



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 26, 2016

MEMORANDUM

TO: The Commission

FROM: Commissioner Ellen L. Weintraub *ELW*
Commissioner Ann M. Ravel *AR*

SUBJECT: Proposal to Attack Scam PACs

The Commission is being increasingly confronted with issues related to entities colloquially known as “Scam PACs,” political committees that collect political contributions, frequently using the name of a candidate, but which spend little to none of the proceeds on political activity benefitting that candidate.¹

Key markers of Scam PACs are high operating expenses and/or large disbursements to entities associated with the managers of the PAC. A 2015 *Politico* study of FEC reports from the 2014 cycle found that a subset of 33 PACs “spent only \$3 million on ads and contributions to boost the long-shot candidates often touted in the appeals, compared to \$39.5 million on operating expenses, including \$6 million to firms owned or managed by the operatives who run the PACs.”²

Donors, especially small donors, give to political committees to express their political views; most people giving to a political committee do not aim to enrich the creators of the PAC. Authorized political committees, for their part, are outraged that Scam PACs are using their candidates’ or organizations’ names to siphon off funds intended to aid their efforts.³

¹ See, e.g., Isaac Arnsdorf and Kenneth P. Vogel, *Trump backers face 'scam PAC' charges*, POLITICO (May 16, 2016), <http://politi.co/1OuU9z5>; Matt Lewis, *The 'Conservative' PACs Trolling for Your Money*, WALL ST. J. (May 7, 2015), <http://on.wsj.com/1JuTsP3>. The *New York Times* published a comprehensive survey of such groups last October: *Republicans Attacking Republicans: Legitimate Fund-Raising Tactic or a Scam?*, N.Y. TIMES (Oct. 23, 2015), <http://nyti.ms/1W8Mk5o>.

² Kenneth P. Vogel, *The rise of 'scam PACs'*, POLITICO (Jan. 26, 2015), <http://politi.co/15BNCgq>.

³ See, e.g., MUR 5472 (Republican Victory Committee), in which the Republican National Committee alleged that the respondent knowingly and willfully fraudulently misrepresented itself as being affiliated with or acting on behalf of the Republican Party in order to solicit contributions; MURs 6633, 6641, 6643 and 6645 (Republican Majority Campaign PAC), in which the Allen West for Congress

The enforcement challenge here is that while Scam PACs receive funds from donors who intend to influence an election for federal office (thus making the transactions reportable contributions within the meaning of the Federal Election Campaign Act⁴), the law provides political committees with great leeway on how they use the funds. So the power of the Commission to directly and comprehensively protect political contributors is limited.⁵

But we are not altogether powerless. We have tools at our disposal that can empower donors with information and allow them to maximize their expression of their political views. We can update our rules on disclaimers to make solicitations more transparent. We can provide the public with a more consumer-friendly disclosure of the information we already collect from political committees. And we can draw upon our experience with Scam PACs to make legislative recommendations to Congress.

DISCLAIMER RULES

Part of the problem with Scam PACs is that while their solicitations (and particularly their online solicitations) can be misleading, many are not clearly outside the letter of Commission disclaimer regulations.⁶

The courts have complicated our efforts to help alleviate donor confusion. The recent *Pursuing America's Greatness* decision,⁷ which casts doubt on the Commission regulation forbidding non-candidate committees from using candidates' names in the committees' names, threatens to take away one of the important tools the Commission uses to help donors distinguish between candidate and non-candidate committees.⁸ The proliferation of super PACs claiming to be supporting particular candidates has complicated the task of donors who may have limited time or resources to research PAC activity.

But the Court, in distinguishing between speech prohibitions and disclosure requirements, noted that the Commission's ability to require disclaimers is extensive. The Commission

Committee alleged that the respondents fraudulently misrepresented themselves as working on behalf of or in support of Allen West for Congress and fraudulently solicited contributions using West's name.

⁴ 52 USC § 30101, *et seq.*

⁵ See, e.g., Will Tucker, *Scam PACs drawing FEC attention*, OPENSECRETS.ORG (May 20, 2016), <https://www.opensecrets.org/news/2016/05/scam-pacs-drawing-fec-attention/>.

⁶ See MURs 6633, 6641, 6643 and 6645 (Republican Majority Campaign PAC), *infra* n. 3. The Commission found no reason to believe that the respondents fraudulently solicited funds because: (1) the respondents were registered with the Commission and complied with Commission reporting requirements, including disclosure of expenditures and disbursements; and (2) the communications that they distributed included disclaimers required under the Act and Commission regulations, which were also sufficient to identify the entity that paid for the communication.

⁷ *Pursuing America's Greatness v. FEC*, No. 15-5264 (D.C. Cir. 2016).

⁸ See MUR 5951 (Californians for Change), in which the respondent agreed not to contest the Commission's findings that they violated the prohibition on including the name of a candidate in the name of any political committee that is not an authorized committee.

could, the Court observed, “require a large disclaimer at the top of the websites and social media pages of unauthorized committees that declares, ‘This Website Is Not Candidate Doe’s Official Website.’”⁹ Current disclaimer language, with its legalistic emphasis on distinctions between authorized or unauthorized committees and communications, may not provide readily understandable and useful information to small-dollar or infrequent donors without law degrees.

We propose a rulemaking that would update the Commission’s disclaimer regulations found at 11 CFR § 110.11(c) and elsewhere to:

- Consider whether the Commission should require web disclaimers to be at the top of a web page,
- Clarify what constitutes online material “presented in a clear and conspicuous manner,”
- Consider whether it would be appropriate to require PACs’ online solicitations to contain a link to their fec.gov “contributor landing page” (see below),
- Consider whether the Commission should require committee disclaimers to be presented a certain minimum size, and
- Consider whether the Commission’s standard disclaimer language can be rewritten in plain English to let the typical donor (as opposed to a lawyer for a campaign committee) know what sort of committee they are considering.

At the next open meeting of the Commission, on September 29, 2016, we will make a motion to open a rulemaking and direct OGC to explore, identify, and recommend to us appropriate regulatory updates.

BETTER COMMISSION DISCLOSURE

Particularly with the new version of its website (currently in beta testing at beta.fec.gov), the Commission provides to the American public a deep and rich array of the information it collects on committees and contributors. But the Commission has not historically focused on presenting this data in a fashion that allows political contributors to easily evaluate particular PACs. It should. Under current rules, the Commission can provide better PAC disclosure to contributors.

The data the Commission collects on PACs, if presented appropriately on its website, could be quite valuable in assisting donors to make informed choices about their political spending. For guidance, the Commission can look to the charity sector, which faces a similar task in evaluating which 501(c)(3) organizations are worthy of contributors’ dollars in a legal regime without a minimum amount that such groups must spend on their mission (much like political committees). Groups like Charity Navigator (www.charitynavigator.org) crunch data from such sources as IRS Form 990s regarding the finances of charities and present it in formats that allow donors to make informed

⁹ *Pursuing America's Greatness, infra* n. 7.

choices about their charitable spending. This is a model the FEC can follow.

Ideally, this effort would result in a prominent “contributor landing page” on fec.gov for each PAC that presents the PAC’s finances in a standardized, easy-to-understand manner that allows political donors to evaluate each group’s financials. Information that could be informative to donors may include: how long the committee has been in existence; the percentage of spending devoted to fundraising, salaries, or other overhead costs; and top-ten sources and recipients of the committee’s funds per year, cycle, or the life of the committee. All of this information is already disclosed, but is not packaged in a way that makes it easy to find or to compare across committees.

Equally important is the back end – making sure that the Commission provides the electronic “hooks” into its data that will allow outside groups to query it in real time and present information in formats the Commission cannot. For instance, while it might be helpful for the Commission to present data that ranks PACs based on the percentage of the total amount raised that is used for political spending, it would not be appropriate for the Commission to assign those groups passing or failing grades based on those percentages. But it would be perfectly appropriate for an outside group to do so on the basis of public information fetched from the Commission.

To these ends, we propose that the Commission direct the Staff Director to consult with the experts producing our website, and those outside the Commission who are familiar with the analysis and presentation of FEC data, to:

- Determine which metrics derived from FEC data can most usefully assist donors in making choices about how to spend their political dollars,
- Determine how the Commission can best present these metrics to allow political spenders to evaluate the value proposition of PACs, and
- Develop and provide web APIs and other tools that will better allow outside groups to query and retrieve Commission data relating to PACs.

LEGISLATIVE RECOMMENDATIONS TO CONGRESS

This Commission’s members have seen plenty of enforcement matters relating to Scam PACs cross their desks, and we have been sounding the alarm.¹⁰ The Commission should employ its experience and send appropriate legislative recommendations to Congress so that we may have direct authority to protect America’s political contributors from Scam PACs. When the Commission next sends its package of legislative recommendations to Congress, we will move that the Commission include the following recommendations:

- Expand the fraud provisions in FECA to encompass Scam PAC behavior,
- Expand personal-use provisions to cover all political committees,

¹⁰ See, e.g., Ann Ravel, *Stopping Scam PACs From Ripping Off Donors*, ROLL CALL (July 13, 2015), <https://shar.es/1xs0hT>.

- Enact anti-self-dealing provisions covering all political committees,
- Require disclosure of PACs' overhead percentage on the home page and solicitation page of PACs and any organization that spends more than \$50,000 on electioneering communications in any calendar year,
- Require PACs' online solicitations to contain a link to their fec.gov "contributor landing page" (see above), and
- Require PAC websites to contain prominent, plain-English information about how the PAC is actually spending its money.

This is by no means a comprehensive list; we welcome input from our colleagues to make it more so.

Fraudulent activities by Scam PACs are not protected by the First Amendment. In fact, Scam PACs injure the efforts of those trying to exercise their First Amendment right to support the candidates of their choice. The Commission thus has an unusual opportunity to avoid deadlock and protect America's political contributors with quick action attacking Scam PACs.

We look forward to hearing our colleagues' thoughts on how best to attack Scam PACs, and we look forward to working together to take concrete action.