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FIRST GENERAL COUNSEL'S REPORT

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SENSITIVE

MUR: 6081
DATE COMPLAINT FILED: 9/26/2008
DATE OF NOTIFICATION: 10/2/2008
LAST RESPONSE RECEIVED: 11/25/2008
DATE ACTIVATED: 12/17/2008

EXPIRATION OF SOL: 8/1/2013

COMPLAINANTS:

Obama for America
Democracy 21¹

RESPONDENTS:

American Issues Project, Inc.
Ed Martin
Ed Failor Jr.
Harold Simmons

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(4)
2 U.S.C. § 431(8)
2 U.S.C. § 431(9)
2 U.S.C. § 431(17)
2 U.S.C. § 432
2 U.S.C. § 433
2 U.S.C. § 434(b)
2 U.S.C. § 434(c)
2 U.S.C. § 441a(a) & (f)
26 U.S.C. § 501(c)
11 C.F.R. § 100.22
11 C.F.R. § 100.57
11 C.F.R. § 109.10(c)
11 C.F.R. § 114.10

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED:

¹ In MUR 6094, Democracy 21 filed a complaint alleging that American Issues Project and another group violated the Federal Election Campaign Act by failing to register and report as political committees. Because the substantive allegations leveled against AIP in MUR 6094 are identical to the allegations raised in this matter, we thus administratively severed AIP from MUR 6094 and address those allegations in this report.

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1 I. INTRODUCTION

2 This matter stems from Complaints filed by Obama for America and Democracy 21
3 alleging that American Issues Project, Inc. ("AIP") committed a knowing and willful violation of
4 the Federal Election Campaign Act, as amended, (the "Act") because it failed to organize,
5 register, and report as a political committee. In addition, the complaint filed by Obama for
6 America ("Obama Complaint") alleges that AIP failed to file a post-convention independent
7 expenditure report in violation of 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10(c). The Obama
8 Complaint also alleges that Harold Simmons, the main (and possibly only) contributor to AIP,
9 violated the \$5,000 contribution limit to political committees by knowingly and willfully
10 violating the biennial aggregate contribution limit of 2 U.S.C. § 441a(a)(3).

11 Citing the Supreme Court's decision in *FEC v. Massachusetts Citizens for Life*, 479 U.S.
12 238 (1986) ("*MCFL*"), and Commission's regulations, including those for qualified nonprofit
13 corporations, AIP argues that it cannot be treated as a political committee.² According to AIP, it
14 devoted the majority of its spending to activities and programs appropriate for 501(c)(4) social
15 welfare organizations and not to the nomination or election of federal candidates. In its October
16 17, 2011, Supplemental Response, AIP further maintains that the Supreme Court's decision in
17 *Citizens United* negated the "legal fiction" that AIP was required to be a qualified nonprofit
18 corporation ("QNC") to make lawful expenditures during the 2008 election cycle.³

19 Based on the available information, we recommend that the Commission find reason to
20 believe that AIP violated 2 U.S.C. §§ 432, 433, and 434 by failing to organize, register, and

² *Citizens United v. FEC*, 130 S. Ct. 76 (2010), allowing corporations to make expenditures and electioneering communications, renders AIP's claim to QNC status moot.

³ Oct. 17, 2011 Resp. at 2. Simmons responded by "generally and specifically" denying the allegations in the complaint. Harold Simmons Resp. (Nov. 18, 2008).

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1 report as a political committee and that the Commission authorize pre-probable cause

2 conciliation

With respect to the other

3 violations, first, we recommend that the Commission find no reason to believe that AIP violated

4 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of \$5,000. Next, because we

5 conclude that AIP was required to file reports as a political committee, we recommend that the

6 Commission dismiss the allegation that AIP violated 2 U.S.C. § 434(c) and 11 C.F.R.

7 § 109.10(c), which require the filing of a Form 5 for independent expenditures made by every

8 person other than a political committee. Further, we recommend that the Commission find no

9 reason to believe that Harold Simmons violated 2 U.S.C. § 441a(a)(1)(C) & (a)(3), because there

10 are no limits on contributions to independent expenditure only political committees. Finally, we

11 recommend that the Commission find no reason to believe that AIP's officers Ed Martin and Ed

12 Failor, Jr. violated the Act.

13 II. FACTUAL AND LEGAL ANALYSIS

14 A. Facts

15 1. AIP

16 AIP is a 501(c)(4) nonprofit Delaware corporation that was originally registered as

17 Citizens for the Republic ("CFTR") in May 2007, before changing its name first to Avenger, Inc.

18 on March 19, 2008, and then to AIP on August 6, 2008.⁴ AIP's corporate filings state that its

19 purpose is "the promotion of social welfare, including, for such purposes, [as] the making of

⁴ See Democracy 21 Complaint, Exs. A, C, and D (Delaware corporate filings); see also Will Evans and Peter Overby, *Obama Goes After Conservative Group – but Can't Find Business Filings*, NPR – SECRET MONEY BLOG, Aug. 26, 2008, available at http://www.npr.org/blogs/secretmoney/2008/08/obama_goes_after_conservative.html. Based on AIP's corporate filings, it appears that CFTR and Avenger Inc. were run by a different board of directors than the board that currently runs AIP, which consists of Ed Martin and Ed Failor Jr.

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1 distributions to organizations that qualify as exempt organizations”⁵ AIP’s website stated
2 that its goal was to “stand strong for the American ideals that make this country special and
3 promote conservative values that have stood the test of time.”⁶

4 AIP President and Board Member Ed Martin reportedly said that he joined AIP to
5 “‘jump[] at the chance’ to get involved with the group because it offered a new avenue to press a
6 conservative agenda as the presidential race played out.”⁷ In addition, Martin “worried that
7 McCain would be vastly outspent, because Obama opted out of public financing and its
8 accompanying spending restrictions”⁸ Another news source reported that “[Martin] said the
9 group formed to combat the ‘hundreds of millions’ that left-leaning groups such as NARAL Pro-
10 Choice America and others would inevitably spend on the election, along with Mr. Obama’s
11 decision to opt out of the public financing system that forces campaigns to abide by spending
12 limits.”⁹

⁵ Democracy 21 Compl., Ex. A, Certificate of Incorporation – A Non-Stock Corporation of Citizens for the Republic, Inc. (later changed to American Issues Project).

⁶ AIP Website, <http://www.americanissuesproject.org/about> (last visited Sept. 3, 2010) (archived website available in Voting Ballots Matters) (the “AIP Website”). The AIP Website is no longer publicly available. It appears that AIP blocked public access to its website at some point in 2009 (or at the latest, early 2010). At that time, the AIP Website required an administrative username and password to access any content. At some point in 2011 (or at the earliest, September 2010) the AIP Website’s domain name appears to have been taken over by another group also referring to itself as “American Issues Project.” This new group, however, appears to be a business consulting company and unrelated to AIP.

⁷ Deirdre Shesgreen, *Outside Groups Ready to Enter Political Fray*, ST. LOUIS POST-DISPATCH, Sept. 18, 2008, at A1.

⁸ *Id.*

⁹ Christina Bellatoni, *Ads From 527s Aim to Divide, Conquer*, WASH. TIMES, Sept. 17, 2008, at 1.

In its October 17, 2011, response, AIP did not directly address the substance of the news articles under consideration by the Office of the General Counsel. AIP responded that “[d]uring the 2008 presidential election, liberal supporters of President Obama targeted AIP and its major donors for threats, verbal assault and intimidation.” Oct. 17, 2011 Resp. at 1. And AIP included in its response “just a few of the news articles describing the scheme developed in 2008 by the Obama campaign for their left-wing defenders to carry out planned attacks against conservative groups and donors to conservative causes.” *Id.*

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1 2. AIP's Spending

2 In late August 2008, AIP ran a television advertisement attacking Barack Obama called
3 "Know Enough."¹⁰ In October 2008, AIP aired "What Happened?," which focused on the ties to
4 the mortgage industry of Senators Reid and Dodd. Finally, on the day after the 2008 election,
5 AIP issued a report called "Issue Autopsy '08," a poll of likely voters in battleground states.

6 The "Know Enough" ad focused on Obama's asserted connections with William Ayers, a
7 former member of a domestic terrorist group called the "Weather Underground." After detailing
8 the Weather Underground's attempted attacks on the U.S. Capitol and other federal buildings in
9 the 1970s, the "Know Enough" advertisement states that "Barack Obama is friends with Ayers"
10 and that "Obama's political career was launched in Ayers' home."¹¹ The advertisement ends
11 with a picture of Obama and asks rhetorically, "Do you know enough to elect Barack Obama?"¹²

12 AIP filed an FEC Form 5 (Report of Independent Contributions Made and Contributions
13 Received) with the Commission on August 19, 2008, disclosing \$2,878,872.75 in expenditures
14 on this advertisement, as well as an identical amount in receipts. The filing disclosed that all of
15 AIP's receipts came from Simmons, that the advertisement "Oppose[d]" Barack Obama, and that
16 AIP filed its Form 5 as a "qualified nonprofit corporation" or "QNC." American Issues Project,
17 FEC Form 5 (Aug. 19, 2008).

18 AIP considered its next television advertisement, launched October 8, 2008, as "the
19 second major phase of a major television advertising campaign . . . spotlighting the role
20 congressional liberals played in blocking oversight and reform of Fannie Mae and Freddie

¹⁰ When "Know Enough" was aired, an AIP spokesperson reportedly stated that "the group has set aside money to carry out non-election-related work to meet the legal requirements [for 501(c)(4) organizations]. Jim Kuhnhenh, *Obama Seeks to Silence Ad Tying Him to 60s Radical*, ASSOCIATED PRESS, Aug. 26, 2008.

¹¹ See Attach. 1.

¹² *Id.*

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1 Mac."¹³ The initial ad buy was for \$1 million.¹⁴ AIP did not report this advertisement to the
2 Commission as an independent expenditure or as an electioneering communication, presumably
3 because it was aimed at Senators Reid and Dodd, both of whom were not on the ballot in 2008
4 but had filed statements of candidacy with the Commission for their 2010 Senate races.

5 Finally, in 2008, AIP produced and circulated "Issue Autopsy '08," which was a survey
6 of early voters and likely voters in four swing states testing voters' opinions on key issues in the
7 days leading up to the election. The report was released on the day after the election,
8 November 5, and the results of the poll were published on the AIP Website.¹⁵

9 AIP regularly updated its website through much of 2009. It also released a television
10 advertisement in February 2009 called "Every Single Day," which reportedly cost almost
11 \$1 million and criticized stimulus spending by the Obama administration.¹⁶ The group released
12 two more advertisements in 2009, "Chattering" on February 23, and "Shocked" on March 23.¹⁷

13 AIP contends that "[t]he majority of [its] annual expenditures are devoted to grassroots
14 lobbying and education on issues, public policies and other communications, activities and
15 programs appropriate to a 501(c)(4) social welfare organization in accordance with all applicable

¹³ See AIP Website, *New Ad Says Liberals' Support of Fannie Mae and Freddie Mac the Root of Financial Crisis* (Oct. 11, 2008); AmericanIssuesProject, *What Happened?*, YOUTUBE, <http://www.youtube.com/watch?v=UvaR7sajArs> (last visited Mar. 11, 2013).

¹⁴ See AIP Website; see also Will Evans, *Attacking Democrats Without Leaving a Trace*, NPR, Oct. 9, 2008, available at http://www.npr.org/blogs/secretmoney/2008/10/attacking_democrats_without_le.html.

¹⁵ Press Release, *American Issues Project Releases Issue Autopsy '08; Survey Says Voters Punished Republicans for Abandoning Conservative Principles*, Nov. 5, 2008, available at <http://www.reuters.com/article/pressRelease/idUS201206+05-Nov-2008+PRN20081105>.

¹⁶ See Press Release, *New Ad "Every Single Day" Says the Excessive Spending Spree Must Stop*, Feb. 20, 2009, available at <http://www.reuters.com/article/pressRelease/idUS175091+20-Feb-2009+PRN20090220>.

¹⁷ See AIP Website, "Chattering," <http://www.youtube.com/watch?v=MmYXFu8xits> (last visited Jan. 11, 2012), available at <http://blip.tv/american-issues-project/chattering-1817664> (last visited Mar. 11, 2013); see also "Shocked," available at <http://www.youtube.com/watch?v=YRVffW94tPo> (last visited Mar. 11, 2013). AIP has not announced the cost of either advertisement.

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1 provisions of the Internal Revenue Code.”¹⁸ According to AIP, it “is a Section 501(c)(4)
2 organization and . . . a majority of its program expenditures were related to issues rather than
3 candidates, political parties or campaigns.”¹⁹

4 Along with its response, AIP submitted its 2008 Form 990 tax return, which assertedly
5 demonstrates that “AIP spent a majority of its program expenditures during the 2008 fiscal year
6 on non-political activities, programs and issues.”²⁰ AIP contends that the Form 990 shows that
7 “of the \$5,897,307 in program expenditures in [fiscal year] 2008, AIP spent \$2,876,753.00 on
8 political campaign/lobbying activities.”²¹ The Form 990 also reports on spending that includes
9 \$788,599 on an “Online Advocacy Project” and \$2,231,955 on Educational Research and Media,
10 but does not detail whether any of this activity includes advertisements such as “What
11 Happened” and “Every Single Day.”²²

12 **B. ANALYSIS**

13 1. The Test for Political Committee Status

14 The Act and Commission regulations define a “political committee” as “any committee,
15 club, association or other group of persons which receives contributions aggregating in excess of

¹⁸ Resp. at 2. AIP also stated — in a letter posted on its website from its counsel to one of the Complainants — that “AIP is not going away. It will be involved going forward as a qualified nonprofit corporation with substantial plans to provide the leadership necessary to fill the void and fight for conservative principles from now on.” Attach. 2 at 3, Letter from Clea Mitchell, Counsel, AIP to Fred Wertheimer, President, Democracy 21 (Oct. 11, 2008).

¹⁹ October 17, 2011 Resp. at 1.

²⁰ *Id.*

²¹ *Id.* In addition to AIP’s 2008 IRS Form 990, we have obtained the application for 501(c)(4) status (IRS Form 1024) submitted by AIP’s predecessor, CFTR, and AIP’s 2007 IRS Form 990. These annual reports cover AIP’s tax year, which begins on May 1 of the corresponding year of the annual report and ends on April 30 of each following year. For example, AIP’s 2007 Form 990 covers the period of May 1, 2007 through April 30, 2008.

²² AIP’s 2008 IRS Form 990 describes the Online Advocacy Project in the following terms: “a sophisticated plan for online grassroots outreach to support its mission . . .” AIP’s Educational Research and Media is described as “a national media educational program to educate and inform the public on core conservative issues in support of its mission.”

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1 \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000
2 during a calendar year.” 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5. In *Buckley v. Valeo*,
3 424 U.S. 1 (1976), the Supreme Court decided that defining political committee status “only in
4 terms of the annual amount of ‘contributions’ and ‘expenditures’” might be overbroad, reaching
5 “groups engaged purely in issue discussion.” *Id.* at 79. To cure that infirmity, the Court
6 concluded that the term “political committee” “need only encompass organizations that are under
7 the control of a candidate or the *major purpose of which is the nomination or election of a*
8 *candidate.*” *Id.* (emphasis added). Accordingly, under the statute as thus construed, an
9 organization that is not controlled by a candidate must register as a political committee only if
10 (1) it crosses the \$1,000 threshold and (2) it has as its “major purpose” the nomination or election
11 of federal candidates.

12 a. The Commission’s Case-By-Case Approach to Major Purpose

13 Although *Buckley* established the major purpose test, it provided no guidance as to the
14 proper approach to determine an organization’s major purpose. See, e.g., *Real Truth About*
15 *Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S.
16 Jan. 7, 2013) (No. 12-311) (“RTAA”). The Supreme Court’s discussion of major purpose in a
17 subsequent opinion, *MCFL*, 479 U.S. 238, was similarly sparse. See *id.* at 262. In that case, the
18 Court identified an organization’s independent spending as a relevant factor in determining an
19 organization’s major purpose, but examined the entire record as part of its analysis and did not
20 chart the outer bounds of the test. 479 U.S. at 238. Following *Buckley* and *MCFL*, lower courts

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1 have refined the major purpose test — but only to a limited extent.²³ In large measure, the
2 contours of political committee status — and the major purpose test — have been left to the
3 Commission.²⁴

4 Following *Buckley*, the Commission adopted a policy of determining on a case-by-case
5 basis whether an organization is a political committee, including whether its major purpose is the
6 nomination or election of federal candidates. Political Committee Status, 72 Fed. Reg. 5596
7 (Feb. 7, 2007) (Supplemental Explanation and Justification) (“Supplemental E&J”). The
8 Commission has periodically considered proposed rulemakings that would have determined
9 major purpose by reference to a bright-line rule — such as proportional (*i.e.*, 50%) or aggregate
10 threshold amounts spent by an organization on federal campaign activity. But the Commission
11 consistently has declined to adopt such bright-line rules. *See* Independent Expenditures;
12 Corporate and Labor Organization Expenditures: 57 Fed. Reg. 33,548, 33,558-59 (July 29,
13 1992) (Notice of Proposed Rulemaking); Definition of Political Committee, 66 Fed. Reg. 13,681,
14 13,685-86 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking); *see also* Summary of
15 Comments and Possible Options on the Advance Notice of Proposed Rulemaking on the
16 Definition of “Political Committee,” Certification (Sept. 27, 2001) (voting 6-0 to hold proposed
17 rulemaking in abeyance).

²³ *See* *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 396 (D.C. Cir. 1981) (stating that political committee “contribution limitations did not apply to . . . groups whose activities did not support an existing ‘candidate’” and finding Commission’s subpoena was overly intrusive where directed toward “draft” group lacking a “candidate” to support); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 861-62 (D.D.C. 1996) (holding that a group’s support of a “farm team” of future potential federal candidates at the state and local level did not make it a political committee under the Act); *see also* *Unity08 v. FEC*, 596 F.3d 861, 869 (D.C. Cir. 2010) (concluding that an organization “is not subject to regulation as a political committee unless and until it selects a ‘clearly identified’ candidate”).

²⁴ Like other administrative agencies, the Commission has the inherent authority to interpret its statute through a case-by-case approach. *See* *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) (“[T]he choice made between proceeding by general rule or by individual . . . litigation is one that lies primarily in the informed discretion of the administrative agency.”)

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1 In 2004, for example, the Commission issued a notice of proposed rulemaking asking
2 whether the agency should adopt a regulatory definition of "political committee." See Political
3 Committee Status: 69 Fed. Reg. 11,736, 11,745-49 (Mar. 11, 2004) (Notice of Proposed
4 Rulemaking). The Commission declined to adopt a bright-line rule, noting that it had been
5 applying the major purpose test "for many years without additional regulatory definitions," and
6 concluded that "it will continue to do so in the future." See Final Rules on Political Committee
7 Status, Definition of Contribution, and Allocation for Separate Segregated Funds and
8 Nonconnected Committees, 69 Fed. Reg. 68,056, 68,064-65 (Nov. 23, 2004).

9 b. Challenges to the Commission's Major Purpose Test and the
10 Supplemental E&J
11

12 When the Commission's 2004 decision not to adopt a regulatory definition was
13 challenged in litigation, the court rejected plaintiffs' request that the Commission initiate a new
14 rulemaking. *Shays v. FEC*, 424 F. Supp. 2d 100, 117 (D.D.C. 2006) ("*Shays I*"). The district
15 court found, however, that the Commission had "failed to present a reasoned explanation for its
16 decision" to engage in case-by-case decision-making, rather than rulemaking, and remanded the
17 case to the Commission to explain its decision. *Id.* at 116-17.

18 Responding to the remand, the Commission issued a Supplemental Explanation and
19 Justification for its final rules on political committee status to further explain its case-by-case
20 approach and provide the public with additional guidance as to its process for determining
21 political committee status. Supplemental E&J at 5595. The Supplemental E&J explained that
22 "the major purpose doctrine requires fact-intensive analysis of a group's campaign activities
23 compared to its activities unrelated to campaigns." *Id.* at 5601-02. The Commission concluded
24 that the determination of an organization's major purpose "requires the flexibility of a case-by-
25 case analysis of an organization's conduct that is incompatible with a one-size fits-all rule," and

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1 that "any list of factors developed by the Commission would not likely be exhaustive in any
2 event, as evidenced by the multitude of fact patterns at issue in the Commission's enforcement
3 actions considering the political committee status of various entities." *Id.*

4 To determine an entity's "major purpose," the Commission explained that it considers a
5 group's "overall conduct," including public statements about its mission, organizational
6 documents, government filings (e.g., IRS notices), the proportion of spending related to "federal
7 campaign activity," and the extent to which fundraising solicitations indicate funds raised will be
8 used to support or oppose specific candidates. *Id.* at 5597, 5605. Among other things, the
9 Commission informed the public that it compares how much of an organization's spending is for
10 "federal campaign activity" relative to "activities that [a]re not campaign related." *Id.* at 5601,
11 5605 (emphasis added).

12 To provide the public with additional guidance, the Supplemental E&J referenced
13 enforcement actions on the public record, as well as advisory opinions and filings in civil
14 enforcement cases following the 2004 rulemaking. *Id.* at 5604-05. The Commission noted that
15 the settlements in several MURs involving section 527 organizations "provide considerable
16 guidance to all organizations" regarding the application of the major purpose test and "reduce
17 any claim of uncertainty because concrete factual examples of the Committee's political
18 committee analysis are now part of the public record." *Id.* at 5595, 5604.

19 After the Commission issued the Supplemental E&J, the *Shays I* plaintiffs again
20 challenged, under the Administrative Procedure Act, 5 U.S.C. §§ 551-59, the Commission's
21 case-by-case approach to political committee status. The court rejected the challenge, upholding
22 the Commission's case-by-case approach as an appropriate exercise of the agency's discretion.
23 *Shays v. FEC*, 511 F. Supp. 2d 19, 24 (D.D.C. 2007) ("*Shays II*"). The court recognized that "an

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1 organization . . . may engage in many non-electoral activities so that determining its major
2 purpose requires a very close examination of various activities and statements.” *Id.* at 31.

3 Recently, the Fourth Circuit rejected a constitutional challenge to the Commission’s case-
4 by-case determination of major purpose. The court upheld the Commission’s approach, finding
5 that *Buckley* “did not mandate a particular methodology for determining an organization’s major
6 purpose,” and so the Commission was free to make that determination “either through
7 categorical rules or through individualized adjudications.” *RTAA*, 681 F.3d at 556. The court
8 concluded that the Commission’s case-by-case approach was “sensible, . . . consistent with
9 Supreme Court precedent and does not unlawfully deter protected speech.” *Id.* at 558.²⁵ The
10 Fourth Circuit concluded that the Supplemental E&J provides “ample guidance as to the criteria
11 the Commission might consider” in determining an organization’s political committee status and
12 therefore is not unconstitutionally vague. *Id.*; see Transcript of Telephonic Oral Ruling, *Free*
13 *Speech v. FEC*, No. 12-CV-127-SWS, at 21-22 (D. Wy. Oct. 3, 2012) (citing *RTAA* and finding

²⁵ The *RTAA* court rejected an argument — similar to the one made by AIP here — that the major purpose test must be confined to “(1) examining an organization’s expenditures to see if campaign-related speech amounts to 50% of all expenditures; or (2) reviewing ‘the organization’s central purpose revealed by its organic documents.’” *RTAA*, 681 F.3d at 555. The Fourth Circuit recognized that determining an organization’s major purpose “is inherently a comparative task, and in most instances it will require weighing some of the group’s activities against others.” *Id.* at 556; see also *Koerber v. FEC*, 483 F. Supp. 2d 740 (E.D.N.C. 2008) (denying preliminary relief in challenge to Commission’s approach to determining political committee status, and noting that “an organization’s ‘major purpose’ is inherently comparative and necessarily requires an understanding of an organization’s overall activities, as opposed to its stated purpose”); *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering organization’s statements in brochures and “fax alerts” sent to potential and actual contributors, as well as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 861, 859 (D.D.C. 1996) (“The organization’s purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.”); *id.* at 864, 866 (applying a fact-intensive inquiry, including review of organizations’ meetings attended by national leaders and organization’s “Political Strategy Campaign Plan and Budget,” and concluding that organization did not have as its major purpose the election of federal candidates).

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1 Commission's method of determining political committee status to be constitutional), *appeal*
2 *docketed*, No. 12-8078 (10th Cir. Oct. 19, 2012).²⁶

3 c. Organizational and Reporting Requirements for Political
4 Committees

5
6 Political committees — commonly known as “PACs” — must comply with certain
7 organizational and reporting requirements set forth in the Act. PACs must register with the
8 Commission, file periodic reports for disclosure to the public, appoint a treasurer responsible for
9 maintaining its records, and identify themselves through “disclaimers” on all of their political
10 advertising, on their websites, and in mass e-mails. *See* 2 U.S.C. §§ 432-34; 11 C.F.R.
11 §110.11(a)(1).²⁷ The Act's reporting requirements “are minimal” and the organizational
12 requirements are not “much of an additional burden.” *SpeechNow.org v. FEC*, F.3d 686, 696
13 (D.C. Cir. 2010) (“*SpeechNow*”). These requirements, which promote disclosure, do not, of
14 course, prohibit speech. *RTAA*, 681 F.3d at 552 n.3.

15 In the wake of the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct. 876
16 (2010), which struck down the Act's prohibitions on corporate independent expenditures and
17 electioneering communications, the D.C. Circuit held in *SpeechNow* that political committees
18 that engage only in independent expenditures are not subject to contribution limits. *See* 599 F.3d
19 at 696. These political committees, often referred to as independent expenditure-only political

²⁶ The Supreme Court's decision in *FCC v. Fox Television Stations, Inc.* is not to the contrary. *See* 132 S. Ct. 2307, 2317 (2012) (“[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved”). In that case, the FCC's indecency standard was held to be vague for lack of notice when it applied a new stricter standard, *ex post facto*, to the Fox defendants, and when it relied on a single “isolated and ambiguous statement” from a 50-year old administrative decision to support its finding of indecency against the ABC defendants. *Id.* at 2319. Here, in sharp contrast, the Supplemental E&J — which was issued several years before the conduct at issue — provides extensive guidance on the Commission's approach to major purpose and has withstood both APA and constitutional challenges. *See also* *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012) (“*Madigan*”) (rejecting vagueness challenge to the definition of “political committee” in the Illinois campaign finance statute).

²⁷ An organization must register as a political committee when it crosses the \$1,000 threshold and determines, based on the guidance in the Supplemental E&J, that it has the requisite major purpose.

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1 committees or Super PACs, continue to be subject, however, to the “minimal” “reporting
2 requirements of 2 U.S.C. §§ 432, 433, and 434(a), and the organizational requirements of
3 2 U.S.C. §§ 431(4) and 431(8).” *Id.* at 689.

4 Notably, the Supreme Court has stressed that such requirements serve the vital role of
5 disclosure in political discourse. *See Citizens United*, 130 S. Ct. at 916 (recognizing that
6 increased “transparency” resulting from FECA disclosure requirements “enables the electorate to
7 make informed decisions and give proper weight to different speakers and messages”); *Doe v.*
8 *Reed*, 561 U.S. ___, 130 S. Ct. 2811, 2820 (2010) (holding that public disclosure of state
9 referendum petitions serves important government interest of “promot[ing] transparency and
10 accountability in the electoral process,” and “preserving the integrity of the electoral process”);
11 *Madigan*, 697 F.3d at 490 (upholding Illinois’s campaign finance disclosure provisions against
12 constitutional facial challenge, finding a substantial relation to “Illinois’s interest in informing its
13 electorate about who is speaking before an election”); *see also Doe*, 130 S. Ct. at 2837 (Scalia,
14 J., concurring) (“Requiring people to stand up in public for their political acts fosters civic
15 courage, without which democracy is doomed.”).²⁸

16 2. Application of the Test for Political Committee Status to American Issues
17 Project

18 a. Statutory Threshold

19 To assess whether an organization has made an “expenditure,” the Commission “analyzes
20 whether expenditures for any of an organization’s communications made independently of a
21 candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader
22 definition at 11 C.F.R. § 100.22(b).” Supplemental E&J at 5606.

²⁸ *But cf. Minn. Citizens for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (striking down certain registration and disclosure provisions of Minnesota’s campaign finance law, finding that those obligations as applied to associations that do not meet Buckley’s “major purpose test” are unduly burdensome and do not match any “sufficiently important disclosure interest”).

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1 AIP's Form 5 filed with the Commission lists independent expenditures totaling almost
2 \$2.9 million for the "Know Enough" advertisement. Thus, AIP made expenditures well in
3 excess of the \$1,000 statutory threshold for political committee status.

4 b. Major Purpose

5 AIP states — in its Response, on its website, and in its tax returns — that its major
6 purpose is not federal campaign activity but rather grassroots advocacy, education on issues and
7 public policies, and other activities appropriate for a section 501(c)(4) organization. The
8 Commission noted in the Supplemental E&J that it may consider such statements in its analysis
9 of an organization's major purpose, Supplemental E&J at 5606, but that such statements are not
10 necessarily dispositive. *See Real Truth About Obama v. FEC*, No. 3:08-cv-00483, 2008 WL
11 4416282, at *14 (E.D. Va. Sept. 24, 2008) ("A declaration by the organization that they are *not*
12 [organized] for an electioneering purpose is not dispositive.") (emphasis in original, alteration
13 added), *aff'd*, 575 F.3d 342 (4th Cir. 2009), *vacated on other grounds*, 130 S. Ct. 2371 (2010),
14 *remanded and decided*, 796 F. Supp. 2d 736, *affirmed sub nom. Real Truth About Abortion v.*
15 *FEC*, 681 F.3d 544 (4th Cir. 2012), *cert. denied*, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-
16 311).

17 Under the Commission's case-by-case approach, the Commission considers the
18 organization's "overall conduct," including its disbursements, activities, and statements.
19 Supplemental E&J at 5597. Here, AIP's proportion of spending related to federal campaign
20 activity is alone sufficient to establish that its major purpose in 2008 was the nomination or
21 election of federal candidates.

22 AIP spent \$2,878,872.75 in 2008 on a single independent expenditure. AIP's argument
23 that it was not a political committee rests on its contention that this amount does not constitute a

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1 majority of its 2008 fiscal *tax year* spending, which was \$5,897,307. AIP's argues — by
2 stressing that the Commission should focus on its spending reported in its IRS Form 990 — that
3 “major purpose” is determined based on a group's fiscal tax year, as opposed to a calendar year.
4 The Commission has determined previously, however, that “neither FECA, as amended, nor any
5 judicial decision interpreting it, has substituted tax status for the conduct-based determination
6 required for political committee status.” Supplemental E&J at 5999. Rather, when interpreting
7 and applying the Act, the Commission has concluded that “a detailed examination of each
8 organization's contributions, expenditures, and major purpose” is the proper approach, as
9 described in detail above. *Id.*

10 Furthermore, a calendar year, not a self-selected fiscal year, provides the firmest statutory
11 footing for the Commission's major purpose determination — and is consistent with FECA's
12 plain language. The Act defines “political committee” in terms of expenditures made or
13 contributions received “*during a calendar year.*” 2 U.S.C. § 431(4) (emphasis added). A
14 calendar year test is therefore consistent with the Act's plain language.

15 Moreover, using a calendar year as the statutory basis for defining “political committee”
16 as required by the Act but not as the basis for examining major purpose, as AIP suggests, could
17 lead to absurd results. For example, two groups with identical spending patterns could be
18 evaluated differently if one group ended its fiscal tax year on May 31 and the other's fiscal tax
19 year ended on December 31. The possibility of such an incongruous result is underscored by the
20 ability of a nonprofit organization to change its tax filing period with the IRS.

21 Finally, examining a group's spending with reference to a calendar year, rather than a
22 fiscal year, is consistent with the Commission's actions in the enforcement matters cited as
23 guidance in the 2007 Supplemental E&J. In two matters cited by the 2007 Supplemental E&J —

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1 and in one concluded shortly thereafter — the Commission focused on the group's activity
2 during the 2004 calendar year for that election to determine major purpose, and only used the
3 groups' later activity to assess their ongoing reporting obligations as political committees.²⁹ The
4 Commission, however, has not routinely examined a group's post-election activity unless such
5 activity implicated its ongoing obligations under the Act.³⁰

6 A clear majority of AIP's total expenditures made during the 2008 *calendar year* was for
7 "Know Enough," an independent expenditure.³¹ The "Know Enough" advertisement accounts
8 for, at the least, 55% of the group's 2008 calendar year activity of no more than \$5,209,991 on
9 programmatic activity.³² Because AIP spent more than a majority of its funds on express
10 advocacy in 2008, it had as its major purpose federal campaign activity (*i.e.*, the nomination or
11 election of a federal candidate).³³ Accordingly, we recommend that the Commission find reason

²⁹ For example, in MUR 5487 (Progress for America Voter Fund), the Commission's major purpose analysis of the group's spending was based on the funds raised and spent "before the 2004 General Election." See Conciliation Agreement ¶¶ 33-36, MUR 5487 (Progress for America Voter Fund). The Commission limited its analysis to activity during 2004 even though Progress for America Voter Fund had raised approximately \$4.6 million and spent approximately \$11.2 million since the 2004 presidential election. *See id.* ¶ 18. The Commission has also noted when groups cease to function after an election cycle. See Conciliation Agreement ¶ 16, MUR 5754 (MoveOn.org Voter Fund); Conciliation Agreement ¶ 36, MURs 5511, 5525 (Swift Boat Veterans and POWs for Truth).

³⁰ Not surprisingly, many political committee enforcement matters involve groups that only spend funds during the calendar year of an election, and that spending thus necessarily forms the sole basis for major purpose analysis.

³¹ Here, the Commission need consider only AIP's express advocacy during the 2008 calendar year to conclude its major purpose is the nomination or election of a federal candidate. *Buckley* does not require, however, that the determination of an organization's major purpose must be confined to consideration of its express advocacy.

³² In reaching that calculation, we included all non-overhead expenses from AIP's 2007 tax year, which ended on April 30, 2008 — a total of \$312,684. We also excluded the \$1 million that AIP spent on the "Every Single Day" advertisement in 2009.

³³ In reaching this conclusion, we do not intend to express the view that a finding of major purpose requires clearance of a 50 percent threshold, but only that the spending on federal campaign activity in this case is alone sufficient to support a finding of major purpose.

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1 to believe that American Issues Project violated 2 U.S.C. §§ 432, 433, and 434.³⁴ Because AIP
2 should be considered an independent expenditure only political committee that would not be
3 subject to the Act's contribution limits,³⁵ we recommend that the Commission find no reason to
4 believe that AIP violated 2 U.S.C. § 441a(f). Finally, we recommend that the Commission find
5 no reason to believe that AIP's officers and directors Martin and Failor violated the Act because
6 we have no information suggesting that they should be held personally liability for AIP's
7 violations.

8 3. Failure to Report Independent Expenditures for the General Election

9 The Obama Complaint also alleges that AIP failed to properly report a portion of the cost
10 of "Know Enough" as an independent expenditure that was made in connection with the general
11 election.³⁶ AIP's website states that it aired the "Know Enough" advertisement on August 29,
12 2008, the day after the Democratic Convention ended.³⁷ But AIP's Form 5 — disclosing the
13 "Know Enough" independent expenditure — stated that the expenditure was made only with
14 respect to the convention and it included only the total cost of the media purchase. The Obama
15 Complaint alleges that AIP was required to file an additional Form 5 disclosing the portion of the
16 "Know Enough" expenditure that was allocable to the general election because AIP aired "Know
17 Enough" after the convention but before the general election.

³⁴ The complaints also allege that AIP knowingly and willfully violated the Act's requirements that a political committee register and report to the Commission. However, there is insufficient information to support a knowing and willful finding.

³⁵ See *SpeechNow*, 599 F.3d at 689; Advisory Op. 2010-09 (Club for Growth); Advisory Op. 2010-11 (Commonsense Ten).

³⁶ See Obama for America Compl. at 3.

³⁷ See Democracy 21 Compl., Ex. J.

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1 If, however, as we conclude, AIP was required to register and report as a political
2 committee under the Act, it was not required to file Form 5 to disclose its independent
3 expenditures to air "Know Enough" on August 29, 2008.³⁸ Instead, AIP should have disclosed
4 its independent expenditures on Schedule E of its regularly scheduled reports and filed a 48-hour
5 notice for its August 29, 2008 independent expenditure using Form 3X. Thus, its failure to file
6 an additional independent expenditure report would be encompassed by its other reporting
7 obligations under 2 U.S.C. § 434(a) and (b).

8 AIP did not register or report as a political committee, and thus did not file reports with
9 the Commission on Form 3X. Nonetheless, because this particular violation would be subsumed
10 as part of AIP's broader reporting requirements under 2 U.S.C. § 434 addressed above, we
11 recommend that the Commission dismiss the allegation that AIP violated 2 U.S.C. § 434(c) and
12 11 C.F.R. § 109.10(c).

13 4. Harold Simmons

14 The Obama Complaint alleges that Simmons has exceeded the limit for contributions to
15 political committees and the aggregate limit for contributions by individuals by donating nearly
16 \$2.9 million to AIP.³⁹ See 2 U.S.C. § 441a(a)(1)(C) & (a)(3). At this time we have limited
17 information regarding the circumstances of Simmons's donation to AIP. In his response,
18 Simmons addresses his contribution only by stating that the "contribution was in advancement of
19 or related to [AIP's] exempt function" under section 501(c)(4) of the Internal Revenue Code.

20 Contribution limitations for individuals contributing to political committees, including
21 those that made only independent expenditures, were in effect at the time Simmons contributed

³⁸ Compare 11 C.F.R. § 104.4 (independent expenditure reporting by political committees) with 11 C.F.R. § 109.10 (independent expenditure reporting by persons other than political committees).

³⁹ See Obama for America Compl. at 3-4.

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1 to AIP. But intervening judicial and Commission precedent permits unlimited contributions to
2 independent expenditure only political committees.⁴⁰ Accordingly, we recommend that the
3 Commission find no reason to believe that Harold Simmons violated 2 U.S.C. § 441a(a)(1)(C) &
4 (a)(3).

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⁴⁰ See *SpeechNow*, 599 F.3d at 689; Advisory Op. 2010-09 (Club for Growth); Advisory Op. 2010-11 (Commonsense Ten).

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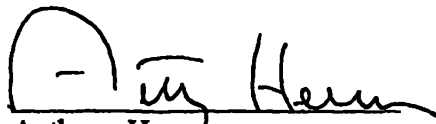
1 **IV. RECOMMENDATIONS**

- 2 1. Find reason to believe that American Issues Project, Inc. violated 2 U.S.C. §§ 432,
3 433, and 434.
4
5 2. Find no reason to believe that American Issues Project, Inc. violated 2 U.S.C.
6 § 441a(f).
7
8 3. Dismiss the allegation that American Issues Project, Inc. violated 2 U.S.C. § 434(c)
9 and 11 C.F.R. § 109.10(c).
10
11 4. Find no reason to believe that Harold Simmons violated 2 U.S.C. § 441a(a)(1)(C) &
12 (a)(3).
13
14 5. Find no reason to believe that Ed Martin and Ed Failor, Jr. violated the Act.
15
16 6. Approve the attached Factual and Legal Analyses.
17
18 7. Enter into pre-probable cause conciliation with American Issues Project, Inc.
19
20 8.

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9. Approve the appropriate letters.

3/12/13
Date



Anthony Herman
General Counsel



Daniel A. Petalas
Associate General Counsel



William A. Powers
Assistant General Counsel

Attachments:

1 - "Know Enough" Script

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"Know Enough" Script

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AUDIO	VIDEO
<p>ANNOUNCER: Beyond the speeches, how much do you know about Barack Obama? What does he really believe? Consider this:</p>	<p>Picture: Several screen shots of Barack Obama with a microphone or at a podium Text: What does he really believe? Consider this:</p>
<p>United 93 never hit the Capitol on 9/11.</p>	<p>Picture: Moving shot of the Capitol fading to a newspaper article Text: United 93 never hit the Capitol on 9/11</p>
<p>But the Capitol was bombed thirty years before -- by an <u>American</u> terrorist group called Weather Underground...</p>	<p>Picture: Different screenshots of photographs, likely from the scene of the Capitol bombing Text: Weather Underground declared war on the United States</p>
<p>that declared "war" on the U.S. -- targeting the Capitol, the Pentagon, Police Stations, and more.</p>	<p>Picture: Screenshot of Capitol, Pentagon, and group of police officers</p>
<p>One of the group's leaders, William Ayers, admits to the bombings, proudly saying later: "We didn't do enough."</p>	<p>Picture: Different images and video of William Ayers Text: "... didn't do enough." William Ayers</p>
<p>Some members of the group Ayers founded even went on to kill police.</p>	<p>Picture: Mug shots of several individuals and a photo of a police cruiser Text: 'Weather' Fugitive Is Seized In Killings</p>
<p>But Barack Obama is friends with Ayers, defending him as quote "respectable" and "mainstream."</p>	<p>Picture: Barack Obama speaking Text: Obama an Ayers ... "respectable" ... "mainstream"</p>
<p>Obama's political career was launched in Ayers' home. And the two served together on a left-wing board.</p>	<p>Picture: Photos of Obama and Ayers, side-by-side Text: Obama's political career was launched in Ayers' home. Served together on left-wing board in Chicago.</p>
<p>Why would Barack Obama be friends with someone who bombed the Capitol...and is proud of it?</p>	<p>Picture: Video of police officer walking through rubble. Photo of William Ayers. Text: Why would Obama be friends with ... someone who bombed the U.S. Capitol?</p>
<p>Do you know enough to elect Barack Obama? American Issues Project is responsible for the content of this ad.</p>	<p>Picture: Photo of Obama Text: Do you know enough to elect Barack Obama? AmericanIssuesProject.org Paid for by American Issues Project. Not Authorized by Any Candidate or Candidate's Committee.</p>