

1 **FEDERAL ELECTION COMMISSION**

2 **FIRST GENERAL COUNSEL’S REPORT**

3 **MUR 7486**

4 COMPLAINT FILED: Aug. 23, 2018

5 NOTIFICATION DATE: Aug. 29, 2018

6 LAST RESPONSE FILED: Feb. 27, 2019

7 ACTIVATION DATE: Apr. 23, 2019

8

9 **STATUTE OF LIMITATIONS:**

10 Oct. 14, 2021 (earliest) – Ongoing

11 **ELECTION CYCLE: 2016, 2018**

12 COMPLAINANT: Campaign Legal Center

13 RESPONDENT: 45Committee, Inc.

14 RELEVANT AUTHORITY: 52 U.S.C. §§ 30102, 30103, 30104

15 INTERNAL REPORTS CHECKED: Disclosure Reports

16 FEDERAL AGENCIES CHECKED:

17 **I. INTRODUCTION**

18 The Complaint in this matter alleges that 45Committee, Inc. (“45Committee”), a Section
19 501(c)(4) nonprofit organization, violated the Federal Election Campaign Act of 1971, as
20 amended (the “Act”), by not registering and reporting as a political committee despite making
21 over \$21 million in independent expenditures in the weeks leading up to the 2016 presidential
22 election. 45Committee asserts that it is not a political committee but is instead an issue-
23 advocacy and lobbying organization. The Complaint, however, alleges that 51% of
24 45Committee’s overall spending in 2016 was for independent expenditures and disbursements
25 for electioneering communications, and that 45Committee’s major purpose was the nomination
26 or election of a federal candidate.

27 45Committee’s public statements, fundraising appeals, and the proportion of its overall
28 spending directed toward independent expenditures and disbursements for electioneering

1 communications in 2016, viewed as a whole, raise a reasonable inference that the organization's
2 "major purpose" was nominating or electing a federal candidate, and, as such, that the
3 organization appears to be a political committee. Accordingly, we recommend that the
4 Commission find reason to believe 45Committee violated 52 U.S.C. §§ 30102, 30103, and 30104
5 by failing to organize, register, and report as a political committee.

6 **II. FACTUAL BACKGROUND**

7 45Committee was organized in April 2015 as a corporation in Virginia, and it claims to
8 be tax-exempt under Section 501(c)(4) of the Internal Revenue Code.¹ 45Committee asserts that
9 it is "an independent, social welfare organization" that was established "to engage primarily in
10 issue advocacy campaigns" and has "been educating Americans on possible solutions to the
11 challenges facing the 45th President of the United States."² 45Committee states that it has a
12 "sister political committee, Future45," that was formed "to engage primarily in federal electoral
13 advocacy."³

14 The Complaint contends that 45Committee's public statements and fundraising appeals
15 indicate that its major purpose is the nomination or election of federal candidates. The
16 Complaint alleges that fundraising efforts promoted 45Committee as a vehicle for potential

¹ 45Committee, Fiscal Year ("FY") 2015-2016 Return of Organization Exempt from Income Tax ("IRS Form 990") at 1 (Feb. 16, 2017); 45Committee Resp. at 1 (Oct. 10, 2018).

² 45Committee Resp. at 1 (quoting its website, *available at* <https://45committee.com>). On each of its annual IRS tax filing documents, 45Committee has described itself as "an organization devoted to promoting solutions to the issues that confront the United States during the 45th President's term" that "will advocate for reforms and solutions on a wide range of public policy issues." *See, e.g.*, 45Committee, FY 2016-2017 IRS Form 990 at 2 (Feb. 15, 2018).

³ 45Committee Resp. at 1. Future45 registered with the Commission as an independent-expenditure-only political committee on March 20, 2015. Future45 Statement of Org. at 1, 5 (Mar. 20, 2015). During the 2016 election cycle, Future45 made \$26,945,036 in independent expenditures, all opposing Hillary Clinton. Future45, Independent Expenditures, 2015-2016, *available at* https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C00574533&cycle=2016&is_notice=true.

1 donors to support the election of a federal candidate, Donald J. Trump, without disclosing their
2 identities. The Complaint cites a news article reporting that “three Republican fundraisers
3 familiar with the effort . . . and others in GOP finance circles say [Todd] Ricketts is making a
4 particular effort to win over donors who want to help [Donald] Trump but are leery of having
5 their names publicly associated with the polarizing Republican nominee.”⁴ According to that
6 article, “Ricketts’s pitch to these donors focuses on the fact that one of the pro-Trump groups
7 he’s fronting can accept unlimited checks while keeping its donors’ names secret.”⁵ It further
8 states that “[t]he group, which is called 45Committee, . . . [can] accept contributions of unlimited
9 sizes that can be used to air political and issue-based ads without disclosing [its] donors’
10 names.”⁶

11 The Complaint further alleges that 45Committee and its “sister political committee,
12 Future45,”⁷ were reportedly organized for the express purpose of influencing a federal election,
13 by funding online and television ads criticizing Hillary Clinton, based on campaign issues that
14 emerged, or comments made by Clinton, during the 2016 presidential election.⁸ The Complaint

⁴ Kenneth P. Vogel, *Secret Money to Boost Trump*, POLITICO (Sept. 28, 2016), available at <https://www.politico.com/story/2016/09/secret-money-to-boost-trump-228817> (cited at Compl. ¶¶ 7, 30.iii).

⁵ *Id.*

⁶ *Id.*

⁷ 45Committee Resp. at 1.

⁸ Compl. ¶¶ 6, 30.ii (quoting Patrick O’Connor and Rebecca Ballhaus, *New GOP Groups Taking Aim at Hillary Clinton*, WALL ST. J. (Oct. 27, 2015), available at <https://www.wsj.com/articles/prominent-gop-donors-launch-new-groups-to-take-aim-at-hillary-clinton-1445984161>) (“The groups — Future45, a super PAC, and 45Committee, an issue-advocacy organization — are designed to seize on issues that emerge in the campaign or comments [Hillary] Clinton makes and quickly assemble ads that will run both online and on television. Organizers are hoping the groups will become something of an experimental, quick-strike vehicle to see what messages and tactics work.”); *see also* Vogel, *supra* (stating that Future45 “along with 45Committee, had been created in October [2015] to attack Clinton, but both had gone largely dormant . . . So Todd Ricketts essentially took them over this month with the intention of running pro-Trump ads”) (cited at Compl. ¶¶ 7, 30.iii).

1 also notes that 45Committee's president, Brian Baker, publicly criticized Clinton, saying: "It
2 will take a builder and a proven job creator to get Americans working again[.] . . . As we all
3 know, after 40 years in political life, [Hillary] Clinton is not the change our country needs — in
4 fact, it is no change at all."⁹

5 Between October 4, 2016, and November 5, 2016, 45Committee made \$21,339,015 in
6 independent expenditures, all of which supported 2016 presidential candidate Donald J. Trump
7 or opposed Trump's general-election opponent, Hillary Clinton.¹⁰ 45Committee also made two
8 disbursements totaling \$671,320 on October 25, 2016, and October 26, 2016, for electioneering
9 communications that referred to Patrick Murphy, a 2016 candidate for the U.S. Senate in
10 Florida.¹¹ During the 2018 election cycle, 45Committee made \$1,687,062 in independent
11 expenditures and four disbursements totaling \$167,669 for electioneering communications that
12 referred to Joseph Manchin and Joseph Donnelly, U.S. Senate candidates in West Virginia and

⁹ Compl. ¶¶ 9, 30.v (quoting Maggie Haberman, *Pro-Trump Group to Release Ads as Part of Major Swing State Effort*, N.Y. TIMES (Oct. 6, 2016), available at <https://www.nytimes.com/2016/10/07/us/politics/campaign-ads.html>) (reporting that 45Committee "will begin airing ads criticizing Hillary Clinton and praising Donald J. Trump as the 2016 election enters its final weeks" with ads "featuring an image of a fatigued-looking Mrs. Clinton [that] describe her as a 'tired' politician mired in scandal, while depicting Mr. Trump as a creator of jobs").

¹⁰ 45Committee, Independent Expenditures, 2015-2016 Election Cycle, available at https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C90016478&cycle=2016&is_notice=true. Over the same period, 45Committee's "sister political committee," Future45, itself spent a little less on independent expenditures — \$20,675,194.51 — all of which were opposing Clinton. Future45, Independent Expenditures, 2015-2016 Election Cycle, available at https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C00574533&cycle=2016&is_notice=true.

¹¹ 45Committee, FEC Form 9, 24-Hour Notice for Electioneering Communications, at 3 (Oct. 28, 2016) (disclosing disbursements of \$663,320 for "Media Placement – Iran Sanctions Act Extension" and \$8,000 for "Media Production – Iran Sanctions Act Extension"). This communication supported extending the Iran Sanctions Act, contending that "the Obama administration's Iranian Nuclear Deal gave [Iran] billions [of dollars]. Congressman Patrick Murphy and Senator Bill Nelson supported the deal. And now the Iranian Sanctions Act is set to expire. Call Murphy and Nelson and tell them it's never too late to do the right thing." See "Iran Sanctions Act Extension," <https://twitter.com/i/status/793850794449797124> (Nov. 2, 2016).

1 Indiana, respectively.¹² As of August 21, 2019, 45Committee has not reported making any
 2 independent expenditures or disbursements for electioneering communications in the 2020
 3 election cycle.¹³ Over its four-year lifespan, therefore, 45Committee has made independent
 4 expenditures totaling \$23,026,077 and disbursements for electioneering communications totaling
 5 \$838,989.

6 Aside from the funds that it reported spending on independent expenditures and
 7 disbursements for electioneering communications, 45Committee reported spending \$36,828,379
 8 for all other expenses to the IRS, funds that it asserts have financed “substantial issue-oriented
 9 activities in furtherance of its mission[,]” including, *e.g.*, “substantial issue advocacy campaigns
 10 — including through television, digital, and direct mail — which relate to the areas of ‘foreign
 11 policy, national security, healthcare, size of government, role and make-up of the federal
 12 judiciary, role of the Internal Revenue Service, reducing the tax burden, ethics issues related to
 13 federal officials, improving the regulatory environment, [and] promoting entrepreneurship.’”¹⁴

¹² 45Committee, Independent Expenditures, 2017-2018 Election Cycle, *available at* https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C90016478&cycle=2018&is_notice=true; 45Committee, Electioneering Communications, 2017-2018 Election Cycle, *available at* https://www.fec.gov/data/electioneering-communications/?committee_id=C30002679. Both electioneering communications supported Mike Pompeo’s confirmation as U.S. Secretary of State. “Bipartisan” refers to Senator Joe Donnelly’s vote to confirm Mike Pompeo as CIA Director and asks viewers to “urge Senator Donnelly to again vote yes for Mike Pompeo” to be confirmed as Secretary of State. *See* 45Committee, FEC Form 9, 24-Hour Notice for Electioneering Communications, at 3 (Apr. 22, 2018); “Bipartisan,” <https://youtu.be/rQxGGoaBoOU> (Apr. 20, 2018). “Right Man” uses essentially the same script with respect to Senator Joe Manchin. *See* 45Committee, FEC Form 9, 24-Hour Notice for Electioneering Communications, at 3 (Apr. 22, 2018); “Right Man,” <https://youtu.be/BrJJsJLevJE> (Apr. 20, 2018).

¹³ 45Committee has not filed any disclosure reports with the Commission during the 2020 election cycle and appears to be inactive. The last disclosure report that it filed with the Commission was in July 2018. *See* 45Committee, FEC Form 5, Report of Independent Expenditures Made and Contributions Received at 1 (July 15, 2018). The most recent post on its website is dated October 10, 2018. *See* <https://45committee.com/news/> (viewed July 30, 2019).

¹⁴ 45Committee Resp. at 2 (quoting 45Committee FY 2016-2017 IRS Form 990). *See, e.g.*, “Real Tax Slayer,” *available at* <https://45committee.com/real-tax-slayer> or https://www.youtube.com/watch?time_continue=29&v=F9cf-szOD2c (Dec. 20, 2017).

1 A declaration by 45Committee's treasurer submitted with its response states that, "[s]ince its
2 inception in April 2015, 45Committee, Inc.'s spending has been primarily related to issue
3 advocacy and policy debates consistent with its tax-exempt status."¹⁵ 45Committee's response
4 also asserts that it "deployed advertising and grassroots advocacy campaigns" supporting the
5 confirmations of Trump administration Cabinet and judicial nominees, including "Attorney
6 General Jeff Sessions, Secretary of State Mike Pompeo, and Supreme Court Justices Neil
7 Gorsuch and Brett Kavanaugh."¹⁶ The current record does not indicate how much of the
8 \$36,828,379 that 45Committee reported spending on all other expenses — *i.e.*, spending that was
9 not directly used for independent expenditures and electioneering communications — was used
10 for its non-election-related advocacy, as opposed to its administrative costs, such as staff salaries
11 and overhead, which would have supported both its election-related and non-election-related
12 advocacy.¹⁷

13 The Complaint alleges that 45Committee satisfied the Act's requirements for political
14 committee status and therefore violated the Act by not registering as a political committee and
15 abiding by the Act's organizational, recordkeeping, and reporting requirements for political

¹⁵ 45Committee Resp., Ex. C (Decl. of Maria Wojciechowski) ¶ 3. Additional information provided in a declaration attached to 45Committee's Supplemental Response, which is based on 45Committee's filing with the IRS for its 2018-2019 fiscal year, is consistent with the information provided in the declaration attached to 45Committee's initial Response. *See* 45Committee Suppl. Resp., Ex. 1 (Decl. of Maria Wojciechowski) ¶¶ 4-5 (Feb. 27, 2019).

¹⁶ 45Committee Resp. at 3. *See, e.g.*, "Confirm," 45Committee, *available at* <https://45committee.com/confirm> or <https://www.youtube.com/watch?v=4PlvnYK9umY> (Sept. 4, 2018).

¹⁷ For its 2016-2017 fiscal year, 45Committee asserts that its "operating costs" were \$447,430.53. 45Committee Resp., Ex. C ¶ 7. However, it provides no breakdown of that figure, which appears potentially inconsistent with its IRS filing for that fiscal year. *See id.*, Ex. A at 10, lines 11b, 11c, 11g, 14, 17, 23, 24c, and 24e (disclosing expenses of \$150,630 for Legal, \$61,694 for Accounting, \$26,975 for Information Technology, \$51,504 for Travel, \$12,484 for Insurance, \$1,379,964 for Research, \$1,250 for Fundraising Expenses, and \$444,344 for "Other"). 45Committee did not provide operating cost figures for its other fiscal years.

1 committees.¹⁸ The Complaint asserts that during calendar year 2016, 45Committee spent
 2 \$22,010,335 on independent expenditures and disbursements for electioneering communications,
 3 out of \$42,564,823 in overall expenses — *i.e.*, 51.7% of 45Committee's 2016 expenses directly
 4 paid for independent expenditures and disbursements for electioneering communications.

5 The chart below summarizes 45Committee's financial activity:¹⁹

	Calendar Year 2016	Fiscal Year²⁰ 2016-2017 (Apr. 1, 2016 – Mar. 31, 2017)	Lifetime
IEs	\$21,339,015	\$21,650,515	\$23,026,077
ECs	\$671,320	\$671,320	\$838,989
Overall Expenses	\$42,564,823 ²¹	\$45,556,334	\$59,854,457
IEs/Overall	50.1%	47.5%	38.5%
(IEs + ECs)/Overall	51.7%	49%	39.9%

¹⁸ Compl. ¶¶ 31–34 (Aug. 23, 2018).

¹⁹ 45Committee's expenses for FY 2015-2016, from April 23, 2015, through March 31, 2016, totaled \$1,008,489; its expenses for FY 2016-2017, from April 1, 2016 through March 31, 2017 totaled \$45,556,334. 45Committee, FY 2015-2016 IRS Form 990 at 1; 45Committee, FY 2016-2017 IRS Form 990 at 1. 45Committee's lifetime reported expenses, from April 23, 2015, through March 31, 2018, totaled \$59,854,457. *See* 45Committee FY 2017-2018 IRS Tax Form 990 at 1 (Feb. 15, 2019).

²⁰ The figures in this column are based on the 45Committee's Response and the sworn declaration of its treasurer. *See* 45Committee Resp., Ex. C ¶¶ 4-6. 45Committee's treasurer states that if all of the organization's FY 2016-2017 operating costs (\$447,430.53) are allocated as political expenses, its "political spending remained under 50% of total expenditures[.]" *Id.* ¶ 7. In that case, the combined "political expenses" — *i.e.*, independent expenditures, disbursements for electioneering communications, and operating expenses — would be \$22,769,265, or almost exactly half (49.98%) of its \$45,556,334 in overall expenditures for the fiscal year.

²¹ News reports indicated that \$4 million of 45Committee's FY 2016-2017 activity occurred during the first five weeks of 2017, and based on that information, the Complaint contends that even if all of 45Committee's FY 2015-2016 expenses, and all but the \$4 million of its FY 2016-2017 expenses, were incurred during calendar year 2016, 45Committee's total expenses during the 2016 calendar year were, at most, \$42,564,823. *See* Compl. ¶ 27 (citing Tom LoBianco, *First on CNN: Pro-Trump Group Hacked, Website Taken Down in Cabinet Fight*, CNN (Feb. 6, 2017), available at <https://www.cnn.com/2017/02/06/politics/45-committee-website-hacked/index.html>) ("The 45 Committee [sic] has spent upward of \$4 million so far on-air and online supporting Trump's Cabinet picks[.]"); *see* David M. Drucker, *Pro-Trump Outside Groups Ready to Shell Out Cash for 2018*, WASH. EXAMINER (Feb. 7, 2017), available at <https://www.washingtonexaminer.com/pro-trump-outside-groups-ready-to-shell-out-cash-for-2018> ("45Committee has invested \$4 million this year alone to generate support for Trump's Cabinet nominees, a senior official with the political nonprofit said Tuesday.") (emphasis added).

1 **III. LEGAL ANALYSIS**

2 **A. Political Committee Status**

3 The Act defines a political committee as “any committee, club, association, or other
4 group of persons” that receives aggregate contributions or makes aggregate expenditures in
5 excess of \$1,000 during a calendar year.²² Notwithstanding the statutory threshold for
6 contributions and expenditures, an organization that is not controlled by a candidate will be
7 considered a political committee only if its “major purpose is Federal campaign activity (*i.e.*, the
8 nomination or election of a Federal candidate).”²³ Political committees are required to register
9 with the Commission, meet organizational and recordkeeping requirements, and file periodic
10 disclosure reports.²⁴

11 The Commission has explained that applying the “major purpose” test “requires the
12 flexibility of a case-by-case analysis of an organization’s conduct that is incompatible with a
13 one-size-fits-all rule” and that “any list of factors developed by the Commission would not likely
14 be exhaustive in any event, as evidenced by the multitude of fact patterns at issue in the
15 Commission’s enforcement actions considering the political committee status of various

²² 52 U.S.C. § 30101(4)(A).

²³ Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5,595, 5,597 (Feb. 7, 2007) (“Suppl. E&J”) (“[D]etermining political committee status under [the Act], as modified by the Supreme Court, requires an analysis of both an organization’s specific conduct — whether it received \$1,000 in contributions or made \$1,000 in expenditures — as well as its overall conduct — whether its major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate).”); *see Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986). In *Buckley*, the Supreme Court held that defining political committee status “only in terms of the annual amount of ‘contributions’ and ‘expenditures’” was overbroad, reaching “groups engaged purely in issue discussion.” *Buckley*, 424 U.S. at 79. To cure that infirmity, the Court concluded that the term “political committee” “need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate.” *Id.* (emphasis added).

²⁴ *See* 52 U.S.C. §§ 30102, 30103, 30104.

1 entities.”²⁵ In conducting that analysis, the Commission will consider whether an organization
 2 has satisfied the “major purpose doctrine through sufficiently extensive spending on Federal
 3 campaign activity.”²⁶ The Commission also looks to the organization’s public statements, which
 4 “can also be instructive in determining an organization’s purpose[,]” while “giving due weight to
 5 the form and nature of the statements, as well as the speaker’s position within the
 6 organization.”²⁷ In addition, the Commission may also need to consider the organization’s
 7 “fundraising appeals” and solicitations to prospective supporters.²⁸

8 **B. There is Reason to Believe That 45Committee is a Political Committee**

9 1. Statutory Threshold

10 To assess whether an organization has made an “expenditure,” the Commission analyzes
 11 whether spending on any of an organization’s communications made independently of a
 12 candidate constitutes express advocacy under 11 C.F.R. § 100.22.²⁹ 45Committee reported
 13 making over \$21 million in independent expenditures in calendar year 2016 and therefore
 14 exceeded the \$1,000 statutory threshold set forth in the Act, which 45Committee does not

²⁵ Suppl. E&J at 5,601-02. *See Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007) (approving the Commission’s case-by-case adjudication approach to resolving political committee status). Though it has periodically considered crafting a bright-line major-purpose rule through rulemaking, the Commission has consistently declined to do so. *See, e.g.*, Independent Expenditures; Corporate and Labor Organization Expenditures, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking); Definition of Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking); *see also* Summary of Comments and Possible Options on the Advance Notice of Proposed Rulemaking on the Definition of “Political Committee,” Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

²⁶ Suppl. E&J at 5,601.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 5,606.

1 dispute.³⁰ Whether 45Committee constituted a political committee therefore turns on whether its
2 major purpose is the nomination or election of federal candidates.

3 2. Major Purpose

4 45Committee's overall conduct — as evidenced by its public statements, fundraising
5 approach, and relative spending on independent expenditures and disbursements for
6 electioneering communications — objectively indicates that its major purpose is the nomination
7 or election of federal candidates.

8 News reports cited in the Complaint provide support for the notion that 45Committee's
9 organizational purpose was the nomination or election of federal candidates. The articles
10 describe appeals to potential supporters by one of 45Committee's primary fundraisers, Todd
11 Ricketts, as well as a public statement that "Clinton is not the change our country needs" by the
12 organization's president, Brian Baker.³¹ Ricketts reportedly sought funding for the organization
13 by conveying to potential donors that 45Committee was "one of the pro-Trump groups" that "can
14 accept unlimited checks while keeping its donors' names secret" because of its status as a
15 501(c)(4) nonprofit organization.³² Rather than soliciting support based on 45Committee's
16 stated mission of advocating for "solutions to the issues that confront the United States during
17 the 45th President's term[.]"³³ Ricketts reportedly solicited donations for the "45Committee" by
18 presenting such a donation as an opportunity for donors to discreetly support Trump, a federal

³⁰ See 52 U.S.C. § 30101(4)(A); 45Committee Resp. at 6 (acknowledging that "45Committee did surpass the Act's \$1,000 spending threshold in 2016").

³¹ See Haberman, *supra* (cited at Compl. ¶¶ 9, 30.v); Vogel, *supra* (cited at Compl. ¶¶ 7, 30.iii).

³² Vogel, *supra* (cited at Compl. ¶¶ 7, 30.iii).

³³ Resp. at 1 (quoting 45Committee's 2017 IRS Form 990).

1 candidate. These news articles indicate that, along with Future45, an IEOPC, 45Committee was
2 reportedly formed — and repurposed by Ricketts after the groups had “gone largely dormant” —
3 for the specific purpose of influencing a federal election, by running ads immediately before the
4 2016 presidential election supporting Donald J. Trump or opposing Hillary Clinton.³⁴

5 45Committee’s name’s use of the number 45 in reference to the forty-fifth president and
6 inclusion of the word “Committee” are consistent with such reports that the organization was
7 holding itself out as a political committee, and, more generally, that it had an electoral purpose.

8 45Committee’s spending during the 32-day period immediately preceding the 2016
9 presidential election further indicates that its major purpose is the nomination or election of
10 federal candidates. In 2016, the first full calendar year that 45Committee existed and the first
11 year in which 45Committee crossed the statutory threshold for political committee status, and the
12 year in which the Complaint alleges 45Committee became a political committee,³⁵ the
13 organization spent more of its funds on independent expenditures and disbursements for
14 electioneering communications — virtually all of which paid for communications expressly
15 advocating for a specific federal candidate or against that candidate’s opponent — than on the
16 issue advocacy purpose described in its IRS filings. Independent expenditures and
17 disbursements for electioneering communications comprised 51.7% of 45Committee’s overall
18 spending in 2016, and 97% of that activity — \$21,339,015 out of \$22,010,443 — was for
19 independent expenditures in the month before the 2016 election. Thus, 48.4% of 45Committee’s
20 overall spending in 2016 paid for everything else, including grants to other nonprofit

³⁴ Haberman, *supra* (cited at Compl. ¶¶ 9, 30.v); O’Connor and Ballhaus, *supra* (cited at Compl. ¶¶ 6, 30.ii); Vogel, *supra* (cited at Compl. ¶¶ 7, 30.iii).

³⁵ See Compl. ¶¶ 2, 26-27.

1 organizations,³⁶ other communications, and general overhead, such as staff salaries, legal and
2 accounting fees, and other administrative expenses. With respect to the overhead, the Complaint
3 points out that some portion of those overhead costs, in turn, would likely have supported the
4 organization's political spending.³⁷ The current record thus establishes a reasonable inference
5 that 45Committee spent more, perhaps significantly more, on political spending than on issue
6 advocacy spending in 2016.

7 45Committee's principal response to the Complaint is that because its spending on
8 independent expenditures and electioneering communications has been below 50% of its overall
9 spending in each *fiscal* year since its formation and over its entire lifetime, it lacks the major
10 purpose of nominating or election federal candidates.³⁸ 45Committee's argument that such
11 spending has been below 50% in each of the 12-month cycles selected to be its fiscal year is
12 unpersuasive in light of the overall circumstances, including the nature of its spending. If
13 45Committee's spending is analyzed in accordance with its preferred fiscal year framework, it
14 remains the case that 47.5% of its overall spending in FY 2016-2017 — \$21,650,550 — was
15 concededly used to make independent expenditures, and if its spending on electioneering

³⁶ 45Committee reported issuing \$3,579,000 in grants to other organizations in FY 2016-2017, including the U.S. Chamber of Commerce, which itself spent \$28,390,254 on independent expenditures in 2016. *See* 45Committee FY 2016-2017 IRS Form 990, Schedule I; U.S. Chamber of Commerce, Independent Expenditures, 2015-2016, *available at* https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C30001101&committee_id=C90013145&cycle=2016&is_notice=true.

³⁷ Compl. ¶ 26 (contending that 45Committee's reported spending on independent expenditures and electioneering communications "may not reflect the total of its election-related spending, such as overhead costs," suggesting that some portion of these overhead costs was used in connection with the independent expenditures and electioneering communications and could therefore also be counted as election-related spending).

³⁸ *E.g.*, 45Committee Resp. at 7 ("[T]he organization's spending on political activity, as a factual matter, has constituted a minority of total spending overall and in each fiscal year, including fiscal year 2017."); *id.* at 9 ("[L]ess than 37% of 45Committee's total spending has been on political activity (including electioneering communications) over its lifetime."); *id.* at 10 ("In each of its fiscal years, including 2017, less than half of its total spending has been on political activity.") (citing Decl. of Maria Wojciechowski at *id.*, Ex. C ¶ 5.).

1 communications is included as relevant or presumptively relevant,³⁹ then 49% of its overall
2 spending was for the purpose of nominating or electing a federal candidate.⁴⁰ Neither the
3 Commission nor any court has ever required that an organization spend a majority of its funds on
4 political activity to meet the major purpose requirement; instead, the Commission has adopted a
5 case by case approach to determining major purpose, which the courts have approved.⁴¹ In this
6 case, considering 45Committee's fundraising purpose as reported in news articles that the
7 Complaint relies upon — to support the election of Donald Trump without disclosing donors'
8 identities — in conjunction with 47.5% of 45Committee's FY 2016-2017 spending, comprising
9 over \$21 million, having been used to make communications expressly advocating for Trump or
10 against his opponent, Hillary Clinton, in the four weeks leading up to the 2016 general election,
11 the overall information supports a finding that 45Committee's major purpose during its 2016-
12 2017 fiscal year was the nomination or election of a federal candidate.⁴²

13 Following the 2016 election, the record indicates that 45Committee spent less, both
14 overall and as a proportion of its post-2016 spending, on independent expenditures and

³⁹ See *CREW v. FEC*, 299 F. Supp. 3d 83, 93 (D.D.C. 2018) (determining that the Commission “must presumptively treat spending on electioneering ads as indicating a purpose of nominating or electing a candidate”); see also *id.* at 100 (“The Commission may *in special circumstances* conclude that an electioneering ad does not have [an election-related major] purpose. But given Congress’s recognition that the “vast majority” of electioneering ads have the purpose of electing a candidate, the Commission’s exclusion of electioneering ads from its major-purpose analysis *should be the rare exception*, not the rule.”) (emphases added).

⁴⁰ 45Committee Resp., Ex. C (Decl. of Maria Wojciechowski) ¶ 6. It is unclear why the figure for “political advocacy” that 45Committee provides in its Response — \$21,650,515 — is \$311,535 greater than the number that 45Committee reported in its independent-expenditure reports filed with the Commission.

⁴¹ See Suppl. E&J at 5,601; *Shays*, 511 F. Supp. 2d at 19.

⁴² As discussed above, see *supra* note 19 and related text, if disbursements for electioneering communications are included, the proportion of political spending rises to 49% of overall spending, and if operating expenses are also included, then spending indicating a major purpose may have been greater than 50% of 45Committee's overall spending.

1 disbursements for electioneering communications, and instead spent comparatively more on
2 supporting the Trump administration's legislative initiatives and nominees to the Cabinet and
3 federal judiciary. However, the record supports a reasonable inference that by the time
4 45Committee engaged in that activity, it had already become a political committee, and the
5 organization's comparatively lesser spending following 2016, and its subsequent decline in
6 activity and possible dormancy⁴³ does not undermine that conclusion.⁴⁴

7 Accordingly, we recommend that the Commission find reason to believe 45Committee
8 violated 52 U.S.C. §§ 30102, 30103, and 30104, and authorize the use of compulsory process.⁴⁵

9 **IV. INVESTIGATION**

10 We propose to investigate 45Committee's overall expenses and activities in 2016 by
11 obtaining relevant financial records, fundraising solicitations, and any other documents relevant
12 to evaluating whether it had the major purpose of nominating or electing federal candidates. We
13 would also seek any internal or external communications regarding its mission and purpose, as
14 well as the organization's initiatives or programs to engage in issue advocacy or spending on the
15 nomination or election of candidates. Although we would initially seek these materials
16 voluntarily, we recommend that the Commission authorize the use of compulsory process.

17 **V. RECOMMENDATIONS**

18 1. Find reason to believe that 45Committee, Inc. violated 52 U.S.C. §§ 30102, 30103,
19 and 30104 by not registering as a political committee and meeting the Act's
20 organizational, recordkeeping, and reporting requirements;

⁴³ See *supra* n.13.

⁴⁴ See also Factual and Legal Analysis at 9, MUR 7465 (Freedom Vote, Inc.) (July 25, 2019) (finding reason to believe a nonprofit organization's "proportion of spending related to Federal campaign activity compared to its total spending in 2014 indicates that its major purpose may be the nomination or election of federal candidates")

⁴⁵ See Certification, MUR 6538R ¶ 1 (Americans for Job Security) (Oct. 18, 2016).

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: 45Committee, Inc. MUR 7486

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission (“Commission”) by the Campaign Legal Center. *See* 52 U.S.C. § 30109(a)(1). The Complaint alleges that 45Committee, Inc. (“45Committee”), a Section 501(c)(4) nonprofit organization, violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by not registering and reporting as a political committee despite making over \$21 million in independent expenditures in the weeks leading up to the 2016 presidential election. 45Committee asserts that it is not a political committee but is instead an issue-advocacy and lobbying organization. The Complaint, however, alleges that 51% of 45Committee’s overall spending in 2016 was for independent expenditures and disbursements for electioneering communications, and that 45Committee’s major purpose was the nomination or election of a federal candidate.

45Committee’s public statements, fundraising appeals, and the proportion of its overall spending directed toward independent expenditures and disbursements for electioneering communications in 2016, viewed as a whole, raise a reasonable inference that the organization’s “major purpose” was nominating or electing a federal candidate, and, as such, that the organization appears to be a political committee. Accordingly, the Commission finds reason to believe 45Committee violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to organize, register, and report as a political committee.

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1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Background**

3 45Committee was organized in April 2015 as a corporation in Virginia, and it claims to
4 be tax-exempt under Section 501(c)(4) of the Internal Revenue Code.¹ 45Committee asserts that
5 it is “an independent, social welfare organization” that was established “to engage primarily in
6 issue advocacy campaigns” and has “been educating Americans on possible solutions to the
7 challenges facing the 45th President of the United States.”² 45Committee states that it has a
8 “sister political committee, Future45,” that was formed “to engage primarily in federal electoral
9 advocacy.”³

10 The Complaint contends that 45Committee’s public statements and fundraising appeals
11 indicate that its major purpose is the nomination or election of federal candidates. The
12 Complaint alleges that fundraising efforts promoted 45Committee as a vehicle for potential
13 donors to support the election of a federal candidate, Donald J. Trump, without disclosing their
14 identities. The Complaint cites a news article reporting that “three Republican fundraisers
15 familiar with the effort . . . and others in GOP finance circles say [Todd] Ricketts is making a
16 particular effort to win over donors who want to help [Donald] Trump but are leery of having

¹ 45Committee, Fiscal Year (“FY”) 2015-2016 Return of Organization Exempt from Income Tax (“IRS Form 990”) at 1 (Feb. 16, 2017); 45Committee Resp. at 1 (Oct. 10, 2018).

² 45Committee Resp. at 1 (quoting its website, *available at* <https://45committee.com>). On each of its annual IRS tax filing documents, 45Committee has described itself as “an organization devoted to promoting solutions to the issues that confront the United States during the 45th President’s term” that “will advocate for reforms and solutions on a wide range of public policy issues.” *See, e.g.*, 45Committee, FY 2016-2017 IRS Form 990 at 2 (Feb. 15, 2018).

³ 45Committee Resp. at 1. Future45 registered with the Commission as an independent-expenditure-only political committee on March 20, 2015. Future45 Statement of Org. at 1, 5 (Mar. 20, 2015). During the 2016 election cycle, Future45 made \$26,945,036 in independent expenditures, all opposing Hillary Clinton. Future45, Independent Expenditures, 2015-2016, *available at* https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C00574533&cycle=2016&is_notice=true.

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1 their names publicly associated with the polarizing Republican nominee.”⁴ According to that
2 article, “Ricketts’s pitch to these donors focuses on the fact that one of the pro-Trump groups
3 he’s fronting can accept unlimited checks while keeping its donors’ names secret.”⁵ It further
4 states that “[t]he group, which is called 45Committee, . . . [can] accept contributions of unlimited
5 sizes that can be used to air political and issue-based ads without disclosing [its] donors’
6 names.”⁶

7 The Complaint further alleges that 45Committee and its “sister political committee,
8 Future45,”⁷ were reportedly organized for the express purpose of influencing a federal election,
9 by funding online and television ads criticizing Hillary Clinton, based on campaign issues that
10 emerged, or comments made by Clinton, during the 2016 presidential election.⁸ The Complaint
11 also notes that 45Committee’s president, Brian Baker, publicly criticized Clinton, saying: “It
12 will take a builder and a proven job creator to get Americans working again[.] . . . As we all

⁴ Kenneth P. Vogel, *Secret Money to Boost Trump*, POLITICO (Sept. 28, 2016), available at <https://www.politico.com/story/2016/09/secret-money-to-boost-trump-228817> (cited at Compl. ¶¶ 7, 30.iii).

⁵ *Id.*

⁶ *Id.*

⁷ 45Committee Resp. at 1.

⁸ Compl. ¶¶ 6, 30.ii (quoting Patrick O’Connor and Rebecca Ballhaus, *New GOP Groups Taking Aim at Hillary Clinton*, WALL ST. J. (Oct. 27, 2015), available at <https://www.wsj.com/articles/prominent-gop-donors-launch-new-groups-to-take-aim-at-hillary-clinton-1445984161>) (“The groups — Future45, a super PAC, and 45Committee, an issue-advocacy organization — are designed to seize on issues that emerge in the campaign or comments [Hillary] Clinton makes and quickly assemble ads that will run both online and on television. Organizers are hoping the groups will become something of an experimental, quick-strike vehicle to see what messages and tactics work.”); see also Vogel, *supra* (stating that Future45 “along with 45Committee, had been created in October [2015] to attack Clinton, but both had gone largely dormant So Todd Ricketts essentially took them over this month with the intention of running pro-Trump ads”) (cited at Compl. ¶¶ 7, 30.iii).

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1 know, after 40 years in political life, [Hillary] Clinton is not the change our country needs — in
2 fact, it is no change at all.”⁹

3 Between October 4, 2016, and November 5, 2016, 45Committee made \$21,339,015 in
4 independent expenditures, all of which supported 2016 presidential candidate Donald J. Trump
5 or opposed Trump’s general-election opponent, Hillary Clinton.¹⁰ 45Committee also made two
6 disbursements totaling \$671,320 on October 25, 2016, and October 26, 2016, for electioneering
7 communications that referred to Patrick Murphy, a 2016 candidate for the U.S. Senate in
8 Florida.¹¹ During the 2018 election cycle, 45Committee made \$1,687,062 in independent
9 expenditures and four disbursements totaling \$167,669 for electioneering communications that
10 referred to Joseph Manchin and Joseph Donnelly, U.S. Senate candidates in West Virginia and
11 Indiana, respectively.¹² As of August 21, 2019, 45Committee has not reported making any

⁹ Compl. ¶¶ 9, 30.v (quoting Maggie Haberman, *Pro-Trump Group to Release Ads as Part of Major Swing State Effort*, N.Y. TIMES (Oct. 6, 2016), available at <https://www.nytimes.com/2016/10/07/us/politics/campaign-ads.html>) (reporting that 45Committee “will begin airing ads criticizing Hillary Clinton and praising Donald J. Trump as the 2016 election enters its final weeks” with ads “featuring an image of a fatigued-looking Mrs. Clinton [that] describe her as a ‘tired’ politician mired in scandal, while depicting Mr. Trump as a creator of jobs”).

¹⁰ 45Committee, Independent Expenditures, 2015-2016 Election Cycle, available at https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C90016478&cycle=2016&is_notice=true. Over the same period, 45Committee’s “sister political committee,” Future45, itself spent a little less on independent expenditures — \$20,675,194.51 — all of which were opposing Clinton. Future45, Independent Expenditures, 2015-2016 Election Cycle, available at https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C00574533&cycle=2016&is_notice=true.

¹¹ 45Committee, FEC Form 9, 24-Hour Notice for Electioneering Communications, at 3 (Oct. 28, 2016) (disclosing disbursements of \$663,320 for “Media Placement – Iran Sanctions Act Extension” and \$8,000 for “Media Production – Iran Sanctions Act Extension”). This communication supported extending the Iran Sanctions Act, contending that “the Obama administration’s Iranian Nuclear Deal gave [Iran] billions [of dollars]. Congressman Patrick Murphy and Senator Bill Nelson supported the deal. And now the Iranian Sanctions Act is set to expire. Call Murphy and Nelson and tell them it’s never too late to do the right thing.” See “Iran Sanctions Act Extension,” <https://twitter.com/i/status/793850794449797124> (Nov. 2, 2016).

¹² 45Committee, Independent Expenditures, 2017-2018 Election Cycle, available at https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C90016478&cycle=2018&is_notice=true; 45Committee, Electioneering Communications, 2017-2018 Election Cycle, available at https://www.fec.gov/data/electioneering-communications/?committee_id=C30002679. Both electioneering communications supported Mike Pompeo’s confirmation as U.S. Secretary of State. “Bipartisan” refers to Senator Joe Donnelly’s vote to confirm Mike Pompeo as CIA Director and asks viewers to “urge Senator Donnelly to again vote yes for Mike Pompeo” to

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1 independent expenditures or disbursements for electioneering communications in the 2020
2 election cycle.¹³ Over its four-year lifespan, therefore, 45Committee has made independent
3 expenditures totaling \$23,026,077 and disbursements for electioneering communications totaling
4 \$838,989.

5 Aside from the funds that it reported spending on independent expenditures and
6 disbursements for electioneering communications, 45Committee reported spending \$36,828,379
7 for all other expenses to the IRS, funds that it asserts have financed “substantial issue-oriented
8 activities in furtherance of its mission[,]” including, *e.g.*, “substantial issue advocacy campaigns
9 — including through television, digital, and direct mail — which relate to the areas of ‘foreign
10 policy, national security, healthcare, size of government, role and make-up of the federal
11 judiciary, role of the Internal Revenue Service, reducing the tax burden, ethics issues related to
12 federal officials, improving the regulatory environment, [and] promoting entrepreneurship.’”¹⁴
13 A declaration by 45Committee’s treasurer submitted with its response states that, “[s]ince its
14 inception in April 2015, 45Committee, Inc.’s spending has been primarily related to issue
15 advocacy and policy debates consistent with its tax-exempt status.”¹⁵ 45Committee’s response

be confirmed as Secretary of State. *See* 45Committee, FEC Form 9, 24-Hour Notice for Electioneering Communications, at 3 (Apr. 22, 2018); “Bipartisan,” <https://youtu.be/rQxGGoaBoOU> (Apr. 20, 2018). “Right Man” uses essentially the same script with respect to Senator Joe Manchin. *See* 45Committee, FEC Form 9, 24-Hour Notice for Electioneering Communications, at 3 (Apr. 22, 2018); “Right Man,” <https://youtu.be/BrJJsJLevJE> (Apr. 20, 2018).

¹³ 45Committee has not filed any disclosure reports with the Commission during the 2020 election cycle and appears to be inactive. The last disclosure report that it filed with the Commission was in July 2018. *See* 45Committee, FEC Form 5, Report of Independent Expenditures Made and Contributions Received at 1 (July 15, 2018). The most recent post on its website is dated October 10, 2018. *See* <https://45committee.com/news/> (viewed July 30, 2019).

¹⁴ 45Committee Resp. at 2 (quoting 45Committee FY 2016-2017 IRS Form 990). *See, e.g.*, “Real Tax Slayer,” *available at* <https://45committee.com/real-tax-slayer> or https://www.youtube.com/watch?time_continue=29&v=F9cf-szOD2c (Dec. 20, 2017).

¹⁵ 45Committee Resp., Ex. C (Decl. of Maria Wojciechowski) ¶ 3. Additional information provided in a declaration attached to 45Committee’s Supplemental Response, which is based on 45Committee’s filing with the

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1 also asserts that it “deployed advertising and grassroots advocacy campaigns” supporting the
2 confirmations of Trump administration Cabinet and judicial nominees, including “Attorney
3 General Jeff Sessions, Secretary of State Mike Pompeo, and Supreme Court Justices Neil
4 Gorsuch and Brett Kavanaugh.”¹⁶ The current record does not indicate how much of the
5 \$36,828,379 that 45Committee reported spending on all other expenses — *i.e.*, spending that was
6 not directly used for independent expenditures and electioneering communications — was used
7 for its non-election-related advocacy, as opposed to its administrative costs, such as staff salaries
8 and overhead, which would have supported both its election-related and non-election-related
9 advocacy.¹⁷

10 The Complaint alleges that 45Committee satisfied the Act’s requirements for political
11 committee status and therefore violated the Act by not registering as a political committee and
12 abiding by the Act’s organizational, recordkeeping, and reporting requirements for political
13 committees.¹⁸ The Complaint asserts that during calendar year 2016, 45Committee spent
14 \$22,010,335 on independent expenditures and disbursements for electioneering communications,

IRS for its 2018-2019 fiscal year, is consistent with the information provided in the declaration attached to 45Committee’s initial Response. *See* 45Committee Suppl. Resp., Ex. 1 (Decl. of Maria Wojciechowski) ¶¶ 4-5 (Feb. 27, 2019).

¹⁶ 45Committee Resp. at 3. *See, e.g.*, “Confirm,” 45Committee, *available at* <https://45committee.com/confirm> or <https://www.youtube.com/watch?v=4PIvnYK9umY> (Sept. 4, 2018).

¹⁷ For its 2016-2017 fiscal year, 45Committee asserts that its “operating costs” were \$447,430.53. 45Committee Resp., Ex. C ¶ 7. However, it provides no breakdown of that figure, which appears potentially inconsistent with its IRS filing for that fiscal year. *See id.*, Ex. A at 10, lines 11b, 11c, 11g, 14, 17, 23, 24c, and 24e (disclosing expenses of \$150,630 for Legal, \$61,694 for Accounting, \$26,975 for Information Technology, \$51,504 for Travel, \$12,484 for Insurance, \$1,379,964 for Research, \$1,250 for Fundraising Expenses, and \$444,344 for “Other”). 45Committee did not provide operating cost figures for its other fiscal years.

¹⁸ Compl. ¶¶ 31–34 (Aug. 23, 2018).

1 out of \$42,564,823 in overall expenses — *i.e.*, 51.7% of 45Committee’s 2016 expenses directly
2 paid for independent expenditures and disbursements for electioneering communications.

3 The chart below summarizes 45Committee’s financial activity:¹⁹

	Calendar Year 2016	Fiscal Year ²⁰ 2016-2017 (Apr. 1, 2016 – Mar. 31, 2017)	Lifetime
IEs	\$21,339,015	\$21,650,515	\$23,026,077
ECs	\$671,320	\$671,320	\$838,989
Overall Expenses	\$42,564,823 ²¹	\$45,556,334	\$59,854,457
IEs/Overall	50.1%	47.5%	38.5%
(IEs + ECs)/Overall	51.7%	49%	39.9%

4 **B. There is Reason to Believe That 45Committee is a Political Committee**

5 The Act defines a political committee as “any committee, club, association, or other
6 group of persons” that receives aggregate contributions or makes aggregate expenditures in
7 excess of \$1,000 during a calendar year.²² Notwithstanding the statutory threshold for

¹⁹ 45Committee’s expenses for FY 2015-2016, from April 23, 2015, through March 31, 2016, totaled \$1,008,489; its expenses for FY 2016-2017, from April 1, 2016 through March 31, 2017 totaled \$45,556,334. 45Committee, FY 2015-2016 IRS Form 990 at 1; 45Committee, FY 2016-2017 IRS Form 990 at 1. 45Committee’s lifetime reported expenses, from April 23, 2015, through March 31, 2018, totaled \$59,854,457. *See* 45Committee FY 2017-2018 IRS Tax Form 990 at 1 (Feb. 15, 2019).

²⁰ The figures in this column are based on the 45Committee’s Response and the sworn declaration of its treasurer. *See* 45Committee Resp., Ex. C ¶¶ 4-6. 45Committee’s treasurer states that if all of the organization’s FY 2016-2017 operating costs (\$447,430.53) are allocated as political expenses, its “political spending remained under 50% of total expenditures[.]” *Id.* ¶ 7. In that case, the combined “political expenses” — *i.e.*, independent expenditures, disbursements for electioneering communications, and operating expenses — would be \$22,769,265, or almost exactly half (49.98%) of its \$45,556,334 in overall expenditures for the fiscal year.

²¹ News reports indicated that \$4 million of 45Committee’s FY 2016-2017 activity occurred during the first five weeks of 2017, and based on that information, the Complaint contends that even if all of 45Committee’s FY 2015-2016 expenses, and all but the \$4 million of its FY 2016-2017 expenses, were incurred during calendar year 2016, 45Committee’s total expenses during the 2016 calendar year were, at most, \$42,564,823. *See* Compl. ¶ 27 (citing Tom LoBianco, *First on CNN: Pro-Trump Group Hacked, Website Taken Down in Cabinet Fight*, CNN (Feb. 6, 2017), available at <https://www.cnn.com/2017/02/06/politics/45-committee-website-hacked/index.html>) (“The 45 Committee [sic] has spent upward of \$4 million so far on-air and online supporting Trump’s Cabinet picks[.]”); *see* David M. Drucker, *Pro-Trump Outside Groups Ready to Shell Out Cash for 2018*, WASH. EXAMINER (Feb. 7, 2017), available at <https://www.washingtonexaminer.com/pro-trump-outside-groups-ready-to-shell-out-cash-for-2018> (“45Committee has invested \$4 million this year alone to generate support for Trump’s Cabinet nominees, a senior official with the political nonprofit said Tuesday.”) (emphasis added).

²² 52 U.S.C. § 30101(4)(A).

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1 contributions and expenditures, an organization that is not controlled by a candidate will be
2 considered a political committee only if its “major purpose is Federal campaign activity (*i.e.*, the
3 nomination or election of a Federal candidate).”²³ Political committees are required to register
4 with the Commission, meet organizational and recordkeeping requirements, and file periodic
5 disclosure reports.²⁴

6 The Commission has explained that applying the “major purpose” test “requires the
7 flexibility of a case-by-case analysis of an organization’s conduct that is incompatible with a
8 one-size-fits-all rule” and that “any list of factors developed by the Commission would not likely
9 be exhaustive in any event, as evidenced by the multitude of fact patterns at issue in the
10 Commission’s enforcement actions considering the political committee status of various
11 entities.”²⁵ In conducting that analysis, the Commission will consider whether an organization
12 has satisfied the “major purpose doctrine through sufficiently extensive spending on Federal

²³ Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5,595, 5,597 (Feb. 7, 2007) (“Suppl. E&J”) (“[D]etermining political committee status under [the Act], as modified by the Supreme Court, requires an analysis of both an organization’s specific conduct — whether it received \$1,000 in contributions or made \$1,000 in expenditures — as well as its overall conduct — whether its major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate).”); *see Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986). In *Buckley*, the Supreme Court held that defining political committee status “only in terms of the annual amount of ‘contributions’ and ‘expenditures’” was overbroad, reaching “groups engaged purely in issue discussion.” *Buckley*, 424 U.S. at 79. To cure that infirmity, the Court concluded that the term “political committee” “need only encompass organizations that are under the control of a candidate or *the major purpose of which is the nomination or election of a candidate.*” *Id.* (emphasis added).

²⁴ *See* 52 U.S.C. §§ 30102, 30103, 30104.

²⁵ Suppl. E&J at 5,601-02. *See Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007) (approving the Commission’s case-by-case adjudication approach to resolving political committee status). Though it has periodically considered crafting a bright-line major-purpose rule through rulemaking, the Commission has consistently declined to do so. *See, e.g.*, Independent Expenditures; Corporate and Labor Organization Expenditures, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking); Definition of Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking); *see also* Summary of Comments and Possible Options on the Advance Notice of Proposed Rulemaking on the Definition of “Political Committee,” Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

1 campaign activity.”²⁶ The Commission also looks to the organization’s public statements, which
2 “can also be instructive in determining an organization’s purpose[,]” while “giving due weight to
3 the form and nature of the statements, as well as the speaker’s position within the
4 organization.”²⁷ In addition, the Commission may also need to consider the organization’s
5 “fundraising appeals” and solicitations to prospective supporters.²⁸

6 To assess whether an organization has made an “expenditure,” the Commission analyzes
7 whether spending on any of an organization’s communications made independently of a
8 candidate constitutes express advocacy under 11 C.F.R. § 100.22.²⁹ 45Committee reported
9 making over \$21 million in independent expenditures in calendar year 2016 and therefore
10 exceeded the \$1,000 statutory threshold set forth in the Act, which 45Committee does not
11 dispute.³⁰ Whether 45Committee constituted a political committee therefore turns on whether its
12 major purpose is the nomination or election of federal candidates.

13 45Committee’s overall conduct — as evidenced by its public statements, fundraising
14 approach, and relative spending on independent expenditures and disbursements for
15 electioneering communications — objectively indicates that its major purpose is the nomination
16 or election of federal candidates.

17 News reports cited in the Complaint provide support for the notion that 45Committee’s
18 organizational purpose was the nomination or election of federal candidates. The articles

²⁶ Suppl. E&J at 5,601.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 5,606.

³⁰ See 52 U.S.C. § 30101(4)(A); 45Committee Resp. at 6 (acknowledging that “45Committee did surpass the Act’s \$1,000 spending threshold in 2016”).

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1 describe appeals to potential supporters by one of 45Committee’s primary fundraisers, Todd
2 Ricketts, as well as a public statement that “Clinton is not the change our country needs” by the
3 organization’s president, Brian Baker.³¹ Ricketts reportedly sought funding for the organization
4 by conveying to potential donors that 45Committee was “one of the pro-Trump groups” that “can
5 accept unlimited checks while keeping its donors’ names secret” because of its status as a
6 501(c)(4) nonprofit organization.³² Rather than soliciting support based on 45Committee’s
7 stated mission of advocating for “solutions to the issues that confront the United States during
8 the 45th President’s term[,]”³³ Ricketts reportedly solicited donations for the “45Committee” by
9 presenting such a donation as an opportunity for donors to discreetly support Trump, a federal
10 candidate. These news articles indicate that, along with Future45, an IEOPC, 45Committee was
11 reportedly formed — and repurposed by Ricketts after the groups had “gone largely dormant” —
12 for the specific purpose of influencing a federal election, by running ads immediately before the
13 2016 presidential election supporting Donald J. Trump or opposing Hillary Clinton.³⁴
14 45Committee’s name’s use of the number 45 in reference to the forty-fifth president and
15 inclusion of the word “Committee” are consistent with such reports that the organization was
16 holding itself out as a political committee, and, more generally, that it had an electoral purpose.
17 45Committee’s spending during the 32-day period immediately preceding the 2016
18 presidential election further indicates that its major purpose is the nomination or election of

³¹ See Haberman, *supra* (cited at Compl. ¶¶ 9, 30.v); Vogel, *supra* (cited at Compl. ¶¶ 7, 30.iii).

³² Vogel, *supra* (cited at Compl. ¶¶ 7, 30.iii).

³³ Resp. at 1 (quoting 45Committee’s 2017 IRS Form 990).

³⁴ Haberman, *supra* (cited at Compl. ¶¶ 9, 30.v); O’Connor and Ballhaus, *supra* (cited at Compl. ¶¶ 6, 30.ii); Vogel, *supra* (cited at Compl. ¶¶ 7, 30.iii).

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1 federal candidates. In 2016, the first full calendar year that 45Committee existed and the first
2 year in which 45Committee crossed the statutory threshold for political committee status, and the
3 year in which the Complaint alleges 45Committee became a political committee,³⁵ the
4 organization spent more of its funds on independent expenditures and disbursements for
5 electioneering communications — virtually all of which paid for communications expressly
6 advocating for a specific federal candidate or against that candidate’s opponent — than on the
7 issue advocacy purpose described in its IRS filings. Independent expenditures and
8 disbursements for electioneering communications comprised 51.7% of 45Committee’s overall
9 spending in 2016, and 97% of that activity — \$21,339,015 out of \$22,010,443 — was for
10 independent expenditures in the month before the 2016 election. Thus, 48.4% of 45Committee’s
11 overall spending in 2016 paid for everything else, including grants to other nonprofit
12 organizations,³⁶ other communications, and general overhead, such as staff salaries, legal and
13 accounting fees, and other administrative expenses. With respect to the overhead, the Complaint
14 points out that some portion of those overhead costs, in turn, would likely have supported the
15 organization’s political spending.³⁷ The current record thus establishes a reasonable inference
16 that 45Committee spent more, perhaps significantly more, on political spending than on issue
17 advocacy spending in 2016.

³⁵ See Compl. ¶¶ 2, 26-27.

³⁶ 45Committee reported issuing \$3,579,000 in grants to other organizations in FY 2016-2017, including the U.S. Chamber of Commerce, which itself spent \$28,390,254 on independent expenditures in 2016. See 45Committee FY 2016-2017 IRS Form 990, Schedule I; U.S. Chamber of Commerce, Independent Expenditures, 2015-2016, available at https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C30001101&committee_id=C90013145&cycle=2016&is_notice=true.

³⁷ Compl. ¶ 26 (contending that 45Committee’s reported spending on independent expenditures and electioneering communications “may not reflect the total of its election-related spending, such as overhead costs,” suggesting that some portion of these overhead costs was used in connection with the independent expenditures and electioneering communications and could therefore also be counted as election-related spending).

1 45Committee’s principal response to the Complaint is that because its spending on
2 independent expenditures and electioneering communications has been below 50% of its overall
3 spending in each *fiscal* year since its formation and over its entire lifetime, it lacks the major
4 purpose of nominating or election federal candidates.³⁸ 45Committee’s argument that such
5 spending has been below 50% in each of the 12-month cycles selected to be its fiscal year is
6 unpersuasive in light of the overall circumstances, including the nature of its spending. If
7 45Committee’s spending is analyzed in accordance with its preferred fiscal year framework, it
8 remains the case that 47.5% of its overall spending in FY 2016-2017 — \$21,650,550 — was
9 concededly used to make independent expenditures, and if its spending on electioneering
10 communications is included as relevant or presumptively relevant,³⁹ then 49% of its overall
11 spending was for the purpose of nominating or electing a federal candidate.⁴⁰ Neither the
12 Commission nor any court has ever required that an organization spend a majority of its funds on
13 political activity to meet the major purpose requirement; instead, the Commission has adopted a
14 case by case approach to determining major purpose, which the courts have approved.⁴¹ In this

³⁸ *E.g.*, 45Committee Resp. at 7 (“[T]he organization’s spending on political activity, as a factual matter, has constituted a minority of total spending overall and in each fiscal year, including fiscal year 2017.”); *id.* at 9 (“[L]ess than 37% of 45Committee’s total spending has been on political activity (including electioneering communications) over its lifetime.”); *id.* at 10 (“In each of its fiscal years, including 2017, less than half of its total spending has been on political activity.”) (citing Decl. of Maria Wojciechowski at *id.*, Ex. C ¶ 5.).

³⁹ *See CREW v. FEC*, 299 F. Supp. 3d 83, 93 (D.D.C. 2018) (determining that the Commission “must presumptively treat spending on electioneering ads as indicating a purpose of nominating or electing a candidate”); *see also id.* at 100 (“The Commission may *in special circumstances* conclude that an electioneering ad does not have [an election-related major] purpose. But given Congress’s recognition that the “vast majority” of electioneering ads have the purpose of electing a candidate, the Commission’s exclusion of electioneering ads from its major-purpose analysis *should be the rare exception*, not the rule.”) (emphases added).

⁴⁰ 45Committee Resp., Ex. C (Decl. of Maria Wojciechowski) ¶ 6. It is unclear why the figure for “political advocacy” that 45Committee provides in its Response — \$21,650,515 — is \$311,535 greater than the number that 45Committee reported in its independent-expenditure reports filed with the Commission.

⁴¹ *See Suppl. E&J* at 5,601; *Shays*, 511 F. Supp. 2d at 19.

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1 case, considering 45Committee’s fundraising purpose as reported in news articles that the
2 Complaint relies upon — to support the election of Donald Trump without disclosing donors’
3 identities — in conjunction with 47.5% of 45Committee’s FY 2016-2017 spending, comprising
4 over \$21 million, having been used to make communications expressly advocating for Trump or
5 against his opponent, Hillary Clinton, in the four weeks leading up to the 2016 general election,
6 the overall information supports a finding that 45Committee’s major purpose during its 2016-
7 2017 fiscal year was the nomination or election of a federal candidate.⁴²

8 Following the 2016 election, the record indicates that 45Committee spent less, both
9 overall and as a proportion of its post-2016 spending, on independent expenditures and
10 disbursements for electioneering communications, and instead spent comparatively more on
11 supporting the Trump administration’s legislative initiatives and nominees to the Cabinet and
12 federal judiciary. However, the record supports a reasonable inference that by the time
13 45Committee engaged in that activity, it had already become a political committee, and the
14 organization’s comparatively lesser spending following 2016, and its subsequent decline in
15 activity and possible dormancy⁴³ does not undermine that conclusion.

16 Accordingly, the Commission finds reason to believe 45Committee violated 52 U.S.C.
17 §§ 30102, 30103, and 30104.⁴⁴

⁴² As discussed above, *see supra* note 19 and related text, if disbursements for electioneering communications are included, the proportion of political spending rises to 49% of overall spending, and if operating expenses are also included, then spending indicating a major purpose may have been greater than 50% of 45Committee’s overall spending.

⁴³ *See supra* n.13.

⁴⁴ *See* Certification, MUR 6538R ¶ 1 (Americans for Job Security) (Oct. 18, 2016).