FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL'S REPORT

MUR 7904
COMPLAINT DATE: May 14, 2021
NOTIFICATION DATE: May 18, 2021
LAST RESPONSE RECEIVED: July 7, 2021
ACTIVATION DATE: Sept. 27, 2021

EXPIRATION OF STATUTE OF LIMITATIONS:
Earliest: Feb. 5, 1995
Latest: Ongoing
ELECTION CYCLES: 1990-2004, 2018-2022

COMPLAINANT:	Caitlin Sutherland, Executive Director Americans for Public Trust
RESPONDENTS:	Hansjörg Wyss The Wyss Foundation Berger Action Fund, Inc. New Venture Fund Sixteen Thirty Fund
RELEVANT STATUTES AND REGULATIONS:	52 U.S.C. § 30102 52 U.S.C. § 30103 52 U.S.C. § 30104 52 U.S.C. § 30121 52 U.S.C. § 30122 11 C.F.R. § 102.1(d) 11 C.F.R. § 104.3 11 C.F.R. § 110.4
INTERNAL REPORTS CHECKED:	Disclosure Reports
FEDERAL AGENCIES CHECKED:	None

I. INTRODUCTION

The Complaint in this matter alleges that a foreign national, Hansjörg Wyss, made millions of dollars in prohibited indirect political contributions funneled through his non-profit entities, the Wyss Foundation and the Berger Action Fund, Inc., to politically active non-profit organizations New Venture Fund ("NVF"), Sixteen Thirty Fund ("STF"), and an unincorporated project jointly managed by NVF and STF known as the Hub Project, which in turn controls a

federal independent expenditure-only political committee named Change Now. The Complaint alleges that Wyss provided these funds for election-related purposes, which resulted in violations of the prohibitions on foreign national contributions and contributions made in the name of another under the Federal Election Campaign Act of 1971, as amended (the "Act").[1] The Complaint also alleges that the Wyss Foundation, the Berger Action Fund, NVF, STF, and the Hub Project all should have registered as political committees and filed required disclosure reports with the Commission.[2]

Respondents admit that Wyss is a foreign national but deny the allegations that Wyss indirectly funneled contributions through and to the Respondent organizations.[3] Wyss, the Wyss Foundation, and the Berger Action Fund state that any grants made through these organizations were accompanied by restrictive covenants providing that the provided funds could not be used for electoral purposes.[4] The recipients of these grants, NVF and STF, state that they complied with the grants' terms and conditions and did not use the funds toward election-related expenses.[5] NVF denies engaging in any political activity, and STF states that the extent of its election-related activity does not make it a political committee.[6]

As discussed further below, the available information indicates that, in 2020, STF directly funded nearly $73 million in federal political spending indicating a major purpose of nominating or electing candidates and may have indirectly funded up to hundreds of millions more through its grants to other organizations in furtherance of the same major purpose. Based

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1 Compl. ¶¶ 3-5 (May 14, 2021).

2 *Id.* ¶¶ 6-7.

3 Hansjörg Wyss, the Wyss Foundation, and the Berger Action Fund, Inc., Resp. at 1-2 (July 7, 2021) ("Wyss Resp.").

4 *Id.* at 6-8.

5 New Venture Fund and Sixteen Thirty Fund Resp. at 3, 9-10 (July 7, 2021) ("NVF/STF Resp.").

6 *Id.* at 3, 5-9.

on public information about those recipient organizations, there is reason to believe that STF, through both its Hub Project activities and other activities, appears to have become a political committee by 2020. Therefore, we recommend that the Commission find reason to believe that STF and the Hub Project failed to register and report as a political committee in violation of 52 U.S.C. §§ 30102, 30103, and 30104. Because there appears to be some overlapping activity between STF and NVF, including through the activities of the Hub Project and numerous local political organizations and brand names that it controlled, we recommend taking no action at this time as to NVF and the Hub Education and Engagement Fund in connection with the political committee status allegations pending the results of the investigation. However, we recommend that the Commission exercise its discretion to dismiss the political committee status allegations as to the Wyss Foundation and the Berger Action Fund.[7] Additionally, we recommend that the Commission dismiss as a matter of prosecutorial discretion the allegations regarding Wyss, the Wyss Foundation, the Berger Action Fund, NVF, and STF in connection with the foreign national contributions and contributions in the name of another.

II. FACTUAL BACKGROUND

A. Respondents

1. Hansjörg Wyss

Wyss is a Swiss citizen and concedes to be a foreign national under the Act.[8] The Complaint alleges that Wyss made $70,000 in direct contributions between 1990 and 2003.[9] Wyss does not deny this allegation, and instead argues only that the alleged contributions are

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7 *Heckler v. Chaney*, 470 U.S. 821 (1985).

8 Wyss Resp. at 2.

9 Compl. ¶ 23.

outside the Act's statute of limitations.[10] The Complaint also argues that Wyss has since made much larger indirect contributions through the organizations below, citing a total figure of $190 million.[11] Wyss, the Wyss Foundation, and the Berger Action Fund submitted a joint response to the Complaint denying these allegations.[12]

2. The Wyss Foundation

The Wyss Foundation is a 501(c)(3) charitable organization.[13] According to its Response, the Wyss Foundation focuses on making grants to other charitable organizations that

[10] Wyss Resp. at 2 & n.24. The Response also argues that the Complaint is speculative and based in part on a news article that cites as one of its sources a WikiLeaks-released document of a type that the Commission has declined to consider in the past. *Id.* at 2. While information derived from such documents may be considered by the Commission, *see, e.g.,* First Gen. Counsel's Rpt. at 16, MUR 7153 (Hillary for America, *et al.)* (explaining that "case law indicates that federal agencies may consider stolen documents in administrative proceedings, as long [as the] agency was not involved in the underlying criminal act"), the analysis in this Report does not rely on the identified documents released by WikiLeaks. *Compare* Statement of Reasons, Chair Weintraub at 6 n.30, MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*) (agreeing with other Commissioners that it would be "inappropriate for the Commission to consider such [WikiLeaks] information" and that WikiLeaks materials should be excluded from deliberation); Statement of Reasons, of Vice Chairman Petersen & Comm'r Hunter at 2 n.4, MURs 6940, *et al.* (explaining that three Commissioners voted against adopting Factual and Legal Analyses that incorporated such WikiLeaks material); *but see* Factual & Legal Analysis ("F&LA") at 9, MUR 7153 (Hillary for America, *et al*.) ("Some Commissioners believe that this fact alone justifies our invocation of prosecutorial discretion, while others consider it one factor in the overall analysis.").

The Complaint in this matter is based on several news articles, one of which draws information from a business plan belonging to the Hub Project that was published by WikiLeaks in 2016. *See* Compl. at 2 (citing Kenneth P. Vogel & Katie Robertson, *Top Bidder for Tribune Newspapers Is an Influential Liberal Donor*, N.Y. TIMES (Apr. 13, 2021), https://www.nytimes.com/2021/04/13/business/media/wyss-tribune-company-buyer.html ("Information . . . came from interviews with five people with knowledge of The Hub Project, an internal memo from another liberal group that was obtained by *The New York Times*, and the appearance of The Hub Project's business plan in a tranche of data made public by WikiLeaks."). This article from 2021 — five years after the WikiLeaks release — appears to have been independently investigated and the information it contains was sourced primarily from interviews and public tax filings. This Report does not consider the Hub Project's business plan. Because of the limited connection to WikiLeaks material, we assess that the allegations in this matter can be considered using information obtained from non-WikiLeaks sources. Further, it appears that the extent to which information published by WikiLeaks can be thought to have led to the reporting underlying the Complaint's allegations is unknown but likely limited to Wyss's involvement in the Hub Project, whereas the analysis in this report focuses on the separate question of STF's political committee status.

[11] Compl. ¶ 23 (citing Kenneth P. Vogel, *Swiss Billionaire Quietly Becomes Influential Force Among Democrats*, N.Y. TIMES (May 3, 2021), https://www.nytimes.com/2021/05/03/us/politics/hansjorg-wyss-money-democrats.html).

[12] *See* Wyss Resp. at 1-2, 7-8, 10.

[13] *Id.* at 2.

focus on conservation, expanding economic opportunities, and reducing inequality.[14] In 2019, the Wyss Foundation disbursed nearly $139 million in such grants.[15] As a charitable organization, the Wyss Foundation states that it is barred under IRS rules from engaging in political activity.[16]

3. The Berger Action Fund

The Berger Action Fund is a 501(c)(4) social welfare organization that is "related to the Wyss Foundation."[17] Berger Action Fund exists to make grants to other social welfare organizations that engage in lobbying and advocacy efforts in support of the same general mission as the Wyss Foundation, namely conservation and economic opportunity.[18] In its 2018 tax year ending March 31, 2019, the Berger Action Fund disbursed over $78 million in such grants.[19] According to its Response, Wyss does not sit on Berger Action Fund's board or exercise any decision-making power over how the Fund spends its money.[20] The group further states that all decisions regarding grants, including the overall budget and the recipients of individual grants from the Berger Action Fund, are made by United States citizens.[21]

Moreover, the Response from the Berger Action Fund states that, although IRS rules would permit it to spend money on federal political activity, it has a policy prohibiting the use of their funds "to support or oppose political candidates or electoral activities."[22] Accordingly, the

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14 *Id*.

15 IRS Form 990-PF, Wyss Found., 2019 Return of Private Foundation, Part 1, line 25 (Nov. 10, 2020), https://apps.irs.gov/pub/epostcard/cor/251823874_201912_990PF_20211007190941 76.pdf.

16 Wyss Resp. at 3.

17 *Id*. at 4.

18 *Id*.

19 IRS Form 990, Berger Action Fund, 2018 Return of Organization Exempt from Income Tax, Part I, line 13 (Jan. 28, 2020), https://apps.irs.gov/pub/epostcard/cor/208948868_201903_990O_20200624171997 87.pdf.

20 Wyss Resp. at 4.

21 *Id*.

22 *Id*. at 5.

Response also denies that the Berger Action Fund ever became a political committee because it has not accepted contributions or made any expenditures, has "never reported an electioneering communication or independent expenditure," and has not engaged in any electoral activity.[23]

4. New Venture Fund

NVF is a 501(c)(3) charitable organization, which appears to work on a wide range of issues, including conservation, global health, international development, education, disaster recovery, and the arts.[24] The Response from NVF claims that at the end of 2019, NVF managed a portfolio of more than $460 million.[25] Among the many projects under the NVF's auspices is the Hub Education and Engagement Fund,[26] which the Complaint highlights as a potential link between Wyss and NVF, as explained in the next section. As a 501(c)(3) organization, NVF is also barred under IRS rules from engaging in political activity. The Response therefore denies that NVF is a political committee.[27]

5. Sixteen Thirty Fund

STF is a 501(c)(4) social welfare organization and states that it works on a variety of issues, including economic equality, health care, climate, racial justice, and voter access.[28] The organization spent over $400 million in 2020 alone, including over $60 million in contributions

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23 *Id.* at 10.

24 NVF/STF Resp. at 2.

25 *Id*.

26 *Id*. *See also Work With Us*, HUB PROJECT, https://thehubproject.org/jobs/ (last visited June 27, 2022) ("The Hub Education and Engagement Fund is a project of the New Venture Fund, a 501(c)(3) public charity that incubates new and innovative public-interest projects and grant-making programs.").

27 NVF/STF Resp. at 8-9.

28 *Id*. at 2.

to federal political committees[29] and more than $250 million in grants to 170 other 501(c)(4) social welfare organizations.[30]

STF claims that the Hub Project cited in the Complaint is one of "numerous projects sponsored by STF," but does not clarify the size of the Hub Project.[31] STF's Response states that the "Hub Project" is a different project than the "Hub Education and Engagement Fund" sponsored by NVF, stating that they are "two projects that complement one another but are sponsored by separate entities."[32] The Hub Project's website describes itself as "made up of organizers, communicators, digital strategists, creatives, researchers, and operations professionals . . . here to help campaigns and coalitions."[33] Additionally, according to information available on the Commission's website, STF also appears to have directly sponsored at least ten locally focused groups or projects engaged in federal political activity.[34]

STF states that it spent nearly $73 million on contributions to federal political committees and electioneering communications in 2020 but argues that this amount accounts for less than

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[29] *Id*. at 7.

[30] IRS Form 990 (Unfiled), Sixteen Thirty Fund, 2020 Return of Organization Exempt from Income Tax, Sched. I, Part II (Oct. 29, 2021) [hereinafter STF 2020 Form 990], https://www.sixteenthirtyfund.org/wp-content/uploads/2021/11/Sixteen-Thirty-Fund-2020-Public-Disclosure-Copy.pdf (copy not available on IRS website).

[31] NVF/STF Resp. at 6.

[32] *Id.* at 2 n.1. The Response does not clarify why the Hub Project website lists NVF as its sponsor. *Supra* note 26.

[33] *See Our Work Is Not About Us*, HUB PROJECT, https://thehubproject.org/about/ (last visited June 27, 2022); *Work With Us*, HUB PROJECT, https://thehubproject.org/jobs/ (last visited June 27, 2022). The U.S. Patent and Trademark Office lists "The Hub Project" as a trademark registered to NVF. *See Trademark Electronic Search System,* U.S. PATENT & TRADEMARK OFF., https://www.uspto.gov/trademarks/search (last visited June 27, 2022) (click "Search out trademark database (TESS)" and search "The Hub Project").

[34] This includes the following groups that paid for electioneering communications and independent expenditures from 2018 through 2020: Demand Justice, A Project of Sixteen Thirty Fund; Democracy for All 2021 Action, A Project of Sixteen Thirty Fund; Floridians for a Fair Shake, A Project of Sixteen Thirty Fund; Health Care Voter, A Project of the Sixteen Thirty Fund; Ohioans for Economic Opportunity; Protect Our Care, A Project of Sixteen Thirty Fund; Sixteen Thirty Fund/Not One Penny; and SoCal Health Care Coalition, A Project of Sixteen Thirty Fund. STF sponsored the following groups in 2016: Sixteen Thirty Fund/Make it Work America1 and Sixteen Thirty Fund/Make it Work America Action.

18% of its overall spending and that in prior years its political spending was an even lower percentage of its overall spending.[35] The NVF and STF Response includes the following chart purportedly depicting the group's spending from 2016 through 2020:[36]

Figure 1: FECA Disbursements in Relation to Overall Spending

	FEC Data				Total Expenses (IRS Form 990)	FECA Disbursements as % of Total Expenses
	Contributions to Federal Political Committees	Federal IEs	Federal ECs	Total FECA Disbursements		
2016	3,500.00	533,496.55	-	**536,996.55**	19,660,860.00	**2.73%**
2017	-	-	-	-	46,893,083.00	**0.00%**
2018	4,008,958.54	114,100.95	824,299.61	**4,947,359.10**	141,396,752.00	**3.50%**
2019	7,713,590.49	-	-	**7,713,590.49**	98,641,867.00	**7.82%**
2020	60,125,567.48	-	12,770,259.14	**72,895,826.62**	410,616,973.00[24]	**17.75%**

STF states that its overall political spending reported on its IRS filings — which may include state and local election activity outside the Commission's jurisdiction — did not exceed 25.3% of overall spending between 2016 and 2019; specifically, according to STF, the percentage of total local, state, and federal election activity compared to overall spending for each year was as follows: 18.4% (2016), 1.9% (2017), 25.3% (2018), and 13.4% (2019).[37] The Response includes an affidavit from STF's President affirming the veracity of the group's IRS filings and providing an estimate of STF's 2020 expenditures ($410,616,973), but did not provide a breakdown of exactly what it considered nonpolitical activity, and thus excluded from its estimate of 2020 federal political activity.[38]

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35 NVF/STF Resp. at 6-7.

36 *Id*. at 8. According to STF's FEC filings, it spent $12,875,630.64 in federal electioneering communications in 2020. *FEC Electioneering Communications: Filtered Results*, FEC.GOV, https://www.fec.gov/data/electioneering-communications/?committee_id=C30002786&committee_id=C30002810&committee_id=C30002844committee_id=C30003040&committee_id=C30003099&committee_id=C30003164 (last visited June 27, 2022) (showing all electioneering communications made by organizations associated with STF).

37 NVF/STF Resp. at 8.

38 *Id.*, Kurtz Aff. ¶ 4.

As of the date of this Report, STF's 2019 and 2020 Form 990s are not yet available to the public through the IRS website.[39] However, STF's website hosts what appears to be an unsigned copy of the group's 2020 Form 990, dated October 29, 2021, for public disclosure,[40] which includes information roughly in line with the numbers provided by the Response.[41] According to this unofficial 2020 Form 990, STF discloses spending over $167 million on political activities in 2020, which represents about 40% of its total spending for the calendar year.[42] Of the more than $410 million in total expenses, STF spent more than $320 million making grants to 246 organizations.[43] STF lists 246 groups as grant recipients,[44] of which the vast majority, measured both in number of recipients and total amounts of funds granted, are also social welfare organizations, as reflected in the following table and chart:

Organization Type	Total Grant Recipients	Total Value of Grants Awarded	Highest Grant	Average Grant Value
501(c)(4)	170	$250,418,705	$128,976,147	$1,473,051
527	38	$53,266,500	$7,700,000	$1,401,750
501(c)(3)	31	$19,573,375	$8,232,242	$631,399
Other	7	$1,333,930	$415,930	$190,561

[39] *Sixteen Thirty Fund*, IRS.GOV, https://apps.irs.gov/app/eos/detailsPage?ein=264486735&name=SIXTEEN%20THIRTY%20FUND&city=&state=&countryAbbr=US&dba=&type=COPYOFRETURNS&orgTags=COPYOFRETURNS (last visited June 27, 2022) (providing available STF tax returns).

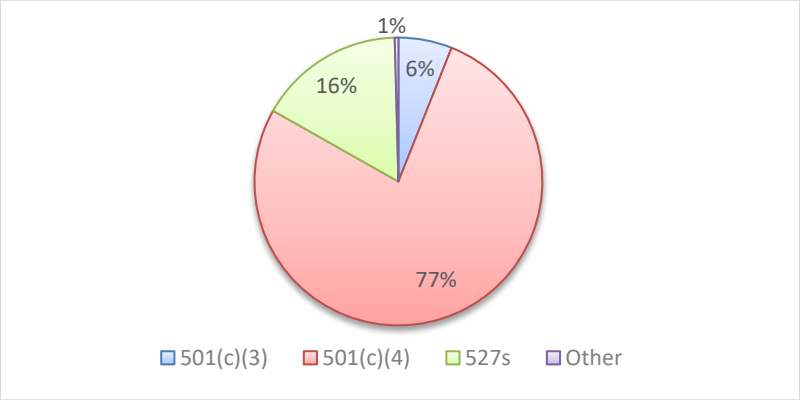
[40] STF 2020 Form 990. We also located an unofficial copy of STF's 2019 form. IRS Form 990, Sixteen Thirty Fund, 2019 Return of Organization Exempt from Income Tax, Sched. I, Part II (Nov. 11, 2020) [hereinafter STF 2019 Form 990], https://www.documentcloud.org/documents/21085690-sixteen-thirty-fund-2019-990

[41] *Cf.* NVF/STF Resp. at 7.

[42] STF 2020 Form 990, Sched. C, Part I-A, line 2.

[43] STF 2020 Form 990, Part I, line 18; *id.* Part IX, line 1; *id.*, Sched. I.

[44] *Id.*, Sched. I. The IRS filing also reflects that STF spent close to $9 million on salaries and employee compensation, (*id.*, Part I., line 15,) and the remaining roughly $76 million on a variety of miscellaneous expenses including management ($8.99 million), (*id.*, Part IX, line 11.a,) lobbying ($5.8 million), (*id.*, Part IX, line 11.d,) advertising and promotion ($23.6 million), (*id.*, Part IX, line 12,) and taxes ($15.5 million) (*id.*, Part IX, line 24.a). It does not appear that STF's response allocated any of these overhead expenses to its calculation of the amount of its political activities.



STF's President also released a public statement summarizing the group's activity in 2020, stating that STF gave over $61 million to political committees and highlighted its $128 million grant to an organization called America Votes "to support their national efforts to expand access to vote by mail and increase voter turnout in communities of color and among traditionally disenfranchised people."[45] America Votes appears to be a social welfare organization whose stated mission is to "lead collaborative efforts to advance progressive policies and win elections in key states."[46]

B. Transfer of Funds Between Respondents

The Complaint's primary allegation is that Wyss provided millions of dollars in illegal contributions by funneling the money through the Wyss Foundation and the Berger Action Fund into NVF and STF. Specifically, the Complaint argues that this money was funneled through the Hub Project, which could be conflating the NVF Hub Education and Engagement Fund with the STF Hub Project that the NVF and STF Response describes as separate entities.[47] The Complaint alleges that the Wyss Foundation specifically created the Hub Project in 2015 as an

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[45] Amy Kurtz, *Progressive Philanthropy Answered the Call in 2020*, MEDIUM (Nov. 17, 2021), [hereinafter Kurtz Medium Post] https://amy-kurtz.medium.com/progressive-philanthropy-answered-the-call-in-2020-57f038a6a5d2.

[46] AMERICA VOTES, https://americavotes.org/ (last visited June 27, 2022).

[47] *See* Compl. ¶¶ 14-21; NVF/STF Resp. at 2 n.1.

initiative to "shape media coverage to help Democratic causes."[48] According to the Complaint, the Hub Project has received approximately $56.5 million from the Wyss Foundation since 2007.[49] The Complaint relies in part on information provided in interviews conducted by the *New York Times* and from an internal memorandum reporters obtained from another organization, which allege that Wyss played a role in the Hub Project but ensured that his connection to the project was untraceable by structuring financial contributions to come from the Wyss Foundation and the Berger Action Fund and not directly from him.[50] According to the Complaint, the Hub Project has been active in political campaigns by controlling the flow of money to other entities, including to Change Now, an independent expenditure-only political committee registered with the Commission that the Hub Project directly controls.[51]

Respondents do not deny that money passed from Wyss to the Wyss Foundation and Berger Action Fund, and then to both NVF and STF. NVF and STF, however, deny receiving funding directly from Wyss and assert that the funds received from the Wyss Foundation and the Berger Action Fund included restrictions barring their use to "intervene in any election in support of or opposition to any candidate for public office or political party, or for voter registration or 'get-out-the-vote' activities."[52]

The Wyss Foundation and Berger Action Fund argue that these entities took precautions to avoid providing substantial assistance with any prohibited foreign political spending and that Wyss was not permitted to participate in any election-related decisions.[53] To ensure that his

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48 Compl. ¶¶ 14-16.

49 *Id.* ¶ 18; NVF/STF Resp. at 2 n.1.

50 Compl. ¶ 23.

51 *Id.* ¶¶ 18-19, 21.

52 NVF/STF Resp. at 10.

53 Wyss Resp. at 2.

funds would not be used for electoral activities, the organizations assert that grants made from the Wyss Foundation to other organizations are subject to binding agreements containing restrictive language requiring that the grantee not use any provided funds for voter registration, get-out-the-vote measures, express advocacy, ballot measures, and similar activities aimed at influencing elections.[54] The Wyss Response provides an example of the restrictive language used in its grant agreements as follows:

> Not to use any funds from this grant for voter registration or Get-out-the-Vote ("GOTV") activities, or to intervene in any election in support of or opposition to any candidate for public office or to support or oppose any political party, or to engage in any activities to influence a ballot measure that would be reportable to federal, state or local campaign finance authorities, that would require a disclaimer under federal, state or local campaign finance law, or that would otherwise be subject to regulation under federal, state or local campaign finance law.[55]

The Wyss Foundation states that the grants it made to NVF limited use of those funds to specific conservation projects, such as the Andes Amazon Fund Project, except for one grant in 2016 in the amount of $25,000 that was intended for the Hub Education and Engagement Fund.[56] According to the Wyss Response, however, even the latter grant included the restrictive language referenced above.[57] Likewise, the Response acknowledges that the Berger Action Fund issued grants to STF but states that it "uses legally-binding agreements to bar all of its grantees, including Sixteen Thirty Fund, from using its money in any way to influence elections."[58]

Neither of the Responses attach copies of any of the policies referenced or any actual agreements containing the restrictive language. They also do not explain any process for

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54 *Id.* at 3.

55 *Id.*

56 *Id.*at 4.

57 *Id*.

58 *Id.* at 5.

confirming that funds were not used for electoral activities or any mechanism for how a violation of the restrictive grant agreement would be discovered.

III. LEGAL ANALYSIS

A. The Commission Should Dismiss the Allegations That Respondents Made Foreign National Contributions and Contributions in the Name of Another

1. The Act's Prohibitions on Contributions by Foreign Nationals and Contributions in the Name of Another

The Act prohibits any "foreign national" from directly or indirectly making a contribution or donation of money or other thing of value, or an expenditure, in connection with a federal, state, or local election.[59] The Act further prohibits persons from soliciting, accepting, or receiving a contribution or donation from a foreign national.[60] The Act's definition of "foreign national" includes an individual who is not a citizen or national of the United States and who is not lawfully admitted for permanent residence.[61] Commission regulations implementing the Act's foreign national prohibition provide:

> A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's Federal or non-

[59] 52 U.S.C. § 30121(a)(1); *see also* 11 C.F.R. § 110.20(b), (c), (e), (f). Courts have consistently upheld the provisions of the Act prohibiting foreign national contributions on the ground that the government has a clear, compelling interest in limiting the influence of foreigners over the activities and processes that are integral to democratic self-government, which include making political contributions and express-advocacy expenditures. *See Bluman v. FEC*, 800 F. Supp. 2d 281, 288-89 (D.D.C. 2011), *aff'd* 132 S. Ct. 1087 (2012); *United States v. Singh*, 924 F.3d 1030, 1040-44 (9th Cir. 2019). Before it was expanded under the Bipartisan Campaign Reform Act of 2002, the scope of the foreign national prohibition made it "unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office; or for any person to solicit, accept, or receive any such contribution from a foreign national." *See* Federal Election Campaign Act Amendments of 1976, Pub. L. No 94-283, § 324. 2 U.S.C. 441e, 90 Stat 475 (May 11, 1976).

[60] 52 U.S.C. § 30121 (a)(2). The Commission's regulations employ a "knowingly" standard here. 11 C.F.R. § 110.20(g). A person knowingly accepts a prohibited foreign national contribution or donation if that person has actual knowledge that funds originated from a foreign national, is aware of facts that would lead a reasonable person to conclude that there is a substantial probability that the funds originated from a foreign national, or is aware of facts that would lead a reasonable person to inquire whether the funds originated from a foreign national but failed to conduct a reasonable inquiry. *Id.* § 110.20(a)(4).

[61] 52 U.S.C. § 30121(b); *see also* 11 C.F.R. § 110.20(a)(3).

> Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements. . . or decisions concerning the administration of a political committee.[62]

The Commission has explained that this provision also bars foreign nationals from "involvement in the management of a political committee."[63]

The Commission has found that not all participation by foreign nationals in the election-related activities of others will violate the Act, such as through volunteer services.[64] By contrast, the Commission has consistently found a violation of the foreign national prohibition where foreign national officers or directors of a U.S. company participated in the company's decisions to make contributions or in the management of its separate segregated fund,[65] and it has found a violation where individuals participated in the decision-making processes of several political

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62 11 C.F.R. § 110.20(i).

63 Contribution Limits and Prohibitions, 67 Fed. Reg. 69,928, 69,946 (Nov. 19, 2002); *see also* Advisory Opinion 2004-26 at 2-3 (Weller) (noting that foreign national prohibition at section 110.20(i) is broad and concluding that, while a foreign national fiancée of a candidate could participate in committees' activities as a volunteer without making a prohibited contribution, she "must not participate in [the candidate's] decisions regarding his campaign activities" and "must refrain from managing or participating in the decisions of the Committees").

64 *See, e.g.,* F&LA at 4-5, MUR 6959 (Cindy Nava) (finding no reason to believe that a foreign national violated 52 U.S.C. § 30121 by performing clerical duties, such as online research and translations, during a one-month-long internship with a party committee); F&LA at 6-9, MURs 5987, 5995, 6015 (Sir Elton John) (finding no reason to believe that a foreign national violated 52 U.S.C. § 30121 by volunteering his services to perform at a campaign fundraiser and agreeing to let the political committee use his name and likeness in its emails promoting the concert and soliciting support, where the record did not indicate that the foreign national had been involved in the committee's decision-making process in connection with the making of contributions, donations, expenditures, or disbursements).

65 *See*, *e.g.*, Conciliation Agreement, MUR 6093 (Transurban Grp.) (stating U.S. subsidiary violated the Act by making contributions after its foreign parent company's board of directors directly participated in determining whether to continue the political contributions policy of its U.S. subsidiaries); Conciliation Agreement, MUR 6184 (Skyway Concession Co., LLC) (stating U.S. company violated the Act by making contributions after its foreign national CEO participated in the company's election-related activities by vetting campaign solicitations or deciding which nonfederal committees would receive company contributions, authorizing release of company funds to make contributions, and signing contribution checks); Conciliation Agreement, MUR 7122 (Am. Pac. Int'l Cap., Inc.) (stating U.S. corporation owned by a foreign company violated the Act by making a contribution after its board of directors, which included foreign nationals, approved a proposal by a U.S. citizen corporate officer to contribute); Conciliation Agreement, MUR 7613 (Zekelman Indus., Inc.) (stating that company CEO, who was a foreign national, violated the foreign national ban when he participated in the decision-making process regarding whether the company's U.S. subsidiary would contribute to a federal political committee).

committees in connection with election-related activities through a commercial vendor.[66] In the latter matters, the Commission concluded that "[b]y providing strategic advice to committees on both the content and target audience for their campaign communications, [the Respondent] may have helped shape political committees' election-related spending decisions."[67]

Additionally, the Act prohibits a person from making a contribution in the name of another person, knowingly permitting his or her name to be used to effect such a contribution, or knowingly accepting such a contribution.[68] The Commission has included in its regulations illustrations of activities that constitute making a contribution in the name of another:

> (i) Giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made; or
> (ii) Making a contribution of money or anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source.[69]

Both the Act and the Commission's implementing regulations provide that a person who furnishes another with funds for the purpose of contributing to a candidate or committee "makes" the resulting contribution.[70] Because the concern of the law is the true source from which a contribution to a candidate or committee originates, we look to the structure of the transaction

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66 *See* F&LA at 10-13, MURs 7350, 7351 (Wylie); *see also* F&LA at 10-13, MURs 7350, 7351, 7382 (Cambridge Analytica).

67 F&LA at 11, MURs 7350, 7351.

68 52 U.S.C. § 30122.

69 11 C.F.R. § 110.4(b)(2)(i)-(ii).

70 *See United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011) (holding that to determine who made a contribution "we consider the giver to be the *source* of the gift, not any intermediary who simply conveys the gift from the donor to the donee." (emphasis added)); *U.S. v. O'Donnell*, 608 F.3d 546, 550 (9th Cir. 2010); *Goland v. United States*, 903 F.2d 1247, 1251 (9th Cir. 1990) ("The Act prohibits the use of 'conduits' to circumvent . . . [the Act's reporting] restrictions." (quoting then-section 441f)).

itself and the arrangement between the parties to determine who in fact "made" a given contribution.

2. The Commission Should Dismiss the Allegations That Respondents Made Foreign National Contributions and Contributions in the Name of Another

Here, it is undisputed that Wyss is a foreign national.[71] Despite his foreign national status, Wyss is still reported as having made contributions to federal and state campaigns. The Commission's contributor database shows that committees reported Wyss making direct contributions totaling $69,000 to federal campaigns from 1990 until 2003 using his own name, but there is no record of any complaints being filed regarding those contributions.[72] Public records also show that Wyss is reported as having made at least $50,000 in individual contributions to a state committee.[73] Details regarding these direct contributions are not addressed in Wyss's Response to the Complaint, and they appear to be in violation of the Act's prohibition on foreign national contributions.[74]

However, the statute of limitations with respect to seeking a monetary penalty has expired as to Wyss's direct contributions because his last known direct political contribution appears to have been to a state committee in 2006. In light of the age of these prohibited

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[71] Wyss Resp. at 2 (admitting that Wyss is a Swiss citizen and a foreign national within the meaning of the Act).

[72] *FEC Contributions: Filtered Results*, FEC.GOV, https://www.fec.gov/data/receipts/individual-contributions/?contributor_name=wyss%2C+han&min_date=01%2F01%2F1971&max_date=12%2F31%2F2022 (last visited June 27, 2022) (showing all contributions by Wyss since 1971, accounting for multiple spellings of his first name).

[73] Wyss contributed $50,000 to Conserving Arizona's Future in 2006. *See* Conserving Arizona's Future, 2006 State of Arizona Pre-General Election Report at 3 (Oct. 25, 2006), https://seethemoney.az.gov/PublicReports/2006/4BBF5981-66C9-4260-9F1D-F434C8696A39.pdf.

[74] *See* 2 U.S.C. § 441e (in effect prior to 2002); 52 U.S.C. § 30121.

contributions, we do not recommend that the Commission expend resources to pursue these violations.

There is also not currently enough information in the record to conclude that Wyss made indirect political contributions by making contributions to the Wyss Foundation and Berger Action Fund that would be used for electoral purposes. The Complaint does not present specific information regarding those possible indirect contributions and the general allegations appear to be contradicted by the Responses, which assert that while grants were made by the Wyss Foundation and the Berger Action Fund to NVF and STF, the foundations explicitly prohibited their use toward election-related activity.[75] Likewise, the Complaint does not present specific information that Wyss was involved in any decision making concerning the use of Wyss foundation funds for political purposes, or that he played a decision-making role with NVF or STF, and the Responses uniformly deny any such involvement.

There is some information in the record that NVF may have engaged in political spending, but the amount in question, just under $41,000, is relatively low compared to the overall amount it received from the Wyss Foundation ($9.5 million in 2019), and the existence of this spending does not, on its own, appear to suggest the existence of a conduit scheme.[76] Due to

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[75] Wyss Resp. at 3-5. The NVF and STF Response includes a chart displaying STF's total revenue, grants from the Berger Action Fund, and its total campaign activity as reported to the IRS from 2016 through 2019 to support the claim that STF had sufficient revenue to pay for its political spending without the Berger Action Fund grants. NVF/STF Resp. at 10. Additionally, STF submitted an affidavit from its President avowing that STF never received funds directly from Wyss, that it complied with all restrictions tied to the Berger Action Fund's grants, and that STF's decisions about how contributions are spent are made by the STF's board of directors and not its donors. NVF/STF Resp., Kurtz Aff. ¶¶ 5-6.

[76] *See* IRS Form 990-PF, Wyss Found., 2019 Return of Private Foundation, Grants Paid Sched. (Nov. 10, 2020), https://apps.irs.gov/pub/epostcard/cor/251823874_201912_990PF_20211007190941 76.pdf. Commission records show that two federal political committees received funds from NVF, despite the restrictive agreements and its 501(c)(3) status prohibiting such political activity: American Bridge 21st Century (since renamed AB PAC) disclosed a $40,000 receipt from NVF on September 11, 2018, with the note "Research Service" on the memo line of the report, and People for Patty Murray disclosed a disbursement to NVF in the amount of $820.80 on March 4, 2020, for "Surrogate Travel" for the 2022 primary and labeled as an operating expenditure, along with a receipt from NVF in the same amount on March 26, 2020, labeled as a "Refund of Overpayment." American Bridge 21st Century, 2018 October Quarterly Report, Sched. A at 17 (Oct. 15, 2018); People for Patty Murray, 2020 April Quarterly Report, Sched. A at 837, Sched. B at 876 (Apr. 11, 2020).

the statute of limitations circumstances respecting Wyss' direct political contributions, the Respondents' denials, and the lack of specific evidence to support the allegations that indirect prohibited contributions were made, we recommend that the Commission dismiss as a matter of prosecutorial discretion the allegations that Wyss, the Wyss Foundation, the Berger Action Fund, NVF, and STF made foreign national contributions and contributions in the name of another.[77]

B. Political Committee Status

1. The Test for Political Committee Status

The Act and Commission regulations define a "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year."[78] In *Buckley v. Valeo*,[79] the Supreme Court held that defining political committee status "only in terms of [the] amount of annual 'contributions' and 'expenditures'" might be overbroad, reaching "groups engaged purely in issue discussion."[80] To cure that infirmity, the Court concluded that the term "political committee" "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[81] Under the statute as thus construed, an organization that is not controlled by a candidate must register as a political committee only if it (1) crosses the $1,000 threshold and (2) has as its "major purpose" the nomination or election of federal candidates.

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77 *Heckler v. Chaney*, 470 U.S. 821 (1985).

78 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5.

79 424 U.S. 1 (1976) (*per curiam*).

80 *Id.* at 79.

81 *Id.*

Although *Buckley* established the major purpose test, it provided no guidance as to the proper approach to determine an organization's major purpose.[82] After *Buckley*, the Commission adopted a policy of determining on a case-by-case basis whether an organization is a political committee, including whether its major purpose is the nomination or election of federal candidates.[83] The Commission decided that determining an organization's major purpose "requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule," and that "any list of factors developed by the Commission would not likely be exhaustive in any event, as evidenced by the multitude of fact patterns at issue in the Commission's enforcement actions considering the political committee status of various entities."[84]

To determine an entity's "major purpose," the Commission considers a group's "overall conduct," including, among other factors, public statements about its mission, organizational documents, and government filings (*e.g.*, IRS filings), and the proportion of spending related to "Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate)."[85] With respect to such comparative spending, the Commission has stated that it compares how much of an organization's spending is for "federal campaign activity" relative to "activities that [a]re not

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[82] *See, e.g.*, *Real Truth About Abortion, Inc. v. FEC* (formerly *Real Truth About Obama v. FEC*), 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*, 568 U.S. 1114 (Jan. 7, 2013) (No. 12-311) ("*RTAA*") ("Although *Buckley* did create the major purpose test, it did not mandate a particular methodology for determining an organization's major purpose.").

[83] *See, e.g.,* Independent Expenditures; Corporate and Labor Organization Expenditures, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking); Definition of Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking); *see also* Summary of Comments and Possible Options on the Advance Notice of Proposed Rulemaking on the Definition of "Political Committee," (Sept. 12, 2001), https://sers.fec.gov/fosers/showpdf.htm?docid=5684; Cert. (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance), https://sers.fec.gov/fosers/showpdf.htm?docid=5669.

[84] Political Committee Status, 72 Fed. Reg. 5595, 5602 (Feb. 7, 2007) (Supplemental Explanation and Justification) [hereinafter Supplemental E&J].

[85] *Id*. at 5597, 5605.

campaign related."[86] Further, a district court has concluded that electioneering communications presumptively have the purpose of influencing a federal election, and thus that it would be contrary to law for the Commission to categorically exclude non-express advocacy in a Commission analysis of an entity's major purpose.[87]

Political committees must comply with certain organizational and reporting requirements set forth in the Act. They must register with the Commission, file periodic reports for disclosure to the public, appoint a treasurer who maintains its records, and identify themselves through "disclaimers" on all of their political advertising, on their websites, and in mass emails.[88]

2. The Commission Should Find Reason to Believe That the Sixteen Thirty Fund is a Political Committee

a. Statutory Threshold

STF, through the Hub Project and its other initiatives, appears to have exceeded the statutory threshold for political committee status.[89] To assess whether an organization has made an "expenditure," the Commission analyzes whether spending on any of an organization's communications made independently of a candidate constitutes express advocacy under

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[86] Supplemental E&J at 5597, 5605-06. This approach was subsequently challenged and upheld in federal district court. *See Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007). In 2012, in *RTAA*, the Fourth Circuit upheld the Commission's case-by-case approach in the face of a constitutional challenge. *See* 681 F.3d 544; *see also Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) (quoting *RTAA* and upholding Commission's case-by-case method of determining political committee status), *cert. denied*, 572 U.S. 1114 (2014).

[87] *See Citizens for Resp. & Ethics in Wash. v. FEC,* 299 F. Supp. 3d 83, 93 (D.D.C. 2018) ("*CREW II*") (determining that the Commission "must presumptively treat spending on electioneering ads as indicating a purpose of nominating or electing a candidate"); *see also id.* at 100 ("The Commission may in special circumstances conclude that an electioneering ad does not have [an election-related major] purpose. But given Congress's recognition that the 'vast majority' of electioneering ads have the purpose of electing a candidate, the Commission's exclusion of electioneering ads from its major-purpose analysis should be the rare exception, not the rule."). *Citizens for Resp. & Ethics in Wash. v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) ("*CREW I*") (stating that it is improper to "exclude from . . . consideration all non-express advocacy in the context of disclosure").

[88] *See* 52 U.S.C. §§ 30102-30104; 11 C.F.R. § 110.11(a)(1).

[89] 52 U.S.C. § 30101(3) (defining political committee as "any committee, club, association, or other group of persons which receives contributions, aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year").

11 C.F.R. § 100.22.[90] STF's most recent official filing with the IRS is from 2019, covering its 2018 activity, and shows that the organization used almost $36 million of its funds on political activity.[91] These 2018 payments included a $27,150,000 payment to America Votes, a $200,000 payment to American Bridge 21st Century Foundation, and $8 million provided to the League of Conservation Voters.[92] In 2020, STF provided almost $6 million to Change Now, the independent expenditure-only political committee allegedly under the direct control of the Hub Project.[93] Additionally, since 2018, STF has reported making approximately over $13 million in federal electioneering communications under separate project names, including the following:

- Demand Justice, A Project of Sixteen Thirty Fund
- Democracy for All 2021 Action, A Project of Sixteen Thirty Fund
- Floridians for a Fair Shake, A Project of Sixteen Thirty Fund
- Health Care Voter, A Project of the Sixteen Thirty Fund
- Protect Our Care, A Project of Sixteen Thirty Fund and
- SoCal Health Care Coalition, A Project of Sixteen Thirty Fund.[94]

STF also spent $114,100 on independent expenditures in 2018 through the following:

- Floridians for a Fair Shake, A Project of Sixteen Thirty Fund
- Ohioans for Economic Opportunity
- Sixteen Thirty Fund/Not One Penny and
- SoCal Health Care Coalition, A Project of Sixteen Thirty Fund.[95]

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[90] Supplemental E&J at 5606.

[91] IRS Form 990, Sixteen Thirty Fund, 2018 Return of Organization Exempt From Income Tax, Sched. C (Nov. 5, 2019) [hereinafter STF 2018 Form 990], https://apps.irs.gov/pub/epostcard/cor/264486735_201812_990O_20200203171003 80.pdf.

[92] *Id.* at Sched. I, Part II.

[93] *See supra* note 51 and accompanying text. *See* STF 2020 Form 990 at Sched. C, Part IV. In 2019, STF gave $25,000 to Change Now. STF 2019 IRS Form 990 at Sched. I, Part II.

[94] *See FEC Electioneering Communications: Filtered Results*, FEC.gov, https://www.fec.gov/data/electioneering-communications/?committee_id=C30002786&committee_id=C30002810&committee_id=C30002844&committee_id=C30003040&committee_id=C30003099&committee_id=C30003164 (last visited June 27, 2022) (showing all electioneering communications by entities associates with STF)

[95] STF spent $548,228.80 in independent expenditures in 2016 through Sixteen Thirty Fund/Make it Work America1 and Sixteen Thirty Fund/Make it Work America Action, along with other projects. *See FEC Independent Expenditures: Filtered Results*, FEC.GOV, https://www.fec.gov/data/independent-expenditures/?data_type=processed&most_recent=true&committee_id=C90016320&committee_id=C90016338&committee_id=C90017484&committee_id=C90017922&committee_id=C90018102&committee_id=C90018110&is_notice=false (last visited June 27, 2022) (showing all independent expenditures made by entities associated with STF).

Therefore, STF has exceeded the statutory threshold for political committee status set forth in the Act.

b. Major Purpose

Having determined that STF meets the statutory threshold for being a political committee, the Commission must consider whether STF's "major purpose" is the nomination or election of a candidate. As set forth above, the Commission makes this determination on a case-by-case basis considering several factors, including the organization's public statements and the proportion of its spending on federal election activities relative to other spending.[96] In this case, STF's public statements are ambiguous, as is its work through the Hub Project. Its website discusses STF's mission broadly to assist "progressive" groups, including specified issue initiatives.[97] Likewise, a public statement from STF's President discusses STF's "mobiliz[ation]" in 2020 to face issues such as "a global pandemic, a long-overdue reckoning with racial justice, and a climate crisis" as well as "the most consequential election of our lives."[98] It is unclear from these few statements, which are the only public statements about STF that this Office was able to locate, whether the purpose of the organization is primarily to advocate for certain issues or to advocate for the election of candidates whose views align with those of STF.

Better indications of STF's purpose come from an analysis of its spending, which indicates that STF's major purpose is the nomination or election of federal candidates. First, STF's Response states that in 2020 it spent about 17.75% of its overall budget giving directly to

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96 Supplemental E&J, 72 Fed. Reg at 5605.

97 *See* SIXTEEN THIRTY FUND, https://www.sixteenthirtyfund.org/ (last visited June 27, 2022) (stating that STF "empower[s] progressive changemakers"); *About Us*, SIXTEEN THIRTY FUND, https://www.sixteenthirtyfund.org/about-us/ (last visited June 27, 2022) (quoting STF President as stating "[W]e have a responsibility to mobilize in the face of societal challenges and provide new investments and initiatives to advocate for what we believe in—from addressing climate change, to protecting voting rights and access to health care, to promoting equity and social justice").

98 Kurtz Medium Post.

federal political committees and making electioneering communications.[99] STF's President announced that in 2020 the group gave $61 million out of a budget of roughly $410 million to political committees,[100] and STF's Response to the Complaint acknowledges another $12.7 million spent in electioneering communications for 2020.[101]

Second, the available details concerning STF's grants to other organizations appears to indicate that STF engaged in extensive additional political activity through substantial grantmaking to social welfare organizations that also participated in political activity. While it appears that STF made grants to several charitable organizations, which according to IRS rules prohibiting 501(c)(3) organizations from political activity could presumptively be excluded from a calculation of total political spending, such grants appear to account for relatively little of STF's overall activity — less than $20 million (less than 5% of its total budget).[102] By contrast, the list of STF's grant recipients in 2020 is dominated by 501(c)(4) social welfare organizations, which account for over 75% of STF's grant recipients by dollar amount and more than 60% of STF's total budget. Moreover, although STF reported $250 million in grants to 170 social welfare groups, most of the money was concentrated in a handful of organizations. In fact, the top five largest grant recipients account for over $180 million of this $250 million. These

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[99] NVF/STF Resp. at 7. While all of these electioneering communications could be treated as presumptively indicating a major purpose of nominating or electing candidates, *see supra* n.86, the Commission has reviewed such communications individually to determine how they should be treated in the major purpose analysis. *See, e.g.*, F&LA at 12-14, MUR 6538R (Americans for Job Security, *et. al*) (analyzing whether certain ads that did not expressly refer to candidates or elections were indicative of a major purpose to nominate or elect a federal candidate by examining the language and context of each ad). In this case, we have not reviewed the electioneering communications and thus treat them only as presumptively tending to show STF's major purpose because STF does so itself. *See supra* page 8 (chart including electioneering communications in "FECA Disbursements").

[100] *Id.* at 7.

[101] *See supra* note 36 and accompanying table.

[102] In its unofficial 2020 tax return, STF reported providing over $163 million, or 40% of its 2020 spending, to section 527 political organizations and for section 527 exempt function activities. STF 2020 Form 990, Sched. C, Part I-C. Because STF reported giving only $53 million in grants to section 527 organizations, it likely gave at least $110 million to social welfare organizations for political activities. *Id*., Sched. I; *supra* page 9.

grantees are listed below, as are their respective independent expenditures, electioneering communications, and contributions to political committees for the year 2020:

Grant Recipient	Amount of STF Grant[103]	Independent Expenditures by Recipient[104]	Electioneering Communications by Recipient	Political Contributions by Recipient
America Votes[105]	$128,976,147	$27,722	None	$55,732,514
North Fund[106]	$19,390,584	None	None	None
Future Forward USA Action[107]	$15,232,000	None	None	$60,748,204
Defending Democracy Together[108]	$10,050,000	$15,391,407	$21,510	$6,787,894

[103] STF 2020 Form 990, Sched. I, Part II.

[104] Data regarding the amount of Independent Expenditures, Electioneering Communications, and Contributions to Political Committees listed in this chart is derived from the Commission's website and includes only 2020 activity.

[105] America Votes appears to operate using three names: America Votes, America Votes, Inc., and America Votes Action Fund and solicits contributions under two of those names on its website. *See Donate to America Votes Action Fund*, AM. VOTES, https://americavotes.org/donateavaf/ (last visited June 27, 2022); *Donate*, AM. VOTES, https://americavotes.org/donate/ (last visited June 27, 2022). It also makes political contributions using all three names. *See FEC Contributions: Filtered Results*, FEC.GOV, https://www.fec.gov/data/receipts/individual-contributions/?contributor_name=america+votes&min_date=01%2F01%2F2020&max_date=12%2F31%2F2020. (last visited June 27, 2022) (showing all contributions by entities with names including "America Votes"); *see also FEC Independent Expenditures: Filtered Results,* FEC.GOV, https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C00492520&cycle=2020&is_notice=true&most_recent=true&support_oppose_indicator=O (las visited June 21, 2022). The most recent IRS filing available for America Votes is for 2018. *See* IRS Form 990, America Votes, 2018 Return of Organization Exempt From Income Tax (July 17, 2020), https://apps.irs.gov/pub/epostcard/cor/264568349_201906_990O_20210527182115555.pdf.

[106] The North Fund describes itself as "a 501(c)(4) non-partisan organization that supports social impact initiatives and campaigns to create a more just, fair, and equitable society," supporting "diverse grantees," ballot initiatives and advocacy campaigns, and in 2020 funded eight ballot initiatives "including successful efforts to expand Medicaid in Missouri, to legalize marijuana in Montana, and to establish a paid family leave program in Colorado." *See* NORTH FUND, https://www.northfund.org/ (last visited June 27, 2022). IRS filings are not available for this organization.

[107] STF also made a separate grant of $7.5 million to Future Forward USA PAC, which STF lists as a 527 organization. STF 2020 Form 990, Sched. I, Part II. Future Forward USA Action appears to primarily fund its sister PAC, FF PAC. *See FEC Contributions: Filtered Results*, FEC.GOV, https://www.fec.gov/data/receipts/individual-contributions/?contributor_name=future+forward+usa&min_date=01%2F01%2F2020&max_date=12%2F31%2F2020 (last visited June 27, 2022) (showing all contributions by Future Forward USA Action in 2020). From 2019 to 2020, FF PAC raised $151 million and 40% of that amount appears to have come from Future Forward USA Action. *FF PAC: Financial Summary 2019-2020*, FEC.GOV, https://www.fec.gov/data/committee/C00669259/?cycle=2020 (last visited June 27, 2022). *See also* IRS Form 990, Future Forward USA Action, 2018 Return of Organization Exempt from Income Tax, Sched. R, Part II (Nov. 15, 2019), https://apps.irs.gov/pub/epostcard/cor/ 824170762_201812_990O_20200210171330 11.pdf (listing Future Forward USA PAC as a related tax-exempt organization in its most recent available IRS filing).

[108] Defend Democracy Together appears to be active with funding independent expenditures, electioneering communications, and in making contributions to federal political committees. *See Defending Democracy Together:*

Grant Recipient	Amount of STF Grant[103]	Independent Expenditures by Recipient[104]	Electioneering Communications by Recipient	Political Contributions by Recipient
Piedmont Rising Inc.[109]	$7,005,000	$1,176,213	$1,616,668	None
Total	**$180,653,731**	**$16,595,342**	**$1,638,178**	**$123,268,612**

While we cannot attribute the proportion of the grants from STF that were used to fund political activities without more information about the recipients' other funding sources, the overall spending patterns of STF's grantees could reasonably be understood as activities STF intended to finance or knew it would be financing. Based on the available data, it appears that some of these grantees were involved in substantial amounts of political activity themselves and it is likely that the above chart undercounts the amount of money ultimately spent on political activity, because many of these groups appear to have also been heavily involved in grantmaking to other organizations. Though incomplete, the available information appears to suggest a multilayered series of organizations each engaging in substantial amounts of political activity as well as substantial grantmaking to other organizations with the same patterns of activity. But whether such grants should be considered spending indicating a major purpose of electing or nominating federal candidates — or not — logically should turn on what the granting organization expected the grant funds would be used for. In light of the comparative size of

Spending 2019-2022, FEC.GOV, https://www.fec.gov/data/committee/C90019316/?tab=spending (last visited June 27, 2022) (showing independent expenditures); *Defending Democracy Together: Spending 2019-2022*, FEC.GOV, https://www.fec.gov/data/committee/C30003008/?tab=spending (last visited June 27, 2022) (showing electioneering communications); *FEC Contributions: Filtered Results*, FEC.gov, https://www.fec.gov/data/receipts/individual-contributions/?contributor_name=defending+democracy+together (last visited June 27, 2022) (showing all contributions by Defending Democracy Together). The most recent IRS filing available for this organization is from 2019. IRS Form 990, Defending Democracy Together, 2019 Return of Organization Exempt from Income Tax (Nov. 10, 2020), https://apps.irs.gov/pub/epostcard/cor/823877328_201912_990O_2021060818295948.pdf.

[109] Piedmont Rising appears to have also been active with funding independent expenditures and electioneering communications. *See FEC Independent Expenditures: Filtered Results*, FEC.GOV https://www.fec.gov/data/independent-expenditures/?data_type=processed&committee_id=C90019613&is_notice=true&candidate_id=S4NC00162&support_oppose_indicator=O&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020 (last visited June 27, 2022) (showing independent expenditures); *Piedmont Rising: Spending 2019-2020*, FEC.GOV, https://www.fec.gov/data/committee/C30003123/?tab=spending (last visited June 27, 2022) (showing electioneering communications). IRS filings are not available for this organization.

STF's grantmaking activity, its knowledge of the activities of the entities it sponsored can be inferred from the circumstances because it would be unreasonable to suppose that the seven-, eight-, and nine-figure grants set forth above were made without STF knowing how the money would be used.

In 2020, STF's grantees listed in the table above spent substantial amounts on making independent expenditures, electioneering communications, and direct contributions to political committees. Considering the amounts of STF's grants in comparison to the recipients' direct contributions and independent expenditures, it would be reasonable to view, for example, the $55.7 million in direct contributions made by America Votes as potentially having been funded by STF's grant of almost $129 million to that organization.[110] In that case, that $55.7 million portion of the grant could be viewed as spending tending to indicate that STF *had* a major purpose of nominating or electing candidates instead of grantmaking activity tending to indicate that STF *did not have* that major purpose. By the same reasoning, up to $15 million that STF gave to Future Forward USA Action (which made nearly $60 million worth of contributions), $10 million that STF gave to Defending Democracy Together (which spent $6.7 million in contributions and another $15 million in independent expenditures), and up to $2.8 million that STF gave to Piedmont Rising (which spent almost $1.2 million in independent expenditures and $1.6 million in electioneering communications), could similarly be considered relevant spending by STF for the major purpose test. Viewing those portions of the grants as relevant political spending (totaling $83.5 million) would more than double the $73 million STF acknowledges spending on political activity, taking the total percentage of relevant spending to 38% ($156.5 million) of STF's total spending for 2020. In its unofficial 2020 tax filing, STF similarly

110 *Supra* page 25 (chart).

represents that it spent over $167 million (40.7% of its total spending) on political activity, indicating that it acknowledges that much of its grantmaking to other organizations were for political purposes, albeit it appears to assert that this figure included state and local activity.[111]

Alternatively, the Commission's major purpose analysis could focus on STF's $128 million grant (over 31% of STF's total spending) to America Votes, the latter of which expressly states that its mission includes "win[ning] elections."[112] The most recent tax return available for America Votes is for Fiscal Year 2018, which reports that the organization spent $26,345,563 on political activity, or roughly 44% of its budget.[113] Further, political committees registered with the Commission reported receiving tens of millions of dollars from America Votes during the 2020 election cycle.[114] In her public statement on 2020 spending, STF's President said that STF made $128 million in grants to America Votes "to support their national efforts to expand access to vote by mail and increase voter turnout in communities of color and among traditionally disenfranchised people."[115] Therefore, in light of America Votes' historic spending patterns and its stated mission of winning elections for progressive candidates, it is reasonable to conclude that STF sent the $128 million to America Votes for the purpose of influencing a federal election. If that $128 million were all treated as counting towards STF's major purpose, then combined with the nearly $73 million in STF's own contributions to federal political committees and electioneering communications, STF's political spending would account for over $200

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111 STF 2020 Form 990, Sched. C, Part I-A, line 1; *supra* page 8.

112 *See* AM. VOTES, https://americavotes.org/ (last visited June 27, 2022) ("We lead collaborative efforts to advance progressive policies and win elections in key states[.]").

113 IRS Form 990, America Votes, 2018 Return of Organization Exempt from Income Tax, Part I, line 18; *id.* at Sched. C (July 17, 2020), https://apps.irs.gov/pub/epostcard/cor/264568349_201906_990O_2021052718211555.pdf.

114 *See supra* notes 103-108 and accompanying table.

115 Kurtz Medium Post. It is not clear from this statement whether the grant was earmarked for a specific project or if that is simply a characterization of the group's overall purpose.

million in political spending, which is nearly half of STF's total $410 million in spending for 2020.[116] Combining the amount of political spending attributable to STF by other grant recipients as discussed above would further increase STF's relevant spending to $228.8 million or 56% of its total spending. In light of the information indicating that STF's relevant spending could have constituted 40% to 56% of its total spending in 2020, it is a reasonable inference that STF had the major purpose of nominating or electing candidates.

The current record is not clear about what kind of activity STF determined to include or exclude from its own political spending calculations. STF appears to operate at least ten separate projects under which it has reported federal election expenditures with the Commission.[117] Additionally, while STF contends that the Hub Project is part of its "social welfare portfolio," the Hub Project appears to engage in a substantial amount of political activity itself. The Complaint points to news reports in which the Hub Project's Executive Director stated that the project targeted specific congressional districts to attack Republican policies, controlled the money flowing from STF into affiliated state-level groups, and controlled the political committee Change Now.[118] According to Commission records, during the 2020 election cycle, STF was

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[116] While STF argues that its full spending history does not support a reason to believe finding that its major purpose is to influence federal elections, NVF/STF Resp. at 6-7, the district court in *CREW I* held that "[l]ooking *only* at relative spending over an organization's lifetime runs the risk of ignoring . . . that an organization's major purpose can change." *CREW I*, 209 F. Supp. 3d at 94 (emphasis in original). Accordingly, the court said, the Commission should give weight to "an organizations' relative spending in the most recent calendar year." *Id.* Here, STF's 2020 spending is the most recent year for which we have information, and its overall spending just in 2020 ($410 million) exceeds the total amount it spent in the four prior years combined ($300 million). *See* NVF/STF Resp. at 7; *supra* page 8 (chart listing STF's admitted federal election-related disbursements). Thus, even if STF's major purpose had not been to influence federal elections prior to 2020, its significantly increased spending in 2020 appears to indicate a change in its major purpose.

[117] *Supra* page 21.

[118] Alexander Burns, *With $30 Million, Obscure Democratic Group Floods the Zone in House Races*, N.Y. TIMES (Oct. 31, 2018), https://www.nytimes.com/2018/10/31/us/politics/democrats-dark-money-midterms.html; *see Arkadi Gerney, Executive Director*, HUB PROJECT, https://thehubproject.org/team/#arkadi-gerney (last visited June 27, 2022) (noting Gerney's past work on "campaigns and strategy" for various organization and work at a political consulting firm).

Change Now's primary contributor, responsible for $6 million of its $8 million in receipts.[119] While STF disclosed grants made to some of its projects on its 2018 Form 990, it does not list the Hub Project as a grant recipient.[120]

Based on this record, including STF's admitted spending, its grants to politically active grant recipients, and its payments for projects managed through the Hub Project, it appears that there is reason to believe that by 2020 STF had the major purpose of influencing a federal election.[121] Accordingly, we recommend that the Commission find reason to believe that the Sixteen Thirty Fund and The Hub Project violated 52 U.S.C. §§ 30102, 30103, and 30104.

3. The Commission Should Take No Action at This Time as to NVF, but Dismiss as to the Wyss Foundation and the Berger Action Fund, Regarding the Political Committee Status Allegations

The Complaint alleges that NVF, the Wyss Foundation, and the Berger Action Fund also should have also registered as political committees and filed reports with the Commission but did not submit specific information regarding the alleged political activities of these organizations.[122]

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[119] *Change Now: Financial Summary 2019-2020*, FEC.gov, https://www.fec.gov/data/committee/C00683599/?cycle=2020 (last visited June 27, 2022); *FEC Receipts: Filtered Results*, FEC.GOV, https://www.fec.gov/data/receipts/?data_type=processed&committee_id=C00683599&contributor_name=Sixteen+Thirty&two_year_transaction_period=2020 (last visited June 27, 2022) (showing all contributions by STF to Change Now during the 2020 election cycle).

[120] STF 2018 Form 990, Sched. I, Part II.

[121] The Commission's inquiry is not limited to considering an organization's conduct in a single year. The Commission may also consider spending over an organization's lifetime. F&LA at 9, MUR 6538R (Americans for Job Security) (describing court decision that the Commission's analysis "must retain the flexibility to account for changes in an organization's major purpose over time"). The record on STF's spending prior to 2020 is equally challenging to parse because of its heavy reliance on grants to other social welfare organizations. It is clear, however, that STF became a significantly larger spender in 2020 than it had been in past years — the STF/NVF Response reports total expenses of $98 million in 2019 and $141 million in 2018. STF/NVF Resp. at 7. We recommend that the Commission examine whether STF's purpose had become the nomination or election of a federal candidate by 2020 based on both the large increase in STF's budget for that year, which gives 2020 an outsized importance in considering the organization's lifetime spending, as well as the lack of any notable information regarding past spending. In any event, it appears that STF's spending was substantially higher in election years 2018 and 2020, which would also be consistent with a major purpose of influencing federal elections. F&LA at 14-15, MUR 6538R (Americans for Job Security) (analyzing shift in election-related spending leading up to the 2010 election).

[122] Compl. ¶¶ 28-30.

However, there are questions specifically regarding NVF's connection to STF and whether NVF engaged in political activities. NVF manages a similarly-named project as STF, the "Hub Education and Engagement Fund," while STF states that it manages "The Hub Project."[123] But STF's Hub Project's staff member salaries, including the salary of its Executive Director, are paid by NVF and not STF, the Hub Project's job recruitment page on its website lists NVF as the project sponsor, and "The Hub Project" name appears to be a trademark registered to NVF.[124] These conflicting pieces of information leave open the possibility that NVF, despite its tax status, may have engaged in political activity through its work with various Hub Project initiatives. It is possible that more information about NVF's activities will become available during the investigation of STF. Therefore, we recommend taking no action at this time as to NVF and the Hub Education and Engagement Fund pending the results of the investigation. There is, however, insufficient information regarding what role, if any, that the Wyss Foundation and the Berger Action Fund played in connection with the alleged political activities. Accordingly, we recommend that the Commission exercise its prosecutorial discretion and dismiss those allegations as to the Wyss Foundation and the Berger Action Fund.[125]

IV. INVESTIGATION

We propose a focused investigation aimed at understanding STF's relationship with its largest grant recipients in the 2018 and 2020 cycles to determine whether it had the major purpose of nominating or electing federal candidates and should have registered and reported as a political committee. We plan to obtain relevant financial records, documents, grant proposals,

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123 NVF/STF Resp. at 2 n.1.

124 *See Arkadi Gerney, Executive Director*, HUB PROJECT, https://thehubproject.org/team/#arkadi-gerney (last visited June 27, 2022); Form 990, New Venture Fund, 2019 Return of Organization Exempt from Income Tax, Part VII, Section A, line 16 (Nov. 10, 2020) (listing Gerney as a "Project Director" with compensation of $320,675); *supra* note 33.

125 *Heckler v. Chaney*, 470 U.S. 821 (1985).

internal memoranda, and information from witnesses, such as the Hub Project's director, to understand how much of the money STF granted to social welfare organizations was intended for political activity.

We believe this targeted investigation will provide enough information to make an appropriate recommendation to the Commission. Although we would initially seek these materials voluntarily, we recommend that the Commission authorize the use of compulsory process, including the issuance of appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary.

V. RECOMMENDATIONS

1. Find reason to believe that the Sixteen Thirty Fund and The Hub Project violated 52 U.S.C. §§ 30102, 30103, and 30104 by not registering as a political committee and meeting the Act's organizational, recordkeeping, and reporting requirements;

2. Take no action at this time as to New Venture Fund and the Hub Education and Engagement Fund concerning the allegation that it failed to register and report as a political committee;

3. Dismiss as a matter of prosecutorial discretion the allegations that the Wyss Foundation and the Berger Action Fund failed to register, maintain records, and report as political committees in violation of 52 U.S.C. §§ 30102, 30103, and 30104;

4. Dismiss as a matter of prosecutorial discretion the allegations that Hansjörg Wyss, the Wyss Foundation, the Berger Action Fund, Inc., the New Venture Fund, and the Sixteen Thirty Fund made foreign national contributions and contributions in the name of another;

5. Approve the Factual and Legal Analysis; and

6. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

June 28, 2022
Date

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