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September 12, 2008

Federal Election Commission  
Complaints Examination & Legal Administration  
Attn: Jeff S. Jordan, Supervisory Attorney  
999 E. Street, NW  
Washington, DC 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL  
2008 SEP 15 A 8:53

Re: MUR 6056

To Whom It May Concern:

Our law firm represents the respondents Protect Colorado Jobs, John Berry, and Curt Corveny (collectively "PCJ") in the matter under review ("MUR") referenced above. The MUR is in response to a complaint filed August 7, 2008 (the "Complaint"), by Mike Coffman ("Coffman"). We respectfully request that the Complaint be dismissed and that the FEC decline to pursue any further action against the respondents.

The basis for the Complaint seems to be the improper use of corporate funds to pay for an educational mail piece sent to voters in the 6<sup>th</sup> Congressional District of Colorado. Coffman does not make any specific allegations, but the recital of facts focuses on the use of corporate funds used to pay for the mailing sent in July, 2008.

The FEC prohibits contributions and expenditures according to 11 C.F.R. § 114.2. Specifically, 11 C.F.R. § 114.2(b) prohibits corporations from:

- Making expenditures as defined in 11 C.F.R. part 100, subpart D;<sup>1</sup>
- Making expenditures with respect to a Federal election for communications to those outside the restricted class that expressly advocate the election or defeat of

<sup>1</sup> 11 C.F.R. § 114.2(b)(2)(i).

one or more clearly identified candidate(s) or the candidates of a clearly identified political party;<sup>1</sup> and

- Making payments for an electioneering communication to those outside the restricted class unless permissible under 11 C.F.R. § 114.10 or 114.15.<sup>2</sup>

PCJ did not make any corporate expenditures in violation of any of these provisions.

PCJ did not make expenditures under 11 C.F.R. part 100, subpart D.

The Complaint fails to demonstrate that PCJ made an expenditure under 11 C.F.R. part 100, subpart D. The mail piece did not constitute "express advocacy," therefore, it is not considered an expenditure.

An "expenditure" under 11 C.F.R. part 100, subpart D includes:

- "Payments, gifts or other things of value,"<sup>4</sup> or
- A "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."<sup>5</sup>

The definition of "expenditure" has been limited by the U.S. Supreme Court to protect against an impermissibly broad definition. Consequently, in *Buckley v. Valeo*<sup>6</sup> the Court stated "we construe 'expenditure' ... to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."<sup>7</sup> Consequently, the mail piece must be analyzed to determine if it constituted express advocacy.

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<sup>1</sup> 11 C.F.R. § 114.2(b)(2)(ii).

<sup>2</sup> 11 C.F.R. § 114.2(b)(3).

<sup>4</sup> 11 C.F.R. § 100.110(a).

<sup>5</sup> 11 C.F.R. § 100.111(a).

<sup>6</sup> 424 U.S. 1 (1976).

<sup>7</sup> *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

PCI did not "expressly advocate" the election or defeat of a candidate.

"Expressly advocating" is defined in 11 C.F.R. § 100.22. To be considered express advocacy, a communication must either (1) use phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," or "Smith for Congress,"<sup>8</sup> or, (2) the communication taken as a whole, with limited reference to external events, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of a candidate.<sup>9</sup>

The regulation is based on the clear dictate of the U.S. Supreme Court in *Buckley v. Valeo*.<sup>10</sup> In addition, only the first part of the regulation has been affirmed by the U.S. Supreme Court. Multiple federal courts have required a bright-line rule that focuses on words of express advocacy, rather than elastic, context based standards.<sup>11</sup> The Tenth Circuit Court has not ruled on directly 11 C.F.R. § 100.22(b), but in *Citizens for Responsible Gov't State Political Action Committee v. Davidson* the Court stated "communications that do not contain express words advocating the election or defeat of a particular candidate are deemed issue advocacy."<sup>12</sup>

The Complaint fails to demonstrate that the mail piece (attached to the Complaint as "Exhibit A") expressly advocated the support or defeat of a candidate. The mail piece does not include any phrases of express advocacy. In addition, the mail piece did not mention any future election and did not mention Coffman's candidacy. In contrast, the piece specifically employs a call-to-action for the recipient to "Call Mike Coffman and ask him to stop increasing his office budgets, comply with immigration laws, and adopt strict office protocols to prevent political influence."<sup>13</sup> A reasonable person could conclude that, on its face, this mail piece encouraged action not related to the election or defeat of Coffman.

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<sup>8</sup> 11 C.F.R. § 100.22(a).

<sup>9</sup> 11 C.F.R. § 100.22(b).

<sup>10</sup> See *Buckley v. Valeo*, 424 U.S. at 44, fn. 52.

<sup>11</sup> See, e.g., *Faucher v. Fed. Election Comm'n*, 928 F.2d 268, 470-1 (1st Cir. 1991); *Fed. Election Comm'n v. Cent. Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2nd Cir. 1980) (en banc); *Fed. Election Comm'n v. Christian Action Network, Inc.*, 110 F.3d 1049, 1051 (4th Cir. 1997); *Chamber of Commerce v. Moore*, 288 F.3d 186, 193 (5th Cir. 2002); *Iowa Right to Life Comm., Inc. v. Williams*, 187 F.3d 963, 969 (8th Cir. 1999); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174, 1187 (10th Cir. 2000).

<sup>12</sup> *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d. at 1187.

<sup>13</sup> Complaint Exhibit A.

**The mail piece sent by PCJ was not an electioneering communication.**

While corporations are generally barred from paying for electioneering communications, the mail piece sent by PCJ was not an electioneering communication and, consequently, did not violate FEC regulations.

The FEC defines an "electioneering communication" in 11 C.F.R. § 100.29. The first and most important requirement is that it is a "broadcast, cable, or satellite communication."<sup>14</sup> These communications are limited to those that are "publicly distributed by a television station, radio station, cable television system, or satellite system."<sup>15</sup>

PCJ distributed its mail piece via the U.S. Postal system. It did not distribute anything through television station, radio station, cable television system, or satellite system. Consequently, the mail piece is not considered an electioneering communication and the prohibition against corporate payment for electioneering communications does not apply in this instance.

In conclusion, PCJ has not violated any election laws or FEC regulations, as claimed by Coffman. PCJ asks that the FEC dismiss the Complaint immediately.

Please feel free to contact me if you have any questions. I can be reached by email at [mnicolaia@hackstaffgessler.com](mailto:mnicolaia@hackstaffgessler.com) or by telephone at (303) 534-4317. Thank you again for your time.

Very truly yours,

HACKSTAFF GESSLER LLC



Mario D. Nicolais, II

MDN:

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<sup>14</sup> 11 C.F.R. § 100.29(a).

<sup>15</sup> 11 C.F.R. § 100.29(b).

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SEP-12-2008 15:05 From:

Tel: 303 534 4309

P.1/2



**FEDERAL ELECTION COMMISSION**  
**999 E Street, NW**  
**Washington, DC 20463**

**STATEMENT OF DESIGNATION OF COUNSEL**  
**Please use one form for each Respondent/Client.**  
**FAX (202) 218-3873**

MUR # 6056NAME OF COUNSEL: Scott E. Gessler and Mario D. NicolaisFIRM: Hackstaff Gessler, LLCADDRESS: 1601 Blake Street Suite 310Denver, Colorado 80202TELEPHONE- OFFICE ( 303 ) 534-4317FAX ( 303 ) 534-4309

The above-named individual and/or firm is hereby designated as my  
 counsel and is authorized to receive any notifications and other communications  
 from the Commission and to act on my behalf before the Commission.

9/12/08  
 Date

  
 Respondent/Client Signature

Title

 RESPONDENT/CLIENT Carl Ogwen  
 (Please Print)

MAILING

ADDRESS: c/o 1601 Blake Street Suite 310Denver, Colorado 80202

TELEPHONE- HOME ( )

BUSINESS ( )

Information is being sought as part of an investigation being conducted by the Federal Election  
 Commission, and the confidentiality provisions of 2 U.S.C. § 437g(a)(1)(A) apply. This section  
 prohibits making public any investigation conducted by the Federal Election Commission without  
 the express written consent of the person under investigation.

SEP-12-2008 15:05 From:

Tel: 303 534 4309

P.2/2



FEDERAL ELECTION COMMISSION  
999 E Street, NW  
Washington, DC 20463

**STATEMENT OF DESIGNATION OF COUNSEL**  
**Please use one form for each Respondent/Client.**  
**FAX (202) 218-5122**

MUR # 6086NAME OF COUNSEL: Scott E. Gessler and Mario D. NicolaisFIRM: Hackstaff Gessler, LLCADDRESS: 1601 Blake Street Suite 310Denver, Colorado 80202TELEPHONE- OFFICE ( 303 ) 534-4317FAX ( 303 ) 534-4309

The above-named individual and/or firm is hereby designated as my  
counsel and is authorized to receive any notifications and other communications  
from the Commission and to act on my behalf before the Commission.

9/12/08  
Date

[Signature]  
Respondent/Client Signature

treasurer  
Title

RESPONDENT/CLIENT Protect Colorado Jobs  
(Please Print)

## MAILING

ADDRESS: c/o 1601 Blake Street Suite 310Denver, Colorado 80202TELEPHONE- HOME (     )                     BUSINESS (     )                     

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prohibits making public any investigation conducted by the Federal Election Commission without  
the express written consent of the person under investigation.

FROM :

PRK NO. :

Sep. 12 2008 02:52PM P2



FEDERAL ELECTION COMMISSION  
ONE F STREET, N.E.  
WASHINGTON, DC 20463

STATEMENT OF DISCLOSURE OF COUNSEL  
FEDERAL ELECTION COMMISSION  
WASHINGTON, DC 20463

NAME: NAME

NAME OF VENDOR: James E. Haggard not David D. Haggard

FIRM: Hackstatt Gessier, LLC

ADDRESS: 701 Main Street Suite 310

DATE: October 2008

TELEPHONE: OFFICE 303-534-4309

FAX: 303-534-4309

The above named individual for the purpose of this statement is my  
counsel and I am hereby certifying that the information provided is true and  
correct to the best of my knowledge and belief.

9-12-08 [Signature] Title

RESPONDENT: James E. Haggard

NAME: NAME

ADDRESS: 701 Main Street Suite 310

TELEPHONE: OFFICE 303-534-4309

FAX: 303-534-4309

I hereby certify that the information provided is true and correct to the best of my knowledge and belief.

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