

FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL’S REPORT

MUR: 7682

DATE COMPLAINT FILED: January 17, 2020

DATE OF NOTIFICATION: January 24, 2020

LAST RESPONSE RECEIVED: March 19, 2020

DATE ACTIVATED: March 31, 2020

SOL: January 7, 2025

ELECTION CYCLE: 2020

COMPLAINANT:

J. McCauley Brown,
Chairman, Republican Party of Kentucky

RESPONDENTS:

Amy McGrath for Senate, Inc., and Chris Patton in
his official capacity as treasurer
Save America Fund and Edward Galvin, in his
official capacity as treasurer
Mark L. Nickolas

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30116
52 U.S.C. § 30125(e)
11 C.F.R. § 300.2(b), (m)
11 C.F.R. § 300.60
11 C.F.R. § 300.61

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Complaint alleges that Amy McGrath for Senate, Inc., and Chris Patton in his official capacity as treasurer (the “McGrath Committee”), through its agent, Mark Nickolas, the then-campaign manager for McGrath’s 2020 Senate campaign, knowingly and willfully solicited non-federal funds to Save America Fund and Edward Galvin in his official capacity as treasurer (“Save America Fund”), an independent expenditure-only political committee (“IEOPC”), in

1 violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).¹ The
2 Complaint is based on public statements Nickolas made to the press about the formation of the
3 IEOPC that allegedly signaled to potential donors that Save America Fund had the support of the
4 McGrath campaign and indicated to donors they should support McGrath “beyond the legal
5 limits” by giving to Save America Fund.²

6 Respondents do not dispute whether Nickolas made the statements but contend that they
7 were not solicitations of non-federal funds because the statements were made to the press and not
8 in the context of a fundraiser.³ They also argue that the statements did not contain any indicia of
9 solicitation, such as providing instructions on how or where to make a contribution, and should
10 be construed to be “mere statements of political support” for Save America Fund and its
11 founder.⁴

12 As set forth below, Nickolas’s statements appear to constitute improper solicitations of
13 non-federal funds to Save America Fund on behalf of the McGrath campaign. Accordingly, we
14 recommend that the Commission find reason to believe that the McGrath Committee and
15 Nickolas violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61, and that the Commission
16 authorize pre-probable cause conciliation with them. Because Save America Fund is not an
17 entity subject to the Act’s regulation of solicitations of non-federal funds by candidates,
18 however, we recommend that the Commission find no reason to believe that Save America Fund
19 violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61.

¹ Compl. (Jan. 21, 2020).

² *Id.* ¶¶ 12-18.

³ McGrath & Nickolas Resp. at 2-3 (Mar. 19, 2020); Save America Fund Resp. at 2-3 (Mar. 13, 2020).

⁴ McGrath & Nickolas Resp. at 2-3; Save America Fund Resp. at 3-4.

II. FACTUAL BACKGROUND

On July 18, 2019, Amy McGrath registered as a candidate for U.S. Senate in Kentucky.⁵ Amy McGrath for Senate, Inc., is her principal campaign committee, and Chris Patton is its treasurer.⁶ Mark Nickolas is McGrath's former campaign manager.

Save America Fund filed a Statement of Organization as an IEOPC on December 24, 2019.⁷ Eric Hyers, who was the former campaign manager for Governor Andy Beshear of Kentucky, founded Save America Fund.⁸ Fire Mitch Save America ("FMSA") is "a project of Save America Fund."⁹ On January 6, 2020, Save America Fund filed an amended Statement of Organization listing its website address as www.firemitchsaveamerica.com.¹⁰ Save America Fund describes itself on that website as "[t]he Super PAC dedicated to replacing Mitch McConnell with Amy McGrath."¹¹

On January 7, 2020, FMSA's Twitter handle posted its first tweet announcing Save America Fund's formation.¹² The same day, reporters interviewed Nickolas about Save America

⁵ FEC Form 2, Amy McGrath, Original Statement of Candidacy at 1 (Jul. 18, 2019).

⁶ FEC Form 1, Amy McGrath for US Senate, Original Statement of Organization (July 9, 2019). The Statement of Organization has been amended several times. *See* FEC Forms 1, Amended Statements of Organization (Aug. 28, 2019; Oct. 8, 2019; Nov. 16, 2019; Dec. 25, 2019; Jan. 3, 2020; Jan. 16, 2020; Apr. 29, 2020).

⁷ FEC Form 1, Save America Fund, Statement of Organization (Dec. 24, 2019).

⁸ *See* Daniel Desrochers, *Former Andy Beshear Staffer Forms Super PAC to Raise Money for Amy McGrath*, LEXINGTON HERALD-LEADER (Jan. 7, 2020), cited in Compl. at 3 (Jan. 21, 2020); Zach Montellaro, *The Democratic Debate Squeeze*, POLITICO (Jan. 7, 2020), cited in Compl. at 3.

⁹ FIRE MITCH SAVE AMERICA, <https://www.firemitchsaveamerica.com/> (last visited Aug. 18, 2020), cited in Compl. at 2; Save America Fund Resp. at 1.

¹⁰ Save America Fund, Amended Statement of Organization, FEC Form 1 (Jan. 6, 2020).

¹¹ FIRE MITCH SAVE AMERICA, <https://www.firemitchsaveamerica.com/> (last visited Aug. 18, 2020).

¹² Compl. ¶ 10 (citing to Fire Mitch Save America (@fire_mitch), TWITTER (Jan. 7, 202, 09:02 AM), https://twitter.com/fire_mitch/status/1214547802686132226 (inaugural tweet); Fire Mitch Save America (@fire_mitch), TWITTER (Jan. 7, 2020, 09:30 AM), https://twitter.com/fire_mitch/status/1214555024744951808 ("We are Fire Mitch Save America. We want to see Mitch McConnell lose, we want to see Amy McGrath win and we've got the roadmap to do it.")).

1 Fund. According to an article published by *Politico*, Nickolas, identified as McGrath's campaign
 2 manager, was described as encouraging "coordination with Save America Fund" and quoted as
 3 stating:

4 This is a big deal that Eric [Hyers] will lead this effort, given his recent success in
 5 ousting the other unpopular Republican in Kentucky in a race that many didn't
 6 think was winnable. He knows this electorate better than anyone We very
 7 strongly encourage donors to give to Eric's group.¹³

8 Further, in an article published in the *Lexington Herald-Leader*, when asked whether the
 9 establishment of Save America Fund signaled support of McGrath by the Kentucky Democratic
 10 establishment, Nickolas, again identified as McGrath's campaign manager in the article,
 11 reportedly disagreed with the notion of signaling support from the Kentucky Democratic
 12 establishment and was quoted as responding: "I think the signal is for people who are interested
 13 in contributing beyond the legal limits, they should have confidence to contribute to the Super
 14 PAC."'¹⁴

15 The Complaint attaches screenshots from Save America Fund's ActBlue donation page,
 16 which Save America Fund and Hyers promoted on Twitter.¹⁵ On top of the donation pages is the
 17 statement "Fire Mitch Save America" next to a photo of Senator McConnell, followed by
 18 "Donate Now. Fire Mitch," and a reprint of Nickolas's above quote in the *Politico* article
 19 encouraging donors to give to Save America Fund.¹⁶ The ActBlue donation pages, which are

¹³ Montellaro, *supra* note 8.

¹⁴ Descrochers, *supra* note 8.

¹⁵ Compl., Exs 3, 4; Fire Mitch Save America (@fire_mitch), TWITTER (Jan. 8, 2020, 12:20 PM), https://twitter.com/fire_mitch/status/1214960192644952064 (including link to ActBlue donation page with reference code "retweet" attached as Exhibit 3 of the Complaint); Eric Hyers (@EricHyers), TWITTER (Jan. 7, 2020, 12:17 PM), <https://twitter.com/EricHyers/status/1214596998424399876> (including link to ActBlue donation page with reference code "fir_or_tw_eh" attached as Exhibit 4 of the Complaint).

¹⁶ Compl., Exs 3, 4.

dated January 8, 2020, do not identify any limits to, or source restrictions on, contributions to Save America Fund.¹⁷

III. LEGAL ANALYSIS

A. There is Reason to Believe that the McGrath Committee, Through Its Agent, Mark Nickolas, Violated the Ban on Soliciting Non-Federal Funds

The Act prohibits federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained, or controlled by or acting on behalf of federal candidates and officeholders, from soliciting funds in connection with a federal election “unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act.”¹⁸ The Act limits contributions to non-authorized, non-party committees to \$5,000 in any calendar year.¹⁹ Although an IEOPC may accept contributions from corporations and individuals without regard to that \$5,000 limitation,²⁰ federal officeholders and candidates may only solicit up to \$5,000 from permissible sources on behalf of such a committee.²¹

The available information indicates that Nickolas was acting as an agent of the McGrath Committee when he made his statement soliciting non-federal funds to Save America Fund.²²

¹⁷ *Id.*

¹⁸ See 52 U.S.C. § 30125(e)(1)(A); see also 11 C.F.R. §§ 300.60, 300.61.

¹⁹ 52 U.S.C. § 30116(a)(1)(C).

²⁰ See *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (*en banc*) (holding that contribution limits are unconstitutional as applied to individuals' contributions to political committees that only make independent expenditures); Advisory Op. 2010-11 (Common Sense Ten) (“AO 2010-11”) (concluding that corporations, labor organizations, political committees, and individuals may each make unlimited contributions to IEOPCs).

²¹ See Advisory Op. 2011-12 (Majority PAC) at 3 (“AO 2011-12) (determining that solicitation restrictions under 52 U.S.C. § 30125(e)(1)(A) remain applicable to contributions solicited by federal candidates, officeholders, and other covered persons); Conciliation Agreement ¶¶ 7, 8, MUR 7048 (Cruz for President) (“CA”) (same); Factual & Legal Analysis at 11, MURs 6563 and 6733 (Rep. Aaron Schock) (“F&LA”).

²² For the purposes of the soft money prohibition, an “agent” of a federal candidate or officeholder is “any person who has actual authority, either express or implied, to engage in any of the following activities on behalf of” that candidate or officeholder: “solicit[ing], receiv[ing], direct[ing], transferr[ing], or spend[ing] funds in connection with any election.” 11 C.F.R. § 300.2(b), (b)(3). In considering whether a person satisfies the definition of “agent,” the Commission need not analyze whether the person had the specific authority to raise *nonfederal* funds; a person who has the authority to raise *federal* funds on behalf of a candidate or individual holding federal

1 As campaign manager of the McGrath campaign, Nickolas exercised broad authority over the
 2 operation of the campaign and was as an agent of McGrath and the McGrath Committee. He
 3 was identified as McGrath's campaign manager when he provided the on-the-record statements
 4 at issue in response to question from the press,²³ and Respondents do not dispute that Nickolas
 5 was acting as an agent of the campaign when he made those statements.²⁴

6 Through regulation, the Commission has defined "to solicit" broadly to mean "to ask,
 7 request, or recommend, explicitly or implicitly, that another person make a contribution,
 8 donation, transfer of funds, or otherwise provide anything of value."²⁵ The regulation further
 9 provides that a "solicitation" is "an oral or written communication that, construed as reasonably
 10 understood in the context in which it is made, contains a clear message asking, requesting, or
 11 recommending that another person make a contribution" and "may be made directly or
 12 indirectly" but "does not include mere statements of political support[.]"²⁶

office is an agent. As the Commission further explained in 2006, the "Commission's current definitions of 'agent' are sufficiently broad to capture actions by individuals where the candidate authorizes an individual to solicit Federal funds on his or her behalf, but privately instructs the individual to avoid raising non-Federal funds." Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4978 (Jan. 31, 2006) ("Revised Agent E&J"). Indeed, "the candidate/principal may . . . be liable for any impermissible solicitations by the agent, despite specific instructions not to do so." *Id.* Thus, if Nickolas had actual authority, express or implied, to raise funds on behalf of the McGrath Committee, it is irrelevant whether he was given any instruction on the raising of, or the authority to raise, nonfederal funds.

²³ See Montellaro, *supra* note 8 ("Mark Nickolas, her campaign manager, said 'We very strongly encourage donors to give to Eric's group.'"); Desrochers, *supra* note 8 ("Mark Nickolas, McGrath's campaign manager, said that a PAC run by Hyers doesn't signal that McGrath has the support of the Kentucky Democratic establishment.")

²⁴ McGrath & Nickolas Resp. at 3; Save America Fund Resp. at 2; *accord* Factual & Legal Analysis at 6, MUR 7048 (Cruz for President, et al.) ("F&LA") ("[T]he record contains no information that the Committee disclaimed any of Lewis's references to contributions at the events.").

²⁵ 11 C.F.R. § 300.2(m); *see also* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,086 (July 29, 2002) (defining "to solicit" as to "ask another person to make a contribution or donation, or transfer of funds, or to provide anything of value, including through a conduit or intermediary").

²⁶ 11 C.F.R. § 300.2(m); *see also* Definitions of "Solicit" and "Direct," 71 Fed. Reg. 13,926, 13,928 (Mar. 20, 2006) ("Solicit E&J").

In 2006, the Commission revised the definition of “to solicit” following a decision by the United States Court of Appeals for the District of Columbia Circuit in *Shays v. FEC* holding that the Commission’s former regulation, promulgated in 2002, was too narrow and failed to include “implicit requests for money.”²⁷ In promulgating the revised definition, the Commission explained that the revision is broad in order to “ensure[] that candidates and parties may not, implicitly and indirectly, raise unregulated funds for either themselves, or subject to statutory exceptions, ‘friendly outsiders.’”²⁸ The Commission further stated: “By covering implicit and indirect requests and recommendations, the new definition forecloses parties and candidates from using circumlocutions ‘that make their intentions clear without overtly “asking” for money’” and “also squarely addresses the central concern of the Court of Appeals in *Shays* that ‘indirect’ as well as ‘direct’” requests for funds or anything of value must be covered.”²⁹

The standard for determining whether a communication is a solicitation is objective and does not turn on the subjective interpretations of the person making the communication or its recipients.³⁰ This objective standard “hinges on whether the recipient should have reasonably understood that a solicitation was made.”³¹ Moreover, “words that would by their plain meaning normally be understood as a solicitation, may not be a solicitation when considered in context, such as when the words are used as part of a joke or parody.”³²

²⁷ Solicit E&J, 71 Fed. Reg. at 13,927 (quoting *Shays v. FEC*, 414 F.3d 76, 104-06 (D.C. Cir. 2005)).

²⁸ *Id.* at 13,928 (quoting *Shays*, 414 F.3d at 106).

²⁹ *Id.*

³⁰ 11 C.F.R. § 300.2(m); *see also* Solicit E&J, 71 Fed. Reg. at 13,928.

³¹ Solicit E&J, 71 Fed. Reg. at 13,929.

³² *Id.* (citing *Phantom Touring, Inc. v. Affiliated Publ’ns*, 953 F.2d 724, 727 (1st Cir. 1992) (providing as an example the point that no reasonable listener would understand a theater critic who wrote “[t]he producer who decided to charge admission for that show is committing highway robbery” to be accusing the producer of the actual crime of robbery)).

Commission regulations provide specific examples of statements that constitute solicitations, which include, but are not limited to, the following:

- “Please give \$100,000 to Group X.”
- “Group X has always helped me financially in my elections. Keep them in mind this fall.”
- “X is an effective State party organization; it needs to obtain as many \$100,000 donations as possible.”
- “Send all contributions to the following address.”
- “You have reached the limit of what you may contribute directly to my campaign, but you can further help my campaign by assisting the State Party.”³³

Both statements made by Nickolas appear to constitute solicitations under Commission regulations. First, in the *Politico* article, when speaking to a reporter about the formation of Save America Fund, Nickolas stated: “This is a big deal that Eric [Hyers] will lead this effort, given his recent success in ousting the other unpopular Republican in Kentucky in a race that many didn’t think was winnable. He knows this electorate better than anyone. We very strongly encourage donors to give to Eric’s Group.”³⁴ Nickolas’s statement contains a direct reference to “Eric’s Group,” *i.e.*, Save America Fund, and he appears to be making a direct plea specifically targeted to donors, with the statement: “We very strongly encourage donors to give to Eric’s Group.” This direct solicitation is closely comparable to the Commission’s examples, such as “Please give \$100,000 to Group X”; “Send all contributions to the following address”; and “Group X has always helped me financially in my elections. Keep them in mind this fall.”³⁵ The clarity of this message requesting contributions to Save America Fund likely explains why the IEOPC decided to publish the statement on its ActBlue donation page.³⁶ The solicitation was

³³ 11 C.F.R. § 300.2(m)(2).

³⁴ *See* Montellaro, *supra* note 8.

³⁵ 11 C.F.R. § 300.2(m)(2)(i), (vi).

³⁶ Compl., Exs 3, 4.

not limited to federally permissible funds and constitutes an impermissible solicitation of soft money contributions.³⁷

Respondents contend that Nickolas's statement is not a solicitation because he was merely expressing political support and was not speaking at a fundraising event.³⁸ These arguments are unpersuasive. On their face, the statements directly encourage donors to make contributions to Save America Fund, and Save America Fund's decision to include the quoted statement in the fundraising context of its ActBlue donation page underscores the fundraising purpose of the statement, that is, that the communication, as reasonably understood, is asking for, requesting, or recommending that persons make contributions.³⁹ The context of a fundraising event such as in-person fundraiser is not a prerequisite for a statement to be a solicitation.⁴⁰

Save America Fund contends that even if the statement constituted a solicitation, it was not a solicitation of "*soft money* funds" because Nickolas did not specify a contribution level and Save America Fund's website does not solicit non-federal funds.⁴¹ Although Nickolas's statement did not specify an amount, Nickolas not only failed to limit the solicitation to contributions of up to \$5,000, but the context of the statement and the article's reference to the Save America Fund being a "Pro-Amy McGrath super PAC" also conveyed, in widely understood terms, that the organization could receive unlimited non-federal contributions by

³⁷ See AO 2011-12 at 3; F&LA at 11, MURs 6563 and 6733.

³⁸ McGrath Committee & Nickolas Resp. at 3; Save America Fund Resp. at 4.

³⁹ 11 C.F.R. § 300.2(m).

⁴⁰ While context should be considered in determining reasonableness, the regulation does not require a particular venue or opine that a particular context is dispositive. As noted above, the Commission's definition of "to solicit" also depends on the type of communications, including implicit and indirect requests for contributions. See Solicit E&J, 71 Fed. Reg. at 13,927, 13,928 (quoting *Shays v. FEC*, 414 F.3d 76, 104-06 (D.C. Cir. 2005)); 11 C.F.R. § 300.2(m).

⁴¹ Save America Fund Resp. at 4.

1 virtue of its super PAC status.⁴² Further, while Save America Fund's ActBlue donation page as
 2 accessed through the Save America Fund's website *currently* limits individual contributions to
 3 \$5,000, consistent with the permissible solicitation levels for candidates,⁴³ Save America Fund
 4 has solicited non-federal funds in other ways. For example, Save America Fund's ActBlue
 5 donation pages, attached to the Complaint, contains no such restrictions,⁴⁴ and its ActBlue
 6 donation page, when accessed directly through the ActBlue website, likewise contains no such
 7 limits.⁴⁵ Save America Fund has reported accepting contributions in excess of \$5,000, including
 8 at least one contribution made through ActBlue.⁴⁶ Accordingly, Nickolas's statement "very
 9 strongly encourag[ing] donors to give to [Save America Fund]" constitutes a soft money
 10 solicitation because a reasonable person would understand it to be requesting contributions to
 11 Save America Fund without limiting the request to the permissible amount of \$5,000.

12 The second statement at issue occurred when Nickolas responded to a reporter's question
 13 about the significance of Save America Fund's formation in the *Lexington Herald-Leader*. In
 14 that article, Nickolas is quoted as stating, "the signal is for people who are interested in
 15 contributing beyond the legal limits, they should have confidence to contribute to the Super

⁴² See AO 2011-12 at 3 ("Federal candidates, officeholders, and national party committees and their agents may only solicit contributions of up to \$5,000 from individuals . . . and Federal political action committees for an IEOPC.").

⁴³ Save American Fund Donation Page, ACTBLUE, <https://secure.actblue.com/donate/firemitschsaveamerica?refcode=website> (visited June 26, 2020)

⁴⁴ Compl., Exs. 3, 4.

⁴⁵ See Save American Fund Donation Page, ACTBLUE, <https://secure.actblue.com/donate/save-america-fund-1> (visited June 26, 2020)

⁴⁶ Save America Fund's 2020 April Quarterly Report reflects eight individual contributions over \$5,000, totaling \$305,000. See FEC Form 3X, Save America Fund, 2020 April Quarterly Report, Sched. A at 32, 33, 49, 74, 92, 159, 169 (reporting contributions of \$10,000, \$10,000), \$25,000, \$50,000, \$100,000, \$10,000, and two \$50,000 contributions, respectively). The 2020 Pre-Primary Report reflects three individual contributions, totaling \$270,000. See FEC Form 3X, Save America Fund, 2020 Pre-Primary Report, Sched. A at 8, 97, 212 (reporting contributions of \$10,000, \$10,000, and \$250,000, respectively).

PAC.”⁴⁷ In making this statement, Nickolas makes express reference to the idea of persons making contributions to Save America Fund in excess of “the legal limits.”⁴⁸ Nickolas’s reference to the idea of a person “contributing beyond the legal limits” directly invokes soft money, which long been understood to mean money that is not regulated by the Act’s source and amount limitations.⁴⁹ He also appears to encourage donors to make such contributions by stating that they “should have confidence” in contributing to “the Super PAC.”⁵⁰ Though not as direct as the statement directly encouraging donors to give to Save America Fund, this statement is closely comparable to one of the illustrative solicitations the Commission has provided: “You have reached the limit of what you may contribute directly to my campaign, but you can further help my campaign by assisting the State Party.”⁵¹ Under these circumstances, a reasonable person would understand that Nickolas’s statement, in his capacity as McGrath’s campaign manager, constituted a clear message encouraging persons to make contributions to Save America Fund, in amounts exceeding the limits applicable to the McGrath Committee.”⁵²

Respondents argue that Nickolas’s statement was not a solicitation for contributions, focusing on the contextual point that Nickolas was not addressing donors but merely answering a question from a reporter.⁵³ In addition, Save America Fund’s response contends that Nickolas

⁴⁷ See Desrochers, *supra* note 8.

⁴⁸ *Id.* Cf. Cruz F&LA at 9, MUR 4078 (finding reason to believe agent of committee made an impermissible solicitation when stating, “you max out and then get engaged in the Super PAC”); CA ¶ 5C, MUR 4078 (same).

⁴⁹ *E.g., McConnell v. FEC*, 540 U.S. 93, 93-94 (2003) (explaining that “hard money” contributions are those subject to the Act’s “source and amount limitations” and that “soft money” is “money as yet unregulated under [the Act]”).

⁵⁰ *Id.*

⁵¹ 11 C.F.R. § 300.2(m)(2)(ix); MUR 7048, *supra* note 48.

⁵² Committees registered as IEOPCs may solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations. See AO 2010-11.

⁵³ McGrath Committee & Nickolas Resp. at 2-3; Save America Fund Resp. at 2-3.

1 was simply disagreeing with the reporter and suggesting that Save America Fund's formation
2 had a "different meaning," without elaborating on what that meaning was.⁵⁴

3 Although Nickolas's statement could be construed as communicating that Save America
4 Fund should be considered a credible organization by virtue of Hyers's association with it, it also
5 includes specific reference to making contributions outside of the Act's otherwise applicable
6 contribution limitations to Save America Fund. While Nickolas was not directly addressing
7 potential donors, a solicitation can be made directly or indirectly under section 300.2(m). Here,
8 when a reporter asked whether the formation of Save America Fund signaled that McGrath had
9 the support of the Kentucky Democratic establishment, Nickolas stated that the formation of the
10 Super PAC signaled a way for supporters of McGrath to make "contributions" "beyond the legal
11 limits." Nickolas further stated that such supporters should have "confidence" in contributing to
12 Save America Fund, thereby positively and clearly recommending the Super PAC to
13 contributors.⁵⁵

14 Under these circumstances, we recommend that the Commission find reason to believe
15 that Nickolas and the McGrath Committee violated 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R.
16 § 300.61 by soliciting non-federal funds.

⁵⁴ Save America Fund Resp. at 3.

⁵⁵ In MUR 7535 (Leah for Senate) this Office recommended dismissing the allegation that a candidate's statements made during media interviews constituted solicitations. *See* First Gen. Counsel's Rpt. at 13, MUR 7535 (Leah for Senate). Although the statements in that matter arguably constituted solicitations, *see id.* at 10-11, the statements made by Nickolas at issue here are clearer by comparison because they directly encourage potential donors to make contributions to the recipient committee, Save America Fund.

B. The Available Information is Insufficient to Indicate that Nickolas Acted Knowingly and Willfully

The Act prescribes additional monetary penalties for violations that are knowing and willful.⁵⁶ A violation of the Act is knowing and willful if the “acts were committed with full knowledge of all the relevant facts and a recognition that the action is prohibited by law.”⁵⁷ This does not require proving knowledge of the specific statute or regulation the respondent allegedly violated.⁵⁸ Rather, it is sufficient to demonstrate that a respondent “acted voluntarily and was aware that his conduct was unlawful.”⁵⁹ This awareness may be shown through circumstantial evidence from which the respondent’s unlawful intent reasonably may be inferred,⁶⁰ such as concealment.⁶¹

The Complaint alleges that Nickolas’s solicitations of non-federal funds to Save America Fund were knowing and willful because of his extensive prior experience with federal

⁵⁶ See 52 U.S.C. § 30109(a)(5)(B), (d).

⁵⁷ 122 Cong. Rec. 12,197, 12,199 (May 3, 1976).

⁵⁸ *United States v. Danielczyk*, 917 F. Supp. 2d 573, 578 (E.D. Va. Jan. 9, 2013) (quoting *Bryan v. United States*, 524 U.S. 184, 195 & n.23 (1998) (holding that, to establish a violation is willful, government needs to show only that defendant acted with knowledge that conduct was unlawful, not knowledge of specific statutory provision violated)).

⁵⁹ *Id.* (citing jury instructions in *United States v. Edwards*, No. 11-61 (M.D.N.C. 2012); *United States v. Acevedo Vila*, No. 08-36 (D.P.R. 2009); *United States v. Fieger*, No. 07-20414 (E.D. Mich. 2008); and *United States v. Alford*, No. 05-69 (N.D. Fla. 2005)).

⁶⁰ *Cf. United States v. Hopkins*, 916 F.2d 207, 213 (5th Cir. 1990) (quoting *United States v. Bordelon*, 871 F.2d 491, 494 (5th Cir. 1989)). *Hopkins* involved a conduit contributions scheme, and the issue before the Fifth Circuit concerned the sufficiency of the evidence supporting the defendants’ convictions for conspiracy and false statements under 18 U.S.C. §§ 371 and 1001.

⁶¹ The Commission has made knowing and willful findings where the respondent sought to conceal activities in violation of the Act. See, e.g., MUR 7225 (Jack Wu) (knowing and willful findings where respondent sought to conceal his activities by filing inaccurate reports with the Commission, keeping incomplete committee records, and making deposits to the committee’s account); MUR 7132 (Michael David Pitts) (knowing and willful findings where respondent sought to conceal embezzlement by under-reporting transfers of payroll deductions and omitting disbursements from disclosure reports); MUR 6980 (Samuel K. Pate) (knowing and willful findings where respondent sought to conceal activities through use of separate accounts without clients’ knowledge).

campaigns⁶² and a prior indictment for failure to file state income tax returns.⁶³ However, notwithstanding Nickolas's extensive political experience, the available information does not indicate that he was aware that his conduct was unlawful.⁶⁴ Further, indictments for failure to file state income tax returns concern a different area of the law and would not appear to suggest that Nickolas was aware that his statements violated the Act. Thus, at this time, we do not recommend the Commission find that Nickolas's solicitation of non-federal funds was knowing and willful.

C. The Commission Should Find No Reason to Believe that Save America Fund Violated the Prohibition on Soliciting Non-federal Funds

As an IEOPC, Save America Fund may solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations for the purpose of making independent expenditures.⁶⁵ Absent any allegations or information regarding coordination with a candidate, an authorized committee, or political party, Save America Fund was permitted to solicit and accept contributions in excess of the Act's amount limitations from permitted sources. As there are no such allegations regarding coordination or respecting improper sources, and the circumstances of this matter do not otherwise indicate coordination, we recommend that the Commission find no reason to believe that Save America Fund violated 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 300.61.

⁶² Compl. ¶¶ 19-25, 40.

⁶³ *Id.* ¶¶ 25, 40 (citing *Democratic Blogger Indicted on State Income Tax Charge*, WAVE3 NEWS (Jan. 17, 2007), <https://www.wave3.com/story/5951391/democratic-blogger-indicted-on-state-income-tax-charge/>).

⁶⁴ We note that in MURs 6563 & 6733 (Rep. Aaron Schock), the Commission did not make knowing and willful findings as to a candidate who made impermissible solicitations and was politically experienced. Factual & Legal Analysis at 3, MURs 6563 & 6733.

⁶⁵ *See* AO 2010-11.

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V. RECOMMENDATIONS

1. Find reason to believe that Amy McGrath for Senate, Inc. and Chris Patton in his official capacity as treasurer violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61;
2. Find reason to believe that Mark L. Nickolas violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61;
3. Find no reason to believe that Save America Fund and Edward Galvin in his official capacity as treasurer violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61 and close the file as to these respondents;
4. Enter into conciliation with Amy McGrath for Senate, Inc. and Chris Patton in his official capacity as treasurer and Mark L. Nicholas prior to a finding of probable cause to believe;
5. Approve the attached Conciliation Agreement;
6. Approve the attached Factual & Legal Analyses; and

7. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

August 21, 2020

Date

Charles Kitcher
Charles Kitcher
Acting Associate General Counsel for Enforcement

Jin Lee
Jin Lee
Acting Assistant General Counsel

Dominique Dillenseger
Dominique Dillenseger
Attorney

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Amy McGrath for Senate, Inc. and Chris Patton MUR 7682
in his official capacity as treasurer
Mark L. Nickolas

I. INTRODUCTION

The Complaint alleges that Amy McGrath for Senate, Inc., and Chris Patton in his official capacity as treasurer (the “McGrath Committee”), through its agent, Mark Nickolas, the then-campaign manager for McGrath’s 2020 Senate campaign, knowingly and willfully solicited non-federal funds to Save America Fund and Edward Galvin in his official capacity as treasurer (“Save America Fund”), an independent expenditure-only political committee (“IEOPC”), in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).¹ The Complaint is based on public statements Nickolas made to the press about the formation of the IEOPC that allegedly signaled to potential donors that Save America Fund had the support of the McGrath campaign and indicated to donors they should support McGrath “beyond the legal limits” by giving to Save America Fund.²

Respondents do not dispute whether Nickolas made the statements but contend that they were not solicitations of non-federal funds because the statements were made to the press and not in the context of a fundraiser.³ They also argue that the statements did not contain any indicia of solicitation, such as providing instructions on how or where to make a contribution, and should

¹ Compl. (Jan. 21, 2020).

² *Id.* ¶¶ 12-18.

³ McGrath & Nickolas Resp. at 2-3 (Mar. 19, 2020).

1 be construed to be “mere statements of political support” for Save America Fund and its
2 founder.⁴

3 As set forth below, Nickolas’s statements appear to constitute improper solicitations of
4 non-federal funds to Save America Fund on behalf of the McGrath campaign. Accordingly, the
5 Commission finds reason to believe that the McGrath Committee and Nickolas violated
6 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61.

7 **II. FACTUAL BACKGROUND**

8 On July 18, 2019, Amy McGrath registered as a candidate for U.S. Senate in Kentucky.⁵
9 Amy McGrath for Senate, Inc., is her principal campaign committee, and Chris Patton is its
10 treasurer.⁶ Mark Nickolas is McGrath’s former campaign manager.

11 Save America Fund filed a Statement of Organization as an IEOPC on December 24,
12 2019.⁷ Eric Hyers, who was the former campaign manager for Governor Andy Beshear of
13 Kentucky, founded Save America Fund.⁸ Fire Mitch Save America (“FMSA”) is “a project of
14 Save America Fund.”⁹ On January 6, 2020, Save America Fund filed an amended Statement of

⁴ McGrath & Nickolas Resp. at 2-3.

⁵ FEC Form 2, Amy McGrath, Original Statement of Candidacy at 1 (Jul. 18, 2019).

⁶ FEC Form 1, Amy McGrath for US Senate, Original Statement of Organization (July 9, 2019). The Statement of Organization has been amended several times. *See* FEC Forms 1, Amended Statements of Organization (Aug. 28, 2019; Oct. 8, 2019; Nov. 16, 2019; Dec. 25, 2019; Jan.3, 2020; Jan. 16, 2020; Apr. 29, 2020).

⁷ FEC Form 1, Save America Fund, Statement of Organization (Dec. 24, 2019).

⁸ *See* Daniel Desrochers, *Former Andy Beshear Staffer Forms Super PAC to Raise Money for Amy McGrath*, LEXINGTON HERALD-LEADER (Jan. 7, 2020), cited in Compl. at 3 (Jan. 21, 2020); Zach Montellaro, *The Democratic Debate Squeeze*, POLITICO (Jan. 7, 2020), cited in Compl. at 3.

⁹ FIRE MITCH SAVE AMERICA, <https://www.firemitschsaveamerica.com/> (last visited Aug. 18, 2020), cited in Compl. at 2; Save America Fund Resp. at 1.

1 Organization listing its website address as www.firemitschsaveamerica.com.¹⁰ Save America
2 Fund describes itself on that website as “[t]he Super PAC dedicated to replacing Mitch
3 McConnell with Amy McGrath.”¹¹

4 On January 7, 2020, FMSA’s Twitter handle posted its first tweet announcing Save
5 America Fund’s formation.¹² The same day, reporters interviewed Nickolas about Save America
6 Fund. According to an article published by *Politico*, Nickolas, identified as McGrath’s campaign
7 manager, was described as encouraging “coordination with Save America Fund” and quoted as
8 stating:

9 This is a big deal that Eric [Hyers] will lead this effort, given his recent success in
10 ousting the other unpopular Republican in Kentucky in a race that many didn’t
11 think was winnable. He knows this electorate better than anyone We very
12 strongly encourage donors to give to Eric’s group.¹³

13 Further, in an article published in the *Lexington Herald-Leader*, when asked whether the
14 establishment of Save America Fund signaled support of McGrath by the Kentucky Democratic
15 establishment, Nickolas, again identified as McGrath’s campaign manager in the article,
16 reportedly disagreed with the notion of signaling support from the Kentucky Democratic
17 establishment and was quoted as responding: “I think the signal is for people who are interested

¹⁰ FEC Form 1, Save America Fund, Amended Statement of Organization (Jan. 6, 2020).

¹¹ FIRE MITCH SAVE AMERICA, <https://www.firemitschsaveamerica.com/> (last visited Aug. 18, 2020).

¹² Compl. ¶ 10 (citing to Fire Mitch Save America (@fire_mitch), TWITTER (Jan. 7, 202, 09:02 AM), https://twitter.com/fire_mitch/status/1214547802686132226 (inaugural tweet); Fire Mitch Save America (@fire_mitch), TWITTER (Jan. 7, 2020, 09:30 AM), https://twitter.com/fire_mitch/status/1214555024744951808 (“We are Fire Mitch Save America. We want to see Mitch McConnell lose, we want to see Amy McGrath win and we’ve got the roadmap to do it.”)).

¹³ Montellaro, *supra* note 8.

1 in contributing beyond the legal limits, they should have confidence to contribute to the Super
2 PAC.’’¹⁴

3 The Complaint attaches screenshots from Save America Fund’s ActBlue donation page,
4 which Save America Fund and Hyers promoted on Twitter.¹⁵ On top of the donation pages is the
5 statement “Fire Mitch Save America” next to a photo of Senator McConnell, followed by
6 “Donate Now. Fire Mitch,” and a reprint of Nickolas’s above quote in the *Politico* article
7 encouraging donors to give to Save America Fund.¹⁶ The ActBlue donation pages, which are
8 dated January 8, 2020, do not identify any limits to, or source restrictions on, contributions to
9 Save America Fund.¹⁷

10 **III. LEGAL ANALYSIS**

11 The Act prohibits federal candidates and officeholders, their agents, and entities directly
12 or indirectly established, financed, maintained, or controlled by or acting on behalf of federal
13 candidates and officeholders, from soliciting funds in connection with a federal election “unless
14 the funds are subject to the limitations, prohibitions, and reporting requirements of the Act.”¹⁸
15 The Act limits contributions to non-authorized, non-party committees to \$5,000 in any calendar

¹⁴ Descrochers, *supra* note 8.

¹⁵ Compl., Exs 3, 4; Fire Mitch Save America (@fire_mitch), TWITTER (Jan. 8, 2020, 12:20 PM), https://twitter.com/fire_mitch/status/1214960192644952064 (including link to ActBlue donation page with reference code “retweet” attached as Exhibit 3 of the Complaint); Eric Hyers (@EricHyers), TWITTER (Jan. 7, 2020, 12:17 PM), <https://twitter.com/EricHyers/status/1214596998424399876> (including link to ActBlue donation page with reference code “fir_or_tw_eh” attached as Exhibit 4 of the Complaint).

¹⁶ Compl., Exs 3, 4.

¹⁷ *Id.*

¹⁸ See 52 U.S.C. § 30125(e)(1)(A); see also 11 C.F.R. §§ 300.60, 300.61.

year.¹⁹ Although an IEOPC may accept contributions from corporations and individuals without regard to that \$5,000 limitation,²⁰ federal officeholders and candidates may only solicit up to \$5,000 from permissible sources on behalf of such a committee.²¹

The available information indicates that Nickolas was acting as an agent of the McGrath Committee when he made his statement soliciting non-federal funds to Save America Fund.²² As campaign manager of the McGrath campaign, Nickolas exercised broad authority over the operation of the campaign and was as an agent of McGrath and the McGrath Committee. He was identified as McGrath's campaign manager when he provided the on-the-record statements

¹⁹ 52 U.S.C. § 30116(a)(1)(C).

²⁰ See *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (*en banc*) (holding that contribution limits are unconstitutional as applied to individuals' contributions to political committees that only make independent expenditures); Advisory Op. 2010-11 (Common Sense Ten) ("AO 2010-11") (concluding that corporations, labor organizations, political committees, and individuals may each make unlimited contributions to IEOPCs).

²¹ See Advisory Op. 2011-12 (Majority PAC) at 3 ("AO 2011-12") (determining that solicitation restrictions under 52 U.S.C. § 30125(e)(1)(A) remain applicable to contributions solicited by federal candidates, officeholders, and other covered persons); Conciliation Agreement ¶¶ 7, 8, MUR 7048 (Cruz for President, *et al.*) ("CA") (same); Factual & Legal Analysis at 11, MURs 6563 and 6733 (Rep. Aaron Schock) ("F&LA").

²² For the purposes of the soft money prohibition, an "agent" of a federal candidate or officeholder is "any person who has actual authority, either express or implied, to engage in any of the following activities on behalf of" that candidate or officeholder: "solicit[ing], receiv[ing], direct[ing], transferr[ing], or spend[ing] funds in connection with any election." 11 C.F.R. § 300.2(b), (b)(3). In considering whether a person satisfies the definition of "agent," the Commission need not analyze whether the person had the specific authority to raise *nonfederal* funds; a person who has the authority to raise *federal* funds on behalf of a candidate or individual holding federal office is an agent. As the Commission further explained in 2006, the "Commission's current definitions of 'agent' are sufficiently broad to capture actions by individuals where the candidate authorizes an individual to solicit Federal funds on his or her behalf, but privately instructs the individual to avoid raising non-Federal funds." Definitions of "Agent" for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4978 (Jan. 31, 2006). Indeed, "the candidate/principal may . . . be liable for any impermissible solicitations by the agent, despite specific instructions not to do so." *Id.* Thus, if Nickolas had actual authority, express or implied, to raise funds on behalf of the McGrath Committee, it is irrelevant whether he was given any instruction on the raising of, or the authority to raise, nonfederal funds.

1 at issue in response to question from the press,²³ and Respondents do not dispute that Nickolas
2 was acting as an agent of the campaign when he made those statements.²⁴

3 Through regulation, the Commission has defined “to solicit” broadly to mean “to ask,
4 request, or recommend, explicitly or implicitly, that another person make a contribution,
5 donation, transfer of funds, or otherwise provide anything of value.”²⁵ The regulation further
6 provides that a “solicitation” is “an oral or written communication that, construed as reasonably
7 understood in the context in which it is made, contains a clear message asking, requesting, or
8 recommending that another person make a contribution” and “may be made directly or
9 indirectly” but “does not include mere statements of political support.”²⁶

10 In 2006, the Commission revised the definition of “to solicit” following a decision by the
11 United States Court of Appeals for the District of Columbia Circuit in *Shays v. FEC* holding that
12 the Commission’s former regulation, promulgated in 2002, was too narrow and failed to include
13 “implicit requests for money.”²⁷ In promulgating the revised definition, the Commission
14 explained that the revision is broad in order to “ensure[] that candidates and parties may not,
15 implicitly and indirectly, raise unregulated funds for either themselves, or subject to statutory

²³ See Montellaro, *supra* note 8 (“Mark Nickolas, her campaign manager, said ‘We very strongly encourage donors to give to Eric’s group.’”); Desrochers, *supra* note 8 (“Mark Nickolas, McGrath’s campaign manager, said that a PAC run by Hyers doesn’t signal that McGrath has the support of the Kentucky Democratic establishment.”).

²⁴ McGrath & Nickolas Resp. at 3; *accord* Factual & Legal Analysis at 6, MUR 7048 (Cruz for President, et al.) (“F&LA”) (“[T]he record contains no information that the Committee disclaimed any of Lewis’s references to contributions at the events.”).

²⁵ 11 C.F.R. § 300.2(m); *see also* Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,086 (July 29, 2002) (defining “to solicit” as to “ask another person to make a contribution or donation, or transfer of funds, or to provide anything of value, including through a conduit or intermediary”).

²⁶ 11 C.F.R. § 300.2(m); *see also* Definitions of “Solicit” and “Direct,” 71 Fed. Reg. 13,926, 13,928 (Mar. 20, 2006) (“Solicit E&J”).

²⁷ Solicit E&J, 71 Fed. Reg. at 13,927 (quoting *Shays v. FEC*, 414 F.3d 76, 104-06 (D.C. Cir. 2005)).

1 exceptions, ‘friendly outsiders.’”²⁸ The Commission further stated: “By covering implicit and
2 indirect requests and recommendations, the new definition forecloses parties and candidates from
3 using circumlocutions ‘that make their intentions clear without overtly “asking” for money’” and
4 “also squarely addresses the central concern of the Court of Appeals in *Shays* that ‘indirect’ as
5 well as ‘direct’” requests for funds or anything of value must be covered.”²⁹

6 The standard for determining whether a communication is a solicitation is objective and
7 does not turn on the subjective interpretations of the person making the communication or its
8 recipients.³⁰ This objective standard “hinges on whether the recipient should have reasonably
9 understood that a solicitation was made.”³¹ Moreover, “words that would by their plain meaning
10 normally be understood as a solicitation, may not be a solicitation when considered in context,
11 such as when the words are used as part of a joke or parody.”³²

12 Commission regulations provide specific examples of statements that constitute
13 solicitations, which include, but are not limited to, the following:

- 14 • “Please give \$100,000 to Group X.”
- 15 • “Group X has always helped me financially in my elections. Keep them in mind this
16 fall.”
- 17 • “X is an effective State party organization; it needs to obtain as many \$100,000
18 donations as possible.”
- 19 • “Send all contributions to the following address.”

²⁸ *Id.* at 13,928 (quoting *Shays*, 414 F.3d at 106).

²⁹ *Id.*

³⁰ 11 C.F.R. § 300.2(m); *see also* Solicit E&J, 71 Fed. Reg. at 13,928.

³¹ Solicit E&J, 71 Fed. Reg. at 13,929.

³² *Id.* (citing *Phantom Touring, Inc. v. Affiliated Publ’ns*, 953 F.2d 724, 727 (1st Cir. 1992) (providing as an example the point that no reasonable listener would understand a theater critic who wrote “[t]he producer who decided to charge admission for that show is committing highway robbery” to be accusing the producer of the actual crime of robbery)).

- “You have reached the limit of what you may contribute directly to my campaign, but you can further help my campaign by assisting the State Party.”³³

Both statements made by Nickolas appear to constitute solicitations under Commission regulations. First, in the *Politico* article, when speaking to a reporter about the formation of Save America Fund, Nickolas stated: “This is a big deal that Eric [Hyers] will lead this effort, given his recent success in ousting the other unpopular Republican in Kentucky in a race that many didn’t think was winnable. He knows this electorate better than anyone. We very strongly encourage donors to give to Eric’s Group.”³⁴ Nickolas’s statement contains a direct reference to “Eric’s Group,” *i.e.*, Save America Fund, and he appears to be making a direct plea specifically targeted to donors, with the statement: “We very strongly encourage donors to give to Eric’s Group.” This direct solicitation is closely comparable to the Commission’s examples, such as “Please give \$100,000 to Group X”; “Send all contributions to the following address”; and “Group X has always helped me financially in my elections. Keep them in mind this fall.”³⁵ The clarity of this message requesting contributions to Save America Fund likely explains why the IEOPC decided to publish the statement on its ActBlue donation page.³⁶ The solicitation was not limited to federally permissible funds and constitutes an impermissible solicitation of soft money contributions.³⁷

³³ 11 C.F.R. § 300.2(m)(2).

³⁴ *See* Montellaro, *supra* note 8.

³⁵ 11 C.F.R. § 300.2(m)(2)(i), (vi).

³⁶ Compl., Exs 3, 4.

³⁷ *See* AO 2011-12 at 3; F&LA at 11, MURs 6563 and 6733.

Respondents contend that Nickolas’s statement is not a solicitation because he was merely expressing political support and was not speaking at a fundraising event.³⁸ These arguments are unpersuasive. On their face, the statements directly encourage donors to make contributions to Save America Fund, and Save America Fund’s decision to include the quoted statement in the fundraising context of its ActBlue donation page underscores the fundraising purpose of the statement, that is, that the communication, as reasonably understood, is asking for, requesting, or recommending that persons make contributions.³⁹ The context of a fundraising event such as in-person fundraiser is not a prerequisite for a statement to be a solicitation.⁴⁰

Although Nickolas’s statement did not specify an amount, Nickolas not only failed to limit the solicitation to contributions of up to \$5,000, but the context of the statement and the article’s reference to the Save America Fund being a “Pro-Amy McGrath super PAC” also conveyed, in widely understood terms, that the organization could receive unlimited non-federal contributions by virtue of its super PAC status.⁴¹ Further, while Save America Fund’s ActBlue donation page as accessed through the Save America Fund’s website *currently* limits individual contributions to \$5,000, consistent with the permissible solicitation levels for candidates,⁴² Save

³⁸ McGrath Committee & Nickolas Resp. at 3.

³⁹ 11 C.F.R. § 300.2(m).

⁴⁰ While context should be considered in determining reasonableness, the regulation does not require a particular venue or opine that a particular context is dispositive. As noted above, the Commission’s definition of “to solicit” also depends on the type of communications, including implicit and indirect requests for contributions. *See* Solicit E&J, 71 Fed. Reg. at 13,927, 13,928 (quoting *Shays v. FEC*, 414 F.3d 76, 104-06 (D.C. Cir. 2005)); 11 C.F.R. § 300.2(m).

⁴¹ *See* AO 2011-12 at 3 (“Federal candidates, officeholders, and national party committees and their agents may only solicit contributions of up to \$5,000 from individuals . . . and Federal political action committees for an IEOPC.”).

⁴² Save American Fund Donation Page, ACTBLUE, <https://secure.actblue.com/donate/firemitchsaveamerica?refcode=website> (visited June 26, 2020) (accessed via Save America Fund website).

America Fund has solicited non-federal funds in other ways. For example, Save America Fund’s ActBlue donation pages, attached to the Complaint, contains no such restrictions,⁴³ and its ActBlue donation page, when accessed directly through the ActBlue website, likewise contains no such limits.⁴⁴ Save America Fund has reported accepting contributions in excess of \$5,000, including at least one contribution made through ActBlue.⁴⁵ Accordingly, Nickolas’s statement “very strongly encourag[ing] donors to give to [Save America Fund]” constitutes a soft money solicitation because a reasonable person would understand it to be requesting contributions to Save America Fund without limiting the request to the permissible amount of \$5,000.

The second statement at issue occurred when Nickolas responded to a reporter’s question about the significance of Save America Fund’s formation in the *Lexington Herald-Leader*. In that article, Nickolas is quoted as stating, “the signal is for people who are interested in contributing beyond the legal limits, they should have confidence to contribute to the Super PAC.”⁴⁶ In making this statement, Nickolas makes express reference to the idea of persons making contributions to Save America Fund in excess of “the legal limits.”⁴⁷ Nickolas’s reference to the idea of a person “contributing beyond the legal limits” directly invokes soft

⁴³ Compl., Exs. 3, 4.

⁴⁴ See Save American Fund Donation Page, ACTBLUE, <https://secure.actblue.com/donate/save-america-fund-1> (visited June 26, 2020) (accessed via ActBlue website).

⁴⁵ Save America Fund’s 2020 April Quarterly Report reflects eight individual contributions over \$5,000, totaling \$305,000. See FEC Form 3X, Save America Fund, 2020 April Quarterly Report, Sched. A at 32, 33, 49, 74, 92, 159, 169 (reporting contributions of \$10,000, \$10,000, \$25,000, \$50,000, \$100,000, \$10,000, and two \$50,000 contributions, respectively). The 2020 Pre-Primary Report reflects three individual contributions, totaling \$270,000. See FEC Form 3X, Save America Fund, 2020 Pre-Primary Report, Sched. A at 8, 97, 212 (reporting contributions of \$10,000, \$10,000, and \$250,000, respectively).

⁴⁶ See Desrochers, *supra* note 8.

⁴⁷ *Id.* Cf. F&LA at 9, MUR 7048 (finding reason to believe agent of committee made an impermissible solicitation when stating, “you max out and then get engaged in the Super PAC”); CA ¶ 5C, MUR 7048 (same).

money, which long been understood to mean money that is not regulated by the Act's source and amount limitations.⁴⁸ He also appears to encourage donors to make such contributions by stating that they "should have confidence" in contributing to "the Super PAC."⁴⁹ Though not as direct as the statement directly encouraging donors to give to Save America Fund, this statement is closely comparable to one of the illustrative solicitations the Commission has provided: "You have reached the limit of what you may contribute directly to my campaign, but you can further help my campaign by assisting the State Party."⁵⁰ Under these circumstances, a reasonable person would understand that Nickolas's statement, in his capacity as McGrath's campaign manager, constituted a clear message encouraging persons to make contributions to Save America Fund, in amounts exceeding the limits applicable to the McGrath Committee."⁵¹

Respondents argue that Nickolas's statement was not a solicitation for contributions, focusing on the contextual point that Nickolas was not addressing donors but merely answering a question from a reporter.⁵² Although Nickolas's statement could be construed as communicating that Save America Fund should be considered a credible organization by virtue of Hyers's association with it, it also includes specific reference to making contributions outside of the Act's otherwise applicable contribution limitations to Save America Fund. While Nickolas was not directly addressing potential donors, a solicitation can be made directly or indirectly under

⁴⁸ *E.g., McConnell v. FEC*, 540 U.S. 93, 93-94 (2003) (explaining that "hard money" contributions are those subject to the Act's "source and amount limitations" and that "soft money" is "money as yet unregulated under [the Act]").

⁴⁹ *Id.*

⁵⁰ 11 C.F.R. § 300.2(m)(2)(ix); MUR 7048, *supra* note 47.

⁵¹ Committees registered as IEOPCs may solicit and accept unlimited contributions from individuals, political committees, corporations, and labor organizations. *See* AO 2010-11.

⁵² McGrath Committee & Nickolas Resp. at 2-3.

1 section 300.2(m). Here, when a reporter asked whether the formation of Save America Fund
2 signaled that McGrath had the support of the Kentucky Democratic establishment, Nickolas
3 stated that the formation of the Super PAC signaled a way for supporters of McGrath to make
4 “contributions” “beyond the legal limits.” Nickolas further stated that such supporters should
5 have “confidence” in contributing to Save America Fund, thereby positively and clearly
6 recommending the Super PAC to contributors.

7 Under these circumstances, the Commission finds reason to believe that Nickolas and the
8 McGrath Committee violated 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 300.61 by soliciting
9 non-federal funds.

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Save America Fund MUR 7682
and Edward Galvin, in his official capacity
as treasurer

I. INTRODUCTION

The Complaint alleges that Amy McGrath for Senate, Inc., and Chris Patton in his official capacity as treasurer (the “McGrath Committee”), through its agent, Mark Nickolas, the then-campaign manager for McGrath’s 2020 Senate campaign, knowingly and willfully solicited non-federal funds to Save America Fund and Edward Galvin in his official capacity as treasurer (“Save America Fund”), an independent expenditure-only political committee (“IEOPC”), in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).¹ The Complaint is based on public statements Nickolas made to the press about the formation of the IEOPC that allegedly signaled to potential donors that Save America Fund had the support of the McGrath campaign and indicated to donors they should support McGrath “beyond the legal limits” by giving to Save America Fund.² Respondent contends that Nickolas’s statements do not constitute solicitations but assert that in any event, the Complaint’s allegation of an impermissible solicitation of nonfederal funds does not apply to it since, as an IEOPC, it is not prohibited from soliciting such funds.³

¹ Compl. (Jan. 21, 2020).

² *Id.* ¶¶ 12-18.

³ Save America Fund Resp. at 3-4 (Mar. 13, 2020).

1 The Complaint alleges a violation of 52 U.S.C. § 30125(e)(1)(A) and 11 C.F.R. § 300.61,
2 which prohibits federal officeholders, candidates, and their agents from soliciting funds in connection
3 with a federal election that do not comply with federal source restrictions, amount limits, or reporting
4 requirements. Because Save America Fund is not an entity subject to the Act’s regulation of
5 solicitations of non-federal funds by candidates, however, the Commission finds no reason to
6 believe that Save America Fund and Edward Galvin in his official capacity as treasurer violated
7 52 U.S.C. § 30125(e) and 11 C.F.R. § 300.61.

8 **II. FACTUAL BACKGROUND**

9 On July 18, 2019, Amy McGrath registered as a candidate for U.S. Senate in Kentucky.⁴
10 Amy McGrath for Senate, Inc., is her principal campaign committee, and Chris Patton is its
11 treasurer.⁵ Mark Nickolas is McGrath’s former campaign manager.

12 Save America Fund filed a Statement of Organization as an IEOPC on December 24,
13 2019.⁶ Eric Hyers, who was the former campaign manager for Governor Andy Beshear of
14 Kentucky, founded Save America Fund.⁷ Fire Mitch Save America (“FMSA”) is “a project of
15 Save America Fund.”⁸ On January 6, 2020, Save America Fund filed an amended Statement of

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⁶ FEC Form 1, Save America Fund, Statement of Organization (Dec. 24, 2019).

⁷ *See* Daniel Desrochers, *Former Andy Beshear Staffer Forms Super PAC to Raise Money for Amy McGrath*, LEXINGTON HERALD-LEADER (Jan. 7, 2020), cited in Compl. at 3; Zach Montellaro, *The Democratic Debate Squeeze*, POLITICO (Jan. 7, 2020), cited in Compl. at 3.

⁸ FIRE MITCH SAVE AMERICA, <https://www.firemitschsaveamerica.com/> (last visited Aug. 18, 2020), cited in Compl. at 2; Save America Fund Resp. at 1.

1 Organization listing its website address as www.firemitschsaveamerica.com.⁹ Save America
2 Fund describes itself on that website as “[t]he Super PAC dedicated to replacing Mitch
3 McConnell with Amy McGrath.”¹⁰

4 On January 7, 2020, FMSA’s Twitter handle posted its first tweet announcing Save
5 America Fund’s formation.¹¹ The same day, reporters interviewed Nickolas about Save America
6 Fund. According to an article published by *Politico*, Nickolas, identified as McGrath’s campaign
7 manager, was described as encouraging “coordination with Save America Fund” and quoted as
8 stating:

9 This is a big deal that Eric [Hyers] will lead this effort, given his recent success in
10 ousting the other unpopular Republican in Kentucky in a race that many didn’t
11 think was winnable. He knows this electorate better than anyone We very
12 strongly encourage donors to give to Eric’s group.¹²

13 Further, in an article published in the *Lexington Herald-Leader*, when asked whether the
14 establishment of Save America Fund signaled support of McGrath by the Kentucky Democratic
15 establishment, Nickolas, again identified as McGrath’s campaign manager in the article,
16 reportedly disagreed with the notion of signaling support from the Kentucky Democratic
17 establishment and was quoted as responding: “I think the signal is for people who are interested

⁹ Save America Fund, Amended Statement of Organization, FEC Form 1 (Jan. 6, 2020).

¹⁰ FIRE MITCH SAVE AMERICA, <https://www.firemitschsaveamerica.com/> (last visited Aug. 18, 2020).

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¹² Montellaro, *supra* note 7.

1 in contributing beyond the legal limits, they should have confidence to contribute to the Super
2 PAC.””¹³

3 The Complaint attaches screenshots from Save America Fund’s ActBlue donation page,
4 which Save America Fund and Hyers promoted on Twitter.¹⁴ On top of the donation pages is the
5 statement “Fire Mitch Save America” next to a photo of Senator McConnell, followed by
6 “Donate Now. Fire Mitch,” and a reprint of Nickolas’s above quote in the *Politico* article
7 encouraging donors to give to Save America Fund.¹⁵ The ActBlue donation pages, which are
8 dated January 8, 2020, do not identify any limits to, or source restrictions on, contributions to
9 Save America Fund.¹⁶

10 **III. LEGAL ANALYSIS**

11 The Act prohibits federal candidates and officeholders, their agents, and entities directly
12 or indirectly established, financed, or maintained, or controlled by, or acting on behalf of federal
13 candidates and officeholders, from soliciting funds in connection with a federal election “unless
14 the funds are subject to the limitations, prohibitions, and reporting requirements of the Act.”¹⁷
15 The Act limits contributions to non-authorized, non-party committees to \$5,000 in any calendar

¹³ Descrochers, *supra* note 7.

¹⁴ Compl., Exs 3, 4; Fire Mitch Save America (@fire_mitch), TWITTER (Jan. 8, 2020, 12:20 PM), https://twitter.com/fire_mitch/status/1214960192644952064 (including link to ActBlue donation page with reference code “retweet” attached as Exhibit 3 of the Complaint); Eric Hyers (@EricHyers), TWITTER (Jan. 7, 2020, 12:17 PM), <https://twitter.com/EricHyers/status/1214596998424399876> (including link to ActBlue donation page with reference code “fir_or_tw_eh” attached as Exhibit 4 of the Complaint).

¹⁵ Compl., Exs 3, 4.

¹⁶ *Id.*

¹⁷ See 52 U.S.C. § 30125(e)(1)(A); see also 11 C.F.R. §§ 300.60, 300.61.

1 year.¹⁸ Although an IEOPC may accept unlimited contributions,¹⁹ federal officeholders and
2 candidate may only solicit up to \$5,000 on behalf of such committee.²⁰

3 As an IEOPC, Save America Fund may solicit and accept unlimited contributions from
4 individuals, political committees, corporations, and labor organizations for the purpose of
5 making independent expenditures.²¹ Absent any allegations or information regarding
6 coordination with a candidate, an authorized committee, or political party, Save America Fund
7 was permitted to solicit and accept contributions in excess of the Act's amount limitations from
8 permitted sources. As there are no such allegations regarding coordination or respecting
9 improper sources, and the circumstances of this matter do not otherwise indicate coordination,
10 the Commission finds no reason to believe that Save America Fund violated 52 U.S.C.
11 § 30125(e)(1)(A) and 11 C.F.R. § 300.61.

¹⁸ 52 U.S.C. § 30116(a)(1)(C).

¹⁹ See *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (*en banc*) (holding that contribution limits are unconstitutional as applied to individuals' contributions to political committees that only make independent expenditures); Advisory Op. 2010-11 (Common Sense Ten) ("AO 2010-11") (concluding that corporations, labor organizations, political committees, and individuals may each make unlimited contributions to IEOPCs).

²⁰ See Advisory Op. 2011-12 (Majority PAC) at 4 (determining that solicitation restrictions under 52 U.S.C. § 30125(e)(1)(A) remain applicable to contributions solicited by federal candidates, officeholders, and other covered persons); Factual and Legal Analysis at 11, MURs 6563 and 6733 (Rep. Aaron Schock).

²¹ See AO 2010-11.