



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) MUR 7454
Blue Magnolia Investments, LLC, *et al.*)
)

STATEMENT OF REASONS OF CHAIRMAN ALLEN DICKERSON

In this Matter, our Office of General Counsel (“OGC”) recommended that the Federal Election Commission (“Commission”) find reason to believe that DefendArizona and Benjamin Ottenhoff in his official capacity as treasurer (“DefendArizona”) violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 110.1(g)(2) and (4) by failing to properly attribute LLC contributions, and that Blue Magnolia Investments, LLC (“Blue Magnolia”) and Highway 76, LLC (“Highway 76”) violated 11 C.F.R. § 110.1(g)(5) by failing to provide the required attribution information when making contributions. OGC also recommended that the Commission approve pre-probable cause conciliation with DefendArizona and both LLCs as to these violations.¹

When the Commission considered OGC’s recommendations in executive session on May 20, 2021, we voted to approve all of the recommendations, subject to an instruction not to seek a monetary penalty when entering into pre-probable cause conciliation with the Respondents.² The Commission reasoned that it was appropriate “to depart from the civil penalty that it would normally seek for the violation at issue” in part because of “a lack of clarity by the Commission concerning the application of 11 C.F.R. § 110.1(g)(5) in these circumstances.”³ I write separately to further discuss this cryptic remark.

I. FACTUAL BACKGROUND

The Complaint in this Matter alleges that two LLCs, Blue Magnolia and Highway 76, violated the Federal Election Campaign Act of 1971, as amended (the “Act”), in connection with two separate \$100,000 contributions to an independent expenditure-only political committee

¹ First Gen’l Counsel’s Report at 22. The Complainant also alleged that Respondents violated 52 U.S.C. § 30122 by knowingly contravening the Act’s prohibition on making contributions in the name of another, and violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register as political committees and file disclosure reports with the Commission. Compl.at 2. Because OGC did not recommend that we find reason to believe with respect to those allegations, they are not discussed here.

² Certification (May 20, 2021), MUR 7454 (Blue Magnolia Investments, LLC, *et al.*).

³ Conciliation Agreement at 3, MUR 7454 (Blue Magnolia Investments, LLC, *et al.*).

(“IEOPC”), DefendArizona.⁴ The Complaint alleges that the LLCs served as conduits for unknown persons to make contributions in the name of another to DefendArizona.⁵

Both LLCs acknowledge that the contributions should have been attributed differently. Blue Magnolia contends that “the incorrect reporting of the contribution was an error, and it asserts that after receiving the Complaint, it requested that DefendArizona amend its disclosure report to attribute the contribution to its single member.”⁶ Highway 76 argues that “it informed DefendArizona who the LLC’s ultimate owners were before making the contribution, but never received a request for additional information as to how the contribution should be attributed.”⁷

Blue Magnolia’s contribution was later attributed to its single member in an amended disclosure report,⁸ and Highway 76 received a full refund of its contribution.⁹ DefendArizona asserts that it had no knowledge that either contribution came from any source other than the LLCs it identified on its disclosure reports.¹⁰

II. LEGAL ANALYSIS

The Act requires all political committees, including IEOPCs, to file periodic disclosure reports disclosing all contributions received and disbursements made.¹¹ Contributions by an LLC that is a tax-disregarded entity and does not have a single natural-person member are treated as partnership contributions and must be attributed to both the entity and to each of its members.¹² Contributions by an LLC that has a single natural-person member and is a tax-disregarded entity must be attributed only to the LLC’s single natural-person member.¹³ When either type of LLC makes a contribution, it must affirm to the recipient—at the time it makes the contribution—that it is eligible to make a contribution and indicate how the contribution is to be attributed.¹⁴

⁴ Compl.at 1-4.

⁵ *See id.*

⁶ First Gen’l Counsel’s Report at 2.

⁷ *Id.*

⁸ DefendArizona Amend. July 2018 Quarterly Report at 6 (Sept. 11, 2018).

⁹ DefendArizona Oct. 2018 Quarterly Report at 35 (Oct. 15, 2018).

¹⁰ *See generally* DefendArizona Resp. at 1-2.

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

¹² 11 C.F.R. § 110.1(e), (g)(2).

¹³ 11 C.F.R. § 110.1(g)(4).

¹⁴ 11 C.F.R. § 110.1(g)(5).

The Commission's regulations concerning the attribution of LLC contributions apply on their face to all LLC contributions irrespective of the recipient.¹⁵ Therefore, "LLCs must affirmatively provide attribution information when making political contributions so that the recipient committees, including IEOPCs, can accurately disclose those contributions to the public."¹⁶

Here, neither Blue Magnolia nor Highway 76 provided the required attribution information when making contributions to DefendArizona. As an LLC that asserts it has not elected corporate federal tax treatment and has a single natural person member, Blue Magnolia's \$100,000 contribution to DefendArizona should have been attributed only to its single member, Van Tuyt.¹⁷ However, DefendArizona attributed the contribution only to Blue Magnolia.¹⁸ Blue Magnolia acknowledges that the initial disclosure "was done in error," but does not claim that it provided the required attribution information when it made the contribution.¹⁹

Highway 76 also failed to provide DefendArizona with the required attribution information. Highway 76 is "a tax-disregarded LLC whose single member is another tax-disregarded LLC (LLC 2), whose single member in turn is an LLC taxed as a partnership (LLC 3) that has two living trusts as its members, Trust 1 and Trust 2."²⁰ Accordingly, "Highway 76's contribution must therefore be attributed to both Highway 76 and LLC 2; LLC 2's contributions must in turn be attributed to LLC 2 and LLC 3; and LLC 3's contributions must in turn be attributed to LLC 3 and its partners, Trust 1 and Trust 2, in proportion to the partners' ownership of LLC 3."²¹ The two trusts must each, in turn, attribute their share of the contribution to their trustees as the true contributors, per the trustees' ownership share of the trusts."²² Put simply, Highway 76's contribution should have been attributed to each of the intermediary holding companies and to

¹⁵ See Statement of Reasons of Chair Caroline C. Hunter and Comm'r Matthew S. Petersen, MUR 6969 (MMWP12 LLC, *et al.*) and MURs 7031 & 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 & 7034 (Children of Israel, *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), (4)).

¹⁶ First Gen'l Counsel's Report at 8 (citing Treatment of Limited Liability Companies Under the Federal Election Campaign Act, 64 Fed. Reg 37,399 (July 12, 1999) ("LLC E&J") ("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.")).

¹⁷ Blue Magnolia Resp. at 2 (citing 11 C.F.R. § 110.1(g)(4)).

¹⁸ DefendArizona July 2018 Quarterly Report at 6, 7 (July 15, 2018).

¹⁹ Blue Magnolia Resp. at 1.

²⁰ First Gen'l Counsel's Report at 9.

²¹ *Id.* (citing 11 C.F.R. §§ 110.1(e), (g)(2)).

²² *Id.* at 9-10 (citing Advisory Op. 1999-19 at 2 (Chris Cohen for Congress) (Aug. 25, 1999)).

the trustees of Trust 1 and Trust 2. Highway 76 responds that its manager, Michael Bidwell, “conveyed to DefendArizona’s local fundraising consultant that Highway 76 was one of the family’s businesses.”²³

Both LLCs in this Matter fell short of their respective obligations: Blue Magnolia failed to provide any attribution information at the time it made the contribution and Highway 76 failed to provide accurate and complete attribution information. Accordingly, both LLCs violated 11 C.F.R. § 110.1(g)(5).

DefendArizona presents a harder problem. In its response, it asserts that “neither [contribution] appeared to be improper on its face” and that it “had no information suggesting otherwise.”²⁴ However, the absence of information on the face of a contribution is not, on these facts, sufficient to absolve DefendArizona.²⁵ DefendArizona did not take *any* affirmative step to ensure it was reporting accurate LLC contributor information. Under 11 C.F.R § 104.7(a), IEOPC reporting errors are excused where a committee “shows that best efforts have been used to obtain, maintain and submit the information required by the Act.”²⁶ The regulation further specifies that if any required contributor information is missing, the treasurer must make at least one effort 30 days after the receipt of the contribution to obtain the missing information.²⁷

Here, DefendArizona had an obligation to obtain, maintain and submit accurate LLC attribution information for the two contributions at issue, and the LLCs had an obligation to provide that information. Although neither contribution appeared to be improper on its face, the fact a contribution appears lawful does not mean a recipient committee has received the attribution information required to properly report that lawful contribution. Accordingly, DefendArizona was required to either accurately attribute these contributions or, pursuant to our best-efforts safe harbor, make at least one effort 30 days after the receipt of each contribution to obtain the information the LLCs failed to provide. Failing to follow either course, DefendArizona violated 52 U.S.C. § 30104(b) and 11 C.F.R. §§ 110.1(g)(2) and (4).

A. Although Respondents Violated the Act, the Commission Did Not Seek A Monetary Penalty Due to A Lack of Clarity Concerning the LLC Attribution Rules.

Notwithstanding my conclusion that DefendArizona failed to properly attribute the LLC contributions, and that Blue Magnolia and Highway 76 failed to provide the required attribution information when making their contributions, due process counseled against seeking a monetary penalty.

²³ Highway 76 Resp. at 4.

²⁴ DefendArizona Resp. at 3.

²⁵ See Commission Factual and Legal Analysis at FN18, MUR 7454 (DefendArizona).

²⁶ 11 C.F.R § 104.7(a).

²⁷ 11 C.F.R. § 104.7(b)(2).

A September 13, 2018, statement of controlling commissioners reasoned that although the LLC attribution rules apply to contributions to IEOPCs, the Commission should exercise its prosecutorial discretion to dismiss such matters because “[p]roceeding in enforcement actions against respondents would be unfair to them, chill speech, and ultimately constitute an ineffective use of Commission resources, given the likelihood that courts would look unfavorably upon enforcement actions here in light of the due process, notice, and First Amendment concerns.”²⁸

The D.C. Circuit has long held that the reasoning from a statement issued by controlling commissioners constitutes the reasoning of the Commission “since their rationale necessarily states the agency’s reasons for acting as it did.”²⁹ Thus, the September 2018 statement served as notice to the public.

The conduct alleged in the Complaint here involves two contributions made to DefendArizona: one from Blue Magnolia on May 30, 2018, and another from Highway 76 on June 30, 2018.³⁰ Both contributions were made and received a few months *before* final notice was provided. Therefore, even though violations occurred, instructing OGC not to seek a monetary penalty was warranted and consistent with the reasoning of the Commission.

B. Existing Commission Regulations Already Require That LLCs Provide the Required Attribution Information When Making a Contribution and That IEOPCs Properly Attribute These Contributions.

At the heart of these matters is a simple question: where the Act or Commission regulations speak of “committees,” does that term encompass new vehicles, such as IEOPCs or Hybrid Committees, that arise from judicial decisions? In my view, the answer is “yes.” And this is for an equally simple reason: a committee, like an IEOPC, is not some new thing under the sun. It is simply a committee, created and regulated pursuant to FECA, that has chosen to exercise certain First Amendment rights acknowledged by the courts. The committee remains subject to existing rules except insofar as those rules conflict with a course of conduct blessed by the judiciary.

Accordingly, and as previously discussed, 11 C.F.R. § 110.1(g)(5) requires that when an LLC makes a contribution, it must affirm to the recipient—at the time it makes the contribution—that it is eligible to do so and indicate how the contribution is to be attributed. Because the Commission is in agreement that its regulations concerning the attribution of LLC contributions apply to all LLC contributions, there should no longer be any confusion concerning the application of this provision.

Also discussed above are the requirements for political committees to make best efforts to obtain, maintain, and submit proper attribution information under 11 C.F.R. § 104.7. These

²⁸ Statement of Reasons of Chair Caroline C. Hunter and Comm’r Matthew S. Petersen, MUR 6969 (MMWP12 LLC, *et al.*) and MURs 7031 & 7034 (Children of Israel, LLC, *et al.*) (Sept. 13, 2018) at 8.

²⁹ See *Democratic Cong. Campaign Comm. v. Fed. Election Comm’n*, 931 F.2d 1131,1134-35 (D.C. Cir. 1987).

³⁰ Compl.at 3-4.

requirements are in addition to regulations requiring a political committee to ascertain whether contributions received exceed contribution limitations and to examine all contributions received for evidence of illegality.³¹ More specifically, political committees must determine if contributions “present genuine questions” as to whether they were made by corporations, labor organizations, foreign nationals, or Federal contractors.³² Because IEOPCs may accept contributions in unlimited amounts from individuals, corporations, and unions, only the prohibitions pertaining to foreign nationals and Federal contractors are applicable to the facts presented in this Matter.³³ Indeed, these regulatory requirements are, in many cases, the Commission’s principal tools for protecting IEOPCs from serving as unwitting conduits for foreign contributions.

In short, Commission regulations already provide the regulated community with adequate guidelines in circumstances like these. 11 C.F.R. § 110.1(g)(5) requires LLCs to provide information to the recipient committee as to how the contribution is to be attributed and affirm to the recipient committee that it is eligible to make the contribution. 11 C.F.R. §§ 103.3(b) and 104.7(a) require political committees, including IEOPCs, to examine all contributions for evidence of illegality and to exercise best efforts to collect and report all required attribution information.

III. CONCLUSION

*Citizens United*³⁴ and *SpeechNow*³⁵ were decided more than a decade ago. To be sure, the Commission should have immediately and publicly clarified the continuing application of its regulations to IEOPCs and—where conflicts existed between the First Amendment liberties acknowledged in those cases and existing law—successfully undertaken a rulemaking to conform to the courts’ orders. The Commission proved unable to do so at the time. In fact, it took nearly five years to successfully undertake the basic ministerial act of updating Commission regulations to strike unconstitutional provisions.³⁶

None of that changes the law. My predecessors were correct to err on the side of caution where changed circumstances and heated rhetoric could easily lead political speakers, especially the unsophisticated, astray. We continued that course here, despite the significant sums at issue. But as I have explained above, for better or worse, the obligations of IEOPCs and LLCs participating in regulated campaign advocacy are governed by the plain text of our existing regulations.

³¹ See 11 C.F.R. § 103.3(b).

³² *Id.*

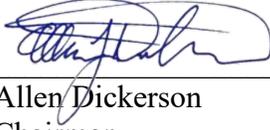
³³ See 52 U.S.C. §§ 30116(a)(1), 30118(a); LLC E&J at 37,397– 37,399.

³⁴ 558 U.S. 310 (2010).

³⁵ 599 F.3d 686 (D.C. Cir. 2010).

³⁶ See Statement of Chairman Lee E. Goodman on the *Citizens United v. FEC* and *McCutcheon v. FEC* Rulemakings (Oct. 15, 2014), (https://www.fec.gov/resources/about-fec/commissioners/goodman/statements/Chairman_Goodman_Statement_on_CU_Rulemaking.pdf).

Accordingly, I voted to find reason to believe that the Respondents violated the Act and authorized pre-probable cause conciliation in this Matter with an instruction to OGC not to seek a monetary penalty.



Allen Dickerson
Chairman

April 14, 2022

Date