



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

December 20, 2017

Note: Two names and associated identifying information have been temporarily redacted from the following document in the public file for FEC Matter Under Review 6920. This information is the subject of litigation and will remain redacted pending the resolution of the litigation or further order of the Court. *See Doe v. FEC*, No. 17-02694 (D.D.C.).



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

AUG 29 2017

**VIA HAND AND ELECTRONIC MAIL**

Charles R. Spies, Esq.  
Clark Hill  
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Washington, DC 20004  
cspies@clarkhill.com

RE: MUR 6920

Dear Mr. Spies:

Based on a complaint filed with the Federal Election Commission on February 27, 2015, and information supplied by your client, the Commission, on January 24, 2017, found that there was reason to believe your client, American Conservative Union, violated 52 U.S.C. § 30122, and instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that a violation has occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days. The Office of the General Counsel will not give extensions absent an agreement to toll the applicable statute of limitations.

You may also request additional information gathered by the Commission in the course of its investigation in this matter. See Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 Fed. Reg. 34986 (June 15, 2011).

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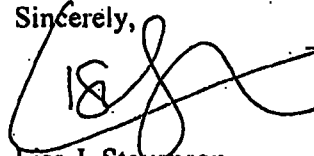
In addition, you may also request an oral hearing before the Commission. See Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919 (Nov. 19, 2007) and Amendment of Agency Procedures for Probable Cause Hearings, 74 Fed. Reg. 55443 (Oct. 28, 2009). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. In this matter, a request for a probable cause hearing will require the Respondent to toll the applicable statute of limitations. See Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919, 64920 (Nov. 19, 2007).

The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Antoinette Fuoto, the attorney assigned to this matter, at (202) 694-1634.

Sincerely,

A handwritten signature in black ink, appearing to read 'LJ Stevenson', written over a large, stylized flourish that loops around the text.

Lisa J. Stevenson  
Acting General Counsel

Enclosure  
Brief  
Supporting Documents

NOV 19 2009

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2  
3 In the Matter of )  
4 ) MUR 6920  
5 American Conservative Union )  
6 )  
7 )  
8

**GENERAL COUNSEL'S BRIEF**

9 **I. STATEMENT OF THE CASE**

10 The Federal Election Commission (the "Commission") received a Complaint alleging  
11 that an Unknown Respondent made a \$1.71 million contribution to Now or Never PAC in the  
12 name of American Conservative Union ("ACU"), in violation of 52 U.S.C. § 30122 and 11  
13 C.F.R. § 110.4(b). Based on ACU's representation that the contribution to Now or Never PAC  
14 was "a political contribution received by the Organization and promptly and directly delivered to  
15 a separate political organization,"<sup>1</sup> the Commission found reason to believe that an Unknown  
16 Respondent made a contribution in the name of another, and that ACU knowingly permitted its  
17 name to be used to effect that contribution.<sup>2</sup> As set forth below, based on further investigation,  
18 the Office of the General Counsel ("OGC") is prepared to recommend that the Commission find  
19 probable cause to believe that ACU violated 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b)(1)(ii)  
20 by knowingly permitting its name to be used to effect a contribution in the name of another.

<sup>1</sup> See Compl (Feb. 27, 2015), Ex. C at Schedule O, Schedule C (ACU Amended Form 990, May 12, 2014).

<sup>2</sup> See Factual & Legal Analysis (American Conservative Union), MUR 6920 (Feb. 7, 2017).

1 **II. FACTS**

2 **A. Background**

3 American Conservative Union is registered with the IRS as a social welfare organization  
4 under section 501(c)(4) of the Internal Revenue Code,<sup>3</sup> and is not registered with the  
5 Commission as a political committee. ACU describes itself as the oldest and largest  
6 conservative grassroots organization in the United States. It received donations totaling  
7 \$8,485,503 in 2012.<sup>4</sup> In 2012, ACU's executive director was Gregg Keller.

8 GI LLC is a Delaware limited liability corporation that was established in September  
9 2012. GI LLC's only known organizational purpose was to support conservative organizations  
10 and causes.<sup>5</sup> Christopher W. Byrd, who died in 2014, served as the "sole manager and officer"  
11 of GI LLC in 2012.<sup>6</sup> Byrd retained James C. Thomas, III to prepare organizational paperwork,  
12 serve as attorney and perform various tasks on behalf of GI LLC.<sup>7</sup> Thomas states that all tasks  
13 he performed for GI LLC were conducted at the request and under the direction of Byrd.<sup>8</sup>

14 The

15 . acting as trustee of ,

16 .<sup>9</sup> also funded GI LLC,

3 ACU Resp. at 1 (April 23, 2015).

4 See Compl., Ex. C at Part I.

5 Thomas Interrogatory Answers at 3 (July 28, 2017).

6 *Id.* at 1-2.

7 *Id.* at 1, 3.

8 *Id.* at 1.

9 *Id.* at 2. A "nominee" is "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." Black's Law Dictionary (10th ed. 2014).

1 providing it with a \$2.5 million wire transfer in October 2012, shortly after the LLC's  
2 formation.<sup>10</sup>

3 Now or Never PAC is an independent expenditure-only committee that filed its Statement  
4 of Organization with the Commission on February 21, 2012. Thomas, who is both an attorney  
5 and an accountant, has been Now or Never PAC's treasurer since its organization in 2012.  
6 During the 2012 cycle, Now or Never PAC raised \$8,250,500 and reported \$7,760,174 in  
7 independent expenditures. The group raised \$540,000 during the 2014 cycle and reported  
8 \$714,811 in independent expenditures. Now or Never PAC has been largely inactive since the  
9 2014 cycle. It has not reported any independent expenditures since then, and raised only \$8,000  
10 in 2016.

11 Axiom Strategies is a Missouri-based political consulting firm that has connections to  
12 both Now or Never PAC and GI LLC. Axiom Strategies has "participated in [Now or Never  
13 PAC's] operations and financial activities," and Thomas's terms of engagement with Now or  
14 Never PAC "expressly authorize" him to carry out the instructions of Axiom Strategies.<sup>11</sup>  
15 Thomas represents that he primarily took direction from Axiom Strategies' founder, Jeff Roe.  
16 Axiom Strategies reportedly also provided GI LLC with recommendations regarding the  
17 distribution of its funds.<sup>12</sup>

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<sup>10</sup> See Thomas Interrogatory Answers at 4.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Id.* at 2.

**B. The October 31, 2012 Contribution**

On October 31, 2012, GI LLC received a \$2.5 million wire transfer from .<sup>13</sup> Once GI LLC received the funds from , Thomas emailed Axiom Strategies consultants Jeff Roe and Sarah Hoeller at 11:11 am, stating “[t]he 2.5 million is here. I am about to wire \$1.8 million to American Conservative Union.”<sup>14</sup>

Earlier that morning, Keller and Roe sent a series of emails confirming an arrangement to transfer funds from GI LLC to ACU, and then from ACU to Now or Never PAC. At 9:41 am, Keller received an email from ACU’s banking representative instructing him that, “[w]hen the funds arrive, we’ll reach out to you immediately for notification,” and requesting “the outgoing wire instructions” to prepare the subsequent transfer for Keller’s signature.<sup>15</sup> Keller forwarded that email to Roe at 9:43 am, who forwarded it on to Hoeller and Thomas at 9:46 am.<sup>16</sup>

At 11:14 am, Thomas emailed Roe and Hoeller requesting ACU’s wiring address. Roe forwarded that message to Keller, who confirmed the address.<sup>17</sup> Thomas then emailed a bank representative wiring instructions for the transfer of \$1.8 million from GI LLC to ACU.<sup>18</sup> Thomas states that he wired the funds to ACU at the direction of Byrd.<sup>19</sup> After authorizing the

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<sup>13</sup> See *id.* at 4. It is unclear if GI LLC, which had only been formed the previous month, had any funds prior to receiving that transfer.

<sup>14</sup> ACU Documents at FEC000004-5.

<sup>15</sup> Thomas Documents at JT2017-0001.

<sup>16</sup> *Id.*

<sup>17</sup> ACU Documents at FEC000004-5.

<sup>18</sup> Thomas Documents at JT2017-0015.

<sup>19</sup> Thomas Interrogatory Answers at 4.

1 transfer, Thomas emailed Keller, Roe, and Hoeller to confirm that the “[m]oney should be on its  
2 way shortly.”<sup>20</sup>

3 Consistent with Keller’s email earlier that morning, shortly after receiving confirmation  
4 of the wire transfer from GI LLC to ACU, Keller wrote to Thomas, Roe, and Hoeller to state,  
5 “[w]ill take action immediately upon receipt.”<sup>21</sup> He followed up with that email minutes later,  
6 stating that he’d “need wiring instructions,” presumably to effectuate the transfer of funds from  
7 ACU to Now or Never PAC.<sup>22</sup> ACU states that prior to its receipt of the wire from GI LLC, it  
8 had a combined total balance of approximately \$538,000 across its bank accounts.<sup>23</sup>

9 Later that afternoon, Roe emailed Thomas and Hoeller to inquire as to the status of the  
10 “acu dough,” stating “[w]e need the mo wire out...”<sup>24</sup> Roe appears to have forwarded that email  
11 to Keller, who was on the email thread when Thomas later replied confirming that Now or Never  
12 PAC received the \$1.71 million.<sup>25</sup> Keller forwarded Thomas’s confirmation to Louisa Imperiale,  
13 then-National Finance Director of ACU, stating, in an apparent reference to the fact that ACU  
14 would keep the difference between the \$1.8 million received from GI LLC and the \$1.71 million  
15 sent to Now or Never PAC, “FYI. We have the \$90k.”<sup>26</sup> Imperiale replied, “Well done!!!!”<sup>27</sup>

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20 ACU Documents at FEC000004.

21 Thomas Documents at JT2017-0011.

22 ACU Documents at FEC000006. Hoeller responded with instructions for wiring funds to Now or Never PAC.

23 ACU Resp. at 1 (April 9, 2017).

24 ACU Documents at FEC000008-9. OGC’s review of Now or Never PAC’s disclosure records from October 31, 2012 found that “the mo wire” may be a reference to an ad buy in support of Missouri Senate candidate Todd Aiken. See Now or Never PAC 24/48 Hour Notice of Independent Expenditures, Schedule E (Oct. 31, 2012). Now or Never PAC spent \$803,775 in support of Aiken on October 31, 2012. *Id.* It is unclear whether Keller knew of the intended use of the contribution.

25 ACU Documents at FEC000008.

26 *Id.*

27 *Id.*



1 Now or Never PAC reported receiving \$1.71 million from ACU in its 2012 post-general  
2 election disclosure report. Thomas, the treasurer of Now or Never PAC, acknowledges that he  
3 "assumed that this contribution may have consisted in part of funds ACU had previously  
4 received from GI LLC[.]"<sup>28</sup>

5 ACU's Director of Operations later characterized the funds sent to Now or Never PAC as  
6 a "pass through" in an email asking Keller if ACU had to make its own filing with the  
7 Commission in connection with the transaction.<sup>29</sup> In May 2014, apparently after an independent  
8 auditor reviewed its 2012 finances,<sup>30</sup> ACU filed an Amended 2012 IRS Form 990 that disclosed  
9 the \$1.71 contribution to Now or Never PAC as "a political contribution received by the  
10 Organization and promptly and directly delivered to a separate political organization."<sup>31</sup> ACU  
11 states that its auditors "included this language without consulting with contemporaneous ACU  
12 staff regarding the nature of the transaction, and instead relied upon the face of ACU's financials  
13 to support the notation on the amended IRS finding."<sup>32</sup> ACU has not affirmatively disputed its  
14 auditors' characterization of the transaction, or offered any alternative explanation for the three-  
15 step structure of the transaction.<sup>33</sup>

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<sup>28</sup> Thomas Interrogatory Answers at 5. Thomas asserts that "he was never informed of any prior arrangement or agreement between GI LLC and ACU that the funds would be used to finance a contribution to by ACU to Now or Never PAC." *Id.*

<sup>29</sup> ACU Second Document Submission, November 30, 2012 email from Melissa Bowman to Gregg Keller.

<sup>30</sup> Compl. ¶¶ 15-17, Exs. B (Conlon & Associates Independent Auditor's Report, Apr. 9, 2014) and C.

<sup>31</sup> *Id.*, Ex. C at Schedule O, Schedule C.

<sup>32</sup> *See Proposed Stipulation of Facts* (July 26, 2017).

<sup>33</sup> ACU has represented that none of the management involved with this transaction continue to be employed by ACU. *See ACU Resp.* at 1 (April 9, 2017). The Commission has sought additional information from former ACU Executive Director Gregg Keller, who refused to provide substantive answers to Commission interrogatories.

1 **III. LEGAL ANALYSIS**

2 Under the Act, a “contribution” includes any gift, subscription, loan, advance, or deposit  
3 of money or anything of value made by any person for the purpose of influencing any election  
4 for federal office.<sup>34</sup> The Act prohibits a person from knowingly allowing his or her name to be  
5 used to effect a contribution in the name of another.<sup>35</sup> The requirement that a contribution be  
6 made in the name of its true source promotes Congress’s objective of ensuring the complete and  
7 accurate disclosure by candidates and committees of the political contributions they receive.<sup>36</sup>  
8 Courts have uniformly rejected the assertion that “only the person who actually transmits funds  
9 . . . makes the contribution,”<sup>37</sup> recognizing that “it is implausible that Congress, in seeking to  
10 promote transparency, would have understood the relevant contributor to be [an] intermediary  
11 who merely transmitted the campaign gift.”<sup>38</sup> Accordingly, the Act and the Commission’s  
12 regulations provide that a person who provides funds to another for the purpose of contributing  
13 to a committee “makes” the resulting contribution.<sup>39</sup> If an intermediary merely plays a  
14 “ministerial role” in transmitting a contribution, the contribution should not be attributed to the  
15 intermediary but instead to the original source.<sup>40</sup>

<sup>34</sup> 52 U.S.C. § 30101(8)(A).

<sup>35</sup> 52 U.S.C. § 30122; 11 C.F.R. § 110.4(b)(1)(ii).

<sup>36</sup> See, e.g., *United States v. O'Donnell*, 608 F.3d 546, 553 (9th Cir. 2010) (“[T]he congressional purpose behind [section 30122] — to ensure the complete and accurate disclosure of the contributors who finance federal elections — is plain.”).

<sup>37</sup> *United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011).

<sup>38</sup> *O'Donnell*, 608 F.3d at 554; see also *Doe v. Reed*, 561 U.S. 186, 199 (2010) (“Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot.”).

<sup>39</sup> See, e.g., *Boender*, 649 F.3d at 660 (“[W]e consider the giver to be the source of the gift, not any intermediary who simply conveys the gift from the donor to the donee.”).

<sup>40</sup> See *O'Donnell*, 608 F.3d 546 at 550.

1 The record provides probable cause to believe that ACU knowingly permitted its name to  
2 be used to effect a contribution in the name of another. The undisputed facts demonstrate that  
3 transferred funds to GI LLC, that GI LLC then forwarded those funds to ACU in order to  
4 make a \$1.71 million contribution to Now or Never PAC, that Now or Never PAC reported that  
5 contribution as coming from ACU rather than the true source of the funds, and that ACU agreed  
6 to allow the parties to use its name to make the contribution in the name of another.

7 Emails documenting the transaction demonstrate that Keller wired the \$1.71 million  
8 contribution to Now or Never PAC immediately after receiving \$1.8 million from GI LLC, an  
9 organization purportedly created to support conservative organizations and causes, who earlier  
10 received the funds from Without the transfer from GI LLC, ACU would have lacked the  
11 funds needed to make a \$1.71 million federal contribution.

12 Additionally, prior to Keller transferring the funds to Now or Never PAC, he wrote to  
13 Thomas, who acted on behalf of both GI LLC and Now or Never PAC, and Axiom Strategies  
14 political consultants to provide the details of the conduit arrangement and confirm that ACU  
15 would "take action immediately upon receipt" of the wire from GI LLC. ACU's  
16 communications stating that it would take "action" upon receipt of GI LLC's wire transfer  
17 provide a strong inference that the parties entered into an agreement by which ACU permitted its  
18 name to be used to effect a contribution to Now or Never PAC in the name of another.

19 The presence of an agreement among the parties is consistent with ACU's later  
20 characterization of the contribution as a "pass through" when its Director of Operations made an  
21 inquiry as to whether ACU had an obligation to make its own filing with the Commission. Such  
22 an agreement is further confirmed by ACU's amended tax filing in which it characterized the

1 \$1.71 contribution to Now or Never PAC as "a political contribution received by the  
2 Organization and promptly and directly delivered to a separate political organization."<sup>41</sup>

3 Finally, ACU's receipt of \$90,000 from GI LLC suggests the difference between the \$1.8  
4 million transfer from GI LLC and the \$1.71 million sent to Now or Never PAC was ACU's fee  
5 for allowing its name to be used to effect a contribution in the name of another. Accordingly,  
6 OGC is prepared to recommend that the Commission find probable cause to believe that ACU  
7 knowingly permitted its name to be used to effect a contribution in the name of another.

8 **IV. CONCLUSION**

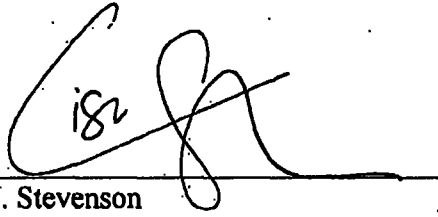
9 Based on the foregoing, the Office of the General Counsel is prepared to recommend that  
10 there is probable cause to believe that American Conservative Union violated 52 U.S.C. § 30122  
11 and 11 C.F.R. § 110.4(b)(1)(ii) by knowingly permitting its name to be used to effect a  
12 contribution in the name of another.

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<sup>41</sup> Compl., Ex. C at Schedule O, Schedule C.

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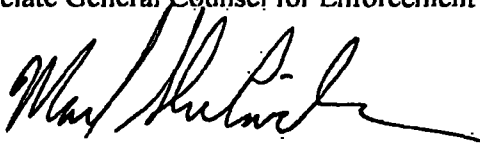
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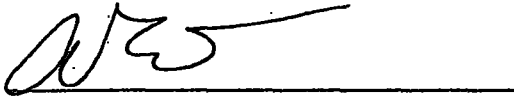
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