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November 12, 2020

Federal Election Commission
Office of Complaints Examination & Legal Administration
General Counsel's Office
Attn: Christal Dennis, Paralegal
1050 First Street NE
Washington, DC 20463
cela@fec.gov

Re: MURs 7838, 7849, 7852

Confidential

Dear General Counsel's Office:

We represent Expensify, Inc. in relation to the three above-listed MURs, each of which pertains to a one-time email from Expensify CEO David Barrett on October 22 or 23, 2020 (the "Barrett email"). Expensify's Statement of Designation of Counsel form authorizing our participation in these MURs is included with this letter.

Though they take different forms, the relevant MURs accuse Expensify – through the Barrett email – of violating federal election laws and regulations by failing to timely file an independent expenditure report and failing to include a valid disclaimer. Specifically, the MURs argue that the Barrett email constitutes an independent expenditure exceeding \$1,000 that required reporting within 24-hours under 52 U.S.C. § 30104(g) and 11 C.F.R. § 109.10(d) and that, because it expressly advocated for the election or defeat of a clearly identified candidate, the Barrett email should have included a disclaimer under 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11. Expensify believes each allegation is misplaced and that the Commission should dismiss these MURs accordingly.

The Barrett email did not require a disclaimer

11 C.F.R. § 110.11, which implements 52 U.S.C. § 30120, provides that the following communications must include disclaimers:

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1. All public communications, as defined in 11 C.F.R. § 100.26, made by a political committee; electronic mail of more than 500 substantially similar communications when sent by a political committee; and all Internet websites of political committees available to the general public.
2. All public communications, as defined in 11 CFR § 100.26, by any person that expressly advocate the election or defeat of a clearly identified candidate.
3. All public communications, as defined in 11 CFR § 100.26, by any person that solicit any contribution.
4. All electioneering communications by any person.

11 C.F.R. § 100.26 defines "public communications" to mean "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term *general public political advertising* shall not include communications over the Internet, except for communications placed for a fee on another person's Web site." 11 C.F.R. § 100.29(c)(1) specifically exempts from the definition of "electioneering communication" any communication that is "publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station," including "electronic mail." And, 11 C.F.R. § 100.5 defines "political committee" such that it does not include Expensify.

Under these definitions and guidance, the Barrett email was *not* a communication that required a disclaimer. As the Federal Election Commission clarified in its transmission of the final version of the revised § 100.26, "The definition of 'public communication' proposed . . . did not encompass any e-mail communications." 71 Fed. Reg. 18596 (Apr. 12, 2006) (codified at 11 C.F.R. § 100.26). Further, "The Commission does not consider e-mail to be a form of 'general public political advertising' because there is virtually no cost associated with sending e-mail communications, even thousands of e-mails to thousands of recipients, and there is nothing in the record that suggests a payment is normally required to do so." *Id.* Finally, the Commission specifically took action in 2006 to "eliminat[e] the requirement that disclaimers appear on e-mail communications by persons other than political committees." 71 Fed. Reg. 18601 (Apr. 12, 2006) (codified at 11 C.F.R. § 110.11).

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Accordingly, the Barret email did not violate federal election laws or regulations because, as an email not sent by a political committee, it did not require a disclaimer.

The Barret email was not an independent expenditure that required reporting

The Barrett email did not trigger any independent-expenditure reporting because it did not satisfy the requirements of an "expenditure" in 11 C.F.R. § 100.111 or the aggregate amount requirements in 11 C.F.R. § 109.10(d). The Federal Election Commission's determination that e-mail communications are not "public communications," not "general public political advertising," and not "electioneering communications," as discussed above, are based in part on Congress' determination that "e-mail is appropriately regulated differently than postal mail" and the other forms of "public communication" that "normally involve at least some charge for delivery, such as telephone charges or postage." 71 Fed. Reg. 18596 (Apr. 12, 2006) (codified at 11 C.F.R. § 100.26). Indeed, assigning value to the transmission of e-mail communications is a difficult proposition. As commenters on the Commission's proposed rule now codified at 11 CFR § 100.26 noted, in light of the "unique nature and variety of Internet communications" like e-mail, the "value of these communications would be difficult to ascertain under the Commission's traditional tests for normal and usual charge or fair market value." *Id.* at 18593. The Commission also considered but ultimately dismissed concerns that defining "political communications" to broadly exclude email (except if sent by political committees) "would allow corporations and labor organizations to make unregulated in-kind contributions to Federal candidates." *Id.* Together, these Commission determinations weigh against any finding that the Barrett email constituted an independent expenditure that exceeded \$1000, let alone the larger amounts the MURs speculate (without evidentiary support) are involved.

To the extent the Commission persists in its inquiry – despite emails falling outside the scope of "public communications," as regulated by federal election laws and regulations – the Barret email did not require reporting because it was not a contribution or expenditure pursuant to 11 C.F.R. § 114.4. 11 C.F.R. § 114 governs corporate and labor organization political activity, and § 114.4(c)(i) provides that a corporation "may endorse a candidate, and may communicate the endorsement to the . . . general public." Under that section, any disbursements "for announcements of endorsements to the general public are not contributions or expenditures, provided that:

- A. The public announcement is not coordinated with a candidate, a candidate's authorized committee, or their agents; and

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- B. Disbursements for any press release or press conference to announce the endorsement are de minimis.”

11 C.F.R. § 114.4(c)(6)(ii).

The Barrett email unquestionably endorsed a candidate (its subject stated plainly “Protect democracy, vote for Biden) and communicated that endorsement beyond Expensify’s restricted class (defined in 11 C.F.R. § 114.1(j) as a corporation’s “stockholders and executive or administrative personnel, and their families, and the executive and administrative personnel of its subsidiaries, branches, divisions, and departments and their families”). To the extent Expensify is found to have made any disbursements related to the announcement of that endorsement through the Barrett email, they are not “contributions or expenditures” because the announcement was not coordinated with President-elect Biden, his authorized committee, or their agents, and Expensify did not make disbursements for a press release or press conference to announce the endorsement. Accordingly, the Barrett email was not a contribution or expenditure, and it did not trigger a reporting requirement pursuant to 52 U.S.C. § 30104(g)(1)(A), 11 C.F.R. § 114.10(b), or 11 C.F.R. § 109.10(d).

For these reasons, the Barret email did not violate federal election laws or regulations, and Expensify respectfully requests that the Commission dismiss MURs 7838, 7849, 7852 as not warranting the further use of Commission resources.

Sincerely,



Michael D. Reif
Partner

cc: Steven C. Carlson, Esq.

Enclosure



FEDERAL ELECTION COMMISSION
1050 First Street, NE
Washington, DC 20463

STATEMENT OF DESIGNATION OF COUNSEL

Provide one form for each Respondent/Witness

EMAIL cela@fec.gov

FAX 202-219-3923

AR/MUR/RR/P-MUR# 7852, 7838, 7849

Name of Counsel: Steven C. Carlson & Michael D. Reif

Firm: Robins Kaplan LLP

Address: 800 LaSalle Avenue, Suite 2800

Minneapolis, MN 55402

Office#: 650.784.4012, 612.349.0171 Fax#: 612.339.4181

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E-mail: scarlson@robinskaplan.com; mreif@robinskaplan.com

The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

11 / 11 / 2020
Date

Ryan Schaffer
(Signature - Respondent/Agent/Treasurer)

Board of Directors
Title

Ryan Schaffer
(Name - Please Print)

RESPONDENT: Expensify
(Please print Committee Name/ Company Name/Individual Named in Notification Letter)

Mailing Address: 88 Kearny St, Suite 1600, San Francisco, CA 94108
(Please Print)

Home#: _____ Mobile#: _____

Office#: _____ Fax#: _____

E-mail: legal@expensify.com

This form relates to a Federal Election Commission matter that is subject to the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A). This section prohibits making public any notification or investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.