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November 8, 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 American Future Fund Political Action (hereinafter, "AFF") and Chris Marston, in his capacity as Treasurer, in the above referenced matter (together, the "Respondents"). The Complaint makes misguided allegations regarding the failure to disclose affiliated committees and designate contributions associated therewith. These allegations, however, rest upon a novel and unjustified application of the law. Accordingly, for the reasons outlined herein, the Commission should find no reason to believe that the Respondents violated the Federal Election Campaign Act of 1971, as amended (the "Act"), or any Commission regulation ("Regulations"). The Complaint warrants no further consideration and should be promptly dismissed.

I. Factual Background

AFF registered with the Federal Election Commission (the "Commission") as a non-connected political committee on May 7, 2008. On March 12, 2014, AFF amended its registration and opened a non-contribution account consistent with *Carey v. FEC*. AFF has operated as a hybrid PAC for over seven years.

The 50-page Complaint filed by the Campaign Legal Center (CLC) accuses AFF and seventeen other committees of two hyper-technical reporting violations. First, CLC claims AFF filled out Form 1 (Statement of Organization) incorrectly and should have listed Congressional Leadership Fund ("CLF") as an "affiliated committee." Second, CLC claims that AFF reported contributions on the wrong line of its disclosure reports, and instead should have classified contributions from CLF as transfers to or from an affiliated committee. More specifically, CLC contends AFF 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 first objects that "eighteen Super PACs falsely presented themselves to voters as independent … despite receiving all or nearly all of their funding from established D.C.-based super PACs." Complaint ¶ 1. While AFF is not a Super PAC, AFF properly disclosed all contributions received by its non-contribution account in reports timely filed with the FEC.

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. CLC's own Complaint, however, which is based on information reported to the FEC by the Respondent, demonstrates that no such deprivation occurred. In fact, 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. Again, all expenditures and contributions were publicly disclosed in accordance with the Act. AFF has satisfied all registration requirements, reported its contributions and expenditures to the Commission, and filed 48- and 24-hour independent expenditure reports. AFF has filed with the Commission consistent with the approach detailed in the Commission's *Statement on Carey v. FEC* (Oct. 6, 2011).[1]

CLC presumes that the referenced affiliation notice on Form 1 applies to Super PACs or the non-contribution accounts of Hybrid PACs, whereas the Commission has never addressed, much less affirmatively required, "affiliation" disclosures by either. 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 or the non-contribution accounts of Hybrid PACs.

II. The Act and Current Commission Regulations Do Not Address Affiliation of Super PACs or the Non-Contribution Accounts of Hybrid PACs

Both the Act (and Commission regulations long predate *Citizens United, SpeechNow.org*, and *Carey v. FEC*, and neither addresses what the Commission now calls "independent expenditure-only committees."[2] The Act and Commission regulations similarly do not address the "Hybrid PACs" authorized by *Carey v. FEC*. While the Commission engaged in rulemaking to remove certain regulatory provisions in response to *Citizens United*,[3] the activity at issue in *SpeechNow.org* has not been addressed through the rulemaking process, although a brief note

[1] *See* FEC Statement on *Carey v. FEC* (2011), Oct. 6, 2011, https://www.fec.gov/updates/fec-statement-on-carey-v-fec/.

[2] 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.

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

acknowledging the decision is appended to 11 C.F.R. § 114.2(b). Similarly, the court's decision in *Carey v. FEC* has been addressed by the Commission only in a Statement issued on October 6, 2011.

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)]."[4] Notably, *SpeechNow.org* does not address Section 30104(b), which is the subject 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.[5] 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 and Hybrid 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 the hybrid committees, or even adjusted its reporting forms to account for the differences between these 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

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

[5] *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").

> 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.[6]

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. In its statement on *Carey v. FEC*, the Commission issued instructions that apply "[u]ntil such time as the Commission adopts a new regulation," and explained that "[t]he Commission intends to initiate a rulemaking, and to amend its reporting forms accordingly, to address the *Carey* opinion and stipulated judgment, as well as related court rulings in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) and *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009)." These rulemakings still have not occurred, and Super PACs and Hybrid 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 and non-contribution accounts to the Act's anti-proliferation provision, its implementing regulation, and the affiliation reporting requirement that is the subject of this Complaint.

Existing FEC reporting forms are even less well suited to Hybrid PAC reporting. Since 2011, Hybrid PACs have effectively reported the activity of two separate committees on a single FEC report. As noted in the Complaint, Hybrid PACs report all non-contribution account receipts on Line 17 (Other Federal Receipts), rather than on Lines 11 – 18 and 19. While the Complaint alleges that AFF failed to report transfers from affiliated committees on Line 12, the Complainant fails to note that Line 12 is *not currently used* for non-contribution reporting. As the Commission instructed in October 2011, "committees should report contributions deposited into the Non-Contribution Account on Line 17 of Form 3X titled 'Other Federal Receipts.'" *Even if* a hybrid PAC received "transfers from an affiliated committee," there is no way for that to be reported on the FEC's current reporting forms.

III. Affiliation Status Is Inapplicable to Super PACs / Non-Contribution Accounts

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.[7] The "affiliation" concept was created half a century ago in the 1976 amendments to the Federal Election Campaign Act, decades before Super PACs

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

[7] *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.").

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).[8]

None of these three consequences is relevant in any way to an independent expenditure-only committee or a hybrid PAC's non-contribution account. Super PACs and non-contribution accounts 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."[9] As the Ninth Circuit explained in 1987:

> 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

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

[9] *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)").

> 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.[10]

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.*"[11]

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, AFF

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

[11] 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).

registered with the Commission and then reported both its spending and its sources of funding as required by law.

IV. AFF and CLF Are Not Affiliated

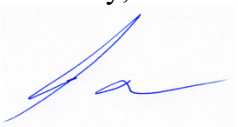
AFF's contribution and non-contribution accounts are legally distinct. CLF contributed funds only to AFF's non-contribution account, and therefore, the question of affiliation raised in the Complaint is only relevant as to AFF's non-contribution account. Contributions to a hybrid PAC's non-contribution account cannot cause the contribution account to become an affiliate, and the Complaint does not present any evidence that AFF's contribution account and CLF have any relationship whatsoever. In fact, AFF's contribution account was organized *before* CLF, and has received hundreds of contributions and made contributions and expenditures in countless federal and non-federal races. It has an established presence wholly independent of CLF or any other entity.

With respect to AFF's non-contribution account, the question of "affiliation" with CLF is legally inapplicable, as explained above. In addition, AFF's non-contribution account is not "a shell PAC suddenly formed in the final weeks of competitive congressional races," nor does it have a "seemingly local name." *See* Complaint ¶ 2. AFF's non-contribution account has been in existence since 2014, and contributions made from CLF to AFF's non-contribution account in one single election cycle, absent any other so-called "control" factors, are legally meaningless, even if the "affiliation" concept were applicable between the two entities.

V. Conclusion

A thorough and proper examination of the authority relating to affiliation clearly demonstrates that the anti-proliferation rule and, accordingly, the affiliation concept created to apply it, are wholly inapplicable to Super PACs and Hybrid PACs' non-contribution accounts. Such rules were instituted to prevent a circumvention of federal contribution limits, which do not apply between CLF and AFF's non-contribution account. For the reasons set forth above, the Complaint should be promptly dismissed.

Sincerely,



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