FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6002
Freedom's Watch, Inc.	)	

STATEMENT OF REASONS
VICE CHAIR CYNTHIA L. BAUERLY AND
COMMISSIONER ELLEN L. WEINTRAUB

In April 2008, the Federal Election Commission ("the Commission") received a complaint alleging that Freedom's Watch, Inc. ("Freedom's Watch") made a prohibited disbursement for an electioneering communication in violation of Section 441b(b)(2) of the Federal Election Campaign Act of 1971, as amended ("the Act"), and failed to make required disclosures in violation of 11 CFR § 104.20(c)(9).[1] We supported the recommendation of the Office of General Counsel ("OGC") to find reason to believe that Freedom's Watch violated 11 CFR § 104.20(c)(9), and to authorize a limited investigation to ascertain whether Freedom's Watch failed to make the required disclosures.[2] The motion to approve OGC's recommendations failed by a vote of 2-3.[3]

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[1] The Commission was delayed in its consideration of this matter because the complaint was filed at a time when the Commission lacked a quorum, and a request was subsequently made to hold the matter in abeyance pending the decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

[2] The Act requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a predicate to opening an investigation into the alleged violation. 2 U.S.C. § 437g(a)(2).

[3] Vice Chair Bauerly and Commissioner Weintraub voted affirmatively. Chairman Petersen and Commissioners Hunter and McGahn dissented. Commissioner Walther recused himself and did not vote. Thereafter, the Commission closed its file in this matter. Certification in MUR 6002, dated April 27, 2010.

According to the complaint, Freedom's Watch began airing a television advertisement on various stations in Louisiana on April 13, 2008, that criticized the voting record of the Democratic candidate in the May 3, 2008 special general election for Louisiana's 6th Congressional District. The complaint further states that on April 16, 2008, Freedom's Watch filed FEC Form 9, "24 Hour Notice of Disbursements/Obligations for Electioneering Communications" regarding disbursements made in connection with the advertisement. While the group reported two expenditures totaling $125,966.80 for media placement and media production on Schedule 9-B, Schedule 9-A was blank and did not list any persons from whom Freedom's Watch received donations of $1,000 or more for the purpose of furthering its electioneering communications.

The complaint in this matter alleges that Freedom's Watch may have received funds specifically for the purpose of airing the electioneering communication at issue. This allegation was based upon a New York Times article reporting that, while the non-profit corporation was established by a number of prominent donors, Freedom's Watch's "roughly $30 million" in spending came almost entirely from Sheldon Adelson, who "insisted on parceling out his money project by project" and "rejected almost all of the staff's proposals that have been brought to him."[4] The article also quoted a Republican operative who asserted that a single donor "essentially dictates the way things occur or do not occur" within this organization.[5]

In January 2010, after the complaint was filed but prior to the Commission's consideration of this matter, the Supreme Court invalidated the prohibition on corporate financing of electioneering communications in *Citizens United v. FEC*.[6] Accordingly, OGC recommended finding no reason to believe that Freedom's Watch violated 2 U.S.C. § 441b(b)(2) when it used its treasury funds for the electioneering communication at issue.[7]

Although the Supreme Court invalidated the provisions related to corporate financing of electioneering communications, it specifically upheld the disclosure provisions applicable to those electioneering communications.[8] In discussing the importance of such disclosure, the

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[4] Michael Luo, *Great Expectations for a Conservative Group Seem All But Dashed*, The New York Times, April 12, 2008.

[5] *Id.*

[6] *See* 130 S.Ct. at 913.

[7] Commissioner Weintraub's motion to find reason to believe Freedom's Watch violated 11 CFR § 104.20(c)(9) included a motion to find no reason to believe that Freedom's Watch violated 2 U.S.C. § 441b(b)(2). The motion failed by a vote of 2-3, with Commissioners Bauerly and Weintraub supporting the motion and Commissioners Petersen, Hunter, and McGahn voting against the motion. Although our colleagues voted against finding no reason to believe that Freedom's Watch violated 2 U.S.C. § 441b(b)(2) and did not offer a separate motion on that provision alone, we presume by their characterization of the allegation as "moot" that they would have supported a no reason to believe finding on that allegation.

[8] *Citizens United*, 130 S.Ct. at 916.

Court stated that "[t]he First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[9]

Commission regulations require disclosure of "the name and address of each person who made a donation aggregating $1,000 or more . . . , which was made for the purpose of furthering electioneering communications."[10] The regulation implements a statutory requirement that when disbursements for electioneering communications are not made from a segregated account for that purpose (which has a separate disclosure requirement), the names and addresses of all those who contributed $1,000 or more to the person making the disbursement, from January 1st of the preceding calendar year to the date of the disbursement, must be disclosed.[11]

As our colleagues point out in their Statement of Reasons, the Commission adopted this regulation in response to the Supreme Court's decision in *FEC v. Wisconsin Right to Life ("WRTL"),* which allowed corporations and labor unions to finance issue-based electioneering communications. Prior to *WRTL,* corporations and unions were prohibited from financing *any* electioneering communications, and thus no regulations addressed their disclosure of those types of communications. After *WRTL,* when corporations and labor unions were allowed to finance electioneering communications that did not contain express advocacy or the functional equivalent thereof, the Commission adopted a regulation to ensure the disclosure of funds received for the purpose of furthering those electioneering communications, while avoiding disclosure of "customers, investors, or members, who have provided funds *for purposes entirely unrelated* to the making of E[lectioneering] C[ommunication]s."[12] Thus, this regulation's purpose was to effectuate the statute's mandate to provide meaningful disclosure about who is making large contributions to groups for the purpose of influencing elections.[13] It certainly was not intended to shield the identity of those donors from public view.

Here, as explained in more detail in the General Counsel's Report, an open question remains as to whether Freedom's Watch failed to disclose donations that were made for the purpose of furthering the electioneering communication at issue.[14] For this reason, we voted to

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[9] *Id.*

[10] 11 CFR § 104.20(c)(9).

[11] 2 USC § 434(f)(2)(E)-(F).

[12] *Explanation and Justification for Final Rules on Electioneering Communications,* 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007) (emphasis added).

[13] 147 Cong. Rec. 5003 (daily ed. Mar. 27, 2001) (statement of Sen. Feingold).

[14] *See* General Counsel's Report in MUR 6002 (circulated on Mar. 15, 2009).

find reason to believe Freedom's Watch violated 11 CFR § 104.20(c)(9) in order to ascertain whether Freedom's Watch received funds for the purpose of airing the advertisement.

Our colleagues state that the complaint does not provide sufficient specific facts for the Commission to find reason to believe that Freedom's Watch violated the Act's electioneering communications reporting provision.[15] However, "reason to believe" is a threshold determination that by itself does not establish that the law has been violated. In fact, "reason to believe" determinations indicate only that the Commission has found sufficient legal justification to open an investigation to determine whether there is probable cause to believe that a violation of the Act has occurred.[16] The complaint attached an article from a well-known news outlet, citing multiple sources. We reject the notion that the Commission should ignore information known to every reader of the New York Times, as if it were some anonymous phone tip.

There was plainly sufficient basis to investigate this matter. The complaint alleges that an individual donor to Freedom's Watch had the authority to approve or reject activities undertaken by the organization. Specifically, the complaint cites the New York Times article which, as noted above, reported that Freedom's Watch's funding came almost entirely from one donor who exercised control over how his contribution was spent and "essentially dictates" Freedom's Watch's actions.[17] In its response, Freedom's Watch asserts that it was not required to list donors to the organization pursuant to the Commission's regulations because it did not *solicit* any donations for the purpose of airing an electioneering communication.[18] Rather than addressing the specific assertion in the article regarding whether any donations to the group were *made* for the purpose of airing electioneering communications, Freedom's Watch instead merely denies *soliciting* donations for that purpose.[19] With respect to electioneering communications, the Commission's regulations do not distinguish between funds that were received as a result of a solicitation and those that were not. The only relevant query is: did the donor make a donation for the purpose of furthering electioneering communications, as opposed to making a donation *for purposes entirely unrelated* to the making of electioneering communications?

Freedom's Watch's argument that it is not required to list all donors to the organization because all funds contributed to Freedom's Watch during 2008 were contributed for general purposes does not address the relevant question, which is whether those "general purposes"

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[15] Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn in MUR 6002 (Aug. 13, 2010), at 6.

[16] *See* 72 F.R. 12545, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process (March 16, 2007).

[17] *See* Michael Luo, *supra* note 4.

[18] Freedom's Watch Response at 7.

[19] *See* Freedom's Watch Response.

included the funding of electioneering communications.[20] Given that Freedom's Watch's only activity appears to have been funding political advertisements, it is not clear what else donors to the organization would have thought they were funding. Simply put, Freedom's Watch's response does not foreclose the possibility that donations were indeed made for the purpose of airing electioneering communications and thus were required to be disclosed. Therefore, we voted to find reason to believe a violation occurred and authorize a limited investigation that would have either established probable cause or exonerated Freedom's Watch.

Our colleagues' crimped reading of 11 CFR § 104.20(c)(9) is inconsistent with the purpose of the Act and the Supreme Court's view of the importance of disclosure. Neither the statute nor the regulation requires that specific donations be explicitly tied to specific communications, as our colleagues appear to suggest. Given the fungibility of money, such a requirement would rarely be met and could easily be circumvented. Such a narrow interpretation cannot be sustained, as it would nullify the statutory requirement to provide disclosure, not only of corporate and labor organization electioneering communications, but also of the contributors who fund them. If a group is using all of its donations for electioneering communications (and associated overhead), all of its donors (over $1,000) must be disclosed. As the Supreme Court recently held, "Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election."[21] The public has an interest in knowing, and the statute requires this transparency.

But even under our colleagues' crimped reading, this complaint warranted investigation. To allow a major donor to contribute millions of dollars to a corporation and call the shots as to what advertisements to run, yet not require that individual's identity to be disclosed makes a mockery of our disclosure regime. If that same individual had given the same amount of money to a political committee that ran the same advertisement, the information would be required to be disclosed promptly and fully under the Commission's regulations.[22] Nowhere has the Court suggested that electioneering communications funded by corporations and labor unions should be subject to less stringent disclosure requirements than those funded by political committees.

The Commission is empowered to administer and enforce the Federal Election Campaign Act. It is our mission to promote disclosure. It is our job to investigate alleged violations of the law. We cannot expect complainants to have already conducted the investigations for us.

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[20] *Id.*

[21] *Citizens United*, 130 S.Ct. at 915.

[22] The Bipartisan Campaign Reform Act of 2002 (BCRA) was aimed, in part, at requiring more robust disclosure of the sources of funds for political advertisements. As one of BCRA's primary sponsors stated on the Senate floor, "If the group is merely a shell for a few wealthy donors, then [the public] will know who those big money supporters are and be much better able to assess their agenda." At the time BCRA was passed, corporations and labor unions were prohibited from expending treasury funds on independent expenditures and electioneering communications and therefore were far more restricted from engaging in campaign activity than political committees.

To the extent our colleagues do not believe the Commission's current regulations require the disclosure of a major donor to a corporation who provided funds for the purpose of creating electioneering communications, we look forward to promulgating new regulations in the coming months that will fully effectuate the statutory mandate to provide adequate and appropriate disclosure of corporate and labor organization expenditures for independent political activity, and the contributors who provide funding for them.

9/16/2010
Date

Cynthia L. Bauerly
Vice Chair

9/16/10
Date

Ellen L. Weintraub
Commissioner