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April 8, 2019

Mr. Jeff S. Jordan
Federal Election Commission
Office of Complaints Examination & Legal Administration
Attn: Kathryn Ross, Paralegal
1050 First Street, NE
Washington, D.C. 20463

Re: Matter Under Review 7569 (3M Company)

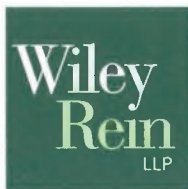
Dear Mr. Jordan,

On March 4, 2019, the Federal Election Commission ("FEC" or "Commission") notified our client, 3M Company ("3M"), of a complaint filed by the Campaign Legal Center. 3M filed a designation of counsel form on March 5. The complaint alleges that 3M violated the federal contractor contribution prohibition at 52 U.S.C. § 30119(a) by contributing \$50,000 to the Congressional Leadership Fund ("CLF"), an independent expenditure only political committee, or "super PAC," that is registered with the Commission.

After reviewing its records, 3M determined that it did make a single contribution to CLF in late-October 2018 based on its belief that *Citizens United v. FEC*, 558 U.S. 310 (2010), permitted corporate contributions to super PACs. Within one business day of learning of the complaint, and assuming the complaint accurately reflects the law (contrary to 3M's pre-existing understanding), 3M requested a refund of its contribution. 3M received a refund check from CLF on March 25 and deposited it on March 27 via 3M's normal accounting system.

As this submission explains, the contribution to CLF was not made in connection with 3M's efforts to obtain contracts with the federal government. Moreover, and as other members of the regulated community appear to have concluded, 3M believed that the contribution was entirely lawful at the time it was made. Indeed, the U.S. Court of Appeals for the District of Columbia Circuit declined to state that 52 U.S.C. § 30119 prohibits government contractors from contributing to super PAC contributions post-*Citizens United*. See *Wagner v. FEC*, 793 F.3d 1, 3–4 (D.C. Cir. 2015) (*en banc*).

Given these circumstances, and also the processes that 3M has put in place to prevent a recurrence of similar contributions and the relatively *de minimis* nature of the contribution at issue here (particularly in relation to CLF's overall spending in 2018 and some of the other matters involving violations of § 30119(a)), 3M respectfully requests that the Commission dismiss this matter as an act of prosecutorial discretion pursuant to *Heckler v. Chaney*, 470 U.S.



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821 (1985). In the alternative, if the Commission believes that further enforcement proceedings are warranted, 3M respectfully requests that this matter be referred to the Commission's Office of Alternative Dispute Resolution for resolution.

THE COMPLAINT

The complaint alleges 3M violated 52 U.S.C. § 30119(a)(1) – i.e., the prohibition on contributions by federal contractors – when the company contributed \$50,000 to CLF on November 1, 2018. In support of its allegations, the Campaign Legal Center claims that 3M was a federal contractor during the relevant period because the company had federal contracts and/or grants with the Department of Homeland Security, the Department of Agriculture, and the Department of Veterans Affairs. *See* Compl. at 3 n.8-9 (citing data from USAspending.gov). The complaint did not explain, however, that USAspending.gov is known to have “continuing data quality issues that have been identified by the U.S. Government Accountability Office,” nor did the complaint address the Congressional Research Service’s own conclusion that the “results may be incomplete or contain inaccuracies.” Congressional Research Service, *Tracking Federal Awards: USAspending.gov and Other Data Sources* at 1 (Oct. 23, 2018).¹

The complaint also alleges that the “Donate” page on CLF’s website contains a disclaimer stating that “[b]y clicking contribute I confirm . . . I am not a federal contractor.” Compl. at 2. The complaint does not, however, allege that 3M used or reviewed this page as part of the contribution process.

THE BACKGROUND

3M is a publicly traded company, founded in 1902, that is headquartered in St. Paul, Minnesota and incorporated in Delaware. *See* 3M, *Annual Report 2017*;² 3M, *3M History*.³ 3M is a diversified technology company, with over \$30 billion in annual sales across four different business groups. *See, e.g., id.* The company produces a diverse range of products and services,

¹ Available at

https://www.everycrsreport.com/files/20181023_R44027_6297390cle94b1899f7caaa9134dbd6207d8af6f.pdf. To that end, at least one of the contracts the complaint attributes to 3M was actually with a subsidiary entity and therefore irrelevant to this complaint. *See infra* at 3; Factual & Legal Analysis to Chevron Corporation and Chevron U.S.A., Inc., Matter Under Review 6726 (Mar. 11, 2014), at <https://www.fec.gov/files/legal/murs/6726/14044353483.pdf>. 3M also was unable to locate information related to the alleged Department of Homeland Security contract and can thus neither confirm nor deny whether 3M had a contract with this agency during the relevant period. *See* Otterstetter Decl. (“Decl.”) ¶ 9.

² Available at https://s2.q4cdn.com/974527301/files/doc_financials/2017/Annual/2017_3M_Annual_Report.pdf.

³ Available at https://www.3m.com/3M/en_US/company-us/about-3m/history/.



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including metered-dose inhalers, reflective sheeting for highway signs, Scotch® Masking Tape, Scotchgard™ Fabric Protectors, and a wide array of Post-it® Products. *See id.*

3M does have contracts with entities such as the U.S. Department of Agriculture. *See* Decl. ¶ 7; *see also* Compl. at 3 n.8 (referencing a contract with this Department). 3M also has a subsidiary, 3M Health Information Systems, which is a separate legal entity from 3M that sometimes does business with the federal government. *See* Decl. ¶ 8. For example, the Department of Veterans Affairs' contract referenced in the complaint (at page 3 n.8) is actually held by this subsidiary rather than 3M itself. *See id.* 3M also has other subsidiaries that are not government contractors. *See id.* ¶ 10.

In 2018, 3M considered making a \$50,000 contribution to CLF. *See id.* ¶ 11. 3M had not previously contributed to a federal super PAC. *See id.* Nevertheless, believing that *Citizens United* permitted such contributions, 3M's in-house lawyer reviewed and approved the contribution to CLF. *See id.* ¶ 12. The attached declaration explains that the contribution was not made in connection with 3M's efforts to obtain contracts with the federal government. *See id.* ¶ 13.

The contribution was made via an October 25, 2018 check rather than by using CLF's website. *See id.* ¶ 14. While 3M was not required to file its own report with the FEC disclosing the contribution, the company had planned to voluntarily disclose the contribution on its own website this month, pursuant to 3M's political activities policy. *See id.* ¶ 15.

CLF reported receiving \$156,236,722.90 in contributions between January 1, 2017 and December 31, 2018. *See* FEC, *Congressional Leadership Fund*.⁴ CLF reported receipt of 3M's contribution on November 1, 2018. *See* CLF, *30-Day Post-Election Report* at 31 (filed Dec. 6, 2018).⁵ CLF had approximately \$700,000 cash on hand following the 2018 general election. *See id.* at 2.

Upon learning of the complaint, 3M reviewed the allegations and researched precedent under the Federal Election Campaign Act of 1971, as amended ("FECA") to determine whether the contribution was prohibited. When 3M learned about the FEC's prior, post-*Citizens United* decisions concerning the federal contractor ban, 3M requested a refund from CLF within one business day. *See* Decl. ¶ 16. CLF provided the refund on March 22, 2019, and a copy of the refund check is incorporated into this submission. *See id.* at Attachment A. 3M has updated its

⁴ Available at <https://www.fec.gov/data/committee/C00504530/?cycle=2018>.

⁵ Available at <http://docquery.fec.gov/pdf/954/201812069135232954/201812069135232954.pdf>.



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internal policies and legal guidance to prohibit the company from making any additional contributions to federal super PACs. *See id.* ¶ 18.

DISCUSSION

3M contributed to CLF based on its belief – and, in particular, the belief of those employees who vetted the contribution – that *Citizens United* permitted U.S. companies to contribute without restriction to super PACs. *See id.* ¶ 12. Indeed, there is much publicly-available material from established sources that supports this view. *See, e.g.,* Ctr. for Responsive Politics, *What Is a PAC?*⁶ (observing that “[t]here are no limits or restrictions on the sources of funds that may be used for [super PAC] expenditures”); FEC, *Registering as a Super PAC* (“Super PACs are independent expenditure-only political committees that may receive unlimited contributions from individuals, corporations, labor unions and other political action committees”).⁷ So even if the complaint correctly summarizes the status of the law, 3M had no intent to violate the statutory prohibition. *See Decl.* ¶ 12.

Furthermore, even though the FECA *may* prohibit 3M’s contribution, we nevertheless believe the Commission should exercise its prosecutorial discretion and dismiss this matter for the following reasons:

1. Like Other Entities That Infrequently Contribute to Super PACs, 3M Was Unaware That Its Contribution Could Be Perceived to Violate the FECA and Quickly Moved to Remedy the Issue.

Since corporate contributions were prohibited prior to *Citizens United*, neither the Commission nor corporations that qualified as federal contractors had much exposure to § 30119(a)’s prohibition. *See, e.g.,* Statement of Chair Cynthia L. Bauerly, *Reporting Requirements and Treatment of Federal Contractors Under the Federal Election Campaign Act and FEC Regulations* at 3 (May 10, 2011) (“*Bauerly Statement*”).⁸ Indeed, given that the Campaign Legal Center filed complaints against several entities at the same time, it appears that many corporations were equally unaware of the potential application of § 30119 to super PAC contributions. *See Campaign Legal Center, Federal Contractors Expect the FEC to Let Them Ignore Contribution Ban* (Feb. 21, 2019).⁹

⁶ Available at <https://www.opensecrets.org/pacs/pacfaq.php>.

⁷ Available at: <https://www.fec.gov/help-candidates-and-committees/filing-pac-reports/registering-super-pac/>.

⁸ Available at https://www.fec.gov/resources/about-fec/commissioners/bauerly/statements/bauerly_statement_05_10_2011.pdf.

⁹ Available at <https://campaignlegal.org/update/federal-contractors-expect-fec-let-them-ignore-contribution-ban>.



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3M was no different than other corporations in these respects. As noted above, *see supra* at 3, 3M had not contributed to a federal super PAC in the eight years since this new form of campaign finance entity had come into existence. Thus, the company had no historical familiarity with the prohibition that might have led 3M to suspect that its contribution could be unlawful. And immediately upon learning of the potential application of the statutory prohibition to its contribution, 3M began working to obtain a refund from CLF. Prosecutorial discretion is warranted in precisely circumstances such as these – i.e., where there is general confusion about application of a rarely-invoked law and the questionable contribution was immediately returned. This is particularly so here given that numerous, non-government-contracting subsidiaries could have lawfully made the contribution to CLF. *See* Decl. ¶ 10.

2. The Contribution at Issue Was Relatively Small and Unlikely to Have Influenced the 2018 Election.

Other aspects of 3M's contribution lend themselves to a *Heckler* dismissal. For example, the amount contributed by 3M represents only about .03% of CLF's receipts for the 2018 election cycle. *See supra* at 3. And for its part, 3M's \$50,000 contribution was less than the larger contributions made by other government contractors. *See* Campaign Legal Center, *Federal Contractors Expect the FEC to Let Them Ignore Contribution Ban* (explaining that Alpha Marine Services contributed \$100,000 to CLF); MUR 7099, Conciliation Agreement (explaining that Suffolk contributed a total of \$200,000 to a super PAC).

Moreover, because the contribution was made very late during the election, it is unlikely that those funds were used to purchase election advertising.¹⁰ This is particularly true when considering first-in, first-out accounting principles, as CLF would not have spent 3M's funds on the 2018 election. *Compare* CLF, *30-Day Post-Election Report* at 2 (reflecting a cash-on-hand balance of \$701,117.02) *with* 30-34 (showing, at most, \$510,725 in funds were raised after 3M's contribution).

3. 3M Has Taken Steps to Prevent a Recurrence of This Issue.

Once 3M became aware of the complaint, the company undertook several steps to prevent future potential violations of 52 U.S.C. § 30119(a). *First*, working with outside counsel, 3M educated the relevant personnel about the statutory prohibition on contributions by

¹⁰ *See, e.g.*, Paul Blake, *From Polling to Production, How a Political Campaign Ad Gets Made*, ABC News (Aug. 18, 2016) (explaining that ads don't suddenly materialize, but rather campaigns are "planning this out weeks and months in advance"); Robin Opsahl, *Six Answers to Your Questions about Political Television Advertising*, Des Moines Register (Sept. 17, 2018) (noting that "at some point there's no more inventory"); Google, *Google Ads Help: About Reserved Media Placements on YouTube* (requiring ads to be submitted over a week in advance).



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government contractors. This includes taking steps to increase communication between 3M's Government Contracts Compliance group and the 3M personnel involved in approving political contributions, who historically had very little involvement in the government contracting and compliance processes. *Second*, 3M updated its corporate policies and internal compliance materials to affirmatively prohibit the company from making future contributions to super PACs. *Third*, to mitigate the risk of future issues, 3M has undertaken a process to retain an external vendor to assist the company with its future compliance and contribution reporting.

4. The First Amendment Likely Prohibits the FEC from Applying the FECA to Prohibit Contributions to Super PACs by Government Contractors.

While it is not within the FEC's jurisdiction to judge the constitutionality of the FECA, the FEC can nonetheless take notice that applying the statutory prohibition to 3M in this case would likely violate the fundamental constitutional principles embodied in the Supreme Court's *Citizens United* decision and subsequent precedent. As courts have explained, "the government has no anti-corruption interest in limiting contributions to an independent expenditure group," *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*), and there is in fact "substantial doubt about the constitutionality of *any* limits on Super PAC contributions — *including* § [30119's] ban on contributions by federal contractors," *Wagner v. FEC*, 901 F. Supp. 2d 101, 107 (D.D.C. 2012), *vacated on other grounds*, 717 F.3d 1007 (D.C. Cir. 2013) (emphasis added).¹¹ Far from upholding the statutory prohibition at issue here, the United States Court of Appeals for the District of Columbia Circuit explicitly declined to confirm that § 30119 may be applied to government contractor contributions to super PACs post-*Citizens United*. See *Wagner*, 793 F.3d at 3–4. And even then-FEC Chair Cynthia Bauerly told Congress that "considerations regarding treatment [of a] corporation were the same as [the] treatment [of a] contractor," meaning that the same reasons courts have provided for striking down the restrictions on corporate contributions to super PACs generally would apply with equal force to government contractor contributions to a super PAC. Bauerly Statement at 3 (citing *FEC v. Weinstein*, 462 F. Supp. 243, 249 (S.D.N.Y. 1978) ("*Bauerly Statement*").

3M is not alone in raising these concerns; numerous parties have presented arguments on precisely this point to the FEC. See, e.g., Center for Competitive Politics, *Comments Regarding the Petition for Rulemaking on Federal Contractors* (REG 2014-09) (Notice 2015-06), at 2-4 (May 29, 2015);¹² *Comments on Behalf of the U.S. Chamber of Commerce of the United States of America Regarding the Petition for Rulemaking on Federal Contractors* (REG 2014-09) (Notice

¹¹ It is also important to underscore that the relevant statutory provision itself only precludes federal contractors from making contributions – not expenditures. See 52 U.S.C. § 30119(a).

¹² Available at <https://sers.fec.gov/fosers/showpdf.htm?docid=336371>.



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2015-06), at 11-12 (May 29, 2015);¹³ MUR 6403, Response of Ahtna, Inc. and NANA Regional Corporation, Inc. at 6-7.¹⁴ Rather than repeat these arguments, 3M simply adopts and incorporates them here by reference. In short, and respectfully, instead of infringing upon 3M's constitutional rights, the Commission should adhere to these authorities and dismiss this matter.¹⁵

* * *

For the foregoing reasons, 3M respectfully requests that the Commission dismiss this matter pursuant to *Heckler*. In the alternative, 3M requests that the Commission process this matter through its Office of Alternative Dispute Resolution.

Best regards,

A handwritten signature in blue ink that reads "Carol A. Laham".

Carol A. Laham
Andrew G. Woodson

¹³ Available at <https://sers.fec.gov/fosers/showpdf.htm?docid=336372>.

¹⁴ Available at <https://www.fec.gov/files/legal/murs/6403/11044304838.pdf>.

¹⁵ In retrospect, 3M is aware that the FEC fined Suffolk Construction Company, Inc. ("Suffolk") for contributing to Priorities USA Action. See MUR 7099, Conciliation Agreement (dated Sept. 25, 2017). In its response, however, Suffolk never raised the above constitutional concerns to the Commission, which 3M is presenting here. See MUR 7099, Response from Suffolk (dated Sept. 1, 2016).

BEFORE THE FEDERAL ELECTION COMMISSION

State of Minnesota)
)
 Ramsey County)

Matter Under Review 7569

DECLARATION OF JOSEPH OTTERSTETTER

I, Joseph Otterstetter, hereby declare as follows:

1. I have personal knowledge of all information contained in this Declaration.
2. Currently, I am the Associate General Counsel for International Operations at 3M Company ("3M"). 3M is a publicly-traded, diversified technology company that was founded in 1902. The company is headquartered in St. Paul, Minnesota.
3. I joined 3M's Legal Affairs organization in 1989 and, during my tenure with the company, I have served as legal advisor to more than 30 different 3M businesses. In my current capacity, I lead 3M's international general legal team, which consists of some 120 legal professionals who serve a variety of 3M businesses and staff organizations.
4. For most of the past 15 years, I have been responsible for reviewing and approving 3M's political contributions. I have taken a conservative approach when reviewing such contributions and place the highest priority on ensuring their lawfulness.
5. On March 4, 2019, 3M received notification that the Campaign Legal Center filed a complaint with the Federal Election Commission alleging a violation of the federal contractor contribution prohibition at 52 U.S.C. § 30119.
6. I have read this complaint, am familiar with its contents, and investigated the circumstances surrounding its allegations. This latter information is detailed in this Declaration.
7. At my request, Charles Horwitz, 3M's Director of Government Contract Compliance, confirmed that, at the time of the contribution at issue, 3M had a contract with the U.S. Department of Agriculture.
8. 3M also has a subsidiary, 3M Health Information Systems, Inc. which is a separate legal entity from 3M that sometimes does business with the federal government. Mr. Horwitz confirmed that the Department of Veterans Affairs' contract referenced in the complaint (at page 3 n.8) is held by this subsidiary rather than 3M itself.

9. Mr. Horwitz was not able to locate any contract with the Department of Homeland Security during the relevant time period.

10. 3M has other subsidiaries that are not government contractors.

11. In 2018, 3M considered making a \$50,000 contribution to CLF. To the best of my knowledge, 3M had not previously contributed to a federal super PAC.

12. At the time I reviewed and approved the proposed contribution, I believed that *Citizens United v. FEC*, 558 U.S. 310 (2010), permitted such contributions.

13. To the best of my knowledge, this contribution had absolutely no connection to any federal contract.

14. The contribution was made via a check dated October 25, 2018. Because 3M's process is to make payments through our normal accounts payable system via check, neither I, nor to my knowledge anyone on 3M's government affairs team, reviewed the "contribute" portion of CLF's website.

15. 3M and its employees are engaged in the community and actively participate in government and public policymaking. As part of that process, 3M publicly posts information about these activities on its website. In response to these and other efforts, the Center for Political Accountability has recognized 3M as a "First Tier" company for its commitment to political disclosure and accountability. Consistent with its past practices, information about 3M's contribution to CLF was scheduled to be posted on the company's website this month.

16. Upon learning of the complaint, reviewing the alleged concerns over the contribution, and analyzing the applicable law, I requested a refund from CLF within one business day.

17. CLF issued the refund check on March 22, 2019, and a copy of the check is incorporated into this submission. See Attachment A. 3M received the refund check on March 25 and deposited it on March 27 via 3M's normal accounting system.

18. 3M has updated its internal policies and legal guidance to prohibit the company from making any additional contributions to federal super PACs.

Under penalty of perjury, I declare that the foregoing is true to the best of my knowledge and belief.

Dated this 4th day of April 2019



Joseph Otterstetter

FOR SECURITY PURPOSES, THE FACE OF THIS DOCUMENT CONTAINS A COLORED BACKGROUND AND MICROPRINTING IN THE BORDER

Congressional Leadership Fund
1747 Pennsylvania Ave. NW
5th Floor
Washington, DC 20006

Chain Bridge Bank
1445-A Laughlin Avenue
McLean, VA 22101

No. 2010

68-947-560

Date 3/22/2019

Pay To The
Order Of 3M

\$ **50,000.00

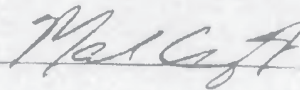
Fifty Thousand and 00/100

Dollars

3M

Attn: Omar Vargas
1425 K Street NW, Suite 300
Washington, DC 20005

Memo: Refund



SECURITY FEATURES INCLUDED. DETAILS ON BACK

Attachment A