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September 7, 2021

**VIA E-MAIL (CELA@FEC.GOV)**  
**CONFIDENTIAL**Mr. Roy Q. Lockett  
Attn: Kathryn Ross, Paralegal  
Office of Complaints Examination & Legal Administration  
Federal Election Commission  
1050 First Street, NE  
Washington, DC 20463**Re: MUR 7912 (Future45 et al.)**

Dear Mr. Lockett:

On July 22, 2021, the Federal Election Commission (“FEC” or “Commission”) notified our clients – a federally-registered super PAC, Future45, and Maria Wojciechowski in her official capacity as treasurer (collectively, “Future45”) – of a complaint (“Complaint”) filed by the Campaign Legal Center and Margaret Christ (collectively, “CLC”).

The Complaint alleges that five “national super PACs,” including those supporting both Republican and Democratic candidates, “established and financed” 18 smaller super PACs between 2017 and 2020 without disclosing that the committees were affiliated. The Complaint argues that the Federal Election Campaign Act of 1971, as amended (“FECA”), and related FEC regulations required these committees to note their affiliated status on their respective Statements of Organization and report any transfers between the affiliated committees on a separate line of their FEC reports. As to Future45, in particular, the Complaint alleges that the committee funded one of the smaller super PACs, Truth Still Matters PAC, prior to the 2020 election but did not make these affiliated-related disclosures.

This Complaint is yet another attempt by CLC to waste the Commissioners’ time and resources on a matter the Commission should immediately dismiss. Among its many problems, this Complaint pushes a flawed legal theory about affiliation and super PACs that misleads the Commission as to the law’s purpose and has **never** been apparent to the regulated community, the FEC’s own Reports Analysis Division, or even CLC until two months ago. Indeed, rather than allege illegality, CLC acknowledged in a November 2018 report that super PACs across the political spectrum were simply utilizing the existent reporting requirements to their advantage (even if, in CLC’s thinking, such requirements constitute a loophole). In short, what CLC is doing here is masquerading its policy concerns as a legal complaint. The Commission should not allow CLC to abuse the FEC’s enforcement process to surprise and sanction two-dozen committees who followed a widespread – and until recently, unchallenged – practice. Instead, CLC should be required to work through the rulemaking or legislative process, as appropriate, to urge Congress or the Commission to make those regulatory changes.

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Even aside from these glaring Due Process problems, there are other reasons to dismiss this Complaint. **First**, the pleading itself is facially deficient. While the Complaint references the Commission's ten-factor test for determining whether two committees are affiliated, CLC argues only that three factors *may* support its position, *speculates* that two other criteria might be met, and then altogether *omits* a discussion of the remaining five factors. That is not a sufficient basis for finding "reason to believe" a violation occurred. **Second**, to the extent there was a violation here – which Future45 does not concede – it was essentially for a technical, ministerial requirement that the committees check one additional box on an amended organizational statement. In addition, the amount at issue was *de minimis* in the overall context of CLC's Complaint. This does not justify further use of the FEC's limited prosecutorial resources, a point the Commission made just five months ago in resolving another matter.

Accordingly, and as further detailed on the following pages, the Commission should find no reason to believe that Future45 violated the FECA or related FEC regulations and dismiss the Complaint. In the alternative, the Commission should exercise prosecutorial discretion under these circumstances and dismiss the Complaint.

### **FACTUAL BACKGROUND**

Future45 is an independent expenditure-only committee, or super PAC, that initially registered with the FEC in March 2015 and amended its registration in September of that year. See Future45, *FEC Form 1*, Mar. 20, 2015;<sup>1</sup> Future45, *FEC Form 1*, Sept. 25, 2021.<sup>2</sup> On its Statements of Organization, Future45 did not identify any other committees as "affiliated."

Over its six-plus years of existence, Future45 has made and duly reported approximately \$35 million in expenditures to the FEC. See, e.g., Future45, *Financial Summary for 2015-2016*.<sup>3</sup> On October 20, 2020, Future45 made a \$125,000 contribution to Truth Still Matters PAC. See Future45, *2020 Post General Election Report*, Dec. 3, 2020.<sup>4</sup> Future45 timely filed its 2020 Post General Election Report with the Commission disclosing this contribution.

### **LEGAL BACKGROUND**

The FECA requires that political committees disclose "the name, address, relationship, and type of any connected organization or affiliated committee" on their Statement of Organization. 52 U.S.C. § 30103(b). The political committee accomplishes this by checking a box on Line 6 indicating that it has an "affiliated committee" and then lists the name of that committee in the designated space. See FEC, *Statement of Organization*.<sup>5</sup> Affiliated committees also report transfers between each other on designated lines of their FEC reports. See FEC, *Report of Receipts and Disbursements* (requiring reporting of such transactions on Lines 12 or 22, as appropriate).<sup>6</sup> The Commission applies a ten-factor test to determine whether two committees are affiliated. See *id.* § 100.5(g)(4)(ii)(A)-(J).

<sup>1</sup> <https://docquery.fec.gov/pdf/414/15970309414/15970309414.pdf>.

<sup>2</sup> <https://docquery.fec.gov/pdf/741/201509259002778741/201509259002778741.pdf>.

<sup>3</sup> <https://www.fec.gov/data/committee/C00574533/?tab=summary&cycle=2016>.

<sup>4</sup> <https://docquery.fec.gov/pdf/273/202012039338277273/202012039338277273.pdf>.

<sup>5</sup> <https://www.fec.gov/resources/cms-content/documents/fecfrm1.pdf>.

<sup>6</sup> <https://www.fec.gov/resources/cms-content/documents/fecfrm3x.pdf>.

## ANALYSIS

### I. **The Affiliation Requirements Are Inapplicable to Super PACs Because There Are No Limits on Contributions to This Type of Committee.**

The FECA's affiliation requirements are essentially "anti-proliferation rules [that] apply in the case of multiple committees established by a group of persons" with the aim of keeping such persons from "evading the contribution limits." H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 6 (1976); see also *Affiliated Committees, Transfer, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions*, 54 Fed. Reg. 34,098, 34,099 (Aug. 17, 1989). In guidance provided to the public, including through its *Campaign Guide for Nonconnected Committees*, the Commission has underscored why the affiliation rules are important:

When two or more committees are affiliated, they share a **single limit** on the contributions they make to candidates and other political committees. A single limit also applies to the aggregate contributions a person makes to committees affiliated with each other.

*Id.* at 8-9, May 2008 (emphasis added).<sup>7</sup>

The affiliation rules – and their emphasis on safeguarding the contribution limits – have no application to super PACs, which are legally able to accept and spend unlimited sums in support of candidates. Moreover, applying these rules to super PACs when the Commission "has not conducted a rulemaking in response to [*SpeechNow.org v. FEC*]," the case establishing the precedent for super PACs, would be like putting multiple carts before the horse – and in ways that would expose the Commission to a litany of Due Process problems. 11 C.F.R. § 114.10(a), Note; 599 F.3d 686 (D.C. Cir. 2010) (en banc).

CLC's own research and public statements underscore this point. In 2018, CLC issued a report entitled "*Dodging Disclosure: How Super PACs Used Reporting Loopholes and Digital Disclaimer Gaps to Keep Voters in the Dark in the 2018 Midterms*."<sup>8</sup> After discussing some of the same examples that are in CLC's Complaint here, the report cited no faults with the various committees' Statements of Organization. Instead, CLC blamed Congress and claimed that "the FEC reporting calendar can have the effect of disguising large super PAC contributions received in the final 20 days of an election." See also Brendan Fischer, *A Small Handful of Big-Money Interests Funded Super PACs That Hid Their Donors Before Election Day*, CLC Blog, Dec. 14, 2018 (observing that if "these super PACs had been subject to the same last-minute reporting requirements that candidates are—that is, if they were required to report large contributions within 48 hours of receiving them—then voters would have learned the sources of these infusions of cash before they went to the polls").<sup>9</sup> As CLC concedes, this is where the solution to the policy issues raised in its Complaint must be addressed, not through the FEC's enforcement process.

<sup>7</sup> <https://www.fec.gov/resources/cms-content/documents/nongui.pdf>.

<sup>8</sup> <https://campaignlegal.org/sites/default/files/2018-11/11-29-18%20Post-Election%20Report%20%281045%20am%29.pdf>.

<sup>9</sup> <https://campaignlegal.org/update/small-handful-big-money-interests-funded-super-pacs-hid-their-donors-election-day>.

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## II. Regardless of the Merits, the Commission Should Exercise Its Prosecutorial Discretion and Dismiss This Matter.

**The Complaint Is Facially Deficient.** The Complaint (at ¶¶ 6-11) references the Commission’s ten-factor test for determining whether two committees are affiliated. Then, in one paragraph, the Complaint (at ¶ 138) attempts to apply that test to Future45 and Truth Still Matters PAC to conclude, merely, that three of the ten factors “appear[]” to support its position and two other factors provide some “indicat[ion]” of the same. The Complaint fails to even mention, must less analyze, the other five factors, including any that would undercut CLC’s arguments. *See, e.g.*, 11 C.F.R. § 100.5(g)(4)(ii)(F) (examining whether two committees have common officers); Truth Still Matters PAC, *FEC Form 1*, Oct. 19, 2020 (identifying the treasurer as Devy Enz); Future45, *FEC Form 1*, Sept. 25, 2015 (identifying the treasurer as Maria Wojciechowski). The Commission cannot base a “reason to believe” finding on such a facially-deficient complaint. *See, e.g.*, Statement of Reasons, *In re Hillary Rodham Clinton US Senate Exploratory Committee*, Matter Under Review 4960, Dec. 21, 2000 (“purely speculative charges . . . do not form an adequate basis to find reason to believe that a violation of the FECA occurred”); Statement of Reason of Chairman Wold and Comm’rs Mason and Thomas, Matter Under Review 4850, July 20, 2000 (“mere conjecture [or a] conclusory allegation . . . does not shift the burden of proof to respondents”).

Indeed, the Complaint does not cite to anything beyond the same reporting data that has been available to the FEC’s Reports Analysis Division for many months. If these transactions did not raise any concerns with the FEC’s professional staff, then they should not give rise to a finding of a violation by the Commission now.

**The “Check the Box” Ministerial Type of Violation Alleged and the Amount at Issue Are *De Minimis*.** With the underlying contributions/expenditures fully and timely disclosed after the election, the heart of CLC’s Complaint is that five national super PACs failed to file amended Statements of Organization checking a box to denote their affiliation status. But even if the Commission somehow concludes that this was a FECA violation – which Future45 does not concede – this type of technical, ministerial reporting violation is not the sort that has warranted punishment from the Commission in the past. *See, e.g.*, Vote Certification of Apr. 19, 2021, Matter Under Review 7671 (Big Tent Republicans PAC) (unanimously dismissing on prosecutorial discretion grounds a complaint that included, *inter alia*, an allegation that a committee improperly identified itself as a nonconnected committee on its Statement of Organization). Nothing warrants the Commission treating Future45, or any of the other Respondents here, differently than similar organizations whose cases were dismissed in the past.

Furthermore, Future 45’s contribution is a tiny fraction of the spending at issue in this matter. As the Complaint (at ¶1) notes, the allegations here are that the 18 smaller super PACs spent a combined \$200 million in alleged violation of the law. Yet Future 45’s contribution was merely \$125,000, or less than .1%, of the aggregate amount at issue. Thus, Future45’s actions here were *de minimis* in that sense as well.

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The Complaint's faulty legal reasoning, speculative allegations, and the *de minimis*, ministerial nature of the alleged violations all underscore why the Commission should find no reason to believe that Future45 violated the FECA or applicable regulations and dismiss the Complaint. In the alternative, the Commission should exercise its prosecutorial discretion and dismiss the Complaint.<sup>10</sup>

Sincerely,



Michael E. Toner  
Caleb P. Burns  
Andrew G. Woodson

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<sup>10</sup> We note that, should the Commission dismiss this case on prosecutorial discretion grounds, that decision is committed to the FEC's sole discretion. See, e.g., *Citizens for Resp. & Ethics in Washington v. FEC*, 993 F.3d 880 (D.C. Cir. 2021) (holding that Commission enforcement decisions are unreviewable when based on prosecutorial discretion); *Common Cause v. FEC*, 108 F.3d 413 (D.C. Cir. 1997) (finding that, absent an informational injury, a complaint generally has no standing to sue the Commission over an enforcement dismissal).