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May 4, 2020

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

Re: MUR 7719

Dear Mr. Jordan,

This response is submitted by the undersigned counsel on behalf of Senate Leadership Fund (“SLF”) in connection with the Complaint designated Matter Under Review 7719.

SLF is registered with the Commission as an independent expenditure-only committee (“IEOPC”) pursuant to Advisory Opinion 2010-11 (Commonsense Ten).¹ The Complainant alleges that SLF “made and failed to report illegal in-kind contributions to Cory Gardner’s campaign for U.S. Senate and illegally facilitated the making of contributions to Cory Gardner’s campaign using corporate resources.” Complaint at 1. The Complainant is wrong on both counts. First, the Complainant cites no evidence (because none exists) indicating that the Gardner campaign was involved in the development or dissemination of SLF’s texts or in any way met the conduct standard of the Commission’s coordinated communications rule. And second, the Complainant incorrectly *assumes* the Commission’s corporate facilitation regulations apply to an IEOPC. Yet even assuming *arguendo* that the terms of the corporate facilitation regulations extend to an IEOPC, the Complainant’s legal analysis completely ignores the impact of *Citizens United v. FEC*, 558 U.S. 310 (2010), and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), on the underpinnings of the Commission’s corporate facilitation regulations. Therefore, for the reasons set forth below, the Complaint should be dismissed.

¹ See Advisory Opinion 2010-11 (Commonsense Ten) at 3 (“Following *Citizens United* and *SpeechNow*, corporations, labor organizations, and political committees may make unlimited independent expenditures from their own funds, and individuals may pool unlimited funds in an independent expenditure-only political committee. It necessarily follows that corporations, labor organizations and political committees also may make unlimited contributions to organizations such as the Committee that make only independent expenditures.”) (footnote omitted).

I. Background

The Complaint contends that “SLF sent a text message blast soliciting contributions for Cory Gardner for Senate” on or around February 16, 2020. Complaint at 1. The Complaint notes that the hyperlink included in the text message directed “the recipient directly to a WinRed fundraising page.”² *Id.* at 2. The Complaint does not include an image of the referenced WinRed fundraising page and only partially describes its contents. The full webpage is included as Exhibit A.

The webpage is a SLF-paid webpage that features an image of Senator Gardner interacting with a supporter obtained from a public source and not from campaign materials. In the website’s contribution box is the following message:

Cory Gardner is a true conservative who needs your help fighting for our shared values.

Donate today to stand with Cory and protect the Republican Senate majority!

Below eight contribution amount buttons is a notice that reads: “Your contribution will benefit Cory Gardner for Senate.” The SLF webpage also includes the following disclaimer:

Paid for by Senate Leadership Fund. Not authorized by any candidate or candidate’s committee. www.senateleadershipfund.org

Additional language regarding permissible contribution sources appears below the disclaimer. This single SLF-paid webpage is hosted on the larger WinRed website, which includes webpages for many other candidates, party committees, and other political committees. SLF is charged website hosting and service fees by WinRed Technical Services (“WRTS”), which is a commercial vendor contracted to operate WinRed’s online platform.

The text message and webpage referenced in the Complaint were developed independently by SLF without any involvement from the Gardner campaign, and the associated costs were treated as independent expenditures.

Recipients of the text message who wished to contribute to Senator Gardner’s campaign could follow the link included in the text message. This link directed the recipient to the SLF webpage hosted on the WinRed site. If a donor made a contribution on the webpage, the transaction was processed by WinRed, and the donor-earmarked contribution was delivered to Cory Gardner for Senate via WinRed PAC, which functions as a conduit consistent with 11 C.F.R. § 110.6. All credit card transaction and processing fees were paid by the recipient of the contribution (*i.e.*, the Gardner campaign) per Commission requirements. SLF did not collect or

² WinRed was developed to function in the same manner as ActBlue. *See, e.g.*, Michelle Ye Hee Lee and Michael Scherer, *GOP launches new fundraising platform to capitalize on Republican small-dollar donor base*, Washington Post (June 24, 2019), https://www.washingtonpost.com/politics/gop-launches-new-fundraising-platform-to-capitalize-on-republican-small-dollar-donor-base/2019/06/24/0bfd29fc-968b-11e9-8d0a-5edd7e2025b1_story.html (“WinRed, the new fundraising platform for GOP committees and campaigns, is modeled after ActBlue”).

forward any contribution, played no role in transmitting contributions, and spent no money on transmittal costs.

II. SLF's Text Message Solicitations and Webpage are Not Coordinated with Any Candidate and SLF Does Not Collect or Forward Any Resulting Contributions

The text message and webpage identified in the Complaint were not coordinated with Senator Gardner, Senator Gardner's campaign committee, or any agent of either. The content of the text message at issue was not created or disseminated at the request or suggestion, or with the assent, of the Gardner campaign, but rather was developed independently by SLF. The Gardner campaign was not materially involved in any decisions or matters related to the text messages and webpage at issue. SLF had no discussions with anyone associated with the Gardner campaign about the text message or webpage at issue. All such decisions, including those regarding the timing of the distribution and recipient list, were undertaken independently by SLF with no involvement whatsoever by anyone associated with Senator Gardner's campaign. In short, nothing relating to SLF's text messages and webpage satisfied any of the conduct standards found at 11 C.F.R. § 109.21(d). Consequently, because SLF's text messages and webpage were not coordinated communications, SLF made no in-kind contributions (illegal or otherwise) to the Gardner campaign.

Under Commission precedent, the activities undertaken by SLF are properly classified as independent expenditures. *See* Advisory Opinion 2003-23 (WE LEAD) at 5 ("If WE LEAD's solicitations in this earmarking program were made independent of any candidate, candidate's authorized political committee, or its agents, by virtue of this independence the direct costs of solicitation incurred by WE LEAD would constitute independent expenditures."); Advisory Opinion 2011-14 (Utah Bankers Association) at 4 ("[T]he Project's website and email communications to the general public soliciting contributions to certain Federal candidates will not result in in-kind contributions to those Federal candidates, because the communications will not be 'coordinated communications' under the Act and Commission regulations."). Accordingly, SLF correctly treated the costs associated with the text message as an independent expenditure, which was reported to the Commission on February 11, 2020.³

As noted above, SLF does not collect, forward, or exercise direction or control over any contributions made to federal candidates who are included on the SLF webpage that is hosted on the WinRed website. No funds are deposited in, or otherwise pass through, any SLF account, and SLF has no role in processing or transmitting these contributions.⁴ Rather, a donor makes an earmarked contribution to Senator Gardner's campaign committee and WinRed PAC serves as a conduit for that donor-earmarked contribution.

In sum, neither Senator Gardner nor anyone in any way associated with his campaign committee: (i) asked, requested, or suggested that SLF undertake any of the activity described

³ *See* attached 24/48 Hour Report of Independent Expenditures, also available at <https://docquery.fec.gov/pdf/754/202002119186497754/202002119186497754.pdf>.

⁴ As noted in the Background section, associated credit card processing fees and transaction costs are paid by the Gardner campaign to WTRS.

above; (ii) participated in the creation or distribution of the text message or webpage; or (iii) reviewed the text message or webpage before they were distributed. SLF's solicitation communications were independently created and distributed and were in no way coordinated with the Gardner campaign.

III. The Commission's Corporate Facilitation Regulations Either Do Not Apply or Cannot Be Applied Constitutionally

The Complainant's corporate facilitation allegation fares no better than its in-kind contribution claim. According to the Complaint, "[t]he use of corporate funds to solicit contributions via a link to a candidate contribution platform is corporate facilitation under Commission precedent." Complaint at 5. The precedent cited by the Complainant (Advisory Opinion 2008-14 (Melothe, Inc.)) is a pre-*Citizens United* advisory opinion that is inapposite to the facts here. Melothe is primarily a media exemption opinion holding that an incorporated media entity *may* provide "a hyperlink directing a media Web site's visitors to a campaign's contribution page," so long as "it does not become a regular feature." Advisory Opinion 2008-14 (Melothe, Inc.) at 7. The media exemption would no longer apply, however, if the media entity "add[s] a contribution page or provid[es] a permanent hyperlink to the appropriate Web site addresses where viewers may make contributions." *Id.* Whether the opinion's media exemption analysis remains valid post-*Citizens United* is an open question. Nevertheless, it is ultimately irrelevant here for two reasons. First, the Melothe opinion involved a corporation's use of its own funds, not third-party political committee spending. And second, the Supreme Court issued a significant, superseding decision in 2010.

A. The Corporate Facilitation Regulation Does Not Apply to Super PACs

As an IEOPC, SLF is lawfully permitted to receive and spend funds from corporations. The Complaint seeks to apply 11 C.F.R. § 114.2(f) to SLF's communications but does not address the preliminary question of whether that regulation even applies to an IEOPC like SLF. A close reading of Section 114.2(f) demonstrates its scope is limited to actions taken directly by corporations and labor unions,⁵ not those of once-removed third parties using funds that were once the property of a corporation. For instance, the general prohibition against facilitating the making of a contribution explicitly applies to "corporations and labor organizations," 11 C.F.R. § 114.2(f)(1), while nothing in the regulation suggests this extends to any group that receives funds from a corporation or labor organization. The 1995 Explanation and Justification for the current facilitation rules is similarly silent about the prohibition applying to recipients of corporate or

⁵ The Commission's corporate facilitation rules date (at least) to the Commission's 1977 regulations implementing the 1976 statutory amendments. See Explanation and Justification for § 114.3, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 104-105 (1977) ("The corporation or labor organization may suggest in a communication sent to stockholders, executive or administrative personnel or members that they contribute to a particular candidate or political committee and provide the candidate's address. The corporation or labor organization may not, however, facilitate the making of contributions to a particular candidate or political committee, other than its separate segregated fund, as by providing envelopes addressed to the candidate or committee or enrolling persons in a payroll deduction plan for contributions to that candidate or committee."). The concept was further developed in Advisory Opinions and discussed in at least one enforcement matter (MUR 3540) in the 1980s before taking its current regulatory form in 1995.

labor organization donations. *See* Final Rule on Corporate and Labor Organization Activity, 60 Fed. Reg. 64,260, 64,264 – 64,265 (Dec. 14, 1995).

The examples listed in Section 114.2(f) of facilitation and non-facilitation further bolster the conclusion that the regulation only applies to direct actions taken by corporations and labor organizations. These examples include the provision of goods, services, or facilities to a political committee (*i.e.*, in-kind contributions); solicitations or coercion of employees; managing a separate segregated fund; and establishing a payroll deduction system. *See* 11 C.F.R. § 114.2(f)(2)-(5). Each example involves actions attributable to the corporations or labor organization themselves; none involve third parties that merely receive donations from corporations or labor organizations.

Under the Complainant’s mistaken theory, the corporate facilitation regulation applies to *any* IEOPC that receives corporate contributions and then uses those funds to independently solicit contributions to candidates. Neither the Act nor Commission regulations, however, contain any indication that facilitation can occur indirectly (such as by a Super PAC that accepts corporate contributions). By contrast, the prohibitions on government contractor and foreign national contributions specifically apply to contributions made “directly *or indirectly*.” *See* 52 U.S.C. §§ 30119(a)(1), 30121(a)(1).

Accordingly, there is no such thing as “corporate facilitation by an independent expenditure-only committee.” But, even if one were to assume for the sake of argument that the corporate facilitation regulations were applicable to the situation at hand, those regulations could not be applied constitutionally.

B. SLF’s Independent Activity Is Protected Speech Under Citizens United, SpeechNow.org, and Advisory Opinion 2010-11

As noted above, SLF is registered with the Commission as an IEOPC in accordance with Commission instructions. In Advisory Opinion 2010-11 (Commonsense Ten) the Commission determined:

Following *Citizens United* and *SpeechNow*, corporations, labor organizations, and political committees may make unlimited independent expenditures from their own funds, and individuals may pool unlimited funds in an independent expenditure-only political committee. It necessarily follows that corporations, labor organizations and political committees also may make unlimited contributions to organizations such as the Committee that make only independent expenditures.

In the D.C. Circuit’s words, “Super PACs [are] political committees that can raise unlimited money to engage in *unlimited* electioneering communications, so long as their activities are not made ‘in cooperation, consultation, or concert, with, or at the request or suggestion of’ a candidate, his or her authorized political committee, or a national, State, or local committee of a political party.” *Stop This Insanity v. FEC*, 902 F. Supp. 2d 23, 37 (D.C. Cir. 2012) (emphasis added). In 2019, the U.S. District Court for the District of Columbia rejected an

effort to ignore and reconsider these precedents. *See Lieu v. FEC*, 370 F. Supp. 3d 175 (D.D.C. 2019). There is simply no lawful basis on which to impose limitations on SLF’s independent political speech.

“Unlimited independent expenditures” (or “unlimited electioneering communications”) necessarily includes independent solicitation of contributions to federal candidates. As three Commissioners previously recognized:

In light of last year’s Supreme Court decision in *Citizens United v. Federal Election Commission*, which struck down the Act’s prohibitions against corporations making independent expenditures and electioneering communications, the continuing viability of the Commission’s facilitation regulation is at best suspect, at least as it applies to corporate and labor fundraising activities that are conducted independently of federal candidates and political party committees.

[***]

Therefore, because a solicitation done independently of a federal candidate or political party committee is political speech, it is as deserving of the full panoply of constitutional protections that is afforded to independent communications.

Consequently, post-Citizens United, if a corporation may ask people to vote for a federal candidate in an independent communication, then surely it may also make an independent communication asking people to make a contribution to that candidate. In other words, if a corporation enjoys the constitutional right to run an independent ad saying “Vote for Smith,” we fail to see how less constitutional protection could be afforded an independent ad saying “Contribute to Smith.”

[***]

The Supreme Court made clear in *Citizens United* that independent corporate political speech may not be prohibited. Thus, the Commission’s facilitation regulation may no longer be used to prohibit independent corporate communications that urge persons to make contributions directly to federal candidates.

MUR 6211 (Krikorian for Congress), Statement of Reasons of Vice Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 1-2 (footnotes omitted), 5 (emphasis added).

In other words, the activity at issue in Advisory Opinion 2008-14 that did not fall within the media exemption, assuming it were conducted independently, can no longer be treated as “corporate facilitation.” Since 2010, that activity has been constitutionally protected corporate independent expenditure activity that the Commission has no authority to restrict. The

Commission's corporate facilitation rules cannot be applied in a manner that would impose a restriction or limitation on SLF's right to make independent expenditures.

The same activity cannot be *both* an independent expenditure and an in-kind contribution. In the absence of coordination, activity that once might have been characterized as "corporate facilitation" is now a permissible independent expenditure. Subsequent to MUR 6211, the Commission concluded that an outside entity may independently make communications soliciting contributions for candidates without generating an in-kind contribution. *See* Advisory Opinion 2011-14 (Utah Bankers Association) at 4 ("the Project's website and email communications to the general public soliciting contributions to certain Federal candidates will not result in in-kind contributions to those Federal candidates, because the communications will not be 'coordinated communications' under the Act and Commission regulations").

The Complaint also contends that "[a]ny expenses incurred by SLF in sending text messages and setting up/administering the WinRed landing page that raises funds for Cory Gardner for Senate constitute illegal in-kind contributions to Cory Gardner's campaign." Complaint at 5. The Complaint is incorrect; as explained above, any such expenses are independent expenditures made consistent with *Citizens United*, *SpeechNow.org*, and Advisory Opinion 2010-11.

Finally, the Complainant claims that "raising funds directly for Cory Gardner for Senate" constitutes "providing a service to a candidate in connection with a federal election," which "results in a contribution." The Commission's regulations governing the raising of funds for federal candidates have never created any such blanket rule. Under the facilitation rules that the Complainant claims apply, the 1977 Explanation and Justification allows that "[t]he corporation or labor organization may suggest in a communication sent to stockholders, executive or administrative personnel or members that they contribute to a particular candidate or political committee and provide the candidate's address."⁶ More recently, the controlling Statement of Reasons in MUR 6211 and Advisory Opinion 2011-14 explain how entities may "rais[e] funds directly" for candidates" without that activity constituting "providing a service to a candidate" that "results in a contribution." The Complainant's "in-kind fundraising service" theory is inconsistent with longstanding Commission precedent and has no application where the activity at issue is undertaken as an independent expenditure.

⁶ Explanation and Justification for § 114.3, H.R. Doc. No. 95-44, 95th Cong., 1st Sess. 104. In 1987, the Commission explained, "[p]artisan communications under section 114.3 may solicit or suggest that the individual member make a contribution to a particular candidate so long as the corporation limits its activity to communication only and does not actually facilitate the making of the member's contribution to the candidate." Advisory Opinion 1987-29 (National Association of Life Underwriters) at 3.

IV. Conclusion

For the reasons set forth above, the Commission should find no reason to be any violation of the Act occurred and dismiss the Complaint. The activity addressed in the Complaint constitutes protected independent expenditure activity.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. Josefiak', with a long horizontal flourish extending to the right.

Thomas J. Josefiak
Michael Bayes
Counsel to Senate Leadership Fund

Attachment (Exhibit A)

Exhibit A



Cory Gardner is a true conservative who needs your help fighting for our shared values.

Donate today to stand with Cory and protect the Republican Senate majority!

\$25	\$50	\$100	\$250
\$500	\$1,000	\$2,800	Other

Your contribution will benefit Cory Gardner for Senate.

[Continue](#)

\$25

Donated before using an account? [Login](#)

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Contributions to WinRed are not deductible as charitable donations for federal income tax purposes.

Contribution rules

- I am a U.S. citizen or lawfully admitted permanent resident (i.e., green card holder).
- This contribution is made from my own funds, and funds are not being provided to me by another person or entity for the purpose of making this contribution.
- I am making this contribution with my own personal credit card and not with a corporate or business credit card or a card issued to another person.
- I am at least eighteen years old. I am not, nor am I making this contribution on behalf of, a corporation, labor organization, national bank, foreign national without a green card, a federal contractor, or any other federally impermissible source.

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