditures

The Commission’s finding that there is reason to believe the Committees violated the Act is based on misplaced assumptions and an overly narrow view of what constitutes “legal services” in the context of a modern presidential campaign. The Factual and Legal Analysis that underpins the Commission’s finding mistakenly assumes that Fusion GPS’s work did not support the Firm’s

² In one instance, the first time the DNC made a payment to the Firm for legal services that had been subcontracted to Fusion GPS, the DNC did report the purpose of the expenditure as “Research Consulting.” However, that description is also sufficient to convey what was actually being paid for under the Commission’s guidance. See Federal Election Commission, Hillary for America, 2015-2016 Reports, <https://www.fec.gov/data/committee/C00575795/?tab=filings&cycle=2016#reports>; Federal Election Commission, DNC Services Corp./Dem. Nat’l Committee, 2015-2016 Reports, <https://www.fec.gov/data/committee/C00010603/?tab=filings&cycle=2016#reports>.

³ Letter from Matthew J. Gehring to William W. Taylor, III, Oct. 24, 2017 (provided to the Commission with the Committees’ October 2, 2018 letter in reference to MUR 7449).

⁴ *Id.*

⁵ See Factual and Legal Analysis (Aug. 9, 2019), MURs 7291 and 7449 (Hillary for America); Factual and Legal Analysis (Aug. 9, 2019), MURs 7291 and 7449 (Democratic National Committee).

Federal Election Commission
 October 23, 2019
 Page 3

legal services for the Committees. In fact, Fusion GPS provided services to the Firm that assisted in the Firm's legal work for the Committees. The Factual and Legal Analysis also fails to recognize the position the Commission has taken in the past—that where a committee accurately reports a disbursement using a Commission-approved purpose description, the purpose reporting is adequate even if it does not itemize each sub-task the vendor carried out. In light of these factual and legal issues in the Commission's analysis, the Commission should reconsider its finding and conclude that the Committees properly reported the purpose of their disbursements to the Firm.

The Federal Election Campaign Act of 1971, as amended (the "Act"), and its accompanying regulations ("Commission Regulations") require committees to report the purpose of each expenditure in excess of \$200 that they itemize on their periodic FEC reports.⁶ The "purpose" of an expenditure means "a brief statement or description of why the disbursement was made."⁷ Examples of specific purposes that meet this requirement include "dinner expenses, media, salary, polling, travel," among others.⁸ The Commission has explicitly stated that "legal services," "legal consulting," and "compliance consulting" are all appropriate descriptions of purpose under FEC guidelines.⁹

The FEC has always indicated that the range of diverse legal services provided by attorneys can be disclosed as "legal services."¹⁰ 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" or "legal consulting." 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.¹¹

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.¹² The academic literature and current industry practices show that these relationships are "common" and

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

⁷ 11 C.F.R. § 104.3(b)(3)(i)(A).

⁸ *Id.* § (B).

⁹ 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).

¹⁰ *See id.*

¹¹ *See id.*

¹² *See generally* Donna Lee Elm, Sean Broderick, Third-Party Case Services and Confidentiality, *Crim. Just.*, Spring 2014, at 15, 17-18.

Federal Election Commission
 October 23, 2019
 Page 4

advantageous for clients.¹³ For example, the American Bar Association has clearly recognized the standard practice of firms retaining third parties to assist in their representation of clients.¹⁴

Law firms have a particularized need for sub-vendors that can assist in the development of detailed factual records.¹⁵ For example, it is widely recognized that attorneys “regularly retain private investigators in their practices.”¹⁶ 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. For example, attorneys in this space often rely on research findings from sub-vendors when performing legal review of public communications—to confirm that there is adequate factual basis for any claims or allegations, so the client does not run afoul of the law. As a result, lawyers representing political organizations regularly contract with sub-vendors to provide them with these essential services.

Additionally, attorneys routinely help clients with tasks such as analyzing legal records and obtaining public records—activities that are often considered “opposition research” in the political sphere but which have distinctly legal elements. Attorneys are uniquely positioned to provide these services to their political clients, with the assistance of sub-vendors that support all aspects of the process from collecting records to analyzing the results. It is also exceedingly common for attorneys to hire consultants to provide expertise in the context of current or anticipated legal proceedings. Such expertise can help the attorney identify a new theory of the case. Take for instance a statistics expert who assists the legal team in a redistricting matter; the attorneys base their work in large part on the findings and analysis of the expert. In short, attorneys who serve political clients provide a wide range of services that require legal acumen and appropriately fall within the “legal services” category. The Commission erroneously fails to recognize these types of legal services in the Factual and Legal Analysis.

¹³ *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).

¹⁴ See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 (2008).

¹⁵ 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).

¹⁶ Douglas R. Richmond, *Watching over, Watching Out: Lawyers’ Responsibilities for Nonlawyer Assistants*, 61 U. Kan. L. Rev. 441, 482-83 (2012).

Federal Election Commission
 October 23, 2019
 Page 5

Here, the Firm retained Fusion GPS in furtherance of its representation of the Committees. These sub-vendor costs were part of the overall scope of the Firm's "legal and compliance consulting" and "legal services." Information regarding the specific work performed by Fusion GPS in furtherance of the Firm's legal services is protected under the attorney-client privilege and is also attorney work product, which explains the lack of details provided in the Committees' initial response to this complaint.¹⁷ The attorney-client privilege protects confidential communications from clients to their attorneys made for the purpose of securing legal advice or services.¹⁸ The privilege also protects communications from attorneys to their clients if the communications "rest on confidential information obtained from the client."¹⁹ The work product doctrine further protects materials, such as memoranda and correspondence, prepared by an attorney or others or at the direction of an attorney. In this case, throughout the 2016 election cycle, the Committees relied on the Firm for a wide range of legal services. Again, this is common for a political committee, who unlike a large corporation or business, does not typically have multiple lawyers for different departments or projects. The nature of the questions, projects and issues that the Committees chose to consult with the Firm is clearly protected by the attorney client privilege and work product doctrine.

However, without waiving any privilege, we can provide a description of the general scope of the services that Fusion GPS provided to the Firm. Fusion GPS's work consisted primarily of open source research, such as requesting and pulling publicly available records. Many of the sources Fusion GPS consulted were of a legal nature, including a significant amount of court filings. It is no secret that then-candidate Trump had a significant history of complex legal proceedings, filings, business transactions, and records, including many outside of the United States. The Firm used Fusion GPS to provide legal services to the Committees, including collecting records and analyzing those records. Fusion GPS also compiled information, gathered by its sub-contractors, related to allegations of wrongdoing against then-candidate Trump; the Firm used the research findings to inform the legal services it provided to the Committees. Other than the breadth and complexity of the project, there was nothing unusual about this arrangement or the way the Committees disclosed it on their FEC reports.

While the Commission's Factual and Legal Analysis suggests that it is in the best position to determine what services lawyers provide to their clients, that is ultimately a decision that clients make. The nature of the legal services that a client chooses to use a lawyer or law firm for has never been required by the Commission to be disclosed in the purpose description on a report, and for good reason—doing so would create a significant tension with the basic tenets of the attorney-

¹⁷ See, e.g., *FTC v. GlaxoSmithKline*, 294 F.3d 141 (D.D.C. 2002); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984); *Mead Data Cent., Inc. v. Department of the Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977).

¹⁸ *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984).

¹⁹ *Id.* at 99; see also *Mead Data Cent., Inc. v. Department of the Air Force*, 566 F.2d 242, 254 (D.C. Cir. 1977).

Federal Election Commission
 October 23, 2019
 Page 6

client privilege and client confidentiality. Perhaps recognizing this, the Commission has specifically determined that “legal services” is an appropriate purpose description. Commissioners have recognized that where a committee reports a purpose that is explicitly approved by the Commission, the purpose will not be deemed inadequate if the disbursed funds were used for various types of activities that are related to the reported purpose.²⁰ For instance, it was not inadequate for a committee to report the purpose of a disbursement as “door-to-door get-our-the-vote (GOTV),” when the committee used the funds for door-to-door GOTV and another type of GOTV activity.²¹ Drawing a parallel conclusion here, the Committees’ purpose reporting was adequate because the Committees used Commission-approved purposes (*i.e.*, “legal services” and “legal and compliance consulting”)²² to describe disbursements for legal services and *activities that furthered those legal services*. To determine that the Committees were required to describe each type of activity that contributed to the Firm’s provision of legal services would be a departure from FEC precedent.

The Commission contends that a “person reading the Committee’s disclosure reports could not have discerned that the Committee was disbursing for anything other than legal services by reading the name of the recipient (*i.e.*, Perkins Coie) together with the reporting purpose (*i.e.*, legal services or legal or compliance consulting.” This reflects a fundamental misunderstanding of the facts here: the Committees were disbursing funds for legal services, not for anything other than legal services. A person reading the Committee’s reports is, in fact, able to discern exactly what the Committees’ were disbursing funds for, as required by the Commission’s own regulations and guidance.

In one instance, the first time the DNC made a payment to the Firm for legal services that had been subcontracted to Fusion GPS, the DNC did report the purpose of the expenditure as “Research Consulting.” However, that description is also sufficient to convey what was actually being paid for under the Commission’s guidance.

As support for its reason to believe determination, the Commission cites to various cases in which it found reason to believe that respondents violated the Act by reporting inadequate or incorrect purposes.²³ But none of these cases are an appropriate reference for the issues presented here. The violations in the cited cases—where the purpose descriptions were either severely misleading or

²⁰ See Statement of Reasons of Commissioners Petersen, Hunter & Goodman at 5 (Dec. 5, 2016), MUR 6698 (United Ballot PAC).

²¹ See *id.*

²² Federal Election Commission, *Purposes of disbursements*, <https://www.fec.gov/help-candidates-and-committees/purposes-disbursement/>.

²³ See Factual and Legal Analysis at n. 39 (Aug. 9, 2019), MURs 7291 and 7449 (Hillary for America); Factual and Legal Analysis at n. 41 (Aug. 9, 2019), MURs 7291 and 7449 (Democratic National Committee).

Federal Election Commission
 October 23, 2019
 Page 7

missing altogether—are of a much different nature than the alleged insufficiency of reporting in the purpose description in the present matter.

First, the Commission cites to a case involving the Conservative Leadership Political Action Committee (“CLPAC”) as support for its determination in the present matter. CLPAC failed to properly report the purpose of *fifty-six* disbursements to vendors totaling over \$1.8 million.²⁴ This included failing to disclose any purpose for disbursements totaling \$177,603 and reporting an inadequate or incomplete purpose for disbursements totaling \$595,715.²⁵ CLPAC’s failures to even report a complete purpose for hundreds of thousands of dollars in disbursements is egregious. As explained above, in this matter the Commission is considering the specificity with which the Committees reported disbursements with respect to a single vendor, when that vendor used a single sub-vendor, and there is no allegation that the Committees simply failed to report purposes for any expenditures. Given the stark differences between these scenarios, it is inappropriate to use the CLPAC case as a comparison. If anything, the CLPAC case suggests the Commission should recognize that the present matter involves the purpose description for a *single sub-vendor* and dismiss this matter in light of the Committees’ explanation and demonstration that they provided full and accurate purpose descriptions.

In another case the Commission cites, the Commission found reason to believe the Dallas County Republican Party violated the Act by misreporting the purpose of *fifty* disbursements totaling \$215,261.²⁶ The respondent sometimes reported generic classifications from its software system as the purpose for the disbursement, including “professional fees” and “fundraising consultant.”²⁷ The respondent said that the reported “purposes were sometimes vague because the software the committee used did not allow enough space to provide detailed purposes.”²⁸ The FEC specifically lists “professional fees” as an *inadequate* purpose description and only considers certain fundraising specifications to be acceptable.²⁹ By contrast, in the present matter, the Commission has honed in on the Committees’ payments to legal counsel as they relate to the Firm’s hiring of a *single sub-vendor*. There is no allegation that the Committees’ FEC reports contain systemic or substantial purpose reporting deficiencies with respect to disbursements to multiple vendors, like in the Dallas County Republican Party case. The Committees used their best efforts to properly report the disbursements at issue; the same cannot be said for the Dallas County Republican Party, which made careless errors. As discussed above, Fusion GPS’s services in fact contributed to the legal services the Firm provided to the Committees, and so the Committees’ purpose reporting is

²⁴ Conciliation Agreement at 4 (Dec. 6, 2005), MUR 5635 (Conservative Leadership Political Action Committee).

²⁵ Report of Audit Division at 23 (Conservative Leadership Political Action Committee) (Nov. 29, 2004).

²⁶ Factual & Legal Analysis at 2-3 (July 9, 2009), MUR 6204 (Dallas County Republican Party).

²⁷ Report of the Audit Division at 13-14 (Dallas County Republican Party) (Nov. 19, 2008).

²⁸ *Id.* at 14.

²⁹ See Federal Election Commission, *Purposes of disbursements*, <https://www.fec.gov/help-candidates-and-committees/purposes-disbursement/>.

Federal Election Commission
 October 23, 2019
 Page 8

in compliance with the Act. This is sharply in contrast to the Dallas County Republican Party's excuse for misreporting the purpose of disbursements: that its software simply did not provide enough space for a proper description. In this case, Committees clearly were acting in good faith to comply with the Act.

In another case the Commission cites, the respondent Cranley for Congress misreported disbursements of approximately \$1.4 million. The committee's reporting discrepancies included missing or inadequate purposes.³⁰ Unlike in that case, the Committees disclosed a purpose for each and every disbursement to the Firm and there was no inadequacy or inaccuracy. Cranley for Congress does not appear to have challenged the Commission's findings regarding the misreported purposes for its disbursements; the committee in effect accepted that it made serious reporting errors. As such, it is inappropriate to analogize these cases.

The Commission's stated position is to "not automatically take any particular action' if a committee fails to describe sufficiently the purpose of a disclosed disbursement. Pursuing further action for such a violation is a 'rare circumstance.'" ³¹ The present case does not give rise to any rare circumstances that warrant the Commission's further investigation. The Committees have provided a sufficient explanation for their purpose reporting. Until now, the Commission has adhered to the standard that where a committee uses a Commission-approved purpose description which accurately captures the services provided by the vendor, the committee need not list out the specific tasks that furthered the provision of the service. To find otherwise in the present case would be a significant departure from precedent that would require a rulemaking, or at the very least, issuance of public guidance. The Commission must not seek to change the law through enforcement actions; such a practice "creates an acute risk of exposure to accusations of partisanship and selective prosecution."³² Because the Committees reported their disbursements to the Firm in accordance with standing Commission guidance, no further action is warranted here.

II. The Commission Should Reconsider all the Issues in MURs 7291 and 7449

If the Commission does not dismiss this matter based on the arguments presented herein, the Committees respectfully request the Commission to take no further action and reconsider the initial reason to believe finding in MURs 7291 and 7449 when the Commission has a quorum. The

³⁰ See Report of the Audit Division at 12-13 (Cranley for Congress) (Apr. 23, 2008); see also Conciliation Agreement at 6 (May 18, 2009), MUR 6134 (Cranley for Congress).

³¹ *Id.* at 4-5 (citing *Statement of Policy: "Purpose of Disbursement" Entries for Filings With the Commission*, 72 Fed. Reg. 887).

³² See, e.g., Statement of Reasons of Vice Chairman McGahn and Commissioner Hunter at 6 (Sept. 18, 2013), MUR 6462 (Donald J. Trump, et al.); Statement of Reasons of Vice Chairman McGahn and Commissioner Hunter at 14 (July 25, 2013), MUR 6540 (Rick Santorum for President) (standing for the proposition that applying standards contrary to precedent in enforcement actions is improper selective prosecution).

Federal Election Commission
October 23, 2019
Page 9

Commission made its reason to believe finding based on a Factual and Legal Analysis that contains material factual and legal errors, as explained above. We believe there is a strong likelihood that a reconstituted Commission would not agree that there is reason to believe the Committees violated the Act or the Commission Regulations by misreporting the purpose of these expenditures based on a corrected analysis. Even if it wished to proceed, the Commission is unable to make any further determinations at this time.³³

Additionally, it is inappropriate to move forward with the resolution of just one of the multiple issues raised in the complaints that gave rise to MURs 7291 and 7449. In other words, neither the Commission nor the Committees can fully address the issues in these matters if the issues are considered on a piecemeal basis.³⁴ Accordingly, the Commission should reconsider all the issues as part of one comprehensive package when it regains a quorum.

CONCLUSION

As discussed herein, there is insufficient evidence to support the Commission's determination that there is reason to believe the Committees violated the Act and Commission Regulations by misreporting the purpose of funds paid to Perkins Coie LLP for legal services. The Commission made this determination based on a flawed Factual and Legal Analysis. The Commission should promptly dismiss this matter or revise the analysis and reconsider the issues raised in the complaints when it has regained a quorum.

Very truly yours,



Marc E. Elias
Graham M. Wilson

³³ See 52 U.S.C. § 30109(a)(2), (a)(4)(A)(i) (requiring 4 votes to make a reason to believe or probable cause determination).

³⁴ For instance, the Commission has not provided a finding regarding whether there is reason to believe the Committees violated the Act by failing to accurately disclose the payees of the disbursements at issue. See Factual and Legal Analysis at 8 (Aug. 9, 2019), MURs 7291 and 7449 (Hillary for America); Factual and Legal Analysis at 9 (Aug. 9, 2019), MURs 7291 and 7449 (Democratic National Committee).