RECEIVED
By OGC-CELA at 12:30 pm, Sep 02, 2021

Holtzman Vogel

HOLTZMAN VOGEL BARAN TORCHINSKY & JOSEFIAK PLLC

September 2, 2021

Roy Q. Luckett, Esq.
Acting Assistant General Counsel
Complaints Examination
& Legal Administration
Office of General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: MUR 7912

Dear Mr. Luckett,

This Response is submitted by the undersigned counsel on behalf of the following committees in MUR 7912: Senate Leadership Fund; American Crossroads; Peachtree PAC; Plains PAC; Keep Kentucky Great; The Maine Way PAC; Faith and Power PAC; DefendArizona; and Mountain Families PAC. Each Respondent is registered with the Federal Election Commission (the "Commission") as an independent expenditure-only committee, and each files regular disclosure reports. The 50-page Complaint filed by the Campaign Legal Center (CLC) accuses the Respondents of two hyper-technical reporting violations. First, CLC claims the Respondents filled out Form 1 (Statement of Organization) incorrectly and should have listed each other as "affiliated committees." Second, CLC claims the Respondents reported contributions on the wrong line of their disclosure reports, and instead should have classified contributions from one another as transfers to or from affiliated committees. More specifically, CLC contends the Respondents violated 52 U.S.C. § 30103(b)(2), which provides, "The statement of organization of a political committee shall include … the name, address, relationship, and type of any connected organization or affiliated committee," and 52 U.S.C. § 30104(b) "by failing to report … contributions … as transfers to affiliated committees."

CLC objects that "eighteen Super PACs falsely presented themselves to voters as independent, often with names that suggested local ties … despite receiving all or nearly all of their funding from established D.C.-based super PACs." Complaint ¶ 1. However, none of the committee names adopted by Respondents violates the Act's naming requirements. Nor is there anything improper or illegal in forming or naming a PAC to associate it with a place or cause; many organizations and candidates do just that. Furthermore, all contributions were disclosed in reports timely filed with the FEC and widely reported in the press, meaning that interested voters could apprise themselves of the support given by Super PACs to other Super PACs.

CLC next complains that "[t]he failure to disclose these affiliations as required by law deprived voters of important information about who was spending to influence their votes." Complaint ¶ 2. Again, all expenditures and contributions were publicly disclosed by each PAC in accordance with the Act. CLC does not allege any disclosure violation other than an alleged failure to note affiliation on FEC Form 1 and disclosure on an allegedly incorrect line on FEC Form 3. Far from demonstrating a lack of disclosure, CLC's Complaint is based on information actually reported to the FEC by the Respondents. The Respondents have satisfied all registration requirements, reported their contributions and expenditures to the Commission, and filed 48- and 24-hour independent expenditure reports. Each Respondent has filed with the Commission consistent with the approach approved in Advisory Opinion 2010-11 (Commonsense Ten).

CLC presumes that the referenced affiliation notice on Form 1 applies to Super PACs, whereas the Commission has never addressed, much less affirmatively required, "affiliation" disclosures by Super PACs. Super PAC affiliation reporting of the sort advocated by the Complaint has *never* been addressed in a rulemaking and the Commission has *never* addressed, in any context, whether the "affiliation" concept even applies to Super PACs.

II. The Act and Current Commission Regulations Do Not Address Affiliation of Super PACs

Both the Federal Election Campaign Act (the "Act") and Commission regulations long predate *Citizens United* and *SpeechNow.org*, and neither accounts for what the Commission now calls "independent expenditure-only committees."[1] While the Commission engaged in rulemaking to remove certain regulatory provisions in response to *Citizens United*,[2] the activity at issue in *SpeechNow.org* has not been addressed through the rulemaking process, although a brief note acknowledging the decision is appended to 11 C.F.R. § 114.2(b).

Independent expenditure-only committees, or Super PACs, are the creation of court decisions that (re)authorized that which Congress prohibited. In *SpeechNow.org*, the D.C. Circuit: (1) invalidated Congress's contribution limits as applied to entities that make only independent expenditures; and (2) held that "[t]he FEC may constitutionally require SpeechNow to comply with 2 U.S.C. §§ 432 [52 U.S.C. § 30102], 433 [52 U.S.C. § 30103], and 434(a) [52 U.S.C. § 30104(a)], and it *may* require SpeechNow to start complying with those requirements as soon as it becomes a political committee under the current definition of § 431(4) [52 U.S.C. § 30101(4)]."[3] Notably, *SpeechNow.org* does not address Section 30104(b), which is the subject

[1] Commission regulations include seven examples of political committees: principal campaign committee; single candidate committee; multi-candidate committee; party committee; delegate committee; leadership PAC; and lobbyist/registrant PAC. *See* 11 C.F.R. § 100.5(e)(1) – (7). A Super PAC does not fall into any of these categories.

[2] *See* Final Rule on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. 62,797 (Oct. 21, 2014).

[3] *SpeechNow.org*, 599 F.3d at 698 (emphasis added).

of this Complaint, and which details the specific contents of the reports that are to be filed under Section 30104(a).

Following *SpeechNow.org*, the Commission approved Commonsense Ten's request to treat itself as a "nonconnected political committee" under the Act and subject itself to existing nonconnected political committee reporting regulations.[4] The advisory opinion request was made because the FEC had no forms or guidance applicable to independent expenditure-only committees. While the result in Advisory Opinion 2010-11 was necessarily shaped by the facts, representations, and concessions contained in the advisory opinion request, Commonsense Ten's proposal and the Commission's response have effectively become the basis for disclosures by such committees. Nonetheless, 52 U.S.C. § 30108(b) requires that "[a]ny rule of law which is not stated in this Act … may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title." The Commission is required to engage in rulemaking in order to properly establish the specific reporting requirements that apply to Super PACs. To date the Commission has not done so.

The Commission has *not* adopted regulations addressing the reporting obligations of independent expenditure-only committees, or even adjusted its reporting forms to account for the differences between independent expenditure-only committees and the political committees described in the Act. In a footnote in Advisory Opinion 2010-11, the Commission explained:

> [T]his advisory opinion implicates issues that will be the subject of forthcoming rulemakings in light of the Citizens United, EMILY's List, and SpeechNow decisions. The results of these rulemakings may require the Commission to update its registration and reporting forms to facilitate public disclosure. In the meantime, the Committee may include a letter with its Form 1 Statement of Organization clarifying that it intends to accept unlimited contributions for the purpose of making independent expenditures. See Attachment A. Electronic filers may include such a letter as a Form 99.[5]

The Commission recognized at the time that it was placing a square peg in a round hole and the language quoted above makes clear the Commission considered its response to be a temporary measure until these matters could be properly addressed in future rulemakings. These rulemakings never happened, and Super PACs continue to operate without specific reporting regulations. One of the issues that remains unaddressed is whether there is any justification for subjecting independent expenditure-only committees to the Act's anti-proliferation provision, its

[4] *See* Advisory Opinion 2010-10 (Commonsense Ten); *see also* Comment of Robert D. Lenhard on Advisory Opinion Request 2010-10 ("both Commonsense Ten and Club for Growth seek permission to use a disclosure regime for political committees that is more robust than what would be required of them if they avoided registration and complied instead with the disclosure requirements for non-political committees that undertake independent expenditure"); Comment of Center for Competitive Politics on Advisory Opinion Request 2010-10 (noting that "Commonsense Ten conceded political committee status").

[5] Advisory Opinion 2010-11 at 3 n.4.

implementing regulation, and the affiliation reporting requirement that is the subject of this Complaint.

III. Affiliation Status Is Inapplicable to Super PACs

The legal determination that two committees are "affiliated" for purposes of the Act has several consequences, all of which are related to contribution limits and none of which have anything to do with public disclosure.[6] The "affiliation" concept was created half a century ago in the 1976 amendments to the Federal Election Campaign Act, decades before Super PACs came to being by virtue of court rulings. The Commission's 1989 Explanation and Justification on its affiliation regulations observes that:

> There are several consequences resulting from a determination that committees are affiliated. First, affiliated committees share a common contribution limit with regard to all contributions they make or receive. . . . Another consequence of affiliation is that there is no limit on the total amount of funds that may be transferred between the two committees . . . . Finally, the Commission notes that determinations of affiliation will affect the ability of a corporation or federation of trade associations to solicit specific categories of individuals under 11 CFR 114.5(g) and 114.8(g).[7]

None of these three consequences is relevant in any way to an independent expenditure-only committee. Super PACs are not subject to contribution limits, they may freely "transfer" funds to one another regardless of affiliation status, and they are not subject to restricted class solicitation limitations.

Simply stated, the Commission's "affiliation" standard implements the "anti-proliferation" rule at 52 U.S.C. § 30116(a)(5), which provides that "all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person … shall be considered to have been made by a single political committee."[8] As the Ninth Circuit explained in 1987:

---

[6] *See*, *e.g.*, Advisory Opinion 1985-06 (Laborers Local 91) ("The status of the Fund as affiliated with the political committee(s) set up by LIU means that the Fund and all its affiliated committees share a single set of contribution limits with respect to contributions made and also with respect to contributions received.").

[7] Final Rule on Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 54 Fed. Reg. 34,098, 34,101 (Aug. 17, 1989).

[8] *See id*. at 34,099 (referring to the "general rule" that "committees commonly established, financed, maintained or controlled are affiliated, and are therefore subject to common contribution limits"); *see also McCutcheon v. FEC*, 572 U.S. 185, 186-187, 201, 211-213 (2014) (discussing antiproliferation rule); Advisory Opinion 1988-14 (Atlantic Marine, Inc.) (referring to "the Commission's regulations implementing the contribution limits of the Act, specifically the anti-proliferation language found in 2 U.S.C. 441a(a)(5)").

> The 1974 Amendments [to the Act] established for the first time substantive contribution caps, enforced by criminal penalties, that strictly limited the amount that any group or individual could contribute to a campaign for federal office. . . . The Commission's enforcement of the new contribution limitations soon proved inadequate to the task of controlling the amounts contributed to federal campaigns by resourceful unions and corporations. Faced with limitations on the amounts their PACs could contribute to a given campaign, large unions and corporations began creating hundreds of new PACs through their locals and subsidiaries. . . . Although its main concern at that time was making the necessary amendments in response to the Supreme Court's recent decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), Congress also enacted "provisions to curtail vertical proliferation of contributions by political committees." 122 Cong. Rec. 12182 (1976) (summary of key provisions of the amendments by Senator Cannon). . . . As the House Conference Report notes, "**The anti-proliferation rules established by the conference substitute are intended to prevent corporations, labor organizations, or other persons or groups of persons from evading the contribution limits**. . . ." H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 58, *reprinted in* 1976 U.S. Code Cong. & Admin. News 946, 973.[9]

As an application of the anti-proliferation rule, the affiliation concept exists solely as a means of preventing circumvention of the Act's contribution limits. **The affiliation concept has no separate public disclosure purpose or basis.** Super PACs are not subject to contribution limits and, therefore, it makes no difference whatsoever whether they are "affiliated" under the Act. Accordingly, the "affiliation" concept has no meaningful application to Super PACs.

Section 30116(a)(5) and its implementing regulations have no application to independent expenditure-only committees because they, by definition, make no contributions. There is no enforcement-related need to collect "affiliation" information from committees that, by virtue of their status, are not capable of violating the Act's contribution limits. Applying the affiliation reporting requirements to independent expenditure-only committees, as CLC urges, would merely add to the regulatory burden on such organizations with no statutory justification. This conclusion is consistent with Advisory Opinion 2010-11, which explicitly recognized the link between affiliation and contribution limits, noting that Commonsense Ten "is not affiliated with any other political committee or organization *that makes contributions within the meaning of the Act.*"[10]

---

[9] *FEC v. Sailors' Union of Pacific Political Fund*, 828 F.2d 502, 504-505 (9th Cir. 1987) (emphasis added).

[10] Advisory Opinion 2010-11 at 2. This link between affiliation and contribution limits was recognized again in the Advanced Notice of Proposed Rulemaking issued following the Supreme Court's decision in *McCutcheon v. FEC*, in which the Commission asked whether "the current affiliation factors at 11 CFR 100.5(g)(4) and 110.3(a)(3) [are] adequate *to prevent circumvention of the base contributions limits*." Advance Notice of Proposed Rulemaking on Aggregate Biennial Contribution Limits, 79 Fed. Reg. 62,361, 62,363 (Oct. 17, 2014) (emphasis added).

In *Americans For Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021), the Supreme Court made clear that the government cannot mandate disclosure simply to compile certain information in its files. Instead, a disclosure mandate must be narrowly tailored to a sufficiently important government interest. There is no basis, let alone an important government interest, in requiring notice of "affiliation" for independent expenditure-only committees.

As noted, Commission regulations regarding affiliation of political committees long pre-date *Citizens United* and *SpeechNow.org*. There is no valid governmental interest in requiring affiliation status to be reported among independent expenditure-only committees. The alleged "voter interest" that CLC references (the supposed "right" to know if a Super PAC has ties to "established D.C.-based Super PACs") does not exist. The Act's anti-proliferation rule serves an anti-circumvention interest, not a public information interest. In the present matter, each committee registered with the Commission and then reported both its spending and its sources of funding as required by law.

*****

For the reasons set forth above, the Complaint should be dismissed.

Sincerely,

Thomas J. Josefiak
Michael Bayes
Counsel to Respondents