



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 OF CHAIRMAN MATTHEW S. PETERSEN  
AND COMMISSIONERS CAROLINE C. HUNTER AND DONALD F. McGAHN**

This matter concerns whether Freedom's Watch, Inc.—a section 501(c)(4) nonprofit corporation—violated the Federal Election Campaign Act of 1971, as amended (“the Act”), by not listing any donations received on a disclosure form it filed with the Commission regarding an electioneering communication it made in 2008. As explained in greater detail below, we voted to exercise our prosecutorial discretion and dismiss this matter because the complaint failed to provide specific information indicating that the funds used to finance the electioneering communication at issue consisted of amounts that had been donated to Freedom's Watch “for the purpose of furthering electioneering communications.”<sup>1</sup>

**I. BACKGROUND**

Freedom's Watch is a nonprofit advocacy corporation that ran numerous advertisements in 2007 and 2008.<sup>2</sup> At issue is an advertisement entitled “Family Taxes” that Freedom's Watch ran in Louisiana on April 15, 2008, that referred to Don Cazayoux—the Democratic candidate in a special election held on May 3, 2008, for Louisiana's 6<sup>th</sup> District Congressional seat.<sup>3</sup> On April 16, 2008, Freedom's Watch filed

<sup>1</sup> 11 C.F.R. § 104.20(c)(9).

<sup>2</sup> Michael Luo, *Great Expectations for a Conservative Group Seem All but Dashed*, New York Times, April 12, 2008, available at <http://www.nytimes.com/2008/04/12/us/politics/12freedom.html> (hereinafter, *NY Times Article*) (cited in MUR 6002, Complaint).

<sup>3</sup> See FEC, *Louisiana Sixth District Special Election Notice*, Feb. 1, 2008, available at [http://www.fec.gov/pages/report\\_notices/2008/la06.shtml](http://www.fec.gov/pages/report_notices/2008/la06.shtml). The vacancy arose when former Representative Richard Baker resigned his seat on February 2, 2008. See Richard Hugh Baker, Biographical Directory of the United State Congress, available at <http://bioguide.congress.gov/scripts/biodisplay.pl?index=b000072>.

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with the Commission FEC Form 9—24 Hour Notice of Disbursements/Obligations for Electioneering Communications<sup>4</sup>—disclosing the amount of the disbursement. The notice did not, however, include any donor information.

The Democratic Congressional Campaign Committee (“Complainant”) filed a complaint with the Commission on April 23, 2008, making two allegations. First, the complaint accused Freedom’s Watch of making a corporate disbursement for an electioneering communication that “cannot be reasonably interpreted as anything other than an appeal to vote against Don Cazayoux” and, thus, “is *not* permissible under 11 C.F.R. § 114.15.”<sup>5</sup> Therefore, according to the complaint, the disbursement made by Freedom’s Watch was prohibited.<sup>6</sup>

Second, the complaint alleged that Freedom’s Watch violated 11 C.F.R. § 114.20(c)(9) by failing to disclose donations made for the purpose of furthering electioneering communications. According to the complaint, “[b]y failing to report *any* contributions made to the corporation for the purpose of furthering electioneering communications, Freedom’s Watch Inc. has acted in contravention of federal campaign finance laws.”<sup>7</sup>

In response, Freedom’s Watch contended, first, that its advertisement was a permissible corporate electioneering communication under both the Supreme Court’s decision in *FEC v. Wisconsin Right to Life (“WRTL”)*<sup>8</sup> and Commission regulations<sup>9</sup> because the communication was susceptible of a reasonable interpretation other than an appeal to vote for or against a federal candidate.<sup>10</sup> And with respect to the allegation that it illegally failed to disclose its donors, Freedom’s Watch argued that it “did not solicit any donations for the purpose of airing an electioneering communication in Louisiana or elsewhere” and that “[a]ll funds contributed to [Freedom’s Watch] during 2008 have been for general purposes.”<sup>11</sup>

Prior to the Commission taking any action on this matter, the Supreme Court rendered its decision in *Citizens United v. FEC*, in which the Court held that the Act’s

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<sup>4</sup> See FEC Form 9, filed by Freedom’s Watch (April 16, 2008), *available at* <http://query.nictusa.com/pdf/291/28039693291/28039693291.pdf#navpanes=0>.

<sup>5</sup> Complaint at unnumbered p. 2 (emphasis in original).

<sup>6</sup> See 11 C.F.R. § 114.14(a)(1).

<sup>7</sup> Complaint at unnumbered p. 3 (emphasis in original).

<sup>8</sup> 127 S. Ct. 2652 (2007).

<sup>9</sup> See 11 C.F.R. § 114.15.

<sup>10</sup> Response at 3-6.

<sup>11</sup> *Id.* at 7.

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prohibitions against corporate funding of independent expenditures and electioneering communications were unconstitutional.<sup>12</sup> The Court did, however, uphold the Act's disclosure requirements that apply to electioneering communications, even to those that are not the functional equivalent of express advocacy.<sup>13</sup>

Therefore, in light of the *Citizens United* decision, the Complainant's first allegation was moot. However, its second allegation—that Freedom's Watch failed to properly file its FEC Form 9—was still live. The Office of General Counsel recommended finding reason to believe that Freedom's Watch violated 11 C.F.R. § 104.20(c)(9), based on suggestions that Freedom's Watch “may have received funds specifically for the purpose of airing the electioneering communication at issue, and [Freedom's Watch's] failure to squarely deny the complaint's allegations.”<sup>14</sup> For the reasons set forth below, we voted against the recommendation.

## II. ANALYSIS

The Act defines an “electioneering communication” as a broadcast, satellite, or cable communication that refers to a clearly identified federal candidate, is made within 30 days before a primary election or 60 days before a general election in which the candidate is seeking office, and in the case of Congressional and Senate candidates, is targeted to the relevant electorate.<sup>15</sup> A communication is “targeted to the relevant electorate” if it can be received by 50,000 or more persons in the district or state in which the candidate was running.<sup>16</sup>

The electioneering communications provisions, which were enacted as part of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), originally prohibited corporate entities like Freedom's Watch from making electioneering communications.<sup>17</sup> However, in *McConnell v. FEC*<sup>18</sup> and in *WRTL*,<sup>19</sup> the Supreme Court limited the scope of the corporate prohibition to those electioneering communications that are the “functional equivalent of express advocacy”—that is, “susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate.” Then, in *Citizens United*, the Supreme Court struck down the ban on corporate electioneering communications in its

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<sup>12</sup> 130 S.Ct. 876, 913 (2010).

<sup>13</sup> *Id.* at 915-16

<sup>14</sup> First General Counsel Report at 5.

<sup>15</sup> 2 U.S.C. § 434(f)(3).

<sup>16</sup> *Id.*

<sup>17</sup> Pub. L. No. 107-155, §§ 203(a) & 214(d) (amending 2 U.S.C. § 441b(b)(2)).

<sup>18</sup> 124 S. Ct. 619, 696 (2003).

<sup>19</sup> 127 S. Ct. at 2667.

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entirety. Therefore, Freedom's Watch was constitutionally permitted to publicly distribute the electioneering communication at issue, regardless of whether it constituted the functional equivalent of express advocacy. Consequently, post-*Citizens United*, this matter hinged solely on an interpretation of the electioneering communications reporting requirements, which as noted above, were upheld in *Citizens United*.

Under Commission regulations, a person or entity that makes electioneering communications aggregating in excess of \$10,000 in any calendar year must file a report with the Commission within 24 hours of the communication's public distribution.<sup>20</sup> Thereafter, such person or entity must file a report after each additional public distribution of an electioneering communication.<sup>21</sup> Prior to the *WRTL* decision, Commission regulations required sponsors of electioneering communications to disclose their donors in one of two ways: either (1) report the names and addresses of all donors who gave \$1,000 or more, aggregating from the beginning of the prior calendar year; or (2) if the sponsor established a separate bank account from which disbursements for electioneering communications were made, then list only the names and addresses of the donors to that account.<sup>22</sup>

Following *WRTL*, which freed corporations and labor unions to use general treasury funds to finance electioneering communications that were not the functional equivalent of express advocacy, the Commission amended its regulations to address how corporations and labor unions would report payments for such communications. Because of the myriad ways in which corporations and labor unions receive funds—including from investors, customers, and donors—and the difficulties that would arise in tracking the sources and amounts of such funding if it had to be reported, the Commission decided not to require corporations and labor unions to report all donors that give an aggregate of \$1,000 or more since the beginning of the prior calendar year.<sup>23</sup> Rather, the Commission amended the relevant rule to require corporations and labor unions to disclose the names and addresses of only those persons who make donations aggregating \$1,000 or more specifically "for the purpose of furthering electioneering communications."<sup>24</sup>

The Commission did so because:

In the Commission's judgment, requiring disclosure of funds received only from those persons who donated specifically for the purpose of furthering ECs [electioneering communications] appropriately provides

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<sup>20</sup> 11 C.F.R. § 104.20(b).

<sup>21</sup> *Id.*

<sup>22</sup> 11 C.F.R. § 104.20(c).

<sup>23</sup> *Explanation and Justification for Final Rules on Electioneering Communications*, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007) (hereinafter, *EC E&J*).

<sup>24</sup> 11 C.F.R. § 104.20(c)(9).

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the public with information about those persons who actually support the message conveyed by the ECs without imposing on corporations and labor organizations the significant burden of disclosing the identities of the vast numbers of customers, investors, or members, who have provided funds for purposes entirely unrelated to the making of ECs.<sup>25</sup>

Consequently, under the amended rule, a corporation or labor union must disclose on Schedule 9-A of FEC Form 9<sup>26</sup>—the form for reporting electioneering communications—only those persons who made donations *for the purpose of furthering electioneering communications*.

In the Explanation and Justification (“E&J”) accompanying the amended electioneering communications rule, the Commission clarified that “[t]he ‘for the purpose of furthering’ standard in 11 C.F.R. § 104.20(c)(9) is drawn from the reporting requirements that apply to independent expenditures made by persons other than political committees.”<sup>27</sup> Those requirements are that independent expenditure reports filed by non-political committees must include, among other things, “[t]he identification of each person who made a contribution in excess of \$200 to the person filing such report, which contribution was made *for the purpose of furthering the reported independent expenditure*.”<sup>28</sup> In other words, a donation must be itemized on a non-political committee’s independent expenditure report only if such donation is made for the purpose of paying for the communication *that is the subject of the report*.

Because the “for the purpose of furthering” standard is the same in both the regulation governing electioneering communications reports by corporations and labor unions [11 C.F.R. § 104.20(c)(9)] and the regulation governing independent expenditure reporting [11 C.F.R. § 109.10(e)(1)(vi)], that standard must be construed consistently in both regulations. For that reason, we interpret 11 C.F.R. § 104.20(c)(9) as requiring a corporation or labor union to disclose the persons who make donations that meet or exceed the \$1,000 threshold only if such donations are made for the purpose of furthering the electioneering communication that is the subject of the report.<sup>29</sup> Otherwise, the corporation or union is under no obligation to disclose such information.

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<sup>25</sup> EC E&J, *supra* note 23, at 72911.

<sup>26</sup> FEC Form 9 and the instructions for the form may be found at: <http://www.fec.gov/info/forms.shtml#other>.

<sup>27</sup> ECE&J, *supra* note 23, at 72911.

<sup>28</sup> 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

<sup>29</sup> The instructions for Form 9 and Schedule 9-A, which the Commission revised in conjunction with the amended electioneering communication reporting regulation, provide additional support for this interpretation. Form 9 is required to be filed for each reportable electioneering communication. As part of that report, all donations made for the purpose of furthering electioneering communications are to be itemized on Schedule 9-A. The instructions for Schedule 9-A specifically state that “[c]orporations, labor organizations and Qualified Nonprofit Corporations making communications permissible under 11 CFR

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The complaint in this matter points to no specific facts that demonstrate that Freedom's Watch financed the "Family Taxes" advertisement in whole or in part with funds donated for the purpose of furthering that particular advertisement (or for that matter, for the purpose of furthering the group's electioneering communications in general). Instead, the complaint points to a New York Times article that, on the basis of anonymous sources, reported that Sheldon Adelson was the primary financier of Freedom's Watch, and that Mr. Adelson "insisted on parceling out his money project by project" and has "rejected almost all of the staff's proposals that have been brought to him."<sup>30</sup> The Complainant believes this is enough for the Commission to find reason to believe that Freedom's Watch violated the Act's electioneering communications reporting provisions and to initiate an investigation.

We disagree. A reason-to-believe finding by the Commission must be based on specific facts from reliable sources.<sup>31</sup> The *New York Times* article did not contain specific facts that the costs associated with the "Family Taxes" advertisement were paid with funds that were donated by Mr. Adelson (or anyone else) for the purpose of furthering the electioneering communication. Moreover, the article relies predominantly on anonymous sources. Therefore, even if such facts had been included in the article, we still would be reluctant to make a reason-to-believe finding based solely on information culled from sources whose credibility and accuracy are difficult to ascertain.

However, even if we assume the anonymous sources cited in the article are credible, that still would not get us closer to finding reason to believe against Freedom's Watch. We note that one source in the article reveals that, besides Mr. Adelson, "several donors have contributed a few hundred thousand dollars" and "one other benefactor has given a million dollars or more."<sup>32</sup> Thus, the funds donated by these other persons would be more than sufficient to cover the roughly \$126,000 cost of the "Family Taxes" advertisement, and there is no suggestion that these other individuals made their donations for the purpose of furthering the electioneering communication.

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114.15 must file Schedule 9A only if any part of the amount on Form 9, Line 10 [Total Disbursements/Obligations reported for the electioneering communication at issue] includes donations made for the purpose of paying for electioneering communications." See Instructions for FEC Form 9, available at <http://www.fec.gov/pdf/forms/fecfrm9i.pdf> (emphasis added).

<sup>30</sup> *NY Times Article, supra note 2.*

<sup>31</sup> See MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1-2 ("The Commission may find reason to believe only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented.... In addition, ... a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint ....").

<sup>32</sup> *NY Times Article, supra note 2.*

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Moreover, prior reports filed with the Commission demonstrate that Freedom's Watch knew the requirements of the relevant regulation and how to comply with them, and that the group was not trying to hide the identities of its donors. In December 2007, Freedom's Watch ran an advertisement entitled "Healthcare" shortly before a special Congressional election and, in connection with the advertisement, filed an FEC Form 9 on which it disclosed \$86,000 in donations received, including \$80,000 from Sheldon Adelson.<sup>33</sup>

By contrast, Freedom's Watch asserts that no donations used to pay for the "Family Taxes" electioneering communication were made "for the purpose of furthering electioneering communications," and therefore, there was no donor reporting requirement. Merely because Freedom's Watch received donations from individuals for the purpose of running an electioneering communication in December 2007 does not necessarily imply that the group's subsequent communications were similarly financed by donations made for the purpose of furthering those communications.

Furthermore, the earlier filing, which disclosed donations made by Sheldon Adelson, does not conflict with the group's assertion that Freedom's Watch did not solicit any donations for the purpose of airing the electioneering communication at issue in this matter. First, there is no specific evidence to contradict the assertion of Freedom's Watch that all funds contributed during 2008 were for general purposes (the general purpose of Freedom's Watch was to engage in activities furthering its core issue agenda).<sup>34</sup> Moreover, the electioneering communication at issue in this matter, "Family Taxes," was aired in connection with a special election to fill the vacancy that arose from the incumbent's retirement on February 2, 2008. Thus, it is highly unlikely that any funds donated by Sheldon Adelson (or anyone else for that matter) prior to February 2, 2008, particularly funds donated in 2007, would have been donated for the purpose of furthering the electioneering communication at issue here. In short, there is insufficient evidence to support a finding of reason to believe that Freedom's Watch violated the Act by not including donor information on the reports at issue in this matter.

### III. CONCLUSION

For the reasons discussed above, the information provided in the complaint provided too thin a basis to proceed with a reason to believe finding. For that reason, we opted to exercise our prosecutorial discretion and dismiss this matter.<sup>35</sup>

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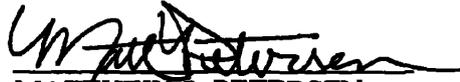
<sup>33</sup> See FEC Form 9, filed by Freedom's Watch (Dec. 8, 2007). at <http://query.nictusa.com/pdf/148/27039572148/27039572148.pdf#navpanes=0>. All of Freedom's Watch's Form 9 filings are available at <http://query.nictusa.com/cgi-bin/fecimg/?C30000756>.

<sup>34</sup> MUR 6002, Response at 7.

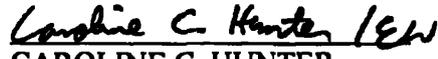
<sup>35</sup> See *Heckler v. Chaney*, 470 U.S. 821 (1985).

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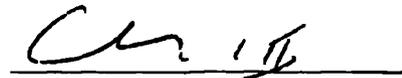
8/13/10  
Date

  
MATTHEW S. PETERSEN  
Chairman

8/12/10  
Date

  
CAROLINE C. HUNTER  
Commissioner

8/13/10  
Date

  
DONALD F. MCGAHN II  
Commissioner

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