FEDERAL ELECTION COMMISSION
Washington, DC

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Hansjörg Wyss	)	
The Wyss Foundation	)	MUR 7904
Berger Action Fund, Inc.	)	
New Venture Fund	)	
Sixteen Thirty Fund	)	
	)	

STATEMENT OF REASONS OF COMMISSIONERS SHANA M. BROUSSARD AND ELLEN L. WEINTRAUB

The Complaint in this matter alleges that Hansjörg Wyss, a foreign national, made millions of dollars in prohibited indirect political contributions funneled through his non-profit entities, the Wyss Foundation and the Berger Action Fund, Inc., to two related politically active non-profit organizations Sixteen Thirty Fund ("STF") and New Venture Fund ("NVF"), and unincorporated projects jointly managed by STF and NVF known as The Hub Project and the Hub Education and Engagement Fund. This statement addresses the Complaint's allegations that Wyss provided these funds for election-related purposes and that the Wyss Foundation, the Berger Action Fund, NVF, STF, and The Hub Project all should have registered as political committees and filed required disclosure reports with the Commission as required by the Federal Election Campaign Act of 1971, as amended (the "Act").[1]

We voted to dismiss the allegations as to the Wyss Foundation and the Berger Action Fund for the reasons set forth in the First General Counsel's Report of the Commission's Office of the General Counsel ("OGC").[2] Further, for the reasons set forth below, we voted to dismiss the allegations that STF, The Hub Project, NVF, and the Hub Education and Engagement Fund failed to register and report as political committees in violation of 52 U.S.C. §§ 30102, 30103, and 30104.[3]

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1 Compl. ¶¶ 6-7 (May 14, 2021).

2 First Gen. Counsel's Rpt. at 31; Certification ("Cert.") ¶ 2.c (July 28, 2022).

3 Cert. ¶ 2 (July 28, 2022).

I. FACTUAL BACKGROUND

STF is a 501(c)(4) social welfare organization and states that it works on a variety of issues, including economic equality, health care, climate, racial justice, and voter access.[4] The organization spent over $400 million in 2020, including over $60 million in contributions to federal political committees[5] and more than $250 million in grants to 170 other 501(c)(4) social welfare organizations.[6]

NVF is a 501(c)(3) charitable organization that appears to work on a wide range of issues, including conservation, global health, international development, education, disaster recovery, and the arts.[7] The Response from NVF states that at the end of 2019, NVF managed a portfolio of more than $460 million.[8] Among the many projects under NVF's auspices is the Hub Education and Engagement Fund.[9] NVF's response explicitly states that "NVF does not engage in any activities to support or oppose candidates for elective office at any level of government." As a 501(c)(3) organization, NVF asserts that it is barred under IRS rules from engaging in political activity and specifically denies that it is a political committee.[10]

STF states that The Hub Project cited in the Complaint is one of "numerous projects sponsored by STF," and is a different project than the "Hub Education and Engagement Fund" sponsored by NVF, explaining that they are "two projects that complement one another but are sponsored by separate entities."[11]

STF states that it spent nearly $73 million on contributions to federal political committees and electioneering communications in 2020. STF argues that this amount constituted less than

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4 New Venture Fund and Sixteen Thirty Fund Resp. at 2 (July 7, 2021) ("NVF/STF Resp.").

5 *Id*. at 7.

6 IRS Form 990 (Unfiled), Sixteen Thirty Fund, 2020 Return of Organization Exempt from Income Tax, Sched. I, Part II (Oct. 29, 2021) [hereinafter STF 2020 Form 990], https://www.sixteenthirtyfund.org/wp-content/uploads/2021/11/Sixteen-Thirty-Fund-2020-Public-Disclosure-Copy.pdf (copy not available on IRS website).

7 NVF/STF Resp. at 2.

8 *Id*.

9 *Id.; see also Work With Us*, HUB PROJECT, https://thehubproject.org/jobs/ (last visited June 27, 2022) ("The Hub Education and Engagement Fund is a project of the New Venture Fund, a 501(c)(3) public charity that incubates new and innovative public-interest projects and grant-making programs.").

10 NVF/STF Resp. at 8-9.

11 *Id.* at 2 n.1, 6. The Hub Project's website describes itself as "made up of organizers, communicators, digital strategists, creatives, researchers, and operations professionals . . . here to help campaigns and coalitions." *See Our Work Is Not About Us*, HUB PROJECT, https://thehubproject.org/about/ (last visited June 27, 2022); *Work With Us*, HUB PROJECT, https://thehubproject.org/jobs/ (last visited June 27, 2022). The U.S. Patent and Trademark Office lists "The Hub Project" as a trademark registered to NVF. *See Trademark Electronic Search System,* U.S. PATENT & TRADEMARK OFF., https://www.uspto.gov/trademarks/search (last visited June 27, 2022) (click "Search out trademark database (TESS)" and search "The Hub Project").

18% of its overall spending and that in prior years its "FECA disbursements," which STF defined as independent expenditures, electioneering communications, and contributions to federal political committees, was an even lower percentage of its overall spending.[12] The NVF and STF Response includes the following chart depicting STF's spending from 2016 through 2020:[13]

Figure 1: FECA Disbursements in Relation to Overall Spending

	FEC Data				Total Expenses (IRS Form 990)	FECA Disbursements as % of Total Expenses
	Contributions to Federal Political Committees	Federal IEs	Federal ECs	Total FECA Disbursements		
2016	3,500.00	533,496.55	-	**536,996.55**	19,660,860.00	**2.73%**
2017	-	-	-	-	46,893,083.00	**0.00%**
2018	4,008,958.54	114,100.95	824,299.61	**4,947,359.10**	141,396,752.00	**3.50%**
2019	7,713,590.49	-	-	**7,713,590.49**	98,641,867.00	**7.82%**
2020	60,125,567.48	-	12,770,259.14	**72,895,826.62**	410,616,973.00[24]	**17.75%**

STF states that its overall "campaign spending" reported on its IRS filings – which appears to include state and local election activity outside the Commission's jurisdiction – did not exceed 25.3% of overall spending between 2016 and 2019; specifically, according to STF, the percentage of total local, state, and relevant federal spending compared to overall spending for each year was as follows: 18.4% (2016), 1.9% (2017), 25.3% (2018), and 13.4% (2019).[14] The Response includes an affidavit from STF's President verifying the group's IRS filings and providing an estimate of STF's 2020 total expenditures ($410,616,973).[15]

At present, STF's 2019 and 2020 Form 990s are not available to the public through the IRS's website.[16] However, STF's website hosts what appears to be an unsigned copy of the

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12 NVF/STF Resp. at 6-7.

13 *Id*. at 8. According to STF's FEC filings, it spent $12,875,630.64 in federal electioneering communications in 2020. *FEC Electioneering Communications: Filtered Results*, FEC.GOV, https://www.fec.gov/data/electioneering-communications/?committee_id=C30002786&committee_id=C30002810&committee_id=C30002844committee_id=C30003040&committee_id=C30003099&committee_id=C30003164 (last visited June 27, 2022) (showing all electioneering communications made by groups or projects controlled by STF).

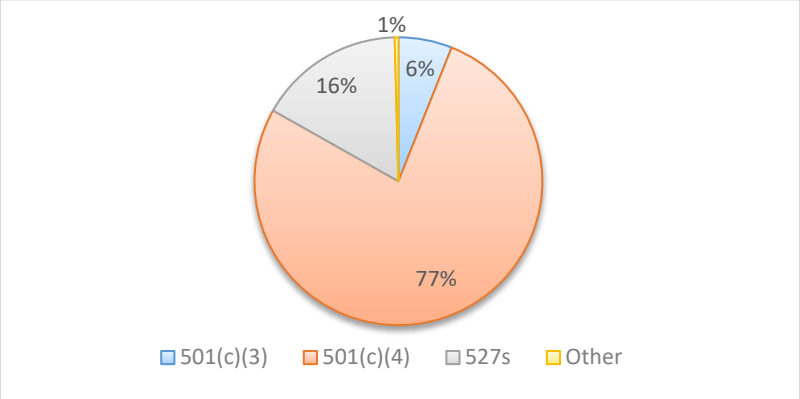
14 NVF/STF Resp. at 8.

15 *Id.*, Kurtz Aff. ¶ 4.

16 *Sixteen Thirty Fund*, IRS.GOV, https://apps.irs.gov/app/eos/detailsPage?ein=264486735&name=SIXTEEN%20THIRTY%20FUND&city=&state=&countryAbbr=US&dba=&type=COPYOFRETURNS&orgTags=COPYOFRETURNS (last visited June 27, 2022) (providing available STF tax returns).

group's 2020 Form 990, dated October 29, 2021,[17] which includes information that appears to support the numbers provided by the Response.[18] According to this unofficial 2020 Form 990, STF discloses spending over $167 million on "political campaign activity expenditures" in 2020, including on state-level activity, which represents about 40% of its total spending for the calendar year.[19] Of the more than $410 million in total expenses, STF spent more than $320 million making grants to 246 organizations.[20] STF lists 246 groups as grant recipients, of which the vast majority, measured both in number of recipients and total amounts of funds granted, are also social welfare organizations, as reflected in the following table and chart:

Organization Type	Total Grant Recipients	Total Value of Grants Awarded	Highest Grant	Average Grant Value
501(c)(4)	170	$250,418,705	$128,976,147	$1,473,051
527	38	$53,266,500	$7,700,000	$1,401,750
501(c)(3)	31	$19,573,375	$8,232,242	$631,399
Other	7	$1,333,930	$415,930	$190,561



STF's President also released a public statement summarizing the group's activity in 2020, stating that STF gave over $61 million to political committees and highlighted its $128 million grant to an organization called America Votes "to support their national efforts to expand access

17 STF 2020 Form 990. OGC also located an unofficial copy of STF's 2019 form. IRS Form 990, Sixteen Thirty Fund, 2019 Return of Organization Exempt from Income Tax, Sched. I, Part II (Nov. 11, 2020) [hereinafter STF 2019 Form 990], https://www.documentcloud.org/documents/21085690-sixteen-thirty-fund-2019-990.

18 *Cf.* NVF/STF Resp. at 7.

19 STF 2020 Form 990, Sched. C, Part I-A, line 2.

20 STF 2020 Form 990, Part I, line 18; *id.* Part IX, line 1; *id.*, Sched. I.

to vote by mail and increase voter turnout in communities of color and among traditionally disenfranchised people."[21]

II. LEGAL ANALYSIS

The Complaint argues that Wyss made large indirect contributions through the Wyss Foundation and the Berger Action Fund, which were ultimately provided to STF, NVF and The Hub Project for election related purposes.[22] Specifically, the Complaint argues that this money was funneled through The Hub Project. [23] According to the Complaint, The Hub Project has received approximately $56.5 million from the Wyss Foundation since 2007 and has been active in political campaigns by controlling the flow of money to other entities, including to Change Now, an independent expenditure-only political committee registered with the Commission that The Hub Project purportedly controls.[24] Respondents Wyss, the Wyss Foundation, and the Berger Action Fund state that any grants made through these organizations were accompanied by restrictive covenants providing that the grants could not be used for electoral purposes.[25] Respondents NVF and STF state that they complied with the grants' terms and conditions and did not use the funds toward election-related expenses.[26] NVF denies engaging in any political activity, and STF states that the extent of its election-related activity does not make it a political committee.[27]

A. Determining Political Committee Status

The Act and Commission regulations define a "political committee" as "any committee, club, association, or other group of persons that receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year."[28] In *Buckley v. Valeo*,[29] the Supreme Court held that defining political committee status "only in terms of [the] amount of annual 'contributions' and 'expenditures'"

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21 Amy Kurtz, *Progressive Philanthropy Answered the Call in 2020*, MEDIUM (Nov. 17, 2021), [hereinafter Kurtz Medium Post] https://amy-kurtz.medium.com/progressive-philanthropy-answered-the-call-in-2020-57f038a6a5d2.

22 Compl. ¶ 23 (citing Kenneth P. Vogel, *Swiss Billionaire Quietly Becomes Influential Force Among Democrats*, N.Y. TIMES (May 3, 2021), https://www.nytimes.com/2021/05/03/us/politics/hansjorg-wyss-money-democrats.html).

23 *See* Compl. ¶¶ 14-21.

24 Compl. ¶¶ 18-19, 21.

25 Hansjörg Wyss, the Wyss Foundation, and the Berger Action Fund, Inc., Resp. at 1-2 and 6-8 (July 7, 2021).

26 NVF/STF Resp. at 3, 9-10.

27 *Id.* at 3, 5-9.

28 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5.

29 424 U.S. 1 (1976) (*per curiam*).

might be overbroad, reaching "groups engaged purely in issue discussion."[30] To cure that infirmity, the Court concluded that the term "political committee" "need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[31] Under the statute as thus construed, an organization that is not controlled by a candidate must register as a political committee only if it (1) crosses the $1,000 threshold and (2) has as its "major purpose" the nomination or election of federal candidates.

Although *Buckley* established the major purpose test, it provided no guidance as to the proper approach to determine an organization's major purpose.[32] After *Buckley*, the Commission adopted a policy of determining on a case-by-case basis whether an organization is a political committee, including whether its major purpose is the nomination or election of federal candidates.[33] The Commission decided that determining an organization's major purpose "requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size-fits-all rule," and that "any list of factors developed by the Commission would not likely be exhaustive in any event, as evidenced by the multitude of fact patterns at issue in the Commission's enforcement actions considering the political committee status of various entities."[34]

To determine an entity's "major purpose," the Commission considers a group's "overall conduct," including, among other factors, public statements about its mission, organizational documents, and government filings (*e.g.*, IRS filings), and the proportion of spending related to "Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate)."[35] With respect to such comparative spending, the Commission has stated that it compares how much of an organization's spending is for "federal campaign activity" relative to "activities that [a]re not campaign related."[36] A district court has concluded that electioneering communications

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30 *Id.* at 79.

31 *Id.*

32 *See, e.g.*, *Real Truth About Abortion, Inc. v. FEC* (formerly *Real Truth About Obama v. FEC*), 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*, 568 U.S. 1114 (Jan. 7, 2013) (No. 12-311) ("*RTAA*") ("Although *Buckley* did create the major purpose test, it did not mandate a particular methodology for determining an organization's major purpose.").

33 *See, e.g.,* Independent Expenditures; Corporate and Labor Organization Expenditures, 57 Fed. Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking); Definition of Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking); *see also* Summary of Comments and Possible Options on the Advance Notice of Proposed Rulemaking on the Definition of "Political Committee," (Sept. 12, 2001), https://sers.fec.gov/fosers/showpdf.htm?docid=5684; Cert. (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance), https://sers.fec.gov/fosers/showpdf.htm?docid=5669.

34 Political Committee Status, 72 Fed. Reg. 5595, 5602 (Feb. 7, 2007) (Supplemental Explanation and Justification) [hereinafter Supplemental E&J].

35 *Id*. at 5597, 5605.

36 Supplemental E&J at 5597, 5605-06. This approach was subsequently challenged and upheld in federal district court. *See Shays v. FEC*, 511 F. Supp. 2d 19 (D.D.C. 2007). In 2012, in *RTAA*, the Fourth Circuit upheld the

"presumptively" indicate a purpose of nominating or electing a candidate, and thus that in a prior matter it was contrary to law for a controlling group of Commissioners to categorically exclude non-express advocacy in a Commission analysis of the major purpose of the entity at issue.[37]

Political committees must comply with certain organizational and reporting requirements set forth in the Act. They must register with the Commission, file periodic reports for disclosure to the public, appoint a treasurer who maintains its records, and identify themselves through "disclaimers" on all of their political advertising, on their websites, and in mass emails.[38]

B. Commission Precedent Does Not Support Finding Reason to Believe That Respondents STF and The Hub Project Are Political Committees

1. Statutory Spending Threshold

STF, through The Hub Project and its other initiatives, appears to have met the first part of the test for political committee status, the statutory spending threshold.[39] To assess whether an organization has made an "expenditure" for purposes of the statutory spending threshold, the Commission analyzes whether spending on any of an organization's communications made independently of a candidate constitutes express advocacy under 11 C.F.R. § 100.22.[40] In 2020, STF provided almost $6 million to Change Now, the independent expenditure-only political

Commission's case-by-case approach in the face of a constitutional challenge. *See* 681 F.3d 544; *see also Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013) (quoting *RTAA* and upholding Commission's case-by-case method of determining political committee status), *cert. denied*, 572 U.S. 1114 (2014).

[37] *See Citizens for Resp. & Ethics in Wash. v. FEC,* 299 F. Supp. 3d 83, 93 (D.D.C. 2018) ("*CREW II*") (determining that the Commission "must presumptively treat spending on electioneering ads as indicating a purpose of nominating or electing a candidate"); *see also id.* at 100 ("The Commission may in special circumstances conclude that an electioneering ad does not have [an election-related major] purpose. But given Congress's recognition that the 'vast majority' of electioneering ads have the purpose of electing a candidate, the Commission's exclusion of electioneering ads from its major-purpose analysis should be the rare exception, not the rule."). *Citizens for Resp. & Ethics in Wash. v. FEC*, 209 F. Supp. 3d 77, 93 (D.D.C. 2016) ("*CREW I"*) (stating that it is improper to "exclude from . . . consideration all non-express advocacy in the context of disclosure"). *See also,* Factual & Legal Analysis at 9, 15, MUR 6538R (Americans for Job Security, *et al.*) (noting the court's instruction "to look beyond express advocacy," the Commission considered the group's spending on both independent expenditures and electioneering communications as part of the major purpose analysis).

[38] *See* 52 U.S.C. §§ 30102-30104; 11 C.F.R. § 110.11(a)(1).

[39] 52 U.S.C. § 30101(3) (defining political committee as "any committee, club, association, or other group of persons which receives contributions, aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year").

[40] Supplemental E&J at 5606.

committee allegedly under the direct control of The Hub Project.[41] STF also spent $114,100 on independent expenditures in 2018 through other organizations.[42]

2. Major Purpose

Having determined that STF has met the statutory spending threshold for being a political committee, the Commission next applies the second part of the test: whether STF's "major purpose" is the nomination or election of a candidate. As set forth above, the Commission makes the major-purpose determination on a case-by-case basis. Historically, the Commission has considered several factors, including the organization's public statements and the proportion of its spending on federal election activities relative to other spending.[43]

In this case, STF's and The Hub Project's public statements do not support the allegation that these Respondents' major purpose is the nomination or election of federal candidates. STF's website describes its mission broadly as "Empowering Progressive Changemakers" and identifies a wide variety of specific issue initiatives, pertaining, for example, to health care; social, racial, and economic justice; climate change; voting access; and civic participation.[44] Likewise, a public statement from STF's President discusses STF's "mobiliz[ation]" in 2020 to face issues such as "a global pandemic, a long-overdue reckoning with racial justice, and a climate crisis." This statement acknowledges giving "over $61 million to political committees" during "the most consequential election of our lives," but also noted the organization's more extensive spending on state and local ballot measures, Supreme Court reform, lobbying for legislative change, and ensuring access to voting during the pandemic.[45] The few public statements about STF in the record, taken as a whole, seem to reflect a general purpose of supporting and facilitating voting and advocacy pertaining to progressive issues, and less so the purpose of electing specific federal candidates.

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41 *See supra* page 5; STF 2020 Form 990 at Sched. C, Part IV. In 2019, STF gave $25,000 to Change Now. STF 2019 IRS Form 990 at Sched. I, Part II.

42 STF spent $548,228.80 in independent expenditures in 2016 through Sixteen Thirty Fund/Make it Work America1 and Sixteen Thirty Fund/Make it Work America Action, along with other projects. *See FEC Independent Expenditures: Filtered Results*, FEC.GOV, https://www.fec.gov/data/independent-expenditures/?data_type=processed&most_recent=true&committee_id=C90016320&committee_id=C90016338&committee_id=C90017484&committee_id=C90017922&committee_id=C90018102&committee_id=C90018110&is_notice=false (last visited June 27, 2022) (showing all independent expenditures made by entities associated with STF).

43 Supplemental E&J, 72 Fed. Reg at 5605.

44 *See* SIXTEEN THIRTY FUND, https://www.sixteenthirtyfund.org/ (last visited June 27, 2022) (stating that STF "empower[s] progressive changemakers"); *About Us*, SIXTEEN THIRTY FUND, https://www.sixteenthirtyfund.org/about-us/ (last visited June 27, 2022) (quoting STF President as stating "[W]e have a responsibility to mobilize in the face of societal challenges and provide new investments and initiatives to advocate for what we believe in—from addressing climate change, to protecting voting rights and access to health care, to promoting equity and social justice").

45 Kurtz Medium Post.

Turning to comparative spending, the available information about STF's spending falls short of the necessary showing that STF's major purpose is the nomination or election of a federal candidate under the analysis applied in prior Commission matters. STF's Response states that in 2020 it spent only 17.75% of its overall budget giving directly to federal political committees and making independent expenditures and electioneering communications, which is far below the level of comparative spending found in cases in which the Commission has voted to proceed.[46]

The available information does indicate that some of the social welfare organizations to which STF made substantial grants *themselves* engaged in making contributions to political committees and making independent expenditures or electioneering communications.

Now, if the Commission were to impute every penny of the grant recipients' spending on contributions, independent expenditures, and electioneering communications to STF, STF's relevant 2020 spending percentages could approach spending levels that the Commission has concluded satisfy the major purpose test.[47] But the information before the Commission does not establish the degree to which STF's grants supported this activity.

More importantly, the Commission has not previously considered the spending of an organization's grantees in establishing whether the organization itself met the major purpose test. Rather, the Commission to date, has examined only the organization's own direct contributions, expenditures, and relevant communications.[48] We voted to abide by those precedents here; the Commission cannot retroactively hold respondents to a standard in the enforcement context that they could not have previously divined. These Respondents appear to have comported their conduct with the guidance previously issued by the Commission. Considering only such direct spending, we do not believe that the record before us justifies pursuing this complaint.

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[46] NVF/STF Resp. at 7. *See, e.g.*, F&LA at 8-10, MUR 7465 (Freedom Vote, Inc.) (finding reason to believe where an organization's campaign activity constituted 61% of total expenditures one year, and nearly 47% over the span of two later years, with an open question about accounting irregularities in those years); F&LA at 15, MUR 6538R (Americans for Job Security, *et al.*) ("More than half of [AJS's total spending] was for independent expenditures . . . and the electioneering communications analyzed above . . . . The Commission has never set a threshold on the proportion of spending on major purpose activities required for political committee status and declines to do so now. Without determining whether it is *necessary* to cross a 50 percent threshold to determine an organization's major purpose, it is *sufficient* in this case, based on the available information, to find reason to believe that AJS's major purpose had become the nomination or election of federal candidates." (emphasis in original)). *See also,* Supplemental E&J, 72 Fed. Reg. at 5605 (providing three examples of organizations whose major purpose was federal campaign activity where the organizations respectively spent 91%, 50-75%, and 68% of their budgets on federal campaign activity).

[47] First Gen. Counsel's Rpt. at 22, 26-28, 29. This theory formed the basis of OGC's recommendation that the Commission find reason to believe that STF was a political committee.

[48] *See, e.g.,* MUR 7465 (Freedom Vote, Inc.) (examining spending on independent expenditures and direct contributions); F&LA at MUR 6538R (Americans for Job Security, et al.) (examining spending on independent expenditures and electioneering communications).

We are not oblivious to the concern that an organization could avoid political committee status by funneling its funds through successive organizations, each of which spent just under half of its funds on direct campaign advocacy and then passed along the rest to another organization that repeated the process until substantially all of the original funds were spent on direct advocacy through multiple steps in the chain.[49] We believe that this is an analysis that the Commission could and should engage in going forward.

In sum, the record before us does not contain compelling statements attributable to STF reflecting a major purpose of nominating or electing candidates. Furthermore, the available financial information is insufficient to support a conclusion that STF's own spending reflects a purpose of nominating or electing a candidate. Accordingly, under the Commission's prior guidance, there is insufficient information in the record before us to find reason to believe that Sixteen Thirty Fund should have registered and reported as a political committee. Similarly, the record lacks information supporting reason to believe that The Hub Project or the Hub Education and Engagement Fund should have registered and reported as political committees. Accordingly, we voted to dismiss the allegations that Respondents violated 52 U.S.C. §§ 30102, 30103, and 30104.

Moving forward, the regulated community should take note that we will consider the grantmaking of alleged political committees to be a relevant criterion when considering an entity's major purpose.

September 1, 2022

Shana M. Broussard
Commissioner

Ellen L. Weintraub
Commissioner

[49] After only five rounds of groups spending 49% on direct advocacy and passing the rest along to the next group, 97% of the initial sum would be spent on direct advocacy.