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October 15, 2019

By email to CELA@fec.gov

Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: MUR 7634
Fairness PAC

Dear Mr. Jordan:

I am responding on behalf of respondent fairness PAC to the complaint ("Complaint") filed with the Commission by the Campaign Legal Center (CLC). For the reasons stated below, the Commission should find no reason to believe that Fairness PAC violated the Federal Election Campaign Act ("the Act") with respect to certain allegations, and with respect to matters as to which Fairness PAC acknowledges noncompliance with the Act the Commission should refer them to pre-probable cause conciliation for a negotiated resolution.

I. Background

Co-respondent Bill de Blasio has been the Mayor of the City of New York since January 1, 2014. In July 2018 he and others established two committees. Fairness PAC, an unincorporated nonfederal political organization under IRC § 527, registered on July 25, 2018 as a political committee with the Commission, and on January 31, 2019 it notified the Commission that it had become a multicandidate political committee. The purpose of Fairness PAC was to support federal Democratic Party candidates and progressive causes in New York State and elsewhere.[1]

[1] *See generally* reports filed with the Commission by Fairness PAC, FEC ID No. C00683664, available via https://www.fec.gov/data/committee/C00683664/.

Co-respondent NY Fairness PAC, also an unincorporated nonfederal political organization under Section 527 of the Internal Revenue Code (IRC), registered on July 27, 2018 as a political action committee with the New York State Board of Elections (NYSBOE). As such, NY Fairness PAC could contribute to New York nonfederal candidates, political party committees and political action committees, but it could not undertake independent expenditures, as defined by the New York Election Law, in the state's nonfederal elections.[2] NY Fairness PAC could, however, spend in connection with nonfederal elections in other states subject only to those states' laws and the obligation to disclose all such spending on its periodic reports to NYSBOE.[3] The purpose of NY Fairness PAC was to support nonfederal Democratic Party candidates and progressive causes in New York State and elsewhere, and it did so, including by making contributions and public communications, and by travel by Mayor de Blasio for activities, events and conferences in order to promote progressive positions on issues and to support candidates who embraced those positions, as reflected on its reports to NYSBOE.[4] Fairness PAC and NY Fairness PAC entered into and operated under a written joint fundraising arrangement in accordance with the Commission's regulations, with Fairness PAC acting as the joint fundraising representative.[5]

At some point during 2019 Mayor de Blasio began to consider becoming a candidate for the Democratic Party's nomination for President of the United States in 2020. Mayor de Blasio considered that travel he undertook in early March marked the first exploratory spending, by NY Fairness PAC. Fairness PAC undertook exploratory spending during the ensuing two months while maintaining other activities, as is reflected on its Mid-Year Report to the Commission and on the July Quarterly Report submitted by De Blasio 2020, which included memo entries to disclose exploratory activities.[6]

Mayor de Blasio decided to become a candidate on May 15. On May 16 he publicly announced his candidacy and co-respondent De Blasio 2020 filed its Statement of Organization with the Commission, and Mayor de Blasio filed a Statement of Candidacy on May 20. The presidential campaign continued until September 20, when Mayor de Blasio announced that he would no longer be an active candidate. Fairness PAC continues to operate in accordance with its original purposes.

Other facts pertinent to the Complaint are set forth below as necessary in responding to the allegations.

II. The Commission Should Find No Reason to Believe That Fairness PAC Violated the Act As Alleged in Part

A. Certain Payments By Fairness PAC Were Not Unlawful Contributions to De Blasio 2020

[2] See N.Y. Election Law § 14-100(16).
[3] *See* NYSBOE, 1978 Formal Opinion No. 8 (1978); 1977 Formal Opinion No. 2 (April 14, 1977).
[4] *See generally* reports filed with NYSBOE by NY Fairness PAC, No. A22609, available via https://www.elections.ny.gov/recipientstext.html.
[5] *See generally* 11 C.F.R. § 102.17.
[6] *See* https://docquery.fec.gov/pdf/448/201907199151533448/201907199151533448.pdf; https://docquery.fec.gov/pdf/569/201907319161343569/201907319161343569.pdf.

CLC alleges that certain payments by Fairness PAC were unlawful contributions to the subsequent De Blasio 2020.[7] Fairness PAC paid a total of $4,193 of exploratory expenses in the form of reimbursements of individuals for travel during March and May, and De Blasio 2020 so reported them on its July Quarterly Report. As a multicandidate PAC, Fairness PAC could contribute up to $5,000 to De Blasio 2020,[8] so these payments were within that limit.

B. Particular Spending by Fairness PAC Identified by CLC Was Not Exploratory

The Complaint makes speculative and factually incorrect allegations that certain payments by d Fairness PAC were "exploratory." While the applicable standard is whether or not particular payments were made "solely" for testing-the-waters purposes,[9] these payments were simply not part of the testing-the-waters activities. We address each such payment in turn.

The $46,000 disbursements by Fairness PAC on April 12 to Trilogy Interactive for "digital media buy" purchased digital advertisements that addressed issues, made no reference whatsoever to any election or potential candidacy, and asked viewers to "sign on" in order to build the respective PACs' lists of email contacts for future fundraising and other activities; viewers were asked to "sign on" if they agreed with particular issue positions (*e.g.,* "It's time for paid family leave for ALL Americans. Sign on if you agree!").[10]

As is well-established, "purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find reason to believe that a violation of [the Act] has occurred."[11] That is the situation here.

C. Contributions to Fairness PAC Were Not "Contributions" Within the Meaning of 11 C.F.R. § 100.72

CLC alleges that De Blasio 2020 unlawfully failed to report contributions to Fairness PAC during 2019 as exploratory contributions, although CLC does not explain whether or why its allegation applies to

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[7] Complaint ¶ 13.
[8] *See* 11 C.F.R. § 110.2(b)(1); AO 1985-40 at 3 (unnumbered).
[9] *See* 11 C.F.R. § 100.131(a); AO 1998-18 at 4 ("Since you have indicated that the sole purpose of conducting the poll was to test the waters for a potential federal candidate, the Commission concludes that the state Party's payment to the pollster must be made entirely from its Federal account.") (footnote omitted); AO 1985-40 at 11 (unnumbered) ("[T]his opinion concludes that [Senator Howard] Baker's private meetings with Republican Party leaders to seek their view on whether he should become a [presidential] candidate will be testing-the-waters activity. Thus, RMF expenditures to defray Mr. Baker's travel costs solely for such meetings will constitute in-kind gifts to his [testing-the-waters fund].").
[10] When De Blasio 2020 was created, it entered into a written, nonexclusive data licensing agreement to pay NY Fairness PAC $19,397.78 for a license to use the latter's email and social media contact lists through December 31, 2020. This fee was calculated by assessing the fair market value of the contact lists to be licensed. De Blasio 2020's payment of this sum appears on its October Quarterly Report. Also upon on its creation, De Blasio 2020 entered into a written agreement with Fairness PAC and NY Fairness PAC to purchase their jointly owned URL, www.billdeblasio.com, for $2,095, half of which De Blasio 2020 paid to each committee, as is disclosed on the October Quarterly Report. This fee similarly was calculated in order to reflect the fair market value of the URL.
[11] Statement of Reasons of Commissioners David Mason, Karl J. Sandstorm, Bradley A Smith and Scott E. Thomas at 3, MUR 4960 (December 21, 2000).

all such payments, an amount of them that matches what CLC alleges was the amount of exploratory spending, or some other portion of them.[12] CLC relatedly alleges that De Blasio 2020 accepted unlawful contributions from any individual who donated or contributed[13] more than $2,800 collectively to NY Fairness PAC, Fairness PAC and De Blasio 2020 during 2019, asserting that this conclusion must follow because both NY Fairness PAC and Fairness PAC undertook expenses that De Blasio 2020 identified as exploratory on its first report to the Commission.[14] These allegation are insufficient both legally and factually to warrant reason-to-believe findings.

Since its early days the Commission by regulation has recognized and regulated – at least with respect to individuals who *do* later become candidates[15] – a "testing-the-waters" phase prior to candidacy. Those regulations, 11 C.F.R. §§ 100.72, 100.131, and 101.3 (which incorporates the other two regulations), distinguish exploratory from candidacy activity and require that only funds "permissible under the Act" be used for the former. The regulations require that a potential candidate keep records of all "[f]unds received *solely* for purpose of determining whether [the] individual should become a candidate" (emphasis added) and all "[p]ayments made *solely* for" that same purpose (emphasis added); and, if the individual subsequently becomes a candidate, his or her authorized committee must report all such "funds received" and "payments made" on its first report to the Commission. As the Commission early stated, the "funds received" include only "funds obtained *expressly* for that purpose."[16] When the Commission amended these regulations in 1985 in order to elaborate further what conduct would indicate candidacy as distinct from exploratory activity, the Commission emphasized the "explicit[ ] limita[tion]" intended by the word "solely"[17], and this limitation has been routinely noted since then.[18] Accordingly, pursuant to the plain language of this regulation, a pre-candidacy payment would become a "contribution" to a subsequently created authorized committee of an actual "candidate" only where either (a) the payment was made to an entity whose sole and expressed purpose was testing the waters, which was not true of Fairness PAC; (b) the donor or contributor was expressly solicited for that exploratory purpose, or (c) the donor or contributor indicated that purpose in connection with his or her payment.

The Commission adopted its testing-the-waters rules in order to enable an individual to consider becoming a federal candidate without being "discouraged from pursuing a variety of activities to determine whether a candidacy for federal office would be feasible."[19] For that reason, it is of course

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[12] See Complaint ¶¶ 33-34.
[13] Consistently with common Commission usage, we use the word "donation" and its other forms to describe funds provided to NY Fairness PAC, and the word "contribution" and its other forms to describe funds provided to Fairness PAC.
[14] See Complaint ¶¶ 33-35.
[15] The Act's text applies only to "candidates," as defined, see 52 U.S.C. § 30101(2), not to individuals who *consider* becoming candidates and either have not yet or never do satisfy either statutory prerequisite of "candidate" status, namely, receiving "contributions" or making "expenditures" that exceed $5,000. The Act does not refer to pre-candidacy, and neither its definitions of "contribution" and "expenditure" nor its exceptions to those terms allude to pre-candidacy. *See* 52 U.S.C. §§ 30101(8) and (9). However, the Commission classifies its testing-the-waters regulations as "exceptions" to those terms. *See* 11 C.F.R. Subparts C and E. Recently, the Commission was unable to agree whether the regulatory "funds permissible" requirement would apply to a Section 527 entity that is used for testing-the-waters activity for an individual who does *not* later become a candidate. *See* AO 2015-09 at 5.
[16] AO 1981-32 at 6 (unnumbered) (emphasis added).
[17] *See* FEC, Explanation and Justification, "Payments Received for Testing the Water Activities," 50 Fed. Reg. 9992, 9993 (March 13, 1985) ("1985 E & J").
[18] *See, e.g.*, First General Counsel's Report at 7 n.30, MUR 6999.
[19] FEC, Federal Election Regulations, Communication from the Chairman, Federal Election Commission, at 40, House Document No. 95-1, 95th Cong., 1st Sess. (January 12, 1977); AO 1981-32 at 4 (unnumbered).

necessary that testing-the-waters activities be clearly distinguished from "candidate" activities.[20] And, by the same token, it is necessary to identify and distinguish activities by a potential candidate that are *neither* solely exploratory nor candidate activities, because they are not subject to any regulation under the Act. The term "solely" in the regulations not only ensures that *candidate* activities *are* subject to the Act, which explicitly defines and regulates "candidates," but also relieves potential candidates who engage in *other* activities – *neither* "testing the waters" nor "candidate" activities – from having to comply with the fundraising, recordkeeping and reporting obligations that the Commission has no power to impose on those activities – namely, that the individual or his vehicle raise and spend only funds permissible under the Act, keep records in accordance with Commission requirements, and then, as a candidate through an authorized committee, publicly report associated receipts as "contributions" and associated payments as "expenditures" *for the candidacy*. In sum, the word "solely" distinguishes exploratory activities from both candidacy activities *and* any other activities by the potential candidate during the testing-the-waters period.

CLC's implicit theory of violation is not only unsupported by Commission precedent in the testing-the-waters context, it is also inconsistent with the fundamental principle under the Act that an individual's contribution to a political committee is *not* also counted as a contribution to the candidate committees to which that political committee contributes, even if a contributor contributed the maximum allowable contribution to each of them, unless the contributor *earmarks* his or her contribution to the political committee to be used as a subsequent contribution to a particular candidate.[21] Absent earmarking, it is irrelevant that some accounting analysis could associate the original contribution to the political committee with the otherwise fungible funds that comprised that later contribution. By the same token, absent evidence of a "solely" exploratory nature, it is irrelevant that by some accounting analysis particular contributions to Fairness PAC could be associated with subsequent exploratory spending.

And, to our knowledge, the Commission has never stated that an authorized committee's inclusion on its first report of exploratory receipts and payments incurred by an entity other than an exploratory-*only* vehicle requires that *all* of its receipts be deemed to have been "solely" for exploratory purposes; that all testing-the-waters "payments made" be matched with an equal sum of testing-the-waters "funds received"; or that the ending cash balance equal the net of testing-the-waters receipts plus authorized committee contributions received minus testing-the-waters payments plus expenditures made. Rather, the appropriate way for an authorized committee to report prior testing-the-waters transactions is to list them as memo entries, as De Blasio 2020 did on its July Quarterly Report (and which CLC does not challenge).

Nor does CLC present pertinent factual allegations that meet its burden at the complaint stage. CLC alleges no facts that suggest, let alone demonstrate, that any contributor to Fairness PAC was ever asked to support a presidential exploratory effort or donated or contributed with that intention, express or otherwise. And, "a political committee or other organization may provide an individual…with a platform to speak about issues, support other candidates, and maintain a public profile without the payments for

[20] 1985 E & J, *supra*.
[21] *See generally* 52 U.S.C. § 30116; 11 C.F.R. § 110.6; FEC, Final Rule, "Affiliated Committees, Transfers, Prohibited Contributions and Earmarked Contributions," 54 Fed. Reg. 34098, 34105-34108 (August 17, 1989).

such activities necessarily being considered contributions to the future candidate's campaign."[22] "[M]ere speculation" otherwise does not suffice to warrant a reason-to-believe finding by the Commission.[23] To be sure, after Mayor de Blasio began to consider a potential presidential candidacy Fairness PAC spent in part to test the waters for such a candidacy, so not exclusively for either that or their original purposes. But this development did not *per se* convert either past donors or those who subsequently contributed through May 14 into contributors "solely for the purpose of determining whether [Mayor de Blasio] should become a candidate…."[24]

Accepting CLC's theory of violation also would be completely unfair by creating a trap for unwary donors and contributors to nonfederal and federal committees by ascribing unsolicited and unexpressed intentions for which there is no evidence, and compelling a subsequent and of course separate authorized committee to submit a sworn public report to the Commission that identifies them as its own contributors. Here, the Commission should not conclusively ascribe such an intention and find reason to believe that Fairness PAC and its co-respondents violated the Act, let alone, as alleged by CLC, by deliberately "concoct[ing] a shell game"[25] involving dozens if not more of their respective hundreds or thousands of donors and contributors.

Finally, it would be wholly inappropriate for the Commission to reach that legal conclusion for the first time in this (or any) enforcement proceeding. Where a matter before the Commission in an enforcement proceeding is of first impression and the respondent acted in accordance with a reasonable understanding of the applicable law, "due process would preclude the Commission from seeking to enact a new legal norm now, without prior notice, behind closed doors in a confidential enforcement action and apply it retroactively.

III. Conduct That Did Not Comply With the Act Should Be Resolved Through Pre-Probable Cause Conciliation

[22] Statement of Reasons of Chairman Matthew S. Peterson, and Commissioners Caroline C. Hunter and Lee E. Goodman at 4, MURs 6470, 6482, 6484 (March 30, 2016). *See also* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 8, MUR 6928; First General Counsel's Report at 29, MUR 5260; First General Counsel's Report at 9, MUR 6907.

[23] *See generally* Statement of Reasons of Commissioners David Mason, Karl J. Sandstorm, Bradley A Smith and Scott E. Thomas at 2, MUR 4960 (December 21, 2000). CLC appears to imply that Fairness PAC from its inception in July 2018 had some connection to Mayor de Blasio's eventual presidential candidacy, as why else quote from a contemporary newspaper article's description of Fairness PAC as a "'federal leadership PAC'" that would "'potentially set[ ] up a run for office after his term as mayor expires.'" See Complaint ¶ 7, quoting https://www.politico.com/states/new-york/albany/story/2018/07/25/de-blasio-launches-federal-pac-and-considers-post-mayoral-run-529622. And, why do so misleadingly: Fairness PAC was *not* a federal leadership PAC, of course, as Mayor de Blasio was neither a federal candidate nor a federal officeholder, *see* 11 C.F.R. § 100.5(e)(6), and CLC omits that the Mayor told the publication that he would "fill out [his] term" as Mayor, which does not expire until December 31, 2021; that the article reported that he "ha[d] insisted he has no plans to run for president"; and that the article reported the Mayor as describing Fairness PAC *exclusively* as a means to support *other* Democrats in their efforts to win federal and state office. *See* First General Counsel's Report, MUR 6907 at 8, 9 (July 28, 2015) (concluding with respect to an IRC § 501(c)(4) organization associated with then-potential presidential candidate Mike Huckabee that "conclusory assertions about [the organization's] purpose made in a news article that, in turn, does not provide specific information to support the claims" does not suffice to find reason to believe that it engaged in testing-the-waters activity, and that "[g]eneral characterizations of [its] purpose, without more, do not afford a reasonable basis to conclude" that there "may have [been] violat[ions of] the Act or Commission regulations.").

[24] 11 C.F.R. § 100.72(a).

[25] Complaint ¶ 2.

Fairness PAC acknowledges that the following actions did not comply with the Act. None was intentional, and most have already been disclosed in reports to the Commission itself. Fairness PAC respectfully request that the Office of General Counsel recommend that the Commission enter into pre-probable cause conciliation with respect to these matters.

First, De Blasio 2020 reimbursed Fairness PAC 16 days late for polling expenses that Fairness PAC had incurred for testing-the-waters purposes. There were two such expenditures, $68,000 to Brilliant Corners Research and Strategies on March 27, 2019 and $55,000 to Keating Research on May 13, 2019. Pursuant to 11 C.F.R. § 110.2(1)(1)(iii)(A) and (2), these payments would not be deemed to be in-kind contributions by Fairness PAC to De Blasio 2020 if De Blasio 2020 had timely reimbursed Fairness PAC for them within 30 days of Mayor de Blasio becoming a candidate; so, by June 14.[26] Instead, as De Blasio 2020 duly reported on the July Quarterly report, De Blasio 2020 erroneously did not reimburse Fairness PAC until June 30.

Second, there were several reporting errors associated with these polling expenditures. Although De Blasio 2020's original July Quarterly Report disclosed, on page 378, its reimbursement of Fairness PAC for $123,000 for "polling," it did not itemize either of the two underlying exploratory expenditures. De Blasio 2020 amended its report on July 19 and disclosed the payment to Brilliant Corners Research and Strategies, but it again omitted the payment to Keating Research. Meanwhile however, Fairness PAC's Mid-Year Report filed on July 31 accurately disclosed both the Brilliant Corners Research and Strategies payment, on page 130, and the Keating Research payment, on page 154, with notations that each was for "Exploratory Activity."

All of these matters are straightforward, no investigation is necessary to establish the facts admitted, and Respondents concede noncompliance with the Act. Under these circumstances pre-probable cause conciliation is appropriate.[27] Fairness PAC is willing to resolve them through that process and respectfully request that the Office of General Counsel so recommend to the Commission.

Conclusion

Accordingly, Fairness PAC respectfully request that the Commission find no reason to believe that Fairness PAC violated the Act as set forth above, and that other matters be referred by the Commission to pre-probable cause conciliation.

Respectfully submitted,

Laurence E. Gold

Laurence E. Gold
Counsel to Fairness PAC

[26] *See* 11 C.F.R. § 110.2(l).
[27] *See generally* 11 C.F.R. § 111.18(d); FEC, *Guidebook for Complainants and Respondents on the FEC Enforcement Process* at 17 (May 2012).