UTRECHT, KLEINFELD, FIORI, PARTNERS

ATTORNEYS AT LAW
1776 Eye Street NW, Tenth Floor, Washington, D.C. 20006
Main (202) 778-4000
Facsimile (202) 379-4161
www.up-law.com

July 29, 2019

Lisa J. Stevenson, Acting General Counsel
Office of the General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: MUR 7562, Investing in US

Dear Ms. Stevenson:

This is the response of our client, Investing in US (the "Respondent") to the Complaint filed in the above-captioned Matter Under Review ("MUR") with the Federal Election Commission (the "Commission" or "FEC"). The Complaint is procedurally deficient and fails to assert facts that would constitute a violation of the Federal Election Campaign Act of 1971, as amended (the "Act") or the Commission's regulations. Instead, the Complaint relies entirely on newspaper articles containing unsworn statements and a medley of anonymous sources that describe conduct that does not violate the Act. The FEC has long held that speculative complaints lacking specific evidence of a violation of the Act are an insufficient basis upon which to find "reason to believe." The reason for this principle is significant and consequential. The Commission regulates in the area of political speech, the most fundamental of our First Amendment rights—and conditioning an investigation on reliable evidence of a violation of the Act is essential to preserving that right.

For the reasons stated below, Respondent respectfully requests that the Commission find no reason to believe that any violation of the Act or the Commission's regulations was committed and close this matter.

A. The Complaint is Procedurally Deficient and Should Be Dismissed

Congress has specifically delineated the statutory powers of the Commission to investigate potential violations of the Act. The Commission's authority to find "reason to believe" a violation has occurred requires a complainant to provide a sworn complaint to the General Counsel with "statements based on personal knowledge" or "statements based on information and belief" that, if true, would constitute a violation of the Act.[1] The regulations set forth the requirements of a proper complaint:

[1] 11 CFR § 111.4(c).

(d) The complaint should conform to the following provisions:

(1) It should clearly identify as a respondent each person or entity who is alleged to have committed a violation;

(2) Statements which are not based upon personal knowledge should be accompanied by an identification of the source of information which gives rise to the complainants belief in the truth of such statements;

(3) It should contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction; and

(4) It should be accompanied by any documentation supporting the facts alleged if such documentation is known of, or available to, the complainant.[2]

The Complaint in this matter does not contain any sworn facts that allege a violation of the Act. The only sworn facts in the Complaint are the mere existence of news articles appended to the letter from the Complainant.

The Commission has frequently found newspaper stories a poor source of sufficient facts to find "reason to believe." This was most clearly presented by Commissioners Donald McGahn and Caroline Hunter, who recognized that, in order to protect respondents from anonymous accusations, "unsworn complaints are considered defective and will be returned to the complainant."[3] The Commissioners further reasoned that, "if anonymous complaints are prohibited by the Act, it is illogical to permit the underlying basis for a complaint to be an anonymous source in a newspaper article."[4] The instant Complaint—which is based on unsworn statements in news articles containing anonymous sources—is riddled with precisely the types of defects that Commissioners McGahn and Hunter cautioned should warrant dismissal.

Although the Commission generally recognizes statements not based upon personal knowledge if they are "accompanied by an identification of the source of information which gives rise to the complainants belief in the truth of such statements,"[5] no such identification accompanied the instant Complaint. It is well-recognized that news articles "are notoriously inaccurate and often reliant on anonymous sources."[6] Even if the Commission afforded weight to the unsworn statements in the news articles attached to the Complaint—which it should not—there are still no sources identified in these articles that could "give rise to the complainants belief in the truth of such

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[2] 11 CFR § 111.4(d).
[3] MUR 6540, Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioner Caroline C. Hunter at 11 (available here: https://www.fec.gov/files/legal/murs/6540/13044340571.pdf). MUR 6540, Commissioner Petersen concurring at 1 (available here: https://www.fec.gov/files/legal/murs/6540/17044405963.pdf).
[4] *Id. In accord,* MUR 7135, Statement of Reasons of Chair Hunter and Commissioner Petersen at 1 ("The sole support…is a single statement made to reporters by a third party purporting to describe Manafort's comments during a call.").
[5] 11 CFR § 111.4(d)(2).
[6] *Supra* note 3 at 11 n.33.

statements" with respect to any allegations that Respondent violated the Act.[7] The Complaint fails to satisfy this standard because the only mention of Respondent's alleged activities in the news articles that form the entire factual record is derived from anonymous sources.

In addition to the deficiencies in the content of the Complaint, the notice provided to Respondent regarding the Complaint violates the Commission's duties under the Act. A copy of the Complaint, dated January 9, 2019, was received by Respondent on June 14, 2019—over five months from the date on which the Complaint was filed. This extended delay clearly violates the process prescribed in 52 USC § 30109(a)(1), which requires the Commission to notify respondents within five days of the Commission's receipt of a complaint. Such a fundamental and unexplained violation of a statutory duty cannot be ignored. Because the Complaint is procedurally deficient both in its content and the manner in which it was served on Respondent, the Commission should find no reason to believe that any violation of the Act or the Commission's regulations was committed.

B. The Complaint Fails to Assert That Respondent Violated the Act and Thus Fails to Satisfy the Reason to Believe Standard

When deciding whether to proceed to an investigation, the Commission must consider solely the contents of a complaint and any information provided by respondents to determine whether there is "reason to believe that a respondent has violated a statute or regulation over which the Commission has jurisdiction."[8] This standard is not easily satisfied—it is "higher than the Rules of Civil Procedure standard for the sufficiency of a complaint."[9] The Commission has made clear that "mere 'official curiosity' will not suffice as the basis for FEC investigations."[10] Indeed, "the Commission may find reason to believe only if a complaint sets forth specific facts, which, if proven true, would constitute a violation of FECA."[11]

In MUR 6540, which involved a complaint analogous to the instant Complaint, Commissioners McGahn and Hunter carefully set out the parameters of the "reason to believe" standard. In that matter, the Office of General Counsel recommended that the Commission open an investigation because "a reason to believe finding is appropriate when 'the available evidence in the matter is at least sufficient to warrant conducting an investigation.'"[12] In their Statement of

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[7] 11 CFR § 111.4(d)(2).
[8] 11 CFR § 111.9(a); *see supra* note 3, at 6 (requiring approval from the Commission for any pre-RTB investigation); MUR 6462, Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioner Caroline C. Hunter (requiring approval from the Commission for any pre-RTB investigation); Memorandum from Vice Chairman Donald F. McGahn to the Commission Re: Background Information Regarding Proposed Enforcement Manual at 5-6 (July 25, 2013)
[9] MUR 5878, Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen at 6 (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981)).
[10] *Id.*
[11] MUR 4960, Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1.
[12] MUR 6540 (Rick Santorum for President), First General Counsel's Report at 19 (quoting Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007)).

Reasons, however, Commissioners McGahn and Hunter expressly rejected that standard, and properly articulated the more stringent standard that Congress requires the Commission to apply:

> The appropriate standard is that there is reason to believe a violation has occurred, and not the lesser standard of a reason to investigate. Indeed, the Commission has in past years recommended to Congress to change the Act to the more lax "reason to investigate" standard, which Congress has declined to do.[13]

In declining to find a reason to believe that a violation occurred, the Commission emphasized the speculative nature of the news articles submitted with the complaint and the lack of any sworn or sourced information, the totality of which amounted to "insufficient credible evidence presented to support a reason to believe that any of the Respondents violated the Act."[14] Notably, the complaint filed in MUR 6540 included sworn assertions by the complainant and identified sources in the appended news articles—two features that are largely absent in the statements in the instant Complaint regarding the Respondent. Nonetheless, the Commission declined to find a reason to believe that a violation of the Act had occurred.

The reasoning adopted by the Commission in MUR 6540 applies with equal force in the present matter. Although the Complaint itself is sworn, the Complainant has no personal knowledge of any facts other than the existence of the appended news articles containing anonymous sources and unattributed speculation. Most importantly, none of the articles contain any assertions that, if true, suggest Respondent committed a violation of the Act.[15] The news articles accompanying the Complaint mention Respondent only sparingly, and never in connection with any activities regulated under the Act. In fact, much—if not all—of the relevant activity described in the articles falls squarely within the protections of the First Amendment and therefore cannot be restricted by the Commission, even if it concerns unpopular or disfavored content.[16] The First Amendment provides extraordinary safeguards to political issue speech, and it prohibits the Commission from making assessments about the truthfulness of such speech.[17] Given the breadth of the First Amendment's protections, the Act's reach may extend only to a narrow set of activities, including communications containing express advocacy, those that qualify as electioneering communications, and contributions to candidates, political committees, or parties. No such activity is described in the news articles appended to the Complaint, to wit:

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[13] *Supra* note 3 at 25.
[14] *Supra* note 3 at 29. Commissioners McGahn and Hunter even asserted that the news articles on which the complaint was based would be insufficient under the incorrect and lesser "reason to investigate" standard. *Id.*
[15] The Commission has long held that a complaint must present facts sufficient to evidence that a violation of the law has occurred, and that mere conclusory allegations without supporting evidence do not shift the burden of proof to respondents. *See, e.g.*, MUR 4850 (Deloitte & Touche, LLP), Statement of Reasons of Chairman Wold, and Commissioners Mason and Thomas at 2 ("The burden of proof does not shift to a respondent merely because a complaint is filed."). That said, Respondent here asserts it did not violate the Act, for it did not create, place, or pay for any of the alleged advertisements.
[16] Nor does liability under the Act turn on the speaker's state of mind or motive. Instead, the Supreme Court has made clear it is the speaker's words that determine if her conduct is regulated. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449, 468-9 (2007); *see also Van Hollen v. FEC*, 811 F.3d 486, 501 (D.C. Cir. 2016) (citing *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003)) (noting the Commission has a "unique prerogative to safeguard the First Amendment when implementing its congressional directives").
[17] There are no facts in the complaint that allege a violation of 11 CFR § 110.16.

- The first news article, dated December 18, 2018 in the *Washington Post*, does not mention Respondent, much less any conduct that violates the Act. Consequently, the assertions in this article cannot form a basis for finding reason to believe Respondent violated the Act.

- The second news article, dated December 18, 2018 in the *New York Times*, largely describes issue speech protected by the First Amendment. In particular, the article claims that a Facebook page called "Alabama Conservative Politics" conducted certain activities on social media in regard to a write-in candidate named Mac Watson in the Alabama Senate Special Election. As best as Respondent can discern, these claims arguably raise two theoretical violations of the Act: a possible disclaimer violation and a possible independent expenditure reporting violation. However, the articles appended to the Complaint present no reason to believe that Respondent engaged in any paid public communications that expressly advocated in support of or opposition to a candidate for federal office—a prerequisite for finding either violation.[18] Even if the assertions established the use of express advocacy through paid advertisements, the activity predates the Commission's clarifications regarding disclaimer requirements for social media and other non-traditional internet advertisements.[19] The only references that could potentially indicate unreported express advocacy or disclaimer violations involve *de minimis* activity on behalf of Mr. Watson, a write-in candidate who, based on public information and the statements in the article, received less than 300 votes[20] and failed to qualify as a "candidate" as defined under the Act.[21] Accordingly, even if there were express advocacy on behalf of Mr. Watson, it would not constitute a violation of the Act. [22]

- The third news article, dated January 7, 2019 in the *New York Times,* concerns a Facebook page called "Dry Alabama," which allegedly promoted the public policy of reinstating prohibition in Alabama.[23] Taken as true, this activity again concerns issue speech protected by the First Amendment, and thus falls outside the four corners of the Act.

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[18] Because the alleged activity described in the article was conducted online, there could be no unreported electioneering communications under the Act. *See* 11 CFR § 100.29 (limiting electioneering communications under the Act to broadcast, cable, or satellite communications). Nor would an endorsement of Mr. Watson have necessarily violated the Act. *See* 11 CFR § 114.4(c)(6).

[19] *See* Advisory Opinion 2002-09 (Commission exempted text message ads from the disclaimer requirement); Advisory Opinion 2010-19 (Commission could not approve a response on whether Google ads required a disclaimer); Advisory Opinion 2011-09 (Commission could not approve a response on whether Facebook ads required a disclaimer); Advisory Opinion 2013-18 (Commission could not approve a response); Advisory Opinion 2017-12 (Dated December 15, 2017, Commission stated that Facebook ads required a disclaimer).

[20] *See* Ala. Sec. of State, Canvass Results for the Special General Election Held on December 12, 2017, https://www.sos.alabama.gov/sites/default/files/voter-pdfs/2017%20Official%20General%20Election%20Results%20with%20Write-In%20Appendix%20-%202017-12-28.pdf.

[21] Mac Watson never filed a statement of candidacy with the FEC, and there are no reports available to establish that he raised or spent over $5,000 in order to trigger candidate status under the Act. *See FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981); *FEC v. Florida for Kennedy Committee*, 681 F.2d 1281 (11th Cir. 1982).

[22] None of the described alleged activity would present a violation of 11 CFR § 110.16.

[23] *Supra* note 16.

Even if the Commission were to find that some of the statements and assertions in the news articles articulated a violation of the Act, any violation would be *de minimis* and should be dismissed under *Heckler v. Chaney*.[24] Even the articles appended to the Complaint acknowledge the activity described had no effect on the election and the best evidence of a violation is potentially some off-handed assistance to a write-in "candidate" who received less than 300 votes in a state-wide Senate race in which more than 1.3 million votes were cast.[25] The Commission regularly dismisses small disclaimer violations pursuant to *Heckler*, and given the multitude of deficiencies in the instant Complaint, it would be appropriate for the Commission to decline to pursue this matter as it raises only potential *de minimis* violations.[26]

C. Conclusion

As detailed above, the Complaint is premised entirely on three news articles containing unsworn statements and anonymous sources, and it was not served in the time required by statute. The Commission thus should dismiss the Complaint as procedurally deficient. Beyond the procedural deficiencies, none of the articles contain any assertions that indicate Respondent engaged in activities that violated the Act—a required showing for the Commission to find reason to believe. Importantly, the activities described in the news articles involve core political issue speech that is vigorously protected by the First Amendment and largely beyond the Commission's purview to regulate. To the extent the Complaint alleges Respondent may have violated the Act, any such violation would be *de minimis* and should be dismissed pursuant to *Heckler v. Chaney*.

Respectfully submitted,

Lyn Utrecht
Adam Clark
Utrecht, Kleinfeld, Fiori Partners
Counsel for Investing in US

[24] 470 U.S. 821 (1985).
[25] *See* Ala. Sec. of State, Canvass Results for the Special General Election Held on December 12, 2017, https://www.sos.alabama.gov/sites/default/files/voter-pdfs/2017%20Official%20General%20Election%20Results%20with%20Write-In%20Appendix%20-%202017-12-28.pdf.
[26] *See*, *e.g.* MUR 7216; MUR 7245; MUR 6658; MUR 6642; ADR 875; ADR 751.