

**FEDERAL ELECTION COMMISSION**  
**FIRST GENERAL COUNSEL'S REPORT**

**MUR 7874**

DATE COMPLAINT FILED: Feb. 2, 2021

DATE OF NOTIFICATIONS: Feb. 8, 2021

LAST RESPONSE RECEIVED: Apr. 2, 2021

DATE ACTIVATED: July 8, 2021

EXPIRATION OF SOL: June 6, 2025

ELECTION CYCLE: 2020

**COMPLAINANT:**

Karyn Kay Griffin

**RESPONDENTS:**

Patriots of America PAC and Henry "Hank"

Foley in his official capacity as treasurer<sup>1</sup>

Dan Backer

Henry "Hank" Foley in his personal capacity

Timothy Viens

**RELEVANT STATUTE****AND REGULATIONS:**

52 U.S.C. § 30104(b), (g)

11 C.F.R. § 104.4(b)(2)

11 C.F.R. § 104.14(g)

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

The Complaint alleges that Patriots of America PAC and Henry "Hank" Foley in his official capacity as treasurer ("POA PAC"), a hybrid political committee that maintains a separate account for independent expenditures, and Dan Backer violated 52 U.S.C. § 30104(b),

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<sup>1</sup> Henry "Hank" Foley was Patriots of America PAC's original treasurer from February 18, 2020, until April 14, 2020, when Dan Backer was named its treasurer. Backer remained the committee's treasurer until February 3, 2021, at which time Foley became its treasurer again. Thus, Backer was the treasurer during the period when the alleged violations occurred, and because the Complaint named him in his personal capacity, he remains a Respondent in this matter.

(g) and 11 C.F.R. § 104.14(g) when they filed a false quarterly disclosure report and failed to file a 48-hour disclosure report required for an independent expenditure in excess of \$10,000. The Complaint contends that these violations arose from the Respondents' deliberate undervaluing of a NASCAR<sup>2</sup> car sponsorship — which entails the purchase of space on a race car to place “mobile advertising” decals visible to any person viewing the race — provided to it by Mike Harmon Racing (“Harmon Racing”) with the assistance of POA PAC board member and race car driver Timothy Viens.<sup>3</sup>

POA PAC reported the sponsorship at issue as a \$9,500 in-kind contribution from Harmon Racing.<sup>4</sup> The Complaint contends that the sponsorship at issue, which promoted then-President Donald J. Trump's 2020 re-election campaign, was undervalued at \$9,500 to avoid the reporting requirements associated with independent expenditures exceeding \$10,000.<sup>5</sup> The Complaint contends that, instead, the sponsorship should have been reported as both an in-kind contribution of \$25,000 — the prevailing general market rate and the rate paid for similar NASCAR sponsorships around the same time — to POA PAC from the sponsorship provider, Harmon Racing, and an independent expenditure by POA PAC for the same amount.<sup>6</sup> The Complaint also names Backer in his personal capacity, alleging that he knowingly caused POA

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<sup>2</sup> “NASCAR” refers to the National Association for Stock Car Auto Racing, which sponsors multiple series of races in the United States. According to NASCAR's website, in the United States, there are three racing series that race throughout the country: the Cup series, the Xfinity series, and the Camping World Truck series. *See* Sean Montgomery, *How the NASCAR Regular Season Works*, NASCAR, <https://nascar101.nascar.com/2021/07/26/how-the-nascar-regular-season-works/> (last visited Nov. 7, 2022). The races at issue in this matter were in the Xfinity series and the Camping World Truck series.

<sup>3</sup> Henry “Hank” Foley, POA PAC's current treasurer, was also notified in his personal capacity as a Respondent in this matter. *See supra* note 1.

<sup>4</sup> POA PAC, 2020 July Quarterly Report at 7-8 (July 15, 2020) <https://docquery.fec.gov/pdf/327/202007159249869327/202007159249869327.pdf>.

<sup>5</sup> Compl. at 5-6 (Feb. 2, 2021).

<sup>6</sup> *Id.*

PAC to file a false FEC report to avoid the relevant reporting obligations under the Act and Commission regulations.<sup>7</sup>

Respondents submitted a joint response, with supporting affidavits from Viens and Harmon, attesting under oath that \$9,500 was the appropriate valuation for the sponsorship, and thus that the sponsorship was appropriately disclosed on POA PAC's quarterly report.<sup>8</sup> The Response also asserts that the Complaint is retaliatory because the Complainant, Griffin, was ousted from POA PAC's board of directors, and POA PAC had already filed a complaint with the Commission against the political committee that Griffin had subsequently created.<sup>9</sup>

For the reasons set forth below, we recommend that the Commission find reason to believe that POA PAC violated 52 U.S.C. § 30104 (b), (g) by intentionally undervaluing and misreporting the in-kind contribution it received from Mike Harmon Racing in the form of a car sponsorship featuring Trump/Pence messaging attributed to POA PAC, and, as a result, not filing a 48-Hour Report in connection with its dissemination.<sup>10</sup> We similarly recommend that the Commission find reason to believe that Backer violated 52 U.S.C. § 30104(b) and (g) by causing

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<sup>7</sup> Compl. at 7.

<sup>8</sup> Respondents also note that, to the extent that the contribution was misreported on POA PAC's 2020 July Quarterly Report because it was only reported as an in-kind contribution and disbursement, but not an independent expenditure, that error was due to the limitations of FECFile software. Resp. at 2, 4 (Apr. 2, 2021) (submitted collectively by all Respondents).

<sup>9</sup> *Id.* at 4; *id.*, Ex. C; see Factual & Legal Analysis ("F&LA"), MUR 7810 (Shout Out Am. PAC, *et al.*). That complaint alleged that Griffin failed to timely register Shout Out America PAC as a political committee, failed to include appropriate disclaimers, made fraudulent representations to the public, solicited prohibited corporate contributions, and failed to make best efforts to collect contributor information. *Id.* at 2-4. On May 24, 2022, the Commission (1) dismissed as a matter of prosecutorial discretion the allegations that Shout Out America PAC failed to register as a political committee and failed to include disclaimers on its communications; (2) found no reason to believe Shout Out America PAC failed to exercise best efforts to obtain contributors' information and solicited prohibited corporate contributions; and (3) closed the file. Certification ("Cert.") ¶ 2 (May 27, 2022), MUR 7810. The allegation that Griffin committed wire fraud is outside the Commission's jurisdiction, and the Commission made no finding as to it. F&LA at 2 n.8, MUR 7810.

<sup>10</sup> To the extent that POA PAC also allegedly violated 52 U.S.C. § 30104 by reporting the in-kind contribution on schedules A and B, but not schedule E of its 2020 July Quarterly Report, we do not recommend pursuing that aspect of the potential violation.

1 POA PAC to underreport the value of the expenditure and by failing to file a 48-Hour Report on  
2 behalf of POA PAC. We further recommend that the Commission authorize pre-probable cause  
3 conciliation with POA PAC and Backer. Finally, because the overall record does not appear to  
4 support a cognizable violation of the Act or Commission regulations by Viens or Foley in his  
5 personal capacity, we recommend that the Commission find no reason to believe as to those  
6 Respondents.

## 7 **II. FACTUAL BACKGROUND**

8 During the 2020 election cycle, several political committees were formed with the stated  
9 purpose of engaging voters through the sponsorship of NASCAR race cars, specifically, by  
10 purchasing advertising space on race cars where decals promoting then-President Trump's re-  
11 election could be placed and viewed by fans watching the races. One of these entities, Patriots  
12 PAC of America ("Patriots PAC"), which is similarly named to Respondent POA PAC, was  
13 formed in January 2020 by Viens and Foley, with Backer becoming the committee's treasurer  
14 shortly after its formation.<sup>11</sup> Patriots PAC attempted to sponsor two race cars with Trump/Pence  
15 branding during the Daytona 500 races in February 2020, which Trump was expected to attend.<sup>12</sup>  
16 First, Patriots PAC planned to sponsor Viens, racing with Mike Affarano Motorsports at the  
17 NextEra Energy Resources 250 on February 14, 2020, at the Daytona International Speedway.<sup>13</sup>  
18 Second, Patriots PAC planned to sponsor Joe Nemechek with Harmon Racing on February 15,

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<sup>11</sup> Patriots PAC, Statement of Organization (Jan. 10, 2020) (listing Foley as treasurer and Viens as the Committee's registered agent). Patriots PAC, Amended Statement of Organization (Jan. 31, 2020) (naming Backer as treasurer and Caitlin Contestable as registered agent).

<sup>12</sup> Sam McEachern, *NASCAR Truck Series Driver to Run Trump 2020 Livery at Daytona*, GM AUTH. (Feb. 4, 2020), <https://gmauthority.com/blog/2020/02/nascar-truck-series-driver-to-run-trump-2020-livery-at-daytona/>.

<sup>13</sup> Sarah Handy, *Tim Viens Will Sport Trump 2020 Scheme in Daytona Truck Race*, KICKINTHETIRES (Feb. 4, 2020), <https://kickinthetires.net/trucks/tim-viens-will-sport-trump-2020-scheme-in-daytona-truck-race/> [<https://web.archive.org/web/20200302135817/https://kickinthetires.net/trucks/tim-viens-will-sport-trump-2020-scheme-in-daytona-truck-race/>].

1 2020,<sup>14</sup> in the NASCAR Racing Experience 300, also in Daytona Beach, Florida.<sup>15</sup> Patriots PAC  
 2 reported paying \$25,000 each to Mike Affarano Motorsports and Mike Harmon Racing in  
 3 connection with these independent expenditures when it filed 48-Hour Reports to disclose each  
 4 sponsorship, disclosing the Nemechek/Harmon Racing sponsorship on February 5, 2020, ten  
 5 days before the scheduled race, and the Viens/Mike Affarano Motorsports sponsorship on  
 6 February 15, 2020, the day after the race was scheduled to occur.<sup>16</sup> However, the intended  
 7 February 14, 2020 sponsorship with Viens/Mike Affarano Motorsports was not fulfilled, because  
 8 the race car did not arrive in Daytona in time to clear inspection.<sup>17</sup>

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<sup>14</sup> As relevant to the Complaint's allegations of undervaluing at issue in this matter, Joe Nemechek has driven in NASCAR racing series since the late 1980s. He won several races within the NASCAR Cup Series in the early 2000s and won races within the NASCAR Xfinity Series throughout the late 1990s and early 2000s. In 2020, he raced part-time for Mike Harmon Racing in the Xfinity series and part-time for his own racing company, NEMCO Motorsports, in the Camping World Truck Series. When Nemechek raced in the February 15, 2020 race, he placed 15th overall, but had an average place of 26th during his 2020 season. *See Joe Nemechek in the 2020 NASCAR Xfinity Series*, DRIVER AVERAGES, [https://www.driveraverages.com/nascar\\_xfinityseries/driveryear.php?drv\\_id=17&yr\\_id=2020](https://www.driveraverages.com/nascar_xfinityseries/driveryear.php?drv_id=17&yr_id=2020) (last visited Nov. 7, 2022). Mike Harmon Racing has raced cars in the NASCAR Xfinity Series since 2015 and his cars have had annual average finishing places that range between 25th and 32nd. *See Mike Harmon Racing NASCAR Xfinity Series Statistics*, DRIVER AVERAGES, [https://www.driveraverages.com/nascar\\_xfinityseries/team.php?team\\_now=778](https://www.driveraverages.com/nascar_xfinityseries/team.php?team_now=778) (last visited Nov. 7, 2022).

<sup>15</sup> *2020 NASCAR Racing Experience 300*, WIKIPEDIA, [hereinafter NASCAR Racing Experience 300 Results], [https://en.wikipedia.org/wiki/2020\\_NASCAR\\_Racing\\_Experience\\_300](https://en.wikipedia.org/wiki/2020_NASCAR_Racing_Experience_300) (last visited Nov. 7, 2022).

<sup>16</sup> Patriots PAC, 48-Hour Report of Independent Expenditures at 1 (Feb. 5, 2020) [hereinafter Patriots PAC/Harmon 48 Hour Report], <https://docquery.fec.gov/pdf/788/202002059186465788/202002059186465788.pdf> (depicting payment of \$25,000 to Mike Harmon Racing for "Mobile Advertising (Carey Account)"); Patriots PAC, 48-Hour Report of Independent Expenditures at 1 (Feb. 15, 2020) [hereinafter Patriots PAC/Viens 48 Hour Report], <https://docquery.fec.gov/pdf/912/202002159186506912/202002159186506912.pdf> (depicting payment of \$25,000 to Mike Affarano Motorsports in the form of an in-kind Carey contribution described as "Racing deposit (In-Kind Carey Contribution from Timothy Viens)").

<sup>17</sup> The car Viens was supposed to drive with Mike Affarano Motorsports slid off the road while in transport to the NextEra race. As a result, the truck did not make it to the check-in on Thursday, February 13, 2020, at 8:00 AM and was forced to withdraw. *See* Mark Harper, *Daytona Xfinity Race Will Feature Trump 2020 Car*, DAYTONA BEACH NEWS J. (Feb. 14, 2020), <https://www.news-journalonline.com/news/20200214/daytona-xfinity-race-will-feature-trump-2020-car> ("[A] mishap far from Florida caused a second Trump 2020 entry, a Chevy Silverado in Friday night's NextEra Energy 250, to drop out, said Port Orange driver Tim Viens."); Michelle R. Martinelli, *President Trump Delivers the Command to Start the Daytona 500 to Loud Cheers*, USA TODAY (Feb. 16, 2020), <https://www.usatoday.com/story/sports/nascar/2020/02/16/president-donald-trump-2020-daytona-500-grand-marshal/4777461002/>.

1           Shortly after these races, Patriots PAC sought to terminate and also filed a miscellaneous  
 2 report with the Commission to “clarify the record.”<sup>18</sup> The Viens/Mike Affarano Motorsports  
 3 sponsorship, which as noted above did not occur because the race car was disqualified, was  
 4 disclosed by Patriots PAC as a deposit, rather than mobile advertising.<sup>19</sup> Nevertheless, Patriots  
 5 PAC stated in its termination report that it had filed its February 15, 2020 48-Hour Report before  
 6 the planned dissemination was set to occur and described the effect of that transaction in its  
 7 termination report.<sup>20</sup>

8           Several days after the February races in Daytona, nearly the same group of individuals  
 9 formed a new political committee, Respondent POA PAC.<sup>21</sup> On February 18, 2020, POA PAC  
 10 filed its original Statement of Organization, listing Foley as its treasurer.<sup>22</sup> On April 14, 2020,  
 11 POA PAC amended its Statement of Organization to list Backer as its treasurer.<sup>23</sup> According to  
 12 the Complaint, at the time of its formation, Foley and Viens were listed as POA PAC’s co-

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<sup>18</sup> Patriots PAC, Miscellaneous Text (Feb. 24, 2020), <https://docquery.fec.gov/pdf/294/202002249203317294/202002249203317294.pdf> (“The Committee files this Form 99 to clarify the record concerning the Independent Expenditure Report filed on February 15, 2020 (Transaction ID SE.4125). The Report was filed prior to planned public dissemination. The race truck at issue did not participate in the race due to a widely reported accident (<https://www.usatoday.com/story/sports/nascar/2020/02/16/president-donald-trump-2020-daytona-500-grandmarshall/4777461002/>) and, as a result, the anticipated dissemination did not occur. This Independent Expenditure Report should be disregarded.”).

<sup>19</sup> Patriots PAC/Viens 48 Hour Report.

<sup>20</sup> Patriots PAC, Termination Report (Mar. 4, 2020), <https://docquery.fec.gov/pdf/276/202003029203555276/202003029203555276.pdf> (“The closing cash on hand for this Termination Report reflects a negative balance due to the Independent Expenditure filed on February 14, 2020 for \$25,000. As discussed in this Report and the Form 99 filed on February 24, 2020, the Independent Expenditure (Transaction ID SE.4125) was not publicly disseminated as planned. As a result, the expenditure did not occur, but the Committee is unable to remove a filed Independent Expenditure Report from this Termination Report and thus the item is incorrectly effecting [*sic*] the Committee’s cash on hand. The correct closing cash on hand for the Committee is \$0.00.”).

<sup>21</sup> According to the Complaint, Patriots PAC was formed by Backer, Foley, Viens, and William Delarosa, whereas POA PAC was formed by Backer, Foley, and Viens. Compl. at 3.

<sup>22</sup> POA PAC, Statement of Organization (Feb. 18, 2020), <https://docquery.fec.gov/pdf/111/202002189186514111/202002189186514111.pdf>.

<sup>23</sup> POA PAC, Amended Statement of Organization (Apr. 14, 2020), <https://docquery.fec.gov/pdf/152/202004149216669152/202004149216669152.pdf>.

1 chairs.<sup>24</sup> Later that month, Complainant Griffin was introduced to POA PAC, and asked to  
 2 fundraise for it.<sup>25</sup> According to the Complaint, Griffin successfully solicited a \$1,000,000  
 3 contribution, which was purportedly conditioned on Griffin replacing Viens as POA PAC's co-  
 4 chair.<sup>26</sup>

5 According to the affidavits submitted with the Response, sometime in May or June  
 6 2020,<sup>27</sup> Viens purportedly negotiated with Harmon Racing to have Harmon Racing make an in-  
 7 kind contribution to POA PAC in the form of a Trump/Pence 2020 sponsorship at a NASCAR  
 8 Xfinity race on June 6, 2020, in Atlanta.<sup>28</sup> However, as early as April 9, 2020, Harmon Racing's  
 9 Twitter account posted images of a die-cast model of the car featuring "Trump Pence 2020" and  
 10 POA PAC's name, postings indicating an earlier timing of the sponsorship agreement.<sup>29</sup> At that  
 11 June 6 race, the Harmon car raced as scheduled and photographs provided by the Respondents  
 12 indicate that at the very least, the rear (the "TV panel") and side panels of the car displayed  
 13 Trump/Pence messaging.<sup>30</sup> The parties appear to agree that neither Griffin nor Backer learned of

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<sup>24</sup> Compl. at 3.

<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.*

<sup>27</sup> See Resp., Viens Aff. ¶ 7 [hereinafter Viens Aff.]; *id.*, Harmon Aff. ¶ 2 [hereinafter Harmon Aff.].

<sup>28</sup> The Complaint contends that this contribution was expected to be structured like the February races sponsored by Patriots PAC, with Viens driving a car with Mike Affarano Motorsports in a Homestead Miami race and Nemechek driving a car with Mike Harmon Racing in Atlanta. However, the Viens/Affarano car apparently failed inspection and was ineligible to race on June 13, 2020. Toby Christie, *Tim Viens, Affarano Motorsports Withdraw Trump Truck After Truck Fails Inspection at Homestead*, TOBYCHRISTIE.COM (June 13, 2020) [hereinafter Christie Article], <https://tobychristie.com/2020/06/13/tim-viens-affarano-motorsports-withdraw-trump-truck-after-truck-fails-inspection-at-homestead/>. On June 13, 2020, Viens announced that, effective immediately, he would be driving with the Harmon Racing team in the Xfinity series while also seeking a new team in the truck series. *Id.*

<sup>29</sup> Mike Harmon Racing (@mhrracing), TWITTER (Apr. 9, 2020, 2:25 PM), <https://twitter.com/mhrracing/status/1248316173218873345>.

<sup>30</sup> See Resp., Ex. B. The hood and roof of the car are not visible in the image provided by Respondent, so we do not know whether those areas also contained Trump/Pence messaging. However, it appears that Viens's race car for the February race displayed Trump/Pence messaging on the hood. See Resp., Ex. A.

1 the sponsorships until after the June 6 race featuring the Harmon car.<sup>31</sup> The parties also appear  
2 to agree that, after learning of the independent expenditure, Backer communicated with POA  
3 PAC staff about the requirements associated with reporting independent expenditures.<sup>32</sup>

4 According to the Complaint, Viens claimed that the sponsorship was funded with a  
5 \$25,000 “credit” that Viens had with Mike Affarano Motorsports related to the February 2020  
6 race from which his car was disqualified.<sup>33</sup> Respondents, on the other hand, claim that Viens  
7 requested that Mike Harmon Racing make its own in-kind contribution in the form of a car  
8 sponsorship to POA PAC, and that such contribution was independent from and unrelated to any  
9 sort of “credit” between Viens and Mike Affarano Motorsports.<sup>34</sup>

10 Complainant Griffin and Respondents present competing explanations concerning how  
11 the reporting of the Harmon sponsorship was handled following the point at which Backer and  
12 POA PAC’s board of directors assert they learned of its existence. Griffin, who was then POA  
13 PAC’s co-chair, states in the Complaint that Backer stated that he would be reporting the  
14 sponsorship as an in-kind contribution for \$9,500, “because otherwise the POA PAC could be  
15 investigated for accepting an ‘unreported independent expenditure.’ [Backer] also told her that  
16 by listing the amount as being under \$10,000, the PAC would be in compliance with quarterly  
17 reporting requirements because if the contribution was over \$10,000 it triggered more immediate  
18 reporting requirements.”<sup>35</sup> Griffin also asserts that she explained to Backer that \$9,500 was not a  
19 reasonable valuation because “she knew racing teams typically charged substantially more for

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<sup>31</sup> See Compl. at 5; Resp. at 2.

<sup>32</sup> See Compl. at 5-6; Resp. at 2-3.

<sup>33</sup> Compl. at 5; see Resp. at 4; Viens Aff. ¶ 5 (acknowledging the existence of a credit but stating that it was not later used for “election-related activity”).

<sup>34</sup> Resp. at 2; Viens Aff. ¶ 7; Harmon Aff. ¶ 2.

<sup>35</sup> Compl. at 6.



1 advertising” and because the sponsorship in the February race, which was a similar race, had  
2 been valued at \$25,000.<sup>36</sup> Griffin also alleges that these conversations occurred prior to POA  
3 PAC obtaining a contribution form from Harmon documenting the \$9,500 valuation, and that, at  
4 the time, Backer told her that there was no documentary proof regarding the value of the Harmon  
5 Racing sponsorship.<sup>37</sup> While the Respondents reject Griffin’s assertion generally, neither the  
6 Response nor the sworn affidavits submitted with it specifically dispute that Backer made these  
7 statements or statements to this effect.

8 Respondents, on the other hand, contend that the \$9,500 valuation was the product of  
9 Harmon’s business judgment and contend that the lower price accounted for the last minute  
10 nature of the sponsorship, as well as the possibility of future sponsorships from POA PAC.<sup>38</sup> In  
11 his sworn statement, Harmon acknowledges offering a discounted rate for the sponsorship and  
12 asserts that he “routinely offer[s] such discounts in the normal course of my business  
13 operations.”<sup>39</sup> Respondents also stress that Backer did not learn of the sponsorship until after it  
14 had occurred and state that Backer both instructed the board and Harmon on independent  
15 expenditure reporting and provided forms for Harmon to complete to document the transaction.<sup>40</sup>

16 The parties appear to agree that a dispute ensued between Griffin and the rest of POA  
17 PAC staff concerning the valuation of the Harmon sponsorship. Griffin alleges that she  
18 “doubted the validity” of the valuation form because Harmon’s signature on it does not match  
19 that provided on another document which she knew to have been signed by Harmon, and she

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<sup>36</sup> *Id.* at 5.

<sup>37</sup> *Id.* (“When Griffin asked for proof relating to the contribution, Backer initially told her that none existed.”).

<sup>38</sup> Resp. at 4; Harmon Aff. ¶ 7.

<sup>39</sup> Harmon Aff. ¶ 7.

<sup>40</sup> Resp. at 4; Viens Aff. ¶ 9; Harmon Aff. ¶¶ 5-6.

1 then refused to authorize the filing of POA PAC's 2020 July Quarterly Report.<sup>41</sup> Griffin was  
 2 then ousted as a POA PAC board member, which she contends was an act of retaliation by  
 3 Backer,<sup>42</sup> but Respondents contend her dismissal was due to Griffin's "dereliction of duties owed  
 4 by an individual serving in such a position."<sup>43</sup> Respondents link that explanation to Griffin's  
 5 attempts to prevent POA PAC from filing its 2020 July Quarterly Report.<sup>44</sup>

6 Shortly thereafter, Griffin formed her own political committee, which has a similar  
 7 mission as POA PAC, and she was previously a Respondent in a different matter, MUR 7810,  
 8 arising from a Complaint filed by POA PAC on October 1, 2020.<sup>45</sup> Because the Complaint in  
 9 this matter was filed on February 2, 2021, subsequent to the Complaint filing in MUR 7810,  
 10 Respondents claim that Griffin's allegations in this matter are meritless and retaliatory.<sup>46</sup>

### 11 III. LEGAL ANALYSIS

#### 12 A. POA PAC's Sponsorship of the Mike Harmon Race Car Was an 13 Independent Expenditure

14 An "independent expenditure" is an expenditure — *i.e.*, a "purchase, payment,  
 15 distribution, loan, advance, deposit, or gift of money or anything of value, made by any person

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<sup>41</sup> Compl. at 6; *compare id.*, Ex. 1 (valuation form purportedly signed by Harmon), *with id.*, Ex. 2 at 2 (sponsorship agreement signed by Harmon).

<sup>42</sup> *Id.* at 6 ("Griffin refused to authorize the filing of the quarterly report that included the false in-kind contribution. She recommended that Viens report this as his contribution. Backer refused to do this and then obtained instructions from the POA PAC co-chair, Foley, to file the report . . . . Two days later, Backer arbitrarily acted to remove Griffin from the POA PAC and reinstalled Viens as the co-chair.").

<sup>43</sup> Resp. at 4 ("The removal was due to various misconduct by Griffin and dereliction of duties owed by an individual serving in such a position. As acknowledged by Griffin through her own admissions in the Complaint, she attempted to prevent the July Quarterly 2020 Report from being filed as required and with the information provided to the Committee specifically for compliance with federal law and its required independent expenditure reporting disclosure.").

<sup>44</sup> *Id.*

<sup>45</sup> *See id.*, Ex. 3 (attaching the complaint filed against Griffin); *see also supra* note 9.

<sup>46</sup> Resp. at 4-5.

1 for the purpose of influencing any election for Federal office”<sup>47</sup> — by a person expressly  
 2 advocating the election or defeat of a clearly identified federal candidate that is not coordinated  
 3 with a candidate, a candidate’s authorized committee or their agents, or a political party  
 4 committee or its agents.<sup>48</sup> The Act requires political committees and persons other than political  
 5 committees to report their independent expenditures.<sup>49</sup> A political committee that makes  
 6 independent expenditures aggregating \$10,000 or more for an election in any calendar year, up to  
 7 and including the 20th day before an election, must report these expenditures within 48 hours.<sup>50</sup>  
 8 These 48-Hour Reports must be filed by the end of the second day “following the date on which  
 9 a communication that constitutes an independent expenditure is publicly distributed or otherwise  
 10 publicly disseminated.”<sup>51</sup> The Act requires that these filings be accurate, and it obligates  
 11 political committees and their treasurers not only to file reports but also to ensure their  
 12 accuracy.<sup>52</sup>

13 Respondents acknowledge that the June 6 Harmon race car was “in all likelihood an  
 14 independent expenditure” but also raise the possibility that the Commission might find that it  
 15 was not.<sup>53</sup> Such a finding would be inconsistent with a prior Commission matter in which the  
 16 Commission found that NASCAR sponsorships can constitute independent expenditures.<sup>54</sup>

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<sup>47</sup> 52 U.S.C. § 30101(9)(A).

<sup>48</sup> *Id.* § 30101(17); 11 C.F.R. § 100.16.

<sup>49</sup> *See generally* 52 U.S.C. § 30104.

<sup>50</sup> *Id.* § 30104(g)(2); 11 C.F.R. § 104.4(b)(2).

<sup>51</sup> 11 C.F.R. § 104.4(b)(2).

<sup>52</sup> 52 U.S.C. § 30104(b); 11 C.F.R. § 104.14(d).

<sup>53</sup> Resp. at 4.

<sup>54</sup> *See* First Gen. Counsel’s Rpt. (“FGCR”) at 3-4, MUR 5563 (Kirk Shelmerdine Racing, LLC); Cert. ¶ 3 (June 7, 2005), MUR 5563 (finding reason to believe that Kirk Shelmerdine Racing, LLC, violated now-52 U.S.C. § 30104(c), by placing a Bush-Cheney decal on its race car). The F&LA for MUR 5563 is not currently publicly available but the certification indicates that the Commission was in agreement with the Office of the General

Respondents further acknowledge that the Harmon race car “was a communication that expressly advocated for the election of a clearly identified federal candidate” and was “not made in consultation or cooperation with, or at the request or suggestion of any candidate, or his or her authorized committees or agents, or a political party committee or its agents.”<sup>55</sup> Finally, Respondents note that the Harmon race car bore the paint scheme and disclaimer language generally used in other similar situations, at POA PAC’s request.<sup>56</sup> Respondents further concede that the Harmon race car’s sponsorship “was clearly intended to serve as an independent expenditure in support of President Trump by [POA PAC].”<sup>57</sup> Respondents have also reported subsequent NASCAR sponsorships as independent expenditures.<sup>58</sup>

As a result, under the relevant Commission precedents, POA PAC’s sponsorship of the Harmon race car was an independent expenditure.<sup>59</sup>

**B. The Commission Should Find Reason to Believe That POA PAC’s Sponsorship of the Mike Harmon Race Car Was Undervalued, Resulting in Reporting Violations**

Harmon Racing made an in-kind contribution to POA PAC by allowing POA PAC to use the space on its car to display Trump/Pence messaging, a form of mobile advertising, which resulted in an independent expenditure. The fair market value of that sponsorship determines

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Counsel’s recommendations. *See* Cert. ¶ 3(d) (June 7, 2005), MUR 5563 (approving the proposed F&LA subject to minor typographical edits).

<sup>55</sup> Resp. at 4 (quoting 11 C.F.R. § 100.16).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See* POA PAC, 2020 October Quarterly Report at 27 (Oct. 15, 2020), <https://docquery.fec.gov/pdf/537/202010159294747537/202010159294747537.pdf>.

<sup>59</sup> It does not appear to be in dispute that Mike Harmon Racing provided space on its car for POA PAC to display its Trump/Pence messaging, but did not create the messaging. Further, the decals on the car attribute the sponsorship to POA PAC. As such, it appears that POA PAC, not Mike Harmon Racing, made the independent expenditure and incurred the reporting obligations. Mike Harmon Racing was not named as a Respondent and we do not recommend notifying Mike Harmon Racing as a Respondent.

1 both the amount of Harmon Racing's in-kind contribution to POA PAC, as well as the  
 2 corresponding value of POA PAC's independent expenditure in support of Trump's presidential  
 3 reelection campaign, both of which POA PAC had an obligation to disclose on its next quarterly  
 4 report.<sup>60</sup> In addition, if the Harmon car sponsorship had a fair market value greater than  
 5 \$10,000, thus making POA PAC's independent expenditure in excess of \$10,000, POA PAC  
 6 would have additionally been obligated to file a 48-hour Report within 48 hours of its  
 7 dissemination.<sup>61</sup>

8 Both the Complaint and Response appear to agree that the POA PAC board members  
 9 who handled POA PAC's reporting obligations did not learn of the independent expenditure until  
 10 more than 48 hours after the race.<sup>62</sup> Griffin contends that at that point, Backer, POA PAC's  
 11 treasurer, expressed awareness that if the sponsorship's valuation did not exceed \$10,000, an  
 12 apparent violation of 52 U.S.C. § 30104(g) would not have occurred and POA PAC would be  
 13 obligated to disclose the independent expenditure only on its next quarterly disclosure report:  
 14 Backer allegedly "told [Griffin] that by listing the amount as being under \$10,000, the PAC  
 15 would be in compliance with quarterly reporting requirements because if the contribution was  
 16 over \$10,000 it triggered more immediate reporting requirements."<sup>63</sup> The Complaint thus alleges

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<sup>60</sup> 11 C.F.R. § 104.4(a); 11 C.F.R. § 104.13.

<sup>61</sup> 52 U.S.C. § 30104(g); 11 C.F.R. § 104.4(b)(2). It does not appear that Harmon was also required to file a 48-hour report in connection with this independent expenditure, as POA PAC reported the in-kind contribution from Harmon — *i.e.*, POA PAC reported receiving a contribution from Harmon for the value of the sponsorship and making an expenditure of the same amount. *See* 11 C.F.R. § 104.13; POA PAC, 2020 July Quarterly Report at 7-8 (July 15, 2020), <https://docquery.fec.gov/pdf/327/202007159249869327/202007159249869327.pdf>.

<sup>62</sup> *See* Compl. at 5; Viens Aff. ¶ 9; Harmon Aff. ¶ 5.

<sup>63</sup> Compl. at 6.

that the Harmon sponsorship was valued at \$9,500 based on the timing of FEC reporting requirements as opposed to the sponsorship's prevailing fair market value.<sup>64</sup>

The Commission has previously addressed the proper method of valuing NASCAR sponsorships. In MUR 5563 (Kirk Shelmerdine Racing, LLC), Kirk Shelmerdine, a well-regarded pit crew chief who later formed and drove for Kirk Shelmerdine Racing, LLC, had difficulty obtaining sponsorships for his car, and placed "Bush-Cheney '04" stickers on the rear quarter panel of its NASCAR race car.<sup>65</sup> Although the respondent in that matter based the value of the independent expenditure on the cost associated with printing the decals, the Commission calculated the value of the independent expenditure by looking to the market value for a similar sponsorship, and examined comparable situations where the respondent had successfully obtained sponsorships for the rear quarter panel of his car for similar races.<sup>66</sup>

The Complaint contends, first, that the independent expenditure at issue in this matter should have been reported as an in-kind contribution from Viens, not Harmon Racing, and second, that the contribution should have been valued at \$25,000.<sup>67</sup> Based on the available information, which includes Respondents' affidavits, it appears that the independent expenditure at issue was indeed an in-kind contribution from Harmon Racing, not Viens.<sup>68</sup> However, the

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<sup>64</sup> *Id.*

<sup>65</sup> See FGCR at 2-3, MUR 5563; Cert. ¶ 3 (June 7, 2005), MUR 5563 (approving FGCR's recommendations).

<sup>66</sup> FGCR at 6-7, MUR 5563; Cert. ¶ 3 (June 7, 2005), MUR 5563 (approving FGCR's recommendations).

<sup>67</sup> Compl. at 5-6.

<sup>68</sup> Although the Complaint alleges that the Harmon sponsorship was funded with a "credit" that Viens had with Mike Affarano Motorsports, based on the available information and the allegations in the Complaint, it appears more likely that the Mike Harmon car sponsorship was separate from but intended to be complemented by a second independent expenditure to sponsor the Viens/Mike Affarano Motorsports truck at the June 13, 2020 Baptist Health 200 race in Homestead-Miami, Florida. See Christie Article. While Viens may have held some type of "credit" with Mike Affarano Motorsports, may have attempted to fund a subsequent sponsorship with his "credit," and may have made statements to Griffin consistent with that intention, the Viens/Affarano car failed inspection, and as a result, no independent expenditure was made. See Patriots PAC, 2020 Termination Report at 10 (Mar. 2, 2020) (reporting the Mike Affarano Motorsports independent expenditure as a "Racing Deposit (In-Kind Carey

information also indicates that the Harmon Racing sponsorship should have been valued at \$25,000, consistent with prior sponsorships and publicly available market data, and not at \$9,500 valuation as Respondents contend.

Providing a relevant comparison to the independent expenditure in this matter, Patriots PAC, a political committee run by Viens, Foley, and Backer, had recently valued a nearly identical sponsorship also resulting in an independent expenditure of the same amount at \$25,000. The affidavit signed by Harmon avers that the \$9,500 valuation at issue was based on the last-minute nature of the sponsorship, as well as a practice of “offer[ing] such discounts in the normal course of my business operations.”<sup>69</sup> However, it does not appear that this sponsorship was, in-fact, that much more last minute than the Daytona Patriots PAC sponsorship valued at \$25,000: Patriots PAC reported that in-kind contribution as being made ten days before the race held on February 15, 2020,<sup>70</sup> while the Harmon affidavit states that Harmon Racing made the in-kind contribution to fund the June 6, 2020 sponsorship “on or about” May 31, 2020, roughly one week before the race.<sup>71</sup>

Additionally, images posted on Harmon Racing’s Twitter account on April 9, 2020, which feature POA PAC’s name and “Trump Pence 2020” on a die-cast model of the Nemechek/Harmon Racing car being offered for sale, suggest that POA PAC’s agreement to

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Contribution from Timothy Viens”). The available information does not indicate that Viens had any type of “credit” with Mike Harmon Racing, nor is there any information to indicate any type of transaction between Mike Affarano Motorsports and Mike Harmon Racing. As such, our analysis focuses solely on the proper valuation of the Harmon sponsorship, and we recommend that the Commission find no reason to believe that Viens violated the Act in connection with this allegation.

<sup>69</sup> Harmon Aff. ¶ 6.

<sup>70</sup> Patriots PAC/Harmon 48 Hour Report.

<sup>71</sup> Harmon Aff. ¶ 2.

1 sponsor the car may have been planned or occurred as early as April 2020,<sup>72</sup> undercutting the  
 2 last-minute business justification for the discounted value of the sponsorship. While Harmon  
 3 Racing may indeed offer discounted rates as a matter of routine in order to generate future  
 4 business, as averred, it seems counterintuitive that the company first provided a \$25,000  
 5 sponsorship valuation for the February race before subsequently offering a discount for the June  
 6 race in a similar arrangement with almost all of the same individuals for the purpose of  
 7 generating future business. That Harmon Racing provided the advertisement in the form of an  
 8 in-kind contribution casts further doubt on the asserted business rationale because POA PAC did  
 9 not, in fact, pay any amount to Harmon Racing; accordingly, whether the contribution was  
 10 valued at \$9,500 or \$25,000 affected only the reporting of POA PAC's activities but did not  
 11 impact either POA PAC's or Harmon Racing's bank balances. The Commission has previously  
 12 calculated the value of an independent expenditure of this sort based on the general market value  
 13 for such a sponsorship, rather than based on individualized circumstances.<sup>73</sup>

14 Publicly available information from marketing firms that specialize in NASCAR  
 15 sponsorships describe the types of car sponsorships available and provide relevant general  
 16 insight into how placement in a race can impact the value of a sponsorship. For example,  
 17 Wolfpack Racing, a marketing company that specializes in NASCAR sponsorships and was a  
 18 2021 sponsor for Harmon Racing,<sup>74</sup> describes a "primary sponsorship" as generally involving

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<sup>72</sup> Mike Harmon Racing (@mhrracing), TWITTER (Apr. 9, 2020, 2:25 PM), <https://twitter.com/mhrracing/status/1248316173218873345> (available in VBM, along with enlargement showing portion of image reflecting that the model car was designed with text reading "PAID FOR BY PATRIOTS OF AMERICA PAC").

<sup>73</sup> See FGCR at 7-8, MUR 5563; Cert. ¶ 3 (June 7, 2005), MUR 5563 (approving FGCR's recommendations).

<sup>74</sup> Wolfpack Racing was a 2021 sponsor for Harmon Racing. See *Mike Harmon Racing Secures 2021 Season Partnership*, MIKEHARMONRACING74 (Jan. 1, 2021), <https://www.mikeharmonracing74.com/news/mike-harmon-racing-secures-2021-season-partnership> [<https://web.archive.org/web/20211230183102/https://www.mikeharmonracing74.com/news/mike-harmon-racing-secures-2021-season-partnership>].



1 “your branding on the hood, both quarter panels, the roof, and the deck lid.”<sup>75</sup> Wolfpack Racing  
 2 values such a sponsorship at upwards of \$15,000.<sup>76</sup> Another NASCAR-focused marketing firm,  
 3 HardHead Marketing, similarly describes a primary sponsorship as involving logo placement on  
 4 “the hood, rear quarter panels, and TV panel.”<sup>77</sup> Depending on the team’s placement in races,  
 5 HardHead Marketing claims that the minimum cost per race associated with a primary  
 6 sponsorship in an Xfinity Series race (the racing series in which Harmon Racing participated on  
 7 June 6, 2020) can range from \$12,000 to \$150,000, with top-30 teams garnering at least  
 8 \$50,000.<sup>78</sup> In short, publicly available market information suggests that similar sponsorships in  
 9 comparable races would not be valued at under \$10,000.

10 Respondents attached a photograph to their Response which depicts “Trump 2020”  
 11 decals on both the rear quarter and the “TV panel” of the vehicle.<sup>79</sup> The hood and the roof of the  
 12 car are not visible in the image but the hoods of the February race cars bore Trump/Pence  
 13 branding.<sup>80</sup> Given that Harmon Racing’s June 6 driver, Nemechek, was at the time averaging a  
 14 26th-place finishing position, that the Harmon Racing team as a whole was averaging around a  
 15 25th-place finishing position in 2020, and, finally, that Harmon Racing provided a virtually  
 16 identical sponsorship in February 2020 at \$25,000, the overall record supports the Complaint’s  
 17 allegation that the June 2020 sponsorship was intentionally valued at less than the prevailing

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<sup>75</sup> *Car Sponsorship Opportunities*, WOLFPACK RACING, <https://wolfpackracingusa.com/car-sponsorship-opportunities/> (last visited Nov. 7, 2022).

<sup>76</sup> *Id.*

<sup>77</sup> *Sponsorship*, HARDHEAD MARKETING, <https://www.hardheadmarketing.com/sponsorships> (last visited Nov. 7, 2022).

<sup>78</sup> *Id.*

<sup>79</sup> Resp., Ex. B.

<sup>80</sup> *See id.*; McEachern Article.

1 market rate, and, accordingly, that the independent expenditure resulting from the sponsorship  
2 was greater than the \$9,500 at which the sponsorship was reported.

3 In addition, there is sufficient information in the record to establish that Backer, POA  
4 PAC's former treasurer, violated 52 U.S.C. § 30104(b) and (g) in his personal capacity. The  
5 available information indicates that Backer caused the Harmon sponsorship to be undervalued in  
6 order to avoid the Act's reporting obligations. Commission regulations hold committee  
7 treasurers personally accountable for the accuracy of any information or statement contained  
8 within the committee's reports.<sup>81</sup>

9 The Commission has issued a Statement of Policy under which it will decline to hold a  
10 current or former treasurer personally liable in an enforcement matter unless the available  
11 information suggests that the treasurer "knowingly and willfully violated an obligation that the  
12 Act or regulations specifically impose on a treasurer or where a treasurer recklessly failed to  
13 fulfill duties imposed by law, or where the treasurer has intentionally deprived himself or herself  
14 of operative facts giving rise to the violation."<sup>82</sup>

15 It is undisputed that as POA PAC's treasurer, Backer was aware of the Act's reporting  
16 obligations and played an integral role in identifying reporting obligations implicated by the  
17 Harmon sponsorship; he also instructed POA PAC staff, as well as Viens and Harmon, regarding

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<sup>81</sup> 11 C.F.R. § 104.14(d) ("Each treasurer of a political committee, and any other person required to file any report or statement under these regulations and under the Act shall be personally responsible for the timely and complete filing of the report or statement and for the accuracy of any information or statement contained within it").

<sup>82</sup> Statement of Policy Regarding Treasurers in Enforcement Proceedings, 70 Fed. Reg. 3, 4 (Jan. 3, 2005); *see also* F&LA at 4, MUR 5652 (Susan Arceneaux) (finding reason to believe assistant treasurer violated the Act in her personal capacity where she recklessly failed to fulfill the duties of the Act and regulations which gave rise to the Committee's violations in treasurer's absence); F&LA at 10-11, MUR 7905 (Robert Lucero) (finding reason to believe the treasurer violated the Act in his personal capacity where he recklessly failed to fulfill the duties imposed on treasurers based on the number of apparent reporting and recordkeeping violations).

1 the Act's reporting obligations.<sup>83</sup> Backer, who served as Patriots PAC's treasurer, was aware of  
 2 that committee's \$25,000 independent expenditure resulting from a similar sponsorship made by  
 3 Viens/Mike Affarano Motorsports in February 2020. In the Complaint, Griffin asserts that  
 4 Backer arrived at a valuation for the Harmon Racing sponsorship, and POA PAC's resulting  
 5 independent expenditure, ahead of receiving the in-kind contribution form from Harmon Racing,  
 6 and further asserts that Backer both knew that the \$9,500 valuation was below the prevailing  
 7 market rate and told her specifically that listing the contribution for under \$10,000 would avoid  
 8 triggering "more immediate reporting requirements."<sup>84</sup> Although the Response includes  
 9 affidavits averring that the reported \$9,500 amount is accurate, it does not specifically take issue  
 10 with these comments attributed to Backer.

11 Based on the foregoing information, we recommend that the Commission find reason to  
 12 believe that Backer and POA PAC violated 52 U.S.C. § 30104(b) and 11 C.F.R. § 104.14(d) by  
 13 failing to file accurate reports with the Commission<sup>85</sup> regarding the value of the June 2020  
 14 sponsorship resulting in an independent expenditure, and violated 52 U.S.C. § 30104(g)(2) and  
 15 11 C.F.R. § 104.4(b)(2) by failing to file a 48-Hour Report in connection with the dissemination  
 16 of an independent expenditure in excess of \$10,000.<sup>86</sup> Because the available information does

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<sup>83</sup> Resp. at 2-3, Viens Aff. ¶ 9, Harmon Aff. ¶¶ 5-6.

<sup>84</sup> Compl. at 5-6.

<sup>85</sup> Respondents note that the FECFile software limited its ability report the sponsorship as both an in-kind contribution (which would generally be reported on Schedule A as a contribution and offset by being reported as an Expenditure on Schedule B) and an independent expenditure (which would be reported on Schedule E). Resp. at 4. We discussed this concern with the Reports Analysis Division. Although the situation faced by Respondents is unusual, and the software is designed to disclose the offset on Schedule B by default, the software does not prevent the Committee from also disclosing the independent expenditure as a memo entry on Schedule E. However, given the novelty of the situation, we do not recommend that the Commission find reason to believe that the Committee violated the Act by only disclosing the sponsorship on Schedules A and B.

<sup>86</sup> This Office considered whether the violations here might be knowing and willful. See 52 U.S.C. § 30109(a)(5)(B), (d). However, given the specific circumstances of this case, including the otherwise clear nature of the record and the amount in violation, we believe conciliating this matter on a non-knowing and willful basis

1 not indicate that Foley or Viens committed any violation of the Act or Commission regulations  
2 in connection with the independent expenditure at issue here, we further recommend the  
3 Commission find no reason to believe that Timothy Viens or Henry “Hank” Foley in his personal  
4 capacity violated the Act or Commission regulations.

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would result in an appropriate and efficient resolution. Thus, we do not recommend further investigation to determine if Respondents may have knowingly and willfully violated the Act.

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**V. RECOMMENDATIONS**

1. Find reason to believe that Dan Backer, Patriots of America PAC and Henry “Hank” Foley in his official capacity as treasurer violated 52 U.S.C. § 30104(b) and (g) and 11 C.F.R. §§ 104.4(b)(2) and 104.14(d) by failing to file accurate reports with the Commission and failing to file a 48 Hour Report in connection with the dissemination of an independent expenditure exceeding \$10,000;
2. Find no reason to believe that Timothy Viens or Henry “Hank” Foley in his personal capacity violated the Act or Commission regulations in connection with this matter;
3. Enter into conciliation with Dan Backer and Patriots of America PAC and Henry “Hank” Foley in his official capacity as treasurer;
4. Approve the attached Factual and Legal Analysis;
5. Approve the attached proposed Conciliation Agreement;
6. Close the file as to Timothy Viens and Henry “Hank” Foley in his personal capacity; and
7. Approve the appropriate letters.

Lisa J. Stevenson  
Acting General Counsel

November 8, 2022

Date

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