



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 27, 2021

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RE: MUR 7454
Highway 76 LLC

Dear Mr. Toner:

On August 8, 2018, the Federal Election Commission (the “Commission”) notified your client, Highway 76 LLC (“Highway 76”), of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended (the “Act”), and the Commission’s regulations. A copy of the complaint was provided to your client at that time. After reviewing the allegations contained in the complaint, your client’s response, and publicly available information, the Commission, on May 20, 2021, found reason to believe that Highway 76 violated 11 C.F.R. § 110.1(g)(5). The Factual and Legal Analysis, which formed a basis for the Commission’s finding and was approved on July 26, 2021, is enclosed for your information.

In order to expedite the resolution of this matter, the Commission has authorized the Office of the General Counsel to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Pre-probable cause conciliation is not mandated by the Act or the Commission’s regulations, but is a voluntary step in the enforcement process that the Commission is offering as a way to resolve this matter at an early stage and without the need for briefing the issue of whether or not the Commission should find probable cause to believe that your client violated the law.

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Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

If your client is interested in engaging in pre-probable cause conciliation, please contact Saurav Ghosh, the attorney assigned to this matter, at (202) 694-1643, or by email at sghosh@fec.gov, within seven days of receipt of this letter. During conciliation, you may submit any factual or legal materials that you believe are relevant to the resolution of this matter. Because the Commission only enters into pre-probable cause conciliation in matters that it believes have a reasonable opportunity for settlement, we may proceed to the next step in the enforcement process if a mutually acceptable conciliation agreement cannot be reached within sixty days. *See* 52 U.S.C. § 30109(a), 11 C.F.R. Part 111 (Subpart A). Conversely, if your client is not interested in pre-probable cause conciliation, the Commission may conduct formal discovery in this matter or proceed to the next step in the enforcement process. Please note that once the Commission enters the next step in the enforcement process, it may decline to engage in further settlement discussions until after making a probable cause finding.

Pre-probable cause conciliation, extensions of time, and other enforcement procedures and options are discussed more comprehensively in the Commission’s “Guidebook for Complainants and Respondents on the FEC Enforcement Process,” which is available on the Commission’s website at <http://www.fec.gov/respondent.guide.pdf>.

Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.¹

This matter will remain confidential in accordance with 52 U.S.C. § 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

We look forward to your response.

On behalf of the Commission,



Shana M. Broussard
Chair

Enclosures

Factual and Legal Analysis

¹ The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Highway 76 LLC

MUR 7454

I. INTRODUCTION

6 This matter was generated by a complaint filed with the Federal Election Commission
7 (“Commission”) by the Campaign Legal Center. *See* 52 U.S.C. § 30109(a)(1). The Complaint
8 alleges that Highway 76 LLC (“Highway 76”), violated the Federal Election Campaign Act of
9 1971, as amended (the “Act”), in connection with a \$100,000 contribution to an independent
10 expenditure-only political committee (“IEOPC”), DefendArizona and Benjamin Ottenhoff in his
11 official capacity as treasurer (“DefendArizona”). The Complaint alleges that the LLC served as
12 a conduit for unknown persons to make contributions in the name of another to DefendArizona,
13 and that Highway 76 failed to register and report as a political committee after making the
14 reported contribution to DefendArizona.

15 Highway 76 denies these allegations but acknowledges that the contribution should have
16 been attributed differently: Highway 76 states that it informed DefendArizona who the LLC's
17 ultimate owners were before making the contribution, but never received a request for additional
18 information as to how the contribution should be attributed. Highway 76 received a full refund
19 of its contribution when it did not provide DefendArizona with any information as to the proper
20 attribution of the contribution.

21 For the reasons explained below, the Commission finds reason to believe that Highway
22 76 violated 11 C.F.R. § 110.1(g)(5) by failing to provide required attribution information when

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1 making its contribution to DefendArizona. The Commission exercises its prosecutorial
 2 discretion to dismiss the remaining allegations.¹

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 **A. Background**

5 DefendArizona is an IEOPC that registered with the Commission on February 1, 2018.²
 6 DefendArizona made \$1.9 million in independent expenditures supporting Martha McSally, a
 7 2018 candidate for the U.S. Senate in Arizona, and made just over \$20 million in independent
 8 expenditures opposing McSally's primary and general election opponents.³ DefendArizona
 9 reported receiving a \$100,000 contribution from Highway 76 on June 30, 2018.⁴ Following the
 10 receipt of the Complaint in this matter, on August 29, 2018, DefendArizona reported refunding
 11 the contribution from Highway 76 but did not amend its disclosure reports with respect to the
 12 attribution of the Highway 76 contribution.⁵

13 Highway 76 was organized as an LLC in Delaware on May 23, 2018, and its registered
 14 agent is the Corporation Trust Company, located at 1209 Orange Street, Wilmington, DE.⁶
 15 According to the sworn statement of its manager, Michael Bidwell, Highways 76 is a disregarded
 16 entity for federal tax purposes and has a single member, which is another tax-disregarded single-

¹ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

² DefendArizona Statement of Org. (Feb. 1, 2018).

³ DefendArizona, Spending, 2017-2018, available at <https://www.fec.gov/data/committee/C00668301/?tab=spending&cycle=2018>.

⁴ DefendArizona July 2018 Quarterly Report at 6, 7 (July 15, 2018).

⁵ DefendArizona Oct. 2018 Quarterly Report at 35 (Oct. 15, 2018).

⁶ Delaware Div. of Corps. Entity Search, "Highway 76 LLC."

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1 member LLC (“LLC 2”).⁷ LLC 2’s single member is, in turn, a third LLC (“LLC 3”) that is
 2 taxed as a partnership and has two members, both of which are trusts: the 2005-1 Bidwell
 3 Family Trust (“Trust 1”) and the 2005-2 Bidwell Family Trust (“Trust 2”).⁸ Michael Bidwell is
 4 a trustee of both trusts and is the manager of LLC 1 and LLC 2.⁹ Highway 76 states that as part
 5 of a broader business strategy by the Bidwell family, which the Response notes owns many
 6 businesses and investments, Highway 76 was “one of three LLCs created in 2018 for potential
 7 business transactions.”¹⁰

8 After a consultant for DefendArizona approached Bidwell about making a contribution to
 9 the IEOPC, Bidwell authorized Highway 76 to make a \$100,000 contribution to DefendArizona
 10 on June 30, 2018, approximately five weeks after its formation.¹¹ Highway 76 states that “for
 11 [internal] accounting purposes, Highway 76’s contribution was attributed to its sole member, and
 12 ultimately to the intermediate holding companies and two irrevocable family trusts in proportion
 13 to their ownership shares.”¹² That attribution was not, however, reflected in DefendArizona’s
 14 disclosure reports filed with the Commission. Highway 76 states that when making the
 15 contribution, it “conveyed” that it “was one of [the Bidwell] family’s businesses[,]” but that
 16 DefendArizona “did not immediately inquire about Highway 76’s tax status or request attribution
 17 information.”¹³

⁷ Highway 76 Resp. at 2 n.4 (Oct. 4, 2018); *id.*, Attach. 1 ¶¶ 3-4. The Response does not identify LLC 2.

⁸ Highway 76 Resp. at 2 n.4; *id.*, Attach. 1 ¶¶ 3-4. The Response does not identify LLC 3.

⁹ Highway 76 Resp. at 2 n.4; *id.*, Attach. 1 ¶¶ 3-4.

¹⁰ Highway 76 Resp. at 2-3; *id.*, Attach. 1 ¶¶ 2, 6.

¹¹ Highway 76 Resp. at 3-4. *id.*, Attach. 1 ¶ 9.

¹² Highway 76 Resp. at 4; *id.*, Attach. 1 ¶ 10.

¹³ Highway 76 Resp. at 4; *id.*, Attach. 1 ¶ 11.

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1 The Complaint alleges that “the only information available” about Highway 76 “is that
2 [it] was incorporated in Delaware and made a \$100,000 contribution to DefendArizona
3 approximately five weeks after being created[,]” and that the public record thus “provide[s] no
4 indication that . . . Highway 76 had accrued sufficient assets, investment earnings, business
5 revenues, or bona fide capital investments to make [a] contribution[] without an infusion of
6 funds provided to [it] for that purpose.”¹⁴ On this basis, the Complaint alleges that the funds
7 used to make the contribution attributed to Highway 76 came from other unknown persons, and
8 that the contribution was, in fact, a contribution in the name of another.

9 The Complaint also alleges that “[t]here is no public record” of Highway 76 “conducting
10 any significant activities other than making contributions since [its] formation.”¹⁵ As such, the
11 Complaint alleges that Highway 76 met the legal standard for political committee status, and
12 therefore violated the Act by failing to register and report as a political committee.

B. Legal Analysis

1. Attribution of LLC Contributions

- i. LLCs Must Provide Accurate Attribution Information for Contributions, and Political Committees Must Accurately Disclose LLC Contributions

Under the Act, all political committees, including IEOPCs, are required to file periodic disclosure reports with the Commission which accurately report all contributions received and disbursements made.¹⁶ Contributions by an LLC that is disregarded for tax purposes and does not have a single natural-person member are treated as partnership contributions, which must be

¹⁴ Compl. at 6 (Aug. 3, 2018).

15 *Id.* at 9.

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

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1 attributed to both the entity and to each of its members.¹⁷ Furthermore, when such an LLC
 2 makes a contribution, it must affirm to the recipient, at the time it makes the contribution, that it
 3 is eligible to make a contribution and indicate how the contribution is to be attributed.¹⁸

4 The Commission’s regulations concerning the attribution of LLC contributions apply on
 5 their face to all LLC contributions irrespective of recipient.¹⁹ These regulations uphold the Act’s
 6 reporting framework and inhibit attempts to circumvent the Act’s contribution source
 7 prohibitions and amount limitations, including prohibitions applicable to IEOPCs.²⁰ The
 8 Commission has recognized that LLCs must affirmatively provide attribution information when
 9 making political contributions so that the recipient committees can accurately disclose those
 10 contributions.²¹

¹⁷ 11 C.F.R. §§ 110.1(e), (g)(2).

¹⁸ 11 C.F.R. § 110.1(g)(5).

¹⁹ See Statement of Reasons of Chair Caroline C. Hunter and Comm’r Matthew S. Petersen, MUR 6969 (MMWP12, LLC, *et al.*) and MURs 7031 and 7034 (Children of Israel, LLC, *et al.*) (Sept. 13, 2018) at 2, 5 (stating that “the Commission’s existing attribution regulations at 11 C.F.R. § 110.1(g) apply to the reporting” of contributions by LLCs that are not taxed as corporations and that, “[b]y operation of the Commission’s attribution rules, MMWP12’s contributions should have been attributed to K2M and each of its owners, Mark and Megan Kvamme. Similarly, Children of Israel’s contributions should have been attributed to Saul Fox.”); Statement of Reasons of Vice Chair Ellen L. Weintraub, MUR 6969 (MMWP12, LLC, *et al.*) and MURs 7031 and 7034 (Children of Israel, LLC, *et al.*) (July 13, 2018) at 2 (“Under Commission regulations, contributions from LLCs that are disregarded entities are not considered corporate contributions, but partnership contributions.”) (citing 11 C.F.R. §§ 110.1(g)(2) and (4)).

²⁰ See 52 U.S.C. §§ 30116(a)(1), 30118(a); Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64 Fed. Reg. 37,397, 37,398 – 37,399 (July 12, 1999) (“LLC E&J”) (discussing role of LLC attribution rules in identifying prohibited contributions from foreign national or government contractor sources, concerns that apply to all LLC contributions, including contributions to IEOPCs).

²¹ LLC E&J at 37,399 (“The Commission further notes that the recipient committee would have no way of knowing how to attribute a contribution made by an eligible multi-member or single member LLC, unless that information was provided.”).

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ii. Highway 76 Did Not Provide Required Attribution Information

2 Highway 76 does not appear to have provided DefendArizona with the required
3 attribution information. Highway 76 is a tax-disregarded LLC whose single member is another
4 tax-disregarded LLC (LLC 2), whose single member in turn is an LLC taxed as a partnership
5 (LLC 3) that has two living trusts as its members, Trust 1 and Trust 2. Under Commission
6 regulations, Highway 76's contribution must therefore be attributed to both Highway 76 and
7 LLC 2; LLC 2's contributions must in turn be attributed to LLC 2 and LLC 3; and LLC 3's
8 contributions must in turn be attributed to LLC 3 and its partners, Trust 1 and Trust 2, in
9 proportion to the partners' ownership of LLC 3.²² The two trusts must each, in turn, attribute
10 their share of the contribution to their trustees as the true contributors, per the trustees'
11 ownership share of the trusts.²³

12 In short, any Highway 76 contribution must be attributed to each of the intermediary
13 holding companies and to the trustees of Trust 1 and Trust 2, which did not happen; Highway
14 76's \$100,000 contribution to DefendArizona was attributed only to Highway 76. In its
15 Response, Highway 76's manager, Michael Bidwell, states that he "conveyed to
16 DefendArizona's local fundraising consultant that Highway 76 was one of the family's
17 businesses."²⁴ That information falls short of Highway 76's obligations under 11 C.F.R.

22 11 C.F.R. §§ 110.1(e), (g)(2).

²³ Advisory Op. 1999-19 at 2 (Chris Cohen for Congress) (Aug. 25, 1999) (“The Commission concludes that a contribution made from your *inter vivos* trust to the Committee is permissible and would be considered a contribution from you, rather than from the trust.”).

²⁴ Highway 76 Resp. at 4; *id.*, Attach. 1 ¶ 11.

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1 § 110.1(g)(5).²⁵ The Commission therefore finds reason to believe Highway 76 violated

2 11 C.F.R. § 110.1(g)(5).

3 2. Contributions in the Name of Another

4 i. No Person May Furnish Another With Funds to Make a
5 Contribution

6 The Act provides that a contribution includes “any gift, subscription, loan, advance, or
7 deposit of money or anything of value made by any person for the purpose of influencing any
8 election for Federal office.”²⁶ The term “person” for purposes of the Act and Commission
9 regulations includes partnerships, corporations, and “any other organization or group of
10 persons.”²⁷ The Act prohibits a person from making a contribution in the name of another
11 person, knowingly permitting his or her name to be used to effect such a contribution, or
12 knowingly accepting such a contribution.²⁸ The Commission has included in its regulations
13 illustrations of activities that constitute making a contribution in the name of another:

14 (i) Giving money or anything of value, all or part of which was provided to
15 the contributor by another person (the true contributor) without disclosing
16 the source of money or the thing of value to the recipient candidate or
17 committee at the time the contribution is made; or

18 (ii) Making a contribution of money or anything of value and attributing as the
19 source of the money or thing of value another person when in fact the
20 contributor is the source.²⁹

²⁵ Highway 76 did not provide the required attribution information even after receiving notice of the Complaint. In its response, Highway 76 states that Bidwell and DefendArizona’s fundraising consultant “discussed the contribution after Highway 76 received a copy of the Complaint, but DefendArizona did not send a written request for information that Mr. Bidwell could refer to counsel.” *Id.*

²⁶ 52 U.S.C. § 30101(8)(A).

²⁷ *Id.* § 30101(11); 11 C.F.R. § 100.10.

²⁸ 52 U.S.C. § 30122.

²⁹ 11 C.F.R. § 110.4(b)(2)(i)–(ii).

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1 Both the Act and the Commission's implementing regulations provide that a person who
 2 furnishes another person with funds for the purpose of contributing to a candidate or committee
 3 "makes" the resulting contribution.³⁰ This is true whether funds are advanced to another person
 4 to make a contribution in that person's name or promised as reimbursement of a solicited
 5 contribution.³¹ Because the concern of the law is the true source from which a contribution to a
 6 candidate or committee originates, we look to the structure of the transaction itself and the
 7 arrangement between the parties to determine who, in fact, "made" a given contribution.

8 ii. Highway 76

9 The Complaint alleges that Highway 76 was used to make a contribution in the name of
 10 another based on the fact that it purported to make a \$100,000 contribution in its own name
 11 approximately five weeks after being formed, and on the lack of public information regarding
 12 Highway 76's activities or evidence indicating that Highway 76 could make such a contribution
 13 without an infusion of funds provided to it for that purpose. In its Response, Highway 76
 14 provided a sworn statement from its manager, Michael Bidwell, stating that he informed
 15 DefendArizona that the LLC was owned by the Bidwell family, and that it was "one of three
 16 LLCs created in 2018 in preparation for potential business transactions."³² Mr. Bidwell's
 17 affidavit states that by mid-2018, the business deals that it was created to facilitate "had

³⁰ See *Boender*, 649 F.3d at 660 (holding that to determine who made a contribution "we consider the giver to be the *source* of the gift, not any intermediary who simply conveys the gift from the donor to the donee.") (emphasis added)); *O'Donnell*, 608 F.3d at 550; *Goland v. United States*, 903 F.2d 1247, 1251 (9th Cir. 1990) ("The Act prohibits the use of 'conduits' to circumvent . . . [the Act's reporting] restrictions." (quoting then-Section 441f)).

³¹ *O'Donnell*, 608 F.3d at 555. Moreover, the "key issue . . . is the *source* of the funds" and, therefore, the legal status of the funds when conveyed from a conduit to the ultimate recipient is "irrelevant to a determination of who 'made' the contribution for the purposes of [Section 30122]." *United States v. Whittemore*, 776 F.3d 1074, 1080 (9th Cir. 2015) (holding that defendant's "unconditional gifts" to relatives and employees, along with suggestion they contribute the funds to a specific political committee, violated Section 30122 because the source of the funds remained the individual who provided them to the putative contributors).

³² Highway 76, Attach. 1 ¶ 6.

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1 progressed to the point where brokers, attorneys, and other professional advisors were actively
 2 working on deals and discussing potential terms and conditions with third parties” and that
 3 “[d]etailed proposals have been made” even if “definitive agreements have not yet been
 4 reached[.]”³³

5 In light of the LLC’s acknowledgement that the contribution was improperly reported,
 6 DefendArizona’s reported refund of the contribution, and the Commission’s reason to believe
 7 finding regarding Highway 76’s violation of the LLC attribution requirements, the Commission
 8 exercises its prosecutorial discretion to dismiss the allegation that Highway 76 violated
 9 52 U.S.C. § 30122.³⁴

10 3. Political Committee Status

11 The Act defines a political committee as “any committee, club, association, or other
 12 group of persons” that receives aggregate contributions or makes aggregate expenditures in
 13 excess of \$1,000 during a calendar year.³⁵ Notwithstanding the threshold for contributions and
 14 expenditures, an organization will be considered a political committee only if its “major purpose
 15 is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate).”³⁶ Political
 16 committees are required to register with the Commission, meet organizational and recordkeeping
 17 requirements, and file periodic disclosure reports.³⁷

³³ Highway 76 Resp. at 3, *id.*, Attach. 1 ¶¶ 6-7.

³⁴ *Heckler*, 470 U.S. at 838.

³⁵ 52 U.S.C. § 30101(4)(A).

³⁶ Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007); *see Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (per curiam); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

³⁷ *See* 52 U.S.C. §§ 30102, 30103, 30104.

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1 The Complaint alleges that Highway 76 was required to register and report as a political
2 committee. The available information regarding its “major purpose” is unclear because the
3 record does not reflect how its federal campaign activity — making a \$100,000 contribution —
4 compares to its other activity. Highway 76 asserts that it was one of several LLCs created for
5 potential Bidwell-family business transactions that were being negotiated in 2018. On that basis,
6 Highway 76 contends that it was “organized and operated for commercial purposes — not for
7 purposes of electing or defeating federal candidates.”³⁸

8 With respect to its past activity, Highway 76’s complex ownership structure has also been
9 clarified in its Response to the Complaint in this matter, and it will become part of the public
10 record when the case file is made public. As for its future activity, the Commission’s reason to
11 believe finding regarding Highway 76’s affirmative obligations under 11 C.F.R. § 110.1(g)(5)
12 provides for the disclosure of any future political contributions, since under that rule, Highway
13 76 must provide the appropriate attribution information to the recipients of any future
14 contributions it makes, as outlined above.³⁹ In consideration of the foregoing, the Commission
15 exercises its prosecutorial discretion to dismiss the allegation that Highway 76 violated the Act’s
16 registration and reporting requirements for political committees.⁴⁰

³⁸ Highway 76 Resp. at 11.

³⁹ *See supra* Section II.B.1; *see also* Advisory Op. 2009-02 at 3 (True Patriot Network, LLC) (Apr. 17, 2009) (concluding that “expenditures by a single member LLC, like contributions, are attributable solely to the LLC’s single member”).

⁴⁰ *Heckler*, 470 U.S. at 838.