

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )

Government Integrity, LLC )

MUR-6920  
OFFICE OF GENERAL  
COUNSEL

**REPLY TO GENERAL COUNSEL'S BRIEF**

This responds to a brief received by counsel to Government Integrity, LLC ("Government Integrity") from the Federal Election Commission's (the "Commission") Office of General Counsel ("OGC") in the above captioned matter which recommends that the Commission find probable cause to believe that Government Integrity knowingly and willfully violated 52 U.S.C. § 30122 by making a contribution in the name of another.

The record in this matter is bereft of any evidence that Government Integrity violated 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b)(1)(i), let alone that any alleged violation was knowing and willful, and we respectfully submit that OGC's conclusions to the contrary must fail. Indeed, the record shows only that Government Integrity made a lawful donation to an IRS 501(c)(4) social welfare organization that could lawfully receive such donation, and the further use of that donation by the 501(c)(4) organization was not a result of any agreement with Government Integrity. There is no evidence that shows knowledge on the part of Government Integrity that any of the funds it donated to the (c)(4) entity were to be passed on to any political committee subject to regulation under the Federal Election Campaign Act (the "Act").

Even if there were such evidence, there is nothing about this matter that renders the state of understanding of the law different from similar cases of the same vintage as to which the Commission has in its discretion declined to act. The result is this matter should thus be no different.

**I. FACTS**

**A. Government Integrity LLC**

Government Integrity is a Delaware limited liability corporation that was established in September 2012 by the Incentive Discretionary Trust ("IDT"). Christopher Byrd, who died in 2014, served as the sole manager and officer of Government Integrity. Government Integrity had apparently been a dormant organization since Byrd's passing until it was revived in connection with the attempted resolution of this matter.

James W. Thomas III served, to a limited extent, as an attorney for Government Integrity. Thomas never served as an officer or director of Government Integrity, and never possessed or exercised any independent decision-making authority over any aspect of Government Integrity's operations or finances.<sup>1</sup> Thomas assisted Government Integrity to prepare organizational paperwork, transfer funds at the direction Byrd, GI LLC's now deceased principal, and serve as its attorney. All tasks and functions Thomas performed on Government Integrity's behalf were conducted at the request and under the direction of Byrd.<sup>2</sup> Thomas has had no personal involvement in, or knowledge of, Government Integrity's business or activities beyond the execution of certain financial transactions on Government Integrity's behalf.<sup>3</sup> Thomas also served as the treasurer of an independent expenditure-only committee, Now or Never PAC, although there is no evidence in the record that Government Integrity was aware of that.

---

<sup>1</sup> Responses of James W. Thomas to Investigative Subpoenas (the "Thomas Response"), response to Request No. 1 (July 28, 2017), at p. 1.

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

<sup>3</sup> *Id.* at Response to Request No. 1(c), at p. 3.

**B. Contribution from American Conservative Union to Now or Never PAC**

The transaction at issue in this matter is a \$1.71 million contribution from American Conservative Union (“ACU”), a 501(c)(4) social welfare organization, to Now or Never PAC on October 31, 2012. ACU had received a \$1.8 million donation from Government Integrity on October 31, 2012, prior to ACU’s contribution to Now or Never PAC.

The record provides that Government Integrity’s donation to ACU was solicited by Axiom Strategies (“Axiom”) and its principal, Jeff Roe.<sup>4</sup> In making this solicitation, Roe did not speak with anyone from Government Integrity regarding the reason for the donation or its intended use by ACU.<sup>5</sup> Following the Axiom solicitation, Byrd instructed Thomas to issue a wire for the donation to ACU.<sup>6</sup> Thomas has stated that Byrd did not provide any other information to Thomas concerning the donation to ACU, including the reasons Byrd authorized it or the circumstances attendant to that decision.<sup>7</sup> When initiating the wire transfer from Government Integrity to ACU, Thomas has stated that he “had no information concerning the anticipated use of the funds” by ACU.<sup>8</sup>

The record further provides that Axiom solicited ACU for the contribution to Now or Never PAC.<sup>9</sup> Roe has stated that, prior to Government Integrity’s donation to ACU, he “did not . . . communicate Axiom’s own belief regarding the possibility of ACU donating to Now or Never PAC” to either Thomas or Byrd.<sup>10</sup> Similarly, Thomas has stated that he was unaware of “any

---

<sup>4</sup> See Jeff Roe’s responses to the subpoena issued in MUR 6920 (the “Roe Response”), Response to Request No. 3(b) (Sept. 1, 2017), at p. 7.

<sup>5</sup> *Id.*

<sup>6</sup> Thomas Response, Response to Request No. 2(a), at p. 3.

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

<sup>8</sup> *Id.* at Response to Request No. 2(e), at p. 5.

<sup>9</sup> Roe Response, Response to Request No. 2, at p. 4.

<sup>10</sup> *Id.* at Response to Request No. 3(f), at p. 8.

prior arrangement or agreement between [Government Integrity] and ACU that the funds would be used to finance a contribution by ACU to Now or Never PAC.”<sup>11</sup> Thomas has further stated that he had “assumed that ACU’s disposition of the funds was the product of its own independent decisionmaking, exercised through duly authorized personnel of ACU,” having not possessed “any contrary facts.”<sup>12</sup>

## **II. LEGAL ANALYSIS**

Contrary to OGC’s allegations, the record lacks any evidence that Government Integrity made a contribution in the name of another to Now or Never PAC, let alone committed a “knowing and willful” violation of the law. Instead, the record clearly demonstrates only that Government Integrity donated to a 501(c)(4) social welfare organization, without any knowledge as to how such funds may be spent in the future.

### **A. Government Integrity Did Not Make a Contribution in the Name of Another**

The record lacks any evidence that Government Integrity made a contribution in the name of another in violation of 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b)(1)(i).

The Act provides that “[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution.” 52 U.S.C. § 30122 (formerly 2 U.S.C. § 441f). OGC asserts that the Act and the Commission’s regulations provide that a person who provides funds to another for the purpose of contributing to a committee “makes” the resulting contribution. Even if that is the case with respect to a contribution made by a 501(c)(4) social welfare organization to an independent expenditure-only committee, a finding that the Commission has never made, the record lacks any evidence that

---

<sup>11</sup> Thomas Response, Response to Request No. 2(e), at p. 5.

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

Government Integrity provided funds to ACU for the purpose of making a contribution to Now or Never PAC.

Government Integrity donated \$1.8 million to ACU, a 501(c)(4) social welfare organization. Byrd did not tell Thomas that the Government Integrity donation would be used by ACU to contribute to Now or Never PAC, and Thomas has stated that he had no information concerning the anticipated use of the funds by ACU when he initiated the wire from Government Integrity.<sup>13</sup> Roe has stated that he did not speak with anyone from Government Integrity regarding the reason for the donation or its intended use by ACU.<sup>14</sup> Indeed, Roe did not speak with Byrd at all regarding Government Integrity's donation to ACU, and he has stated that he did not communicate Axiom's belief regarding the possibility of ACU donating to Now or Never PAC to Thomas.<sup>15</sup> Moreover, to the extent that Thomas was aware that ACU might contribute to Now or Never PAC, such knowledge cannot be attributed to Government Integrity, as it was outside the limited scope of his apparent engagement as an attorney by Government Integrity. *See, e.g., United States v. One Parcel of Land*, 965 F.2d 311, 316 (7th Cir. 1992) (“[W]here an agent obtains knowledge while acting outside the scope of his agency, the standard presumption [that the agent reports his knowledge to his principal] is unfounded, and the court will not impute the agent's knowledge to the corporation.”).

Notwithstanding its inferences to the contrary, OGC has failed to contest this clear, direct evidence, and OGC has failed to demonstrate any agreement between Government Integrity and ACU on these facts. Without such an agreement, ACU's contribution cannot have been in the

---

<sup>13</sup> Thomas Response, Response to Request No. 2(e), at p. 5.

<sup>14</sup> Roe Response, at Response to Request No. 3(f), at p. 8.

<sup>15</sup> *Id.*

name of Government Integrity, and OGC cannot show that Government Integrity made a contribution in the name of another in violation of 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b)(1)(i).

**B. OGC Is Not Entitled to Apply an Adverse Inference from IDT's Failure to Comply with the Commission's Subpoena**

Moreover, contrary to OGC's urging, OGC cannot apply an adverse inference from the fact that IDT did not comply with the Commission's subpoena, based on the reasons for which IDT was unable to comply.

OGC appears to seek to use that inference to support its contention that there is no alternative explanation for the structure except that it was a scheme to conceal the source of the funds. (OGC Br. 11-12) In making this assertion, OGC cites to *International Union v. NLRB* for the broad proposition that an administrative agency may draw an adverse inference from a party's failure to comply with a subpoena, or indeed any failure to put forward evidence, even in the absence of an effort to enforce the subpoena.<sup>16</sup> In so doing, however, OGC failed to recognize a critical limitation to the *International Union* rule, as the court specifically states that the rule does not apply when the objection to the subpoena is constitutional in nature. *See* 459 F.2d at 1339 ("Of course, the adverse inference rule is inapplicable in situations where a party has a constitutional right to suppress the evidence in question. If a party contends, of example, that the evidence would incriminate him or that its production would chill First Amendment freedoms, the Government may not burden the exercise of constitutional rights by attaching an adverse inference to produce the evidence."). Courts have specifically recognized that enforcement of Commission subpoenas implicates fundamental First Amendment rights. *See*,

---

<sup>16</sup> OGC Br. 11 n.45, (citing 459 F.2d 1329 (D.C. Cir. 1972)).



*e.g.*, *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 389 (D.C. Cir. 1981). In addition, it is well-recognized that an adverse inference cannot be drawn from the invocation of the attorney-client privilege. *See United States ex. rel. Barko v. Halliburton Co.*, 241 F. Supp. 3d 37, 54-55 (D.D.C. 2017) (collecting cases).

Against this standard, we are unaware of any prior Commission case in which an adverse inference was drawn under similar circumstances. As this issue pertains to the enforcement of a subpoena by the Commission, IDT's First Amendment rights were clearly implicated. Moreover, IDT repeatedly advised OGC that the subpoena "calls for information protected by the attorney-client privilege and attorney work product doctrine" based on the fact that IDT's trustee is an attorney.<sup>17</sup> OGC has not contested these issues. Accordingly, these fundamental and well-settled principles preclude an adverse inference in this case.

**C. Even if Government Integrity Could be Alleged to Have Made a Contribution in the Name of Another, Recent Commission Decisions Mandate No Action, as Opposed to a Knowing and Willful Finding**

Even if Government Integrity could be alleged to have made a contribution in the name of another, which as described above OGC has failed to do, OGC cannot demonstrate that Government Integrity's conduct was "knowing and willful." Indeed, such a finding is foreclosed under the Commission's recent decisions in the *W Spann LLC*, *F8, LLC*, *Specialty Investments Group, Inc.*, and *SPM Holdings* MURs (collectively the "LLC MURs"), in which the Commission concluded that it should not find probable cause to believe that Respondents there committed a violation during the same time period of the conduct at issue here in light of the lack

---

<sup>17</sup> *See, e.g.*, Letter from M. Dry to M. Shonkwiler and A. Fuoto, *Subpoena MUR 6920* (August 31, 2017); Letter from M. Dry to M. Shonkwiler and A. Fuoto, *Subpoena MUR 6920* (September 19, 2017).

of clarity in the law with respect to contributions in the name of another to independent expenditure-only committees.

Under the relevant provisions of the Act, the Commission can find a violation “knowing and willful” only where the violator acted deliberately, “with full knowledge of all of the relevant facts and a recognition that the action[s] [were] prohibited by law.” 122 Cong. Rec. 12,197, 12,199 (May 3, 1976)). Without “evidence of . . . ‘defiance’ or ‘knowing, conscious, and deliberate flaunting’ [sic] of the Act,” courts have refused to find violations knowing and willful. *AFL-CIO v. FEC*, 628 F.2d 97, 101 (D.C. Cir. 1980) (vacating a district court’s “knowing and willful” finding where there was no evidence, but instead “every indication . . . that the [respondent] considered itself to be in compliance with the Act”) (quoting *Frank Irey, Jr., Inc. v. Occupational Safety & Health Review Comm’n*, 519 F.2d 1200, 1207 (3d Cir. 1974)).

Here, it cannot be reasonably claimed that Government Integrity “knowingly and willfully” violated section 30122 when the law itself was unclear at the time. As stated in the Controlling Statement of Reasons for the LLC MURs, corporate entities could not make contributions under the Act when Congress enacted the prohibition against contributions in the name of another, and Congress thus likely did not contemplate that corporations could violate the prohibition against giving in the name of another by acting as the source of funds for contributions. See MURs 6485, 6487, 6488, 6711, and 6930, Statement of Reasons of Commissioners Petersen, Hunter, and Goodman (April 1, 2016), at p. 9. Indeed, until the LLC MURs, the Commission had “considered alleged violations of Section 30122 almost exclusively in contexts where individuals were the purported straw donors,” and “prior to *Citizens United*, nearly every alleged straw-donor scheme addressed by the Commission involved *excessive and/or prohibited contributions*.” *Id.* (emphasis in original). No excess or prohibited



contribution is claimed here. Similarly, like the LLC MURs, the Act's amount limitations and corporate source prohibitions are not implicated here because the contribution at issue was to Now or Never PAC, an independent expenditure-only PAC, which may only engage in independent speech and does not make contributions to candidates.

The alleged section 30122 violation claimed here – a contribution from a 501(c)(4) entity and involving a donation from an LLC – thus differs substantially from those previously considered by the Commission prior to the LLC MURs. OGC cannot point to any facts indicating that Government Integrity deliberately, with full knowledge of all relevant facts and a recognition that both its actions were prohibited by law and its conduct could be considered illegal, because the law did not contemplate at the time that its contribution could have violated section 30122.

The OGC's attempt to bootstrap such an argument by pointing to what it mischaracterizes as attempts to conceal the identity of one or more donors is also unavailing. As is amply demonstrated above and by the Controlling Statement of Reasons in the LLC MURs, it was far from settled law that the identification of LLCs as donors was unlawful. Thus, even if there were evidence to show that the flow of funds at issue in this case was intended to screen from view any putative source of funds, that goal was widely understood to be permissible prior to the decision in the LLC MURs, and its pursuit cannot support a "knowing and willful" finding.<sup>18</sup>

For the sake of fairness and integrity in the exercise of its discretion, the Commission should treat like circumstances alike particularly where the alleged violations here occurred in

---

<sup>18</sup> Indeed, it is far from clear that these facts, even considered hypothetically, can constitute a violation even now. Congress has not acted to make these contributions illegal and the Commission lacks legal authority to create new crimes or violations where Congress has failed to act. The Commission may wish to know the "ultimate source" of corporate funds allegedly received indirectly by a political committee, but it cannot make identifying the same a requirement of law without the legal authority to do so.

October 2012, during the same time period as the conduct at issue in the LLC MURs. If the Commission believes that Government Integrity could be alleged to have made a contribution in the name of another, we respectfully request that the Commission exercise its prosecutorial discretion here, as the Commission did with respect to the LLC MURs, without finding probable cause that Government Integrity committed a violation.

### III. CONCLUSION

Based on the foregoing, Government Integrity respectfully requests that Commission not find probable cause to believe that Government Integrity violated 52 U.S.C. § 30122 and 11 C.F.R. § 110.4(b)(1)(i).

10/6/17

Date



Elliot S. Berke  
Counsel for Government Integrity  
Berke Farah LLP  
1200 New Hampshire Ave. NW  
Suite 800  
Washington, DC 20036

202.517.0585 (Tel.)  
eberke@berkefarah.com  
<http://www.berkefarah.com>