



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 21 2015

Scott E. Thomas, Esq.
Dickstein Shapiro LLP
1825 Eye Street, N.W.
Washington, D.C. 20006-5403

RE: MUR 6873
Wal-Mart Stores, Inc.
Wal-Mart Stores, Inc. PAC for
Responsible Government

Dear Mr. Thomas:

On September 25, 2014, the Federal Election Commission notified your clients, Wal-Mart Stores, Inc. and Wal-Mart Stores, Inc. PAC for Responsible Government and R. Lee Culpepper, in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint and information supplied by your clients, the Commission, on December 15, 2015, voted to dismiss this matter. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009).

If you have any questions, please contact Jin Lee, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter Blumberg".

Peter Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Wal-Mart Stores, Inc. MUR 6873
Wal-Mart Stores Inc. PAC for Responsible
Government and R. Lee Culpepper
in his official capacity as treasurer

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I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission (“Commission”).¹ The Complaint asserts that Wal-Mart Stores, Inc. (“Wal-Mart”) improperly exchanged treasury funds for voluntary contributions by operating a charitable matching program that encourages contributions to its separate segregated fund, Wal-Mart Stores Inc. PAC for Responsible Government (“WALPAC”). Under the WALPAC matching program, for each dollar an employee or “associate” contributes to WALPAC, Wal-Mart makes a \$2 charitable donation to Wal-Mart Associates in Critical Need a/k/a Associates in Critical Need Trust (“ACNT”), a non-profit charitable organization tax-exempt under section 501(c)(3) of the Internal Revenue Code that provides funds to Wal-Mart employees who experience financial hardships.

Respondents deny that they violated the law, asserting that no statute, regulation, or other Commission guidance prohibits the WALPAC matching program.² They note that, in the advisory opinion process, the Commission has long construed corporate matching programs designed to increase PAC participation as permissible “solicitation expenses,” so long as no individual contributor obtains a tangible benefit from either the SSF or the designated charity as

¹ See 52 U.S.C. § 30109(a)(2) (formerly 2 U.S.C. § 437g(a)(2)).

² Resp. at 1.

1 a result of that participation.³ The Respondents represent that no Wal-Mart employees received
2 assistance from the charitable program because of their participation in the matching program.
3 Therefore, Respondents contend that the Commission should likewise find that the WALPAC
4 matching program does not violate the Act.⁴

5 As set forth below, the Commission concludes that Wal-Mart's donations to ACNT under
6 the WALPAC matching program appear to qualify as permissible solicitation expenses,
7 consistent with the Commission's historical treatment of other matching arrangements.
8 Moreover, whatever indirect financial benefit a particular participant may arguably receive as a
9 result of participating in the program under the circumstances presented here would be *de*
10 *minimis* and does not warrant further enforcement proceedings in any event.

11 II. FACTUAL BACKGROUND

12 Wal-Mart is a retail corporation based in Bentonville, Arkansas. WALPAC, Wal-Mart's
13 SSF, was first formed in 1970 and is a registered political committee with the Commission. In
14 2001, Wal-Mart established ACNT, whose mission is "to provide financial aid to Wal-Mart
15 Associates when they experience extreme financial hardship."⁵ Since its inception, ACNT has
16 made over 110,000 grants totaling over \$100 million to Wal-Mart employees who experience "a
17 demonstrable economic hardship," such as a serious medical illness, natural disaster, or
18 homelessness.⁶ Grants are capped at \$1,500 during an employee's career with Wal-Mart.⁷

³ *Id.* at 2, 4.

⁴ *Id.*

⁵ ACNT 2012 Form 990 (June 13, 2013) (Attachment A of Complaint).

⁶ Resp. at 3, ACNT Program Guidelines (Attachment 2 of Response).

⁷ Resp. at 4.

1 In 2004, Wal-Mart began soliciting its restricted class employees to contribute to
2 WALPAC by offering to double the amount of any such contributions in corporate donations to
3 ACNT.⁸ According to the Respondents, since January 2011, a total of 17,853 members of Wal-
4 Mart's management have contributed to WALPAC.⁹ Respondents represent that only a small
5 proportion of WALPAC contributors received ACNT grants.¹⁰ For example, in fiscal year 2014,
6 ACNT awarded 15,740 grants to Wal-Mart employees, of which only 39 grants were awarded to
7 individuals who contributed to WALPAC, or .0025% of all grants in 2014.¹¹ Wal-Mart has also
8 submitted a sworn affidavit averring that "the ACNT grant request form does not question
9 whether the applying associate contributes to WALPAC" and that "there is no reference to
10 WALPAC at any stage of the application process."¹²

11 According to ACNT's financial statements,¹³ in 2012 ACNT received contributions and
12 other revenue totaling over \$16.7 million. ACNT received \$5.2 million of that revenue from
13 Wal-Mart associates, \$3.5 million from Wal-Mart pursuant to the WALPAC matching program,
14 and another \$8 million from the Walton Family Foundation.¹⁴ ACNT made \$10.1 million in
15 critical need payments to qualified employees that year.¹⁵ In 2013, ACNT received almost \$15
16 million in contributions and other revenue, with Wal-Mart associates contributing over \$5.3

⁸ *Id.* at 2.

⁹ *Id.* at 4.

¹⁰ *Id.*

¹¹ *Id.* (citing Affidavit of Emily Reynolds ¶¶ 8, 10 (Nov. 13, 2014) ("Reynolds Aff.") (Attachment 4 of Response)).

¹² Reynolds Aff. ¶ 7.

¹³ Compl., Attach. B (ACNT Financial Statements (Jan. 31, 2013; Jan. 31, 2012)). The Complaint appears to cite to drafts of the financial statements, but the Respondents also rely on the same information. *See* Resp. at 3 n.9 (comparing employee contributions to those made by Wal-Mart itself). For present purposes we therefore accept the accuracy of that information.

¹⁴ Compl., Attach. B at 3; Resp. at 3 n.9.

¹⁵ Compl., Attach. B at 3.

1 million, Wal-Mart contributing \$3.6 million pursuant to the WALPAC matching program, the
2 Walton Family Foundation contributing \$4 million, and the Wal-Mart Foundation contributing
3 \$2 million.¹⁶ ACNT's critical need payments totaled approximately \$13.8 million in 2013.¹⁷

4 III. LEGAL ANALYSIS

5 A. Prior Commission Treatment of Charitable Matching Programs and the 6 Prohibition on Exchanging Treasury Monies for Voluntary Contributions.

7
8 The Act prohibits corporations from making contributions to any federal candidate or
9 political committee.¹⁸ Corporations may nonetheless use treasury funds for the establishment,
10 administration, and solicitation of contributions to an SSF.¹⁹ They may not use that process,
11 however, "as a means of exchanging treasury monies for voluntary contributions."²⁰ In this
12 respect, Commission regulations specify that a corporation may not pay a contributor for his
13 contribution "through a bonus, expense account, or other form of direct or indirect
14 compensation."²¹

15 The Commission has determined that a corporation may offer to match the voluntary
16 political contributions of relevant employees with charitable donations, so long as "the individual
17 contributor to the separate segregated fund would not receive a financial, tax, or other tangible
18 benefit from either the corporation or the recipient charities, thus avoiding an exchange of
19 corporate treasury monies for voluntary contributions."²² The Commission has treated the cost

¹⁶ *Id.*; Resp. at 3 n.9.

¹⁷ Comp., Attach. B at 3.

¹⁸ 52 U.S.C. § 30118(a).

¹⁹ *See id.* § 30118(b)(2); 11 C.F.R. § 114.5(b).

²⁰ 11 C.F.R. § 114.5(b).

²¹ *Id.* § 114.5(b)(1).

²² Advisory Op. 1994-07 (GEON PAC) (permitting match to charity of PAC donor's own choosing, citing Advisory Opinions 1994-3, 1990-6, 1989-9, and 1989-7). *Accord* Advisory Op. 1994-03 (EnviroSource, Inc.)

1 of such matching programs as permissible solicitation expenses.²³ The Commission has
2 previously been divided, however, over whether a corporation may solicit contributions to its
3 SSF through an offer to donate to a charity twice the amount of any voluntary contribution to the
4 SSF.²⁴

5 **B. The WALPAC Matching Program Does Not Appear to Violate the Act or**
6 **Commission Regulations Under the Circumstances Presented Here.**
7

8 The Complaint alleges that Wal-Mart is improperly “trading general-treasury funds for
9 contributions” through its two-for-one matching program.²⁵ The Complaint contends the
10 corporation’s donation to the charity constitutes a “form of indirect compensation” to a
11 participating employee in at least two respects.²⁶ First, because an employee can leverage or
12 convert his or her contribution to WALPAC into a larger contribution to ACNT, an employee
13 may make a donation to ACNT through the program with a lesser financial burden than doing so
14 directly.²⁷ Second, because the sole intended beneficiaries of ACNT are Wal-Mart employees,
15 and employees who contribute through the matching program remain eligible to receive grants
16 from ACNT, Wal-Mart is providing a direct (albeit potential) financial benefit to its employees

(permitting matching program where “PAC contributors will not receive any financial benefit from either the corporation or the charity as a result of his or her participation.”); Advisory Op. 2003-04 (Freeport) (permitting corporate matching program where “each contributor to the PAC will be given written notice that he or she cannot receive any tangible benefit from the charitable entity in exchange for the matching contribution.”).

²³ See *supra* note 22.

²⁴ Advisory Op. Request 2009-03 (IntercontinentalExchange, Inc.) (“AOR 2009-03”). In AOR 2009-03, the requestor proposed to make up to a \$2 charitable donation for every \$1 a PAC contributor made to the SSF. The Office of General Counsel submitted a proposed draft advisory opinion that would have approved the request, reasoning that the double matching program would be a permissible solicitation expense so long as the PAC contributors received “no tangible benefit or premium in exchange for their contributions to the SSF.” Draft AO 2009-03 (Apr. 9, 2009). The Commission failed to approve that draft by a vote of 3-3. Certification, AOR 2009-03 (Apr. 21, 2009).

²⁵ Comp. at 3.

²⁶ *Id.* at 4.

²⁷ *Id.*

1 in return for their WALPAC contributions.²⁸ The Complaint further alleges that the WALPAC
2 matching program exerts an “improper coercive pressure” on Wal-Mart’s employees to
3 contribute to its SSF in violation of the anti-coercion provisions of the Act and regulations.²⁹

4 Respondents contend that the matching program is permissible under the Act. The
5 circumstances presented here are novel, and the Commission has yet to address them squarely.
6 Nonetheless, on balance the WALPAC matching program does not give rise to an impermissible
7 exchange of corporate funds for contributions under the terms of the Commission’s
8 implementing regulations and analogous precedent.

9 First, the Complaint asserts that Wal-Mart employees receive a direct benefit as a result
10 of their eligibility for grants generally. We conclude that the facts here do not support that claim.
11 In determining who is eligible to receive a grant, it appears that the charity does not assess
12 whether an employee made a political contribution to the SSF.³⁰ Although some WALPAC
13 donors have received ACNT grants, the Response represents that there is “no correlation
14 between the amount they have contributed and the amount they have received in grant funds to
15 cover hardship circumstances.”³¹ According to ACNT’s Program Guidelines, grants are
16 available to both hourly Wal-Mart associates — who are not members of the restricted class and,
17 thus, not solicited in connection with the matching program — as well as salaried members of
18 management. Further, to receive a benefit from the charity, claimants must demonstrate that
19 they satisfy certain qualifying circumstances reflecting financial hardship, such as serious

²⁸ *Id.* at 5.

²⁹ *Id.*

³⁰ Resp. at 4.

³¹ *Id.*

1 medical illness, death of an eligible dependent, natural disaster, or homelessness.³² The
2 Guidelines do not include making contributions to WALPAC as a factor in awarding grants, and
3 according to Respondents, the ACNT grant request form does not ask whether an applicant has
4 contributed to WALPAC.³³ Respondents also represent that Wal-Mart has never suggested that
5 WALPAC contributors should look for ways to apply for an ACNT grant.³⁴ The program
6 therefore appears consistent in this respect with other charitable matching programs that the
7 Commission has previously approved — notwithstanding that this program involves a charity
8 that provides grants to Wal-Mart employees who satisfy the charity's exigency requirements —
9 because receiving a grant from ACNT remains entirely unrelated to whether the particular
10 recipient contributed to WALPAC.³⁵

11 As to the ratio of the charitable payment to the size of the SSF contribution, the
12 Commission previously has been divided over whether a two-to-one match constitutes a
13 permissible exchange of corporate funds for voluntary contributions. It is true that an individual
14 in Wal-Mart's restricted class who wishes to make a donation to ACNT would be able to halve
15 the out-of-pocket expense of making a charitable contribution of a particular size, up to the
16 allowable maximum for SSF contributions. But reducing an individual donor's burden with
17 respect to making a donation of a particular size to a specified charity, standing alone, does not
18 constitute indirect "compensation" to the individual. Hence, it would not result in a payment to

³² *Id.*, Attach. 2.

³³ *Id.* at 2, 4 (citing Reynolds Aff. ¶ 7).

³⁴ *Id.* at 4; Reynolds Aff. ¶ 6 ("[T]o the best of our knowledge and belief, [WALPAC] has never suggested that WALPAC contributors should apply to ACNT for a grant.").

³⁵ The Commission has previously recognized in its advisory opinion process that the IRS also has concluded that charitable matching programs that do not benefit the individual making the contribution do not result in "compensation" to that contributor. See Taxation of Charity-PAC Contribution Matching Programs, IRS Gen. Counsel Mem. 39,877 (Aug. 27, 1992), <http://www.irs.gov/pub/irs-tege/gcm39877.pdf>.

1 the individual contributor “through a bonus, expense account, or other form of direct or indirect
2 compensation,” as contemplated under the terms of the relevant Commission regulation.³⁶ And
3 because the record reflects that making a contribution to WALPAC plays no part in determining
4 eligibility for an ACNT “critical need” grant, it appears that doubling the amount of a
5 contribution to WALPAC as a charitable donation to ACNT merely increases the permissible
6 solicitation expenses of Wal-Mart in connection with its management of the program.³⁷

7 Even if the Commission were to construe the benefit of a two-for-one matching
8 contribution as a form of compensation to the donor, however, the likelihood of any particular
9 participating donor being selected to receive an ACNT grant would be so minimal as to be *de*
10 *minimis*. Indeed, according to the Response, only .0025% of WALPAC donors who participated
11 in the matching program received ACNT grants in fiscal year 2014. Consequently, dismissal is
12 appropriate here.

13 The Complaint also suggests that a double-matching program may be coercive.³⁸ The
14 Act prohibits an SSF from making contributions or expenditures secured by physical force, job
15 discrimination, financial reprisals, or the threat thereof.³⁹ The record here contains no
16 information suggesting any employee was coerced into contributing through the WALPAC
17 matching program.

³⁶ 11 C.F.R. § 114.5(b)(1).

³⁷ *Id.* § 114.5(b); *see supra* note 22 (citing advisory opinions in which the Commission has approved the cost associated with SSF charitable matching programs as a form of permissible SSF solicitation expense).

³⁸ Specifically, the Complaint contends that the matching program exerts an “improper coercive pressure” on employees in the restricted class to contribute to the SSF. Compl. at 5.

³⁹ 52 U.S.C. § 30118(b)(3)(A); 11 C.F.R. § 114.5(a).

1 IV. CONCLUSION

2 For the foregoing reasons, the Commission dismisses the allegation that Wal-Mart or

3 WALPAC violated 52 U.S.C. § 30118 and 11 C.F.R. § 114.5.⁴⁰

⁴⁰

See Heckler v. Chaney, 470 U.S. 821 (1985).