

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL’S REPORT

MUR 7750

DATE COMPLAINT FILED: June 22, 2020

DATE OF NOTIFICATION: June 24, 2020

DATE OF LAST RESPONSE: July 9, 2020

DATE ACTIVATED: Aug. 20, 2020

EXPIRATION OF SOL: Jan. 29 – Mar. 3, 2025

ELECTION CYCLE: 2020

COMPLAINANTS:

Rev. Dr. T. Anthony Spearman
 North Carolina State Conference of the
 National Association for the Advancement of
 Colored People (NAACP)

RESPONDENTS:

Faith and Power PAC and Ezekiel Patterson in his
 official capacity as treasurer
 Senate Leadership Fund and Caleb Crosby in his
 official capacity as treasurer

**RELEVANT STATUTES
AND REGULATION:**

52 U.S.C. § 30104(b)(6)(B)(iii)

52 U.S.C. § 30104(g)(3)(B)

52 U.S.C. § 30116(a)

52 U.S.C. § 30125(a)

11 C.F.R. § 300.2(c)

INTERNAL REPORTS CHECKED: Disclosure Reports**FEDERAL AGENCIES CHECKED:** None**I. INTRODUCTION**

The Complaint alleges that Faith and Power PAC and Ezekiel Patterson in his official capacity as treasurer (“FPP”), an independent expenditure-only political committee (“IEOPC”), filed false reports of independent expenditures it made in the 2020 North Carolina Democratic Primary for U.S. Senate, in violation of 52 U.S.C. §§ 30104(b)(6)(B)(iii), (g)(3)(B) of the Federal Election Campaign Act of 1971, as amended (the “Act”). The Complaint argues that the reports were false because they indicated that the independent expenditures supported or opposed

1 candidates in the Democratic Primary, whereas FPP's true intention in making the expenditures
2 was to support incumbent Republican Senator Thom Tillis in the general election by dividing the
3 Democratic candidates and confusing Democratic Primary voters.

4 The Complaint further alleges that Senate Leadership Fund and Caleb Crosby in his
5 official capacity as treasurer ("SLF"), an IEOPC that is aligned with Republican Party leadership
6 and that exclusively funded FPP, is a "Republican Party front" that operated FPP as a "paper
7 outfit" to influence the North Carolina Democratic Primary. This allegation may suggest that
8 FPP coordinated its expenditures with a political party committee, for which SLF acted as an
9 agent, thus resulting in FPP making excessive in-kind contributions to the party committee in
10 violation of 52 U.S.C. § 30116(a). Alternatively, it may suggest that SLF was established,
11 financed, maintained, or controlled ("EFMC'd") by a national committee of a political party and
12 thus bound by the contribution and source limitations that apply to such committees, resulting in
13 SLF receiving excessive and corporate contributions in violation of the soft money provision at
14 52 U.S.C. § 30125(a).

15 Respondents deny the allegations in a joint Response. They contend that FPP properly
16 reported independent expenditures for television advertisements and mailers by listing either
17 Erica Smith or Cal Cunningham, the Democratic Primary candidates for or against whom the
18 communications expressly advocated. Respondents assert that none of FPP's communications
19 discussed or depicted Tillis, who was not a candidate in the primary, and thus FPP was not
20 required to list his name on its reporting of the independent expenditures. Respondents also
21 contend that the Complaint offers no support for its apparent claim that FPP coordinated with a
22 political party committee.

As discussed below, the available FPP advertisements and mailers do not appear to provide a basis for reporting independent expenditures in support of Tillis, even if Respondents intended that the communications would ultimately benefit his candidacy. Accordingly, we recommend that the Commission find no reason to believe that FPP inaccurately reported independent expenditures in violation of 52 U.S.C. §§ 30104(b)(6)(B)(iii), (g)(3)(B).

Although the available information supports the notion that SLF created FPP for the purpose of influencing the North Carolina Democratic Primary, and that their relationship was initially concealed from voters, there is insufficient information to support a reasonable inference that FPP coordinated its communications with a political party committee, or that SLF was EFMC'd by a national committee of a political party. Accordingly, we recommend that the Commission dismiss the allegations that FPP violated 52 U.S.C. § 30116(a) by making an excessive contribution to a party committee, and that SLF violated 52 U.S.C. § 30125(a) by soliciting, receiving, or directing funds that were not subject to the limitations and prohibitions of the Act.

II. FACTUAL BACKGROUND

Faith and Power PAC registered with the Commission as an IEOPC on January 29, 2020.¹ It was rapidly funded by two contributions from the Senate Leadership Fund, which identifies itself as an “independent Super PAC” whose goal is to “protect and expand the Republican Senate Majority.”² SLF gave FPP an initial \$2.45 million on January 31, 2020, and

¹ Faith and Power PAC, Statement of Organization (Jan. 29, 2020), <https://docquery.fec.gov/pdf/424/202001299182323424/202001299182323424.pdf>.

² Senate Leadership Fund, <https://www.senateleadershipfund.org/about/>.

another \$500,000 on February 12, 2020.³ These contributions from SLF, which came two days and two weeks after FFP was created, were the only contributions that FFP reported receiving. Due to the committees' reporting deadlines, however, those payments (and the relationship they evidenced between FFP and SLF) were not made public until February 20, 2020.⁴ In the interim, FFP spent nearly the entirety of SLF's contributions, approximately \$2.93 million, on independent expenditures in the Democratic Primary for Senate in North Carolina.⁵

FFP's independent expenditures focused on two of the Democratic contenders, Erica Smith and Cal Cunningham. On February 8, 2020, the committee reported an initial expenditure of \$2.43 million in support of Smith.⁶ Ten days later, FFP reported independent expenditures of just over \$250,000 in support of Smith and the same amount in opposition to Cunningham.⁷ Cunningham won the primary on March 3, 2020,⁸ and to date FFP has not reported receiving any additional contributions or making any other independent expenditures.⁹

³ Faith and Power PAC, Receipts, https://www.fec.gov/data/receipts/?two_year_transaction_period=2020&committee_id=C00736751&data_type=processed.

⁴ Faith and Power PAC, Pre-Primary Report at 6 (Feb. 20, 2020), <https://docquery.fec.gov/pdf/953/202002209187234953/202002209187234953.pdf> (disclosing both SLF contributions); Senate Leadership Fund, February Monthly Report at 24 (Feb. 20, 2020), <https://docquery.fec.gov/pdf/928/202002209187234928/202002209187234928.pdf> (disclosing the initial \$2.45 million contribution from SLF to FFP).

⁵ Faith and Power PAC, Independent Expenditures, https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C00736751&is_notice=false&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020 (showing three independent expenditures dated February 3, 2020, and February 14, 2020).

⁶ Faith and Power PAC, Independent Expenditure 48-Hour Report (Feb. 8, 2020), <https://docquery.fec.gov/pdf/106/202002089186488106/202002089186488106.pdf>.

⁷ Faith and Power PAC, Independent Expenditure 24-Hour Report (Feb. 18, 2020), <https://docquery.fec.gov/pdf/375/202002189186512375/202002189186512375.pdf>.

⁸ Gary D. Robertson, *Cunningham Wins Senate Primary; Forest Earns GOP Gov's Nod*, ASSOCIATED PRESS (Mar. 3, 2020), <https://apnews.com/528a57c72cdb6cc528503e5a5b926aba>.

⁹ Faith and Power PAC, Independent Expenditures, https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C00736751&is_notice=false&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020; Faith and Power PAC, Receipts, https://www.fec.gov/data/receipts/?two_year_transaction_period=2020&committee_id=C00736751&data_type=processed.

The Complaint alleges that FPP is a “paper outfit” created by SLF, a “Republican Party front,” with the objective of intervening in the North Carolina Democratic Primary on behalf of a “major political party committee.”¹⁰ The Complaint contends that SLF selected the name Faith and Power PAC because of its likely appeal to older African American voters, and that its support of Smith, an African American candidate, was a “race-based wedge tactic to confuse progressive Black and White voters, deliberately creating bad blood between the two main competitors in the Democratic Primary.”¹¹ The objective of this strategy, according to the Complaint, was to benefit the re-election campaign of Republican Senator Thom Tillis.¹² Thus, the Complaint alleges, when FPP reported making independent expenditures in support of Smith or in opposition to Cunningham, and when its treasurer certified that the expenditures were not made in “cooperation, consultation, or concert with, or at the request or suggestion of any . . . political party committee or its agent,” those representations were false.¹³

The Response argues that the Complaint’s allegations have no support, and that FPP made and properly reported independent expenditures in support of Smith and in opposition to Cunningham.¹⁴ The Response notes that independent expenditure reports must identify the candidate that the expenditures support or oppose, and it argues that, in practice, that candidate is the person whose election or defeat the communication expressly advocates, not the candidate

¹⁰ Compl. ¶¶ 2-4, 8 (June 22, 2020) (internal punctuation omitted).

¹¹ See *id.* ¶¶ 4, 9. The Complaint also suggests, however, that FPP may have intended to draw support away from Smith by “implying Ms. Smith accepted funds from Republicans — a fatal accusation for any Black candidate in the south.” *Id.* ¶ 9.

¹² *Id.* ¶¶ 2-3.

¹³ See *id.* ¶ 8; *id.*, Ex. 5 (24-hour independent expenditure report containing treasurer’s certification that expenditures were made independently of political party committees and their agents).

¹⁴ Resp. at 1-2 (July 9, 2020).

the spender may subjectively intend to benefit (*i.e.*, Tillis).¹⁵ In support of their argument that FPP followed these reporting requirements, the Response provides copies of FPP mailers and links to videos it identifies as FPP television advertisements.¹⁶

The Response submits three mailers and five videos, each of which reference only Smith or Cunningham.¹⁷ One of the mailers contains photos of both candidates, describes their positions and backgrounds, and urges recipients to “vote no on Cal Cunningham” and “vote for Erica Smith.”¹⁸ The remaining mailers show only Smith, describe her policy positions, and urge a vote in her favor.¹⁹ Similarly, one of the provided videos features photos of Smith and Cunningham, compares their policy positions, and urges viewers: “on March 3rd, vote Democrat Erica Smith for U.S. Senate.”²⁰ The remaining videos urge voters to support Smith without reference to Cunningham.²¹ None of the communications provided by Respondents refer to Tillis in any way.

The Response also contends that, to the extent the Complaint alleges coordination between FPP and a party committee, it provides no information to support that argument.²² The

¹⁵ *Id.* at 2-3.

¹⁶ *Id.* at 1 n.1, 2 (emphasis omitted).

¹⁷ *Id.* at 1 n.1 (linking to videos); *id.* at Attach. at 1-6 (providing mailers).

¹⁸ *Id.*, Attach. at 1-2.

¹⁹ *Id.*, Attach. at 3-6.

²⁰ *Id.* at 1 n.1 (linking to video); Faith and Power PAC, *North Carolina's Choice*, YOUTUBE (Feb. 19, 2020), https://www.youtube.com/watch?v=2PCuUA2Q6_A.

²¹ Resp. at 1 n.1 (linking to videos); Faith and Power PAC, *Only Erica Smith*, YOUTUBE (Feb. 6, 2020), <https://www.youtube.com/watch?v=8y6tT6ktQGw>; Faith and Power PAC, *Only Erica Smith – 15 Second Spot*, YOUTUBE (Feb. 6, 2020), <https://www.youtube.com/watch?v=HKpcsjaMffU>; Faith and Power PAC, *Only Erica Smith – 6 Second Spot*, YOUTUBE (Feb. 6, 2020), <https://www.youtube.com/watch?v=uInUuuaxFAM>; Faith and Power PAC, *Wonder – Radio Spot*, YOUTUBE (Feb. 18, 2020), <https://www.youtube.com/channel/UC2JaMaetwqMgcQqLsElnXyw/videos>.

²² Resp. at 3.

Response states that SLF is not a party committee, and that “[a]side from a general reference to the ‘Republican Party,’ the Complaint does not identify any actual party committee with whom coordination supposedly occurred.”²³

III. LEGAL ANALYSIS

A. The Commission Should Find No Reason to Believe that Faith and Power PAC Inaccurately Reported Independent Expenditures

An independent expenditure is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate and that is not made in concert or cooperation with, or at the request or suggestion of, that candidate, the candidate’s authorized committee, their agents, or a political party committee or its agents.²⁴ A communication constitutes express advocacy if it includes phrases such as “vote for the President” or “vote against Old Hickory,” or if it includes words “which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s).”²⁵ A candidate is “clearly identified” when the candidate’s name, nickname, photograph, or a drawing of the candidate appears, or when the candidate’s identity “is apparent by unambiguous reference,” for example “the Democratic presidential nominee.”²⁶

The Act requires unauthorized committees, like FPP, to report certain information about the independent expenditures they make, including “a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and

²³ *Id.*

²⁴ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

²⁵ 11 C.F.R. § 100.22.

²⁶ 52 U.S.C. § 30101(18); 11 C.F.R. § 100.17.

office sought by such candidate.”²⁷ The same information is required in 24- and 48-hour reports of qualifying independent expenditures, including “the name of each candidate whom an expenditure is intended to support or oppose.”²⁸ The Commission’s regulations echo these requirements.²⁹

There is no basis to infer that FFP’s independent expenditure reports failed to correctly identify the candidates supported or opposed. The available advertisements and mailers clearly identify and contain express advocacy for Smith and against Cunningham — for example, “vote for Erica Smith” and “vote no on Cal Cunningham.”³⁰ Accordingly, FFP identified Smith and Cunningham as the candidates supported and opposed. However, the Complaint points out that FFP was funded by SLF, an IEOPC aligned with Senate Republicans, and suggests that FFP’s undisclosed intent was to benefit incumbent Senator Thom Tillis.³¹ The Complaint therefore argues that FFP, with respect to all of its independent expenditures, should have reported Tillis as the supported candidate.³²

Even if the allegation regarding FFP’s true intention is correct, neither the Act nor the Commission’s regulations require political committees to identify candidates who they believe may indirectly benefit from their communications.³³ In *Buckley v. Valeo*, the Supreme Court

²⁷ 52 U.S.C. § 30104(b)(6)(B)(iii).

²⁸ *Id.* § 30104(g)(3)(B).

²⁹ 11 C.F.R. § 104.3(b)(3)(vii) (setting out requirements for regular reporting of independent expenditures); *id.* § 104.4(c)-(d) (setting out requirements for 24- and 48-hour reporting).

³⁰ *E.g.*, Resp., Attach. 2. We note, however, that Respondents do not indicate which advertisements and mailers correspond with each of FFP’s reported independent expenditures.

³¹ *Id.* ¶¶ 5-6.

³² *See id.*

³³ 52 U.S.C. § 30104(b)(6)(B)(iii); *id.* § 30104(g)(3)(B); 11 C.F.R. § 104.3(B)(3)(vii); *id.* § 104.4(c)-(d).

held that, to avoid constitutional deficiencies in the provisions governing independent expenditures, the reach of the Act in this area must be “limited to communications that include explicit words of advocacy or defeat of a candidate,” given vagueness problems that arise when analyzing based on intent and effect.³⁴ In the context of electioneering communications, the Court in *FEC v. Wisconsin Right to Life* similarly concluded that “the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.”³⁵ The Complaint’s request that the Commission require FPP to identify an unnamed additional candidate, which it allegedly intended to benefit through its communications, appears to go beyond the requirements of the Act and Commission regulations and could pose potential problems of administration.³⁶

Therefore, we recommend that the Commission find no reason to believe that, by reporting the relevant candidate as either Smith or Cunningham, FPP’s independent expenditure reports violated 52 U.S.C. §§ 30104(b)(6)(B)(iii), (g)(3)(B).

B. The Commission Should Dismiss the Allegations Relating to Coordinated Communications and Impermissible Receipt of Soft Money

The Complaint generally alleges that SLF is a “front” for the “national Republican Party” and operated on behalf of a “major ‘political party committee’” when it created and funded FFP to influence the North Carolina Democratic Primary.³⁷ These allegations may suggest that FPP’s

³⁴ 424 U.S. 1, 43-44 (1976).

³⁵ 551 U.S. 449, 469 (2007). Section 203 of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which amended the Act, concerned the prohibition on using corporate and labor funds for electioneering communications.

³⁶ In a situation where an advertisement expressly advocated for a clearly identified candidate and also identified and compared the positions of her opponent, the Commission advised that the committee was not required to identify the opponent on its disclosure report. *See* Advisory Op. 2010-10 (Nat’l Right to Life PAC) at 4.

³⁷ Compl. ¶¶ 2, 8.

expenditures were coordinated with an agent of a political party committee, SLF, and therefore constituted potentially excessive in-kind contributions.

A communication is coordinated with a candidate, authorized committee, political party committee, or their agent if it: (1) was paid for, in whole or in part, by a person other than the candidate, authorized committee, or political party committee (the “payment prong”); (2) satisfies at least one of the content standards set out at 11 C.F.R. § 109.21 (the “content prong”); and (3) satisfies at least one of the conduct standards set out at 11 C.F.R. § 109.21(d) (the “conduct prong”).³⁸ FPP paid for advertisements and mailers, so the payment prong is met.³⁹ The content prong is also met because the advertisements and mailers were public communications that expressly advocated for the election or defeat of clearly identified candidates for federal office, Erica Smith and Cal Cunningham.⁴⁰

The information before the Commission, however, does not reasonably support a conclusion that the conduct prong is met — *i.e.*, that SLF acted as an agent of a political party committee and, in that role, interacted with FPP in a way that would satisfy one of the conduct standards in the Commission’s regulation. The Complaint alleges that SLF was a “front” for the Republican Party; that SLF, in turn, used FPP as “cover for a major ‘political party committee’”; and that FPP’s treasurer “knew he was working for the national Republican Party” in support of Tillis.⁴¹ The Complaint does not cite to any source of supporting information or otherwise

³⁸ 11 C.F.R. § 109.21(a).

³⁹ *Id.* § 109.21(a)(1). *See, e.g.*, Resp., Attach. at 1 (disclaimer attesting that the advertisement was paid for by Faith and Power PAC).

⁴⁰ *Id.* § 109.21(c)(3). Public communications are defined at 11 C.F.R. 100.26 to include communications “by means of any broadcast, cable, or satellite communication,” as well as mass mailings.

⁴¹ Compl. ¶¶ 2-3, 8.

1 elaborate on these claims. Such general assertions are not sufficient to assess, at the outset,
 2 whether there was an agency relationship between SLF and the unnamed Republican Party
 3 entity.⁴² Moreover, they do not describe any particular interactions or communications between
 4 SLF and FPP that would satisfy the conduct prong — for example, information indicating that
 5 the FPP mailers or television advertisements were created, produced, or distributed at the request
 6 or suggestion of SLF.⁴³ In sum, the Complaint offers no information and we are not presently
 7 aware of information that would support a reasonable inference that FPP coordinated its
 8 communications with a political party committee.

9 Alternatively, the Complaint's allegations could be read to suggest that SLF is a "front"
 10 for the Republican Party because it was EFMC'd by that party's national committee. Entities
 11 that are EFMC'd by such committees may not "solicit, receive, or direct to another person a
 12 contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that
 13 are not subject to the limitations, prohibitions, and reporting requirements" of the Act.⁴⁴ Thus, if
 14 SLF was EFMC'd by the Republican National Committee ("RNC"), it would have been subject
 15 to the amount and source prohibitions applicable to the RNC, and it almost certainly would have
 16 violated 52 U.S.C. § 30125(a) by soliciting, receiving, or directing funds that were not subject to
 17 the limitations and prohibitions of the Act.⁴⁵

⁴² For purposes of 11 C.F.R. Part 109, which governs coordinated and independent expenditures, Commission regulations define agent to mean "any person who has actual authority, either express or implied" to engage in a list of enumerated activities on behalf of the specified persons. 11 C.F.R. § 109.3. For example, a person is an agent of a political party committee if that person has actual authority to "request or suggest that a communication be created, produced or distributed" on behalf of that committee. *Id.* § 109.3(a)(1).

⁴³ See *id.* § 109.21(d)(1) ("request or suggestion" standard).

⁴⁴ 52 U.S.C. § 30125(a).

⁴⁵ *Id.* § 30125(a)(2).

The Commission's regulations set out ten non-exclusive factors to be considered in determining whether an "entity," here SLF, is EFMC'd by a national political party committee, referred to as a "sponsor."⁴⁶ These factors must be examined in the context of the overall relationship between the sponsor and the entity to determine whether they are evidence that the sponsor directly or indirectly EFMC'd the entity.⁴⁷ The factors include, for example, whether the sponsor and entity have similar patterns of receipts or disbursements that indicate they have a formal or ongoing relationship with each other.⁴⁸

Here, the Complaint asserts that SLF was a "front" for an unnamed Republican Party committee, but it does not identify the relevant sponsor or, critically, provide any specific information regarding the Republican Party committee's relationship to or interactions with SLF. Assuming the relevant sponsor is the RNC, information in the public domain indicates that some of the EFMC factors would not be met. For example, there is no indication that the RNC owns a controlling interest in the voting stock or securities of SLF, as SLF is a nonstock corporation;⁴⁹ and the RNC's disclosure reports do not show that it directly provides funds to SLF.⁵⁰ Without more information, however, a more thorough analysis of the relationship between the entity and potential sponsor is not possible.

⁴⁶ 11 C.F.R. § 300.2(c).

⁴⁷ *Id.*

⁴⁸ *Id.* § 300.2(c)(2)(x).

⁴⁹ *Id.* § 300.2(c)(2)(i); Virginia State Corporation Commission, Senate Leadership Fund, <https://cis.scc.virginia.gov/EntitySearch/BusinessInformation?businessId=298522&source=FromEntityResult&isSeries=False>.

⁵⁰ 11 C.F.R. § 300.2(c)(2)(vii); Republican National Committee, Disbursements, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00003418&recipient_name=C00571703 (filtered by recipient).

1 The Complaint broadly contends that SLF created and funded FPP to disguise its
 2 intervention in the Democratic Primary in North Carolina, and in this it appears to be correct.⁵¹
 3 As discussed above, FPP registered with the Commission a little over a month before the primary
 4 election. Two days later, SLF made an initial \$2.45 million contribution to FFP and
 5 approximately two weeks later made a \$500,000 contribution. FFP did not report receiving
 6 contributions from any other source. Given this temporal proximity and the magnitude of the
 7 contributions, it is reasonable to infer that SLF created and funded FFP for the purpose of using
 8 FFP to make expenditures in the North Carolina Democratic Primary.⁵²

9 Until the committees filed reports with the Commission on February 20, 2020, shortly
 10 before the March 3, 2020, primary, this relationship was not disclosed through records filed with
 11 the Commission. Indeed, the next day SLF issued a statement calling its funding of FFP “[a]n
 12 unqualified success” and contending that it had borrowed the strategy from Democrats, who it
 13 argued “have a long history of meddling in other Republican primaries.”⁵³ This delayed
 14 transparency, however, does not clearly lead to the links the Complaint posits between SLF and
 15 an unidentified Republican Party entity. Given the lack of sufficient information to evaluate the

⁵¹ Compl. ¶ 4.

⁵² In matters involving allegations under 52 U.S.C. § 30122, that a person funded an LLC for the purpose of making contributions in the name of another, we have looked to the temporal proximity between when the LLC was formed and when it made a political contribution as evidence that the LLC operated as a conduit on behalf of a “true source.” *See, e.g.*, First Gen. Counsel’s Report at 12-13, MURs 7014, 7017, 7019, and 7090 (DE First Holdings, *et al.*) (recommending reason to believe when an LLC made two \$250,000 conduit contributions sixteen days and twenty-two days, respectively, after its formation and vaguely offered only that it was formed as a “for profit LLC”); First Gen. Counsel’s Report at 9-10, MUR 6995 (Right to Rise, *et al.*) (recommending reason to believe when an LLC made a \$100,000 contribution two weeks after being formed and ambiguously stated that it had plans to do business in the future).

⁵³ Senate Leadership Fund, *SLF Statement on Funding Faith and Power PAC: “An Unqualified Success,”* Feb. 21, 2020, <https://www.senateleadershipfund.org/slf-statement-on-funding-faith-and-power-pac-an-unqualified-success/>.

existence and implications of such a relationship, we recommend that the Commission dismiss the allegation that SLF violated 52 U.S.C. § 30125(a) by soliciting, receiving, or directing funds that were not subject to the limitations and prohibitions of the Act.⁵⁴

IV. RECOMMENDATIONS

1. Find no reason to believe that Faith and Power PAC and Ezekiel Patterson in his official capacity as treasurer violated 52 U.S.C. §§ 30104(b)(6)(B)(iii), (g)(3)(B) by improperly reporting independent expenditure information;
2. Dismiss the allegation that Faith and Power PAC and Ezekiel Patterson in his official capacity as treasurer violated 52 U.S.C. § 30116(a) by making excessive contributions;
3. Dismiss the allegation that Senate Leadership Fund and Caleb Crosby in his official capacity as treasurer violated 52 U.S.C. § 30125(a) by soliciting, receiving, or directing funds that were not subject to the limitations and prohibitions of the Act;
4. Approve the attached Factual and Legal Analysis;
5. Approve the appropriate letters; and

⁵⁴ See Factual & Legal Analysis at 3-5, MUR 7070 (Congressional Leadership Fund) (dismissing allegation that an entity was EFMC'd by a candidate when information suggesting a violation was unclear and incomplete).

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6. Close the file.

Lisa J. Stevenson
Acting General Counsel

11/17/2020

Date

Charles Kitcher

Charles Kitcher
Acting Associate General Counsel for Enforcement

Claudio Pavia

Claudio J. Pavia
Acting Assistant General Counsel

Laura Conley

Laura Conley
Attorney

Attachment:

1. Factual and Legal Analysis

Respondents: Faith and Power PAC and Ezekiel Patterson
in his official capacity as treasurer
Senate Leadership Fund and Caleb Crosby
in his official capacity as treasurer

The Complaint further alleges that Senate Leadership Fund and Caleb Crosby in his official capacity as treasurer (“SLF”), an IEOPC that is aligned with Republican Party leadership and that exclusively funded FPP, is a “Republican Party front” that operated FPP as a “paper outfit” to influence the North Carolina Democratic Primary. This allegation may suggest that FPP coordinated its expenditures with a political party committee, for which SLF acted as an agent, thus resulting in FPP making excessive in-kind contributions to the party committee in

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1 violation of 52 U.S.C. § 30116(a). Alternatively, it may suggest that SLF was established,
2 financed, maintained, or controlled (“EFMC’d”) by a national committee of a political party and
3 thus bound by the contribution and source limitations that apply to such committees, resulting in
4 SLF receiving excessive and corporate contributions in violation of the soft money provision at
5 52 U.S.C. § 30125(a).

6 Respondents deny the allegations in a joint Response. They contend that FPP properly
7 reported independent expenditures for television advertisements and mailers by listing either
8 Erica Smith or Cal Cunningham, the Democratic Primary candidates for or against whom the
9 communications expressly advocated. Respondents assert that none of FFP’s communications
10 discussed or depicted Tillis, who was not a candidate in the primary, and thus FPP was not
11 required to list his name on its reporting of the independent expenditures. Respondents also
12 contend that the Complaint offers no support for its apparent claim that FPP coordinated with a
13 political party committee.

14 As discussed below, the available FPP advertisements and mailers do not appear to
15 provide a basis for reporting independent expenditures in support of Tillis, even if Respondents
16 intended that the communications would ultimately benefit his candidacy. Accordingly, the
17 Commission finds no reason to believe that FFP inaccurately reported independent expenditures
18 in violation of 52 U.S.C. §§ 30104(b)(6)(B)(iii), (g)(3)(B).

19 Although the available information supports the notion that SLF created FPP for the
20 purpose of influencing the North Carolina Democratic Primary, and that their relationship was
21 initially concealed from voters, there is insufficient information to support a reasonable inference
22 that FPP coordinated its communications with a political party committee, or that SLF was
23 EFMC’d by a national committee of a political party. Accordingly, the Commission dismisses

the allegations that FPP violated 52 U.S.C. § 30116(a) by making an excessive contribution to a party committee, and that SLF violated 52 U.S.C. § 30125(a) by soliciting, receiving, or directing funds that were not subject to the limitations and prohibitions of the Act.

II. FACTUAL BACKGROUND

Faith and Power PAC registered with the Commission as an IEOPC on January 29, 2020.¹ It was rapidly funded by two contributions from the Senate Leadership Fund, which identifies itself as an “independent Super PAC” whose goal is to “protect and expand the Republican Senate Majority.”² SLF gave FPP an initial \$2.45 million on January 31, 2020, and another \$500,000 on February 12, 2020.³ These contributions from SLF, which came two days and two weeks after FPP was created, were the only contributions that FPP reported receiving. Due to the committees’ reporting deadlines, however, those payments (and the relationship they evidenced between FPP and SLF) were not made public until February 20, 2020.⁴ In the interim, FPP spent nearly the entirety of SLF’s contributions, approximately \$2.93 million, on independent expenditures in the Democratic Primary for Senate in North Carolina.⁵

¹ Faith and Power PAC, Statement of Organization (Jan. 29, 2020), <https://docquery.fec.gov/pdf/424/202001299182323424/202001299182323424.pdf>.

² Senate Leadership Fund, <https://www.senateleadershipfund.org/about/>.

³ Faith and Power PAC, Receipts, https://www.fec.gov/data/receipts/?two_year_transaction_period=2020&committee_id=C00736751&data_type=processed.

⁴ Faith and Power PAC, Pre-Primary Report at 6 (Feb. 20, 2020), <https://docquery.fec.gov/pdf/953/202002209187234953/202002209187234953.pdf> (disclosing both SLF contributions); Senate Leadership Fund, February Monthly Report at 24 (Feb. 20, 2020), <https://docquery.fec.gov/pdf/928/202002209187234928/202002209187234928.pdf> (disclosing the initial \$2.45 million contribution from SLF to FPP).

⁵ Faith and Power PAC, Independent Expenditures, https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C00736751&is_notice=false&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020 (showing three independent expenditures dated February 3, 2020, and February 14, 2020).

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FPP's independent expenditures focused on two of the Democratic contenders, Erica Smith and Cal Cunningham. On February 8, 2020, the committee reported an initial expenditure of \$2.43 million in support of Smith.⁶ Ten days later, FPP reported independent expenditures of just over \$250,000 in support of Smith and the same amount in opposition to Cunningham.⁷ Cunningham won the primary on March 3, 2020,⁸ and to date FPP has not reported receiving any additional contributions or making any other independent expenditures.⁹

The Complaint alleges that FPP is a "paper outfit" created by SLF, a "Republican Party front," with the objective of intervening in the North Carolina Democratic Primary on behalf of a "major political party committee."¹⁰ The Complaint contends that SLF selected the name Faith and Power PAC because of its likely appeal to older African American voters, and that its support of Smith, an African American candidate, was a "race-based wedge tactic to confuse progressive Black and White voters, deliberately creating bad blood between the two main competitors in the Democratic Primary."¹¹ The objective of this strategy, according to the Complaint, was to benefit the re-election campaign of Republican Senator Thom Tillis.¹² Thus,

⁶ Faith and Power PAC, Independent Expenditure 48-Hour Report (Feb. 8, 2020), <https://docquery.fec.gov/pdf/106/202002089186488106/202002089186488106.pdf>.

⁷ Faith and Power PAC, Independent Expenditure 24-Hour Report (Feb. 18, 2020), <https://docquery.fec.gov/pdf/375/202002189186512375/202002189186512375.pdf>.

⁸ Gary D. Robertson, *Cunningham Wins Senate Primary; Forest Earns GOP Gov's Nod*, ASSOCIATED PRESS (Mar. 3, 2020), <https://apnews.com/528a57c72cdb6cc528503e5a5b926aba>.

⁹ Faith and Power PAC, Independent Expenditures, https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C00736751&is_notice=false&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020; Faith and Power PAC, Receipts, https://www.fec.gov/data/receipts/?two_year_transaction_period=2020&committee_id=C00736751&data_type=processed.

¹⁰ Compl. ¶¶ 2-4, 8 (June 22, 2020) (internal punctuation omitted).

¹¹ *See id.* ¶¶ 4, 9. The Complaint also suggests, however, that FPP may have intended to draw support away from Smith by "implying Ms. Smith accepted funds from Republicans — a fatal accusation for any Black candidate in the south." *Id.* ¶ 9.

¹² *Id.* ¶¶ 2-3.

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the Complaint alleges, when FPP reported making independent expenditures in support of Smith or in opposition to Cunningham, and when its treasurer certified that the expenditures were not made in “cooperation, consultation, or concert with, or at the request or suggestion of any . . . political party committee or its agent,” those representations were false.¹³

The Response argues that the Complaint’s allegations have no support, and that FPP made and properly reported independent expenditures in support of Smith and in opposition to Cunningham.¹⁴ The Response notes that independent expenditure reports must identify the candidate that the expenditures support or oppose, and it argues that, in practice, that candidate is the person whose election or defeat the communication expressly advocates, not the candidate the spender may subjectively intend to benefit (*i.e.*, Tillis).¹⁵ In support of their argument that FPP followed these reporting requirements, the Response provides copies of FPP mailers and links to videos it identifies as FPP television advertisements.¹⁶

The Response submits three mailers and five videos, each of which reference only Smith or Cunningham.¹⁷ One of the mailers contains photos of both candidates, describes their positions and backgrounds, and urges recipients to “vote no on Cal Cunningham” and “vote for Erica Smith.”¹⁸ The remaining mailers show only Smith, describe her policy positions, and urge a vote in her favor.¹⁹ Similarly, one of the provided videos features photos of Smith and

¹³ See *id.* ¶ 8; *id.*, Ex. 5 (24-hour independent expenditure report containing treasurer’s certification that expenditures were made independently of political party committees and their agents).

¹⁴ Resp. at 1-2 (July 9, 2020).

¹⁵ *Id.* at 2-3.

¹⁶ *Id.* at 1 n.1, 2 (emphasis omitted).

¹⁷ *Id.* at 1 n.1 (linking to videos); *id.* at Attach. at 1-6 (providing mailers).

¹⁸ *Id.*, Attach. at 1-2.

¹⁹ *Id.*, Attach. at 3-6.

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Cunningham, compares their policy positions, and urges viewers: “on March 3rd, vote Democrat Erica Smith for U.S. Senate.”²⁰ The remaining videos urge voters to support Smith without reference to Cunningham.²¹ None of the communications provided by Respondents refer to Tillis in any way.

The Response also contends that, to the extent the Complaint alleges coordination between FPP and a party committee, it provides no information to support that argument.²² The Response states that SLF is not a party committee, and that “[a]side from a general reference to the ‘Republican Party,’ the Complaint does not identify any actual party committee with whom coordination supposedly occurred.”²³

III. LEGAL ANALYSIS

A. The Commission Finds No Reason to Believe that Faith and Power PAC Inaccurately Reported Independent Expenditures

An independent expenditure is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate and that is not made in concert or cooperation with, or at the request or suggestion of, that candidate, the candidate’s authorized committee, their agents, or a political party committee or its agents.²⁴ A communication

²⁰ *Id.* at 1 n.1 (linking to video); Faith and Power PAC, *North Carolina’s Choice*, YouTube (Feb. 19, 2020), https://www.youtube.com/watch?v=2PCuUA2Q6_A.

²¹ Resp. at 1 n.1 (linking to videos); Faith and Power PAC, *Only Erica Smith*, YouTube (Feb. 6, 2020), <https://www.youtube.com/watch?v=8y6tT6ktQGw>; Faith and Power PAC, *Only Erica Smith – 15 Second Spot*, YouTube (Feb. 6, 2020), <https://www.youtube.com/watch?v=HKpcsjaMfFU>; Faith and Power PAC, *Only Erica Smith – 6 Second Spot*, YouTube (Feb. 6, 2020), <https://www.youtube.com/watch?v=uInUuuaxFAM>; Faith and Power PAC, *Wonder – Radio Spot*, YouTube (Feb. 18, 2020), <https://www.youtube.com/channel/UC2JaMaetwqMgcQqLsElnXyw/videos>.

²² Resp. at 3.

²³ *Id.*

²⁴ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

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constitutes express advocacy if it includes phrases such as “vote for the President” or “vote against Old Hickory,” or if it includes words “which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s).”²⁵ A candidate is “clearly identified” when the candidate’s name, nickname, photograph, or a drawing of the candidate appears, or when the candidate’s identity “is apparent by unambiguous reference,” for example “the Democratic presidential nominee.”²⁶

The Act requires unauthorized committees, like FPP, to report certain information about the independent expenditures they make, including “a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate.”²⁷ The same information is required in 24- and 48-hour reports of qualifying independent expenditures, including “the name of each candidate whom an expenditure is intended to support or oppose.”²⁸ The Commission’s regulations echo these requirements.²⁹

There is no basis to infer that FPP’s independent expenditure reports failed to correctly identify the candidates supported or opposed. The available advertisements and mailers clearly identify and contain express advocacy for Smith and against Cunningham — for example, “vote for Erica Smith” and “vote no on Cal Cunningham.”³⁰ Accordingly, FPP identified Smith and

²⁵ 11 C.F.R. § 100.22.

²⁶ 52 U.S.C. § 30101(18); 11 C.F.R. § 100.17.

²⁷ 52 U.S.C. § 30104(b)(6)(B)(iii).

²⁸ *Id.* § 30104(g)(3)(B).

²⁹ 11 C.F.R. § 104.3(b)(3)(vii) (setting out requirements for regular reporting of independent expenditures); *id.* § 104.4(c)-(d) (setting out requirements for 24- and 48-hour reporting).

³⁰ *E.g.*, Resp., Attach. 2. The Commission notes, however, that Respondents do not indicate which advertisements and mailers correspond with each of FPP’s reported independent expenditures.

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Cunningham as the candidates supported and opposed. However, the Complaint points out that FPP was funded by SLF, an IEOPC aligned with Senate Republicans, and suggests that FPP's undisclosed intent was to benefit incumbent Senator Thom Tillis.³¹ The Complaint therefore argues that FPP, with respect to all of its independent expenditures, should have reported Tillis as the supported candidate.³²

Even if the allegation regarding FPP's true intention is correct, neither the Act nor the Commission's regulations require political committees to identify candidates who they believe may indirectly benefit from their communications.³³ In *Buckley v. Valeo*, the Supreme Court held that, to avoid constitutional deficiencies in the provisions governing independent expenditures, the reach of the Act in this area must be "limited to communications that include explicit words of advocacy or defeat of a candidate," given vagueness problems that arise when analyzing based on intent and effect.³⁴ In the context of electioneering communications, the Court in *FEC v. Wisconsin Right to Life* similarly concluded that "the proper standard for an as-applied challenge to BCRA § 203 must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect."³⁵ The Complaint's request that the Commission require FPP to identify an unnamed additional candidate, which it

³¹ *Id.* ¶¶ 5-6.

³² *See id.*

³³ 52 U.S.C. § 30104(b)(6)(B)(iii); *id.* § 30104(g)(3)(B); 11 C.F.R. § 104.3(B)(3)(vii); *id.* § 104.4(c)-(d).

³⁴ 424 U.S. 1, 43-44 (1976).

³⁵ 551 U.S. 449, 469 (2007). Section 203 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which amended the Act, concerned the prohibition on using corporate and labor funds for electioneering communications.

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allegedly intended to benefit through its communications, appears to go beyond the requirements of the Act and Commission regulations and could pose potential problems of administration.³⁶

Therefore, the Commission finds no reason to believe that, by reporting the relevant candidate as either Smith or Cunningham, FPP's independent expenditure reports violated 52 U.S.C. §§ 30104(b)(6)(B)(iii), (g)(3)(B).

B. The Commission Dismisses the Allegations Relating to Coordinated Communications and Impermissible Receipt of Soft Money

The Complaint generally alleges that SLF is a “front” for the “national Republican Party” and operated on behalf of a “major ‘political party committee’” when it created and funded FFP to influence the North Carolina Democratic Primary.³⁷ These allegations may suggest that FPP's expenditures were coordinated with an agent of a political party committee, SLF, and therefore constituted potentially excessive in-kind contributions.

A communication is coordinated with a candidate, authorized committee, political party committee, or their agent if it: (1) was paid for, in whole or in part, by a person other than the candidate, authorized committee, or political party committee (the “payment prong”); (2) satisfies at least one of the content standards set out at 11 C.F.R. § 109.21 (the “content prong”); and (3) satisfies at least one of the conduct standards set out at 11 C.F.R. § 109.21(d) (the “conduct prong”).³⁸ FPP paid for advertisements and mailers, so the payment prong is

³⁶ In a situation where an advertisement expressly advocated for a clearly identified candidate and also identified and compared the positions of her opponent, the Commission advised that the committee was not required to identify the opponent on its disclosure report. *See* Advisory Op. 2010-10 (Nat'l Right to Life PAC) at 4.

³⁷ Compl. ¶¶ 2, 8.

³⁸ 11 C.F.R. § 109.21(a).

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met.³⁹ The content prong is also met because the advertisements and mailers were public communications that expressly advocated for the election or defeat of clearly identified candidates for federal office, Erica Smith and Cal Cunningham.⁴⁰

The information before the Commission, however, does not reasonably support a conclusion that the conduct prong is met — *i.e.*, that SLF acted as an agent of a political party committee and, in that role, interacted with FPP in a way that would satisfy one of the conduct standards in the Commission’s regulation. The Complaint alleges that SLF was a “front” for the Republican Party; that SLF, in turn, used FPP as “cover for a major ‘political party committee’”; and that FPP’s treasurer “knew he was working for the national Republican Party” in support of Tillis.⁴¹ The Complaint does not cite to any source of supporting information or otherwise elaborate on these claims. Such general assertions are not sufficient to assess, at the outset, whether there was an agency relationship between SLF and the unnamed Republican Party entity.⁴² Moreover, they do not describe any particular interactions or communications between SLF and FPP that would satisfy the conduct prong — for example, information indicating that the FPP mailers or television advertisements were created, produced, or distributed at the request or suggestion of SLF.⁴³ In sum, the Complaint offers no information and the Commission is not

³⁹ *Id.* § 109.21(a)(1). *See, e.g.*, Resp., Attach. at 1 (disclaimer attesting that the advertisement was paid for by Faith and Power PAC).

⁴⁰ *Id.* § 109.21(c)(3). Public communications are defined at 11 C.F.R. 100.26 to include communications “by means of any broadcast, cable, or satellite communication,” as well as mass mailings.

⁴¹ Compl. ¶¶ 2-3, 8.

⁴² For purposes of 11 C.F.R. Part 109, which governs coordinated and independent expenditures, Commission regulations define agent to mean “any person who has actual authority, either express or implied” to engage in a list of enumerated activities on behalf of the specified persons. 11 C.F.R. § 109.3. For example, a person is an agent of a political party committee if that person has actual authority to “request or suggest that a communication be created, produced or distributed” on behalf of that committee. *Id.* § 109.3(a)(1).

⁴³ *See id.* § 109.21(d)(1) (“request or suggestion” standard).

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1 presently aware of information that would support a reasonable inference that FPP coordinated
2 its communications with a political party committee. Accordingly, the Commission dismisses
3 the allegation that FPP violated 52 U.S.C. § 30116(a) by making excessive contributions.

4 Alternatively, the Complaint’s allegations could be read to suggest that SLF is a “front”
5 for the Republican Party because it was EFMC’d by that party’s national committee. Entities
6 that are EFMC’d by such committees may not “solicit, receive, or direct to another person a
7 contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that
8 are not subject to the limitations, prohibitions, and reporting requirements” of the Act.⁴⁴ Thus, if
9 SLF was EFMC’d by the Republican National Committee (“RNC”), it would have been subject
10 to the amount and source prohibitions applicable to the RNC, and it almost certainly would have
11 violated 52 U.S.C. § 30125(a) by soliciting, receiving, or directing funds that were not subject to
12 the limitations and prohibitions of the Act.⁴⁵

13 The Commission’s regulations set out ten non-exclusive factors to be considered in
14 determining whether an “entity,” here SLF, is EFMC’d by a national political party committee,
15 referred to as a “sponsor.”⁴⁶ These factors must be examined in the context of the overall
16 relationship between the sponsor and the entity to determine whether they are evidence that the
17 sponsor directly or indirectly EFMC’d the entity.⁴⁷ The factors include, for example, whether
18 the sponsor and entity have similar patterns of receipts or disbursements that indicate they have a
19 formal or ongoing relationship with each other.⁴⁸

⁴⁴ 52 U.S.C. § 30125(a).

⁴⁵ *Id.* § 30125(a)(2).

⁴⁶ 11 C.F.R. § 300.2(c).

⁴⁷ *Id.*

⁴⁸ *Id.* § 300.2(c)(2)(x).

1 Here, the Complaint asserts that SLF was a “front” for an unnamed Republican Party
2 committee, but it does not identify the relevant sponsor or, critically, provide any specific
3 information regarding the Republican Party committee’s relationship to or interactions with SLF.
4 Assuming the relevant sponsor is the RNC, information in the public domain indicates that some
5 of the EFMC factors would not be met. For example, there is no indication that the RNC owns a
6 controlling interest in the voting stock or securities of SLF, as SLF is a nonstock corporation;⁴⁹
7 and the RNC’s disclosure reports do not show that it directly provides funds to SLF.⁵⁰ Without
8 more information, however, a more thorough analysis of the relationship between the entity and
9 potential sponsor is not possible.

10 The Complaint broadly contends that SLF created and funded FFP to disguise its
11 intervention in the Democratic Primary in North Carolina, and in this it appears to be correct.⁵¹
12 As discussed above, FFP registered with the Commission a little over a month before the primary
13 election. Two days later, SLF made an initial \$2.45 million contribution to FFP and
14 approximately two weeks later made a \$500,000 contribution. FFP did not report receiving
15 contributions from any other source. Given this temporal proximity and the magnitude of the
16 contributions, it is reasonable to infer that SLF created and funded FFP for the purpose of using
17 FFP to make expenditures in the North Carolina Democratic Primary.

⁴⁹ *Id.* § 300.2(c)(2)(i); Virginia State Corporation Commission, Senate Leadership Fund, <https://cis.scc.virginia.gov/EntitySearch/BusinessInformation?businessId=298522&source=FromEntityResult&isSeries=False>.

⁵⁰ 11 C.F.R. § 300.2(c)(2)(vii); Republican National Committee, Disbursements, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00003418&recipient_name=C00571703 (filtered by recipient).

⁵¹ Compl. ¶ 4.

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1 Until the committees filed reports with the Commission on February 20, 2020, shortly
2 before the March 3, 2020, primary, this relationship was not disclosed through records filed with
3 the Commission. Indeed, the next day SLF issued a statement calling its funding of FPP “[a]n
4 unqualified success” and contending that it had borrowed the strategy from Democrats, who it
5 argued “have a long history of meddling in other Republican primaries.”⁵² This delayed
6 transparency, however, does not clearly lead to the links the Complaint posits between SLF and
7 an unidentified Republican Party entity. Given the lack of sufficient information to evaluate the
8 existence and implications of such a relationship, the Commission dismisses the allegation that
9 SLF violated 52 U.S.C. § 30125(a) by soliciting, receiving, or directing funds that were not
10 subject to the limitations and prohibitions of the Act.⁵³

⁵² Senate Leadership Fund, *SLF Statement on Funding Faith and Power PAC: “An Unqualified Success,”* Feb. 21, 2020, <https://www.senateleadershipfund.org/slf-statement-on-funding-faith-and-power-pac-an-unqualified-success/>.

⁵³ See Factual & Legal Analysis at 3-5, MUR 7070 (Congressional Leadership Fund) (dismissing allegation that an entity was EFMC’d by a candidate when information suggesting a violation was unclear and incomplete).