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# AMERICANS FOR PROSPERITY ACTION™

2200 Wilson Blvd. #102-177 | Arlington, Virginia 22201

May 6, 2021

Jeff S. Jordan  
Assistant General Counsel  
Complaints Examination and Legal Administration  
Federal Election Commission  
1050 First Street, NE  
Washington, D.C. 20463

Re: MUR 7887

Dear Mr. Jordan,

Americans for Prosperity Action, and Alex Varban, in his official capacity as Treasurer, (“AFPA,” collectively) submit this letter in response to the Complaint filed by Campaign Legal Center (“CLC”) against Hamilton Company.

AFPA is not a respondent in this matter but was notified that the FEC “received a complaint that indicates Americans for Prosperity Action, Inc. and you in your official capacity as treasurer may have violated the Federal Election Campaign Act of 1971.” To the contrary, the Complaint does not allege that AFPA or its Treasurer may have violated The Federal Election Campaign Act of 1971, as amended (the “Act”) and the FEC’s notification letter contains no indication of what potential liability AFPA could have.

The Act states that “the Commission shall notify, in writing, any *person alleged in the complaint to have committed such a violation.*”<sup>1</sup> FEC regulations state the complaint “should clearly identify as a respondent each person or entity who is alleged to have committed a violation”<sup>2</sup> and the Office of General Counsel (“OGC”) shall “*notify each respondent that the complaint has been filed.*”<sup>3</sup>

The FEC’s Guidebook for Complainants and Respondents on the FEC Enforcement Process (“Guidebook”) defines “respondent” as a “person or entity who is the subject of a complaint or a referral...that alleges that the person or entity may have violated” the Act or Commission regulations.<sup>4</sup> However, the Guidebook fails to provide the public with any information regarding a practice whereby OGC adds a person or entity as a respondent even though the complaint does not allege that the person or entity violated the Act.

OGC published an Enforcement Manual in June 2013 (“OGC Manual”) without Commission approval.<sup>5</sup> The OGC Manual permits OGC to send a pre-RTB letter if OGC determines the person or entity “faces

<sup>1</sup> 52 U.S.C. § 30109(a)(1) (emphasis added).

<sup>2</sup> 11 C.F.R. § 111.4 (d)(1).

<sup>3</sup> 11 C.F.R. § 111.5(a) (emphasis added).

<sup>4</sup> The FEC’s Guidebook for Complainants and Respondents on the FEC Enforcement Process (May 2012) at 9, available at [https://www.fec.gov/resources/cms-content/documents/respondent\\_guide.pdf](https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf).

<sup>5</sup> OGC Enforcement Manual (June 2013), available at [https://www.fec.gov/resources/about-fec/commissioners/weintraub/ogc\\_docs/generalcounselsmemorandumdatedjune122013.pdf](https://www.fec.gov/resources/about-fec/commissioners/weintraub/ogc_docs/generalcounselsmemorandumdatedjune122013.pdf); see also Memo from Commissioners McGahn, Hunter, and Petersen to Commission, June 12, 2013, available at [https://www.fec.gov/resources/about-fec/commissioners/weintraub/ogc\\_docs/memorandumfromvicechairmandonaldf.mcghn,commissionercarolinec.hunterandcommissionermatthewspetersendatedjune122013.pdf](https://www.fec.gov/resources/about-fec/commissioners/weintraub/ogc_docs/memorandumfromvicechairmandonaldf.mcghn,commissionercarolinec.hunterandcommissionermatthewspetersendatedjune122013.pdf) (following an oversight hearing before the House Committee on Administration, FEC Commissioners discussed the enforcement manual during several public meetings, including on June 12, 2013. The Republican

potential liability and should be notified” even when there is no allegation in the complaint that the person or entity violated the Act.<sup>6</sup> But the OGC Manual provides no statutory or regulatory support for this standard and no guidance to the public regarding when a person or entity may “[face] potential liability.” In addition, the OGC Manual in the “Naming Respondents” subsection on political committees cites the Treasurer Policy as support for naming political committees who are “involved in an enforcement proceeding.”<sup>7</sup> However, this reliance is misplaced, as the Treasurer Policy states that treasurer of a political committee is subject to enforcement proceedings only “when a complaint asserts *sufficient allegations* to warrant naming a political committee as a respondent.”<sup>8</sup> These standards – whether a person or entity “faces potential liability” or is “involved in an enforcement proceeding” – are arbitrary, vague, and quite different than the statutorily-supported standards of “clearly [identifying] each respondent who is alleged to have a committed a violation”<sup>9</sup> or “[asserting] sufficient allegations.”<sup>10</sup>

Consequently, no statute, regulation, or policy empowers the Commission or OGC to add AFPA or its treasurer to MUR 7887 as the Complaint does not allege it violated the Act.

Many commentors and respondents have challenged OGC’s practice of adding respondents in the pre-RTB phase as improper.<sup>11</sup> The policy implications were made clear by the Perkins Coie, LLP Political Law Group’s response to the FEC’s January 18, 2013 Request for Comment on its enforcement process:

The Commission's initial process for reviewing a complaint is critical to the integrity of the overall enforcement process, and to the rights of those who participate in the political process. Being notified that one is a respondent in an administrative complaint before the Commission is a significant, negative event. Even in routine cases, it can trigger notifications to auditors, lenders and others who engage with the organization. It can easily chill what would otherwise be protected First Amendment activity. Notwithstanding the Act's confidentiality obligations, it can give rise to unwanted press or political attention. It is accordingly important for the Commission to use great care when identifying and notifying each person who is a "respondent" under 11 C.F.R. §111.5(a).<sup>12</sup>

Thus, for the factual, legal, and policy reasons outlined above, APFA was improperly named as a respondent and requests that OGC confirm in writing that it is not a respondent.

However, in the event that OGC disagrees with AFPA’s position, and while reserving all rights, AFPA can only speculate as to why it included as a respondent, and our response is as follows: AFPA does not know if Hamilton Company is a federal contractor and has no reason to believe that Hamilton Company was a

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Commissioner’s proposal, at sections 3.2.3 and 3.2.5, prohibited OGC from naming respondents merely because they were mentioned in the complaint without any allegation of a violation. This proposal allowed for a OGC to add additional respondents if approved by the Commission.)

<sup>6</sup> Section 3.2.3, “Reviewing the Complaint”, OGC Manual (June 2013), states that “[t]he attorney should read the complaint...to identify allegations and issues that may be implicated in a matter...” and that in some instances OGC must send additional notification letters to an “individual or other entity not yet named as respondents [who] faces potential liability.”

<sup>7</sup> Section 3.2.5.1, “Political Committees and Treasurers: Treasurer Policy” (“[i]f a federal political committee is involved in an enforcement proceeding, the Commission’s general policy is to name the committee and its current treasurer in his or her official capacity as respondents in the matter. See Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (Jan. 3, 2005) (“Treasurer Policy”).

<sup>8</sup> Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (Jan. 3, 2005), available at <https://www.govinfo.gov/content/pkg/FR-2005-01-03/pdf/04-28668.pdf> [hereinafter Treasurer Policy].

<sup>9</sup> 11 C.F.R. § 111.4 (d)(1).

<sup>10</sup> Treasurer Policy, *supra* note 8.


<sup>11</sup> See, e.g., Response of Restore Our Future in MUR 6485 (W Spann LLC); Response of Sheldon Adelson to MUR 7101 (House Majority PAC).

<sup>12</sup> Comment from Perkins Coie LLP Political Law Group on Enforcement Process, April 19, 2013, available at <https://www.fec.gov/resources/cms-content/documents/perkinscoie.pdf>.

federal contractor at the time the contribution was made and, therefore, AFPA did not knowingly solicit a contribution from a federal contractor.<sup>13</sup>

The language of the Act and FEC regulations, in addition to Commission precedent, are clear that the federal contractor ban applies to a committee *knowingly* soliciting contributions from a federal government contractor<sup>14</sup>—the Commission has consistently declined to take action against committees who may have unknowingly accepted such a contribution.<sup>15</sup> Consequently, the Commission must dismiss Americans for Prosperity Action in this matter consistent with the law and Commission precedent.

Respectfully submitted,



Lindsey Melody Specht  
Corporate Secretary, AFP Action



Alex Varban  
Treasurer, AFP Action

cc: Mr. Charles Kitcher, Acting Associate General Counsel, Enforcement

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<sup>13</sup> Following receipt of the March 22nd letter from the FEC, and at the request of the contributor, AFPA refunded the contribution in question, as well as a personal contribution from the contributor. The refunded contributions will be reflected on AFPA's May Monthly Report.

<sup>14</sup> 52 U.S.C. § 30119(a)(2); 11 C.F.R. § 115.1; 11 C.F.R. § 115.2.

<sup>15</sup> See, e.g., MUR 3110 (M.D.C. Holdings, Inc.); MUR 2582 (Birdview Satellite Communications); MUR 7099 (Suffolk Construction Company, Inc.); MUR 7451 (Ring Power Corporation, *et al.*); MUR 7568 (Alpha Marine Services Holdings, LLC).