FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
American Conservative Union, *et al.*	)	MUR 6920
	)	

STATEMENT OF REASONS OF VICE CHAIR CAROLINE C. HUNTER AND COMMISSIONER LEE E. GOODMAN

The Commission found reason to believe that Respondents American Conservative Union ("ACU"), Now and Never PAC, and Government Integrity, LLC ("GI, LLC") violated section 30122 of the Federal Election Campaign Act of 1971, as amended ("the Act"), conducted an investigation, voted unanimously to find probable cause that ACU violated the Act, and entered into a conciliation agreement that required the Respondents to pay a civil penalty in the amount of $350,000.

The Commission voted unanimously, on January 24, 2017, to find reason to believe that ACU and Now or Never PAC violated the Act. The Commission also voted unanimously to find reason to believe against an "Unknown Respondent."[1] Nine months later, on September 19, 2017, the Commission's Office of General Counsel ("OGC") submitted a report to the Commission recommending that the Commission find reason to believe two non-respondents, [redacted] ("[redacted]") and an individual associated with [redacted], violated the Act by making a contribution to Now or Never PAC in the name of ACU.[2] We voted to proceed to enforce the Act against three Respondents—ACU, Now or Never PAC, and GI, LLC—but not to add the fourth organization, [redacted],[3] as a Respondent for the following reasons.

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[1] Commission Certification, MUR 6920 (Jan. 24, 2017). On July 11, 2017, the Commission voted unanimously to substitute GI, LLC in place of "Unknown Respondent" and voted unanimously to find reason to believe GI, LLC violated the Act. *See* Commission Certification, MUR 6920 (July 11, 2017).

[2] OGC did not recommend substituting [redacted] as an Unknown Respondent. That was irregular. The Commission typically would vote to add a person or organization and then vote to find reason to believe. We believe that parties added to a matter are entitled to formal notice of a complaint pursuant to 52 U.S.C. § 30109(a)(1), and a right to respond to the complaint, before the Commission votes to find reason to believe that party has violated the Act.

[3] References herein to [redacted] incorporate an individual associated with [redacted].

A. The Legal Theory of [redacted] Legal Responsibility Was Unclear

The legal theory on which OGC based its recommendation to make a reason to believe finding as to [redacted] was unprecedented and unclear.[4] OGC argued that [redacted] violated the Act by [redacted], which in turn donated funds to a non-profit corporation, which in turn contributed the funds to the Super PAC. Whether [redacted] violated the Act by making a contribution in the name of an LLC [redacted] was, and remains, an unclear legal issue. We have previously explained our reluctance to punish citizens for novel theories of violations, in cases of first impression, where the law is evolving, and citizens did not have fair notice. We applied that reluctance in cases involving LLC contributions as recently as February 2016.[5] Our action in those matters is under judicial review at this time and we have been awaiting judicial clarification of our decision in those cases.[6] It would have been unfair and possibly inefficient to pursue enforcement against [redacted] for engaging in similar conduct where the issue was not clear, we had dismissed similar legal theories against other persons, and a federal court is currently reviewing the reasonableness of our action. Furthermore, there is scant legal precedent applying 52 U.S.C. § 30122's "true source" rule to funders three or four layers behind the reportable contribution to a Super PAC. These issues were likely to be contested and litigated.

The Commission already was proceeding in an area of law that was contested by three Respondents. There was no direct, established precedent holding that non-profit corporations, all of which accept donations from other persons, violate 52 U.S.C. § 30122 when they make a contribution to a Super PAC with funds received from another donor. Non-profit corporate contributions to Super PACs are still a relatively new phenomenon under the Act, authorized in 2010 by two court decisions recognizing constitutional protections for such activity, *Citizens United* and *SpeechNow*.[7] The Commission has not defined the circumstances under which a non-profit corporation's contribution of funds it received from another person constitutes that person's contribution under section 30122 of the Act. Already pursuing a contested legal theory in a case of first impression, we believed adding a novel question – the responsibility of a funder of a LLC donor to a non-profit contributor to a Super PAC – would distract from and thereby complicate our efforts to establish a clear precedent in the case of the three Respondents that directly transacted the contribution.

In addition to complicating the legal theory, the facts establishing [redacted] potential legal liability were unclear. Historically, the Act's giving-in-the-name-of-another prohibition focused

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4 *See Heckler v. Chaney*, 470 U.S. 821, 824-25 (1985) (noting FDA Commissioner had refused to take enforcement action because of his conclusion that FDA jurisdiction in the area was unclear).

5 *See* Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman in the Matters of MURs 6485 (W Spann LLC, *et al.*), 6487 & 6488 (F8, LLC, *et al.*), 6711 (Specialty Investments Group, Inc. *et al.*), and 6930 (SPM Holdings LLC, *et al.*).

6 *See Campaign Legal Center, et al. v. FEC*, No. 16-cv-0072 (filed Apr. 22, 2016).

7 *See Citizens United v. FEC*, 558 U.S. 310 (2010); *SpeechNOW v. FEC*, 559 F.3d 686 (D.C. Cir. 2010).

on the "true source" of a contribution and whether a person passed funds through a straw donor for the intended purpose of making a contribution. All contributions by non-profits have an original source, a donor, but defining each contribution by a non-profit as a contribution in the name of two or three original donors as the "true source" of the contribution is wholly new terrain under 52 U.S.C. § 30122. As to [redacted], any investigation would have been required to focus on whether the funds used to make a contribution were intentionally funneled through GI, LLC for the purpose of making a contribution that evades the Act's reporting requirements. The Commission had circumstantial evidence but no direct evidence of [redacted] GI, LLC.[8] In other words, evidence as to [redacted] intent required further factual development as to [redacted] during a period when time was running out.[9]

B. Risk of Statute of Limitations Expiring

Second, had the Commission added [redacted] as a Respondent at its September 19, 2017 executive session, and provided [redacted] notice of the Complaint and notice that it had been substituted as a named Respondent, and afforded [redacted] an opportunity to respond,[10] that process would have significantly delayed enforcement against the other Respondents and diverted valuable agency resources. The case was already facing a statute of limitations deadline[11] and we were more concerned with focusing Commission resources on successful enforcement against the principal Respondents, ACU, Now or Never PAC, and GI, LLC. The investigation into the activities of these organizations was advanced and there was substantial factual development. We were concerned that adding [redacted] at that late date, and delaying the case to allow time for a response, would delay enforcement efforts against them. Moreover, had [redacted] filed a response, OGC would have first reviewed the response and provided the Commission with its recommendation, a process which would have taken additional weeks. At least a month to two months would have been added to the case, delaying conciliation efforts with the three principal Respondents.

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[8] In a separate statement our colleague has publicly prejudged [redacted] guilt, characterizing unknown persons as "key players in a scheme" and asserting they are guilty of "engineering an intricate plot to defeat the public's interest" and "trying to influence the election." *See* Cover Letter to the Statement of Commissioner Ellen L. Weintraub in MUR 6920 (American Conservative Union) (Dec. 19, 2017). Our colleague goes on to conclude (without citing any statement by [redacted] that persons unknown "got away with it." Our colleague has presupposed facts and intent without investigation or consideration of a response. *See* Statement of Commissioner Ellen L. Weintraub at 1, MUR 6920 (ACU) ("[W]hoever concocted this elaborate scheme . . . succeeded in hiding their identity"). Such prejudgment raises serious due process concerns, heightened in this matter where the non-respondent has challenged Commission action in a pending lawsuit. *See, e.g.*, 52 U.S.C. § 30109(a)(3) (mandating each respondent be given a copy of probable cause brief and an opportunity to respond).

[9] Further complicating any future investigation of [redacted] is the fact that Christopher W. Byrd, GI, LLC's sole manager and officer, died in 2014.

[10] The Commission by statute must allow Respondents fifteen (15) days to respond to a complaint. 52 U.S.C. § 30109(a)(1). Even after finding reason to believe a respondent has violated the law, the Commission's standard practice is to afford the respondent an opportunity to respond to the reason to believe finding, which is articulated in a factual and legal analysis.

[11] The statute of limitations would have run as to [redacted] on October 31, 2017. *See* Third Gen. Counsel's Rpt. at 1 n.1 (Sept. 15, 2017), MUR 6920 (ACU).

However, even if the Commission had dispensed with formal notice and the right to respond and proceeded directly to enforcement of its reason to believe finding, it would have forced yet another series of precious time consuming procedures. OGC's post-investigation recommendation to find probable cause would have been sent to [redacted] and [redacted] would have fifteen (15) more days to respond to that recommendation.[12] Even if the Commission voted to find probable cause, [redacted] would have had a minimum of thirty (30) days to conciliate.[13]

Thus, the Commission was aware that the time remaining on the five-year statute of limitations to conclude enforcement was imminent. The statute of limitations would run on or about October 31, 2017, five years after the date ACU contributed to Now or Never PAC.[14] A majority of Commissioners expressed concerns about concluding the case before the statute of limitations ran, and we believed the most efficient prosecutorial path forward was to finalize the case against the three Respondents as efficiently and expeditiously as possible, whether by conciliation or civil action.

Moreover, we were confident that a global conciliation with the Respondents could be achieved, absent the procedural, legal, and investigative complexities presented by [redacted] involvement. [redacted] Yet OGC had declined to pursue conciliation with the three named Respondents for several months while it devoted time and resources to investigating a potential violation by [redacted]. We were concerned that OGC had already lost several months of the statute of limitations in this process. We did not want to lose additional time or lose the realistic opportunity to resolve the matter effectively. Furthermore, we believed time would not accommodate the remaining enforcement steps, required by statute, and thus any finding would be academic. We have declined to issue purely academic findings.[15]

C. Commission's Decision Was Reasonable under *Heckler*

In sum, we concluded the prudent and preferred course was to conciliate with the named Respondents. The Commission was well within its discretion to take the safer course.

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12 52 U.S.C. § 30109(a)(3).

13 52 U.S.C. § 30109(a)(4).

14 *See* Third Gen. Counsel's Rpt. at 1 n.1 (Sept. 15, 2017), MUR 6920 (ACU, *et al.*); 28 U.S.C. § 2462 (statute of limitations for civil penalties). *See also FEC v. Nat'l Right to Work Comm.*, 916 F. Supp. 10 (D.D.C. 1996); *FEC v. NRSC*, 877 F. Supp. 15 (D.D.C 1995).

15 *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman, MURs 6391/6471 (Commission on Hope, Growth, and Opportunity). *See also CREW v. FEC*, 236 F. Supp. 3d 378 (D.D.C. 2017), *appeal docketed*, No. 15-2038 (Mar. 21, 2017).

"An agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise."[16] Here, we concluded the unclear state of the law, imminent expiration of the statute of limitations and other legal difficulties weighed in favor of proceeding to conciliation with the named Respondents promptly and without jeopardizing the resolution in hand by adding [redacted] on more uncertain legal and factual grounds. That decision was reasonable.[17]

D. <u>The Public Interest was Served By the Commission's Decision</u>

Finally, we believed the public interest would be best served by establishing the legal precedent that the prohibition against contributing in the name of another in section 30122 is violated where Donor 1 donates funds to Non-Profit 2 with specific instructions to contribute those funds to Super PAC 3. The Commission had strong, direct evidence establishing that course of conduct here with respect to three Respondents, but not [redacted]. In addition to establishing the precedent, we believed the Commission could deter future misconduct by a conciliation agreement requiring a significant civil penalty. These objectives would be complicated by adding two additional Respondents with novel legal and factual defenses. In the end, our effort proved successful. The Conciliation Agreement in this enforcement matter establishes clear precedent, imposed a large $350,000 civil penalty, and it will deter future misconduct. The Act's disclosure and informational purposes were served. This matter could have gone in a different direction, one that would have delayed any resolution for years. We avoided that.

Caroline C. Hunter — Dec. 20, 2017

Caroline C. Hunter
Vice Chair

Date

Lee E. Goodman — Dec. 20, 2017

Lee E. Goodman
Commissioner

Date

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16 *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (Agencies must determine what action, if any, should be taken, depending on numerous factors, including "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all").

17 *See CREW v. FEC*, 236 F. Supp. 3d 378 (D.D.C. 2017), *appeal docketed*, No. 15-2038 (Mar. 21, 2017). "Under [] established notions of prosecutorial discretion, then, it is hardly incumbent upon the Commission to pursue every additional, alleged violation that occurred against every potential respondent that exists, especially when" the Commission pursued the central respondent. Statement of Reasons of Commissioner David M. Mason at 4, MURs 4568, 4633. 4634, and 4736 (Carolyn Malenick, *et al.*).