



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 29, 2020

Michael E. Zolandz, Esq.
Benjamin P. Keane, Esq.
Dentons USA LLP
1900 K Street, NW
Washington, DC 20006

RE: MUR 7768
(formerly AR 19-03)

Dear Messrs. Zolandz and Keane:

In the normal course of carrying out its supervisory responsibilities, the Federal Election Commission (“the Commission”) became aware of information suggesting that the Ambulatory Surgery Center Association PAC and John Greenwich, in his official capacity as treasurer (the “Committee” or “ASCAPAC”), may have violated the Federal Election Campaign Act of 1971, as amended (the “Act”). On September 9, 2019, the Commission notified the Committee that it was being referred to the Commission's Office of the General Counsel for possible enforcement action under 52 U.S.C. § 30109. On June 30, 2020, in connection with the Audit Division (“Audit”) referral of 2016 election cycle activity, the Commission opened a Matter Under Review (“MUR”) and found reason to believe that the Committee violated 52 U.S.C. § 30118(a) by accepting prohibited corporate contributions totaling \$80,028; violated 52 U.S.C. § 30104(b) by failing to properly report receipts totaling \$187,623; and violated 52 U.S.C. § 30102(h)(1) and 11 C.F.R. § 103.3(a) by failing to timely deposit receipts totaling \$84,333. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's findings.

In order to expedite the resolution of this matter, the Commission has authorized the Office of the General Counsel (“OGC”) to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Pre-probable cause conciliation (“PPCC”) is not mandated by the Act or the Commission’s regulations, but is a voluntary step in the enforcement process that the Commission is offering to resolve this matter at an early stage and without the need for briefing the issue of whether or not the Commission should find probable cause to believe that your clients violated the law.

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If your clients are interested in engaging in pre-probable cause conciliation, please contact Tony Buckley, the attorney assigned to this matter, at (202) 694-1650 or tbuckley@fec.gov, within seven days of receiving this letter. During conciliation, you may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials within 15 days of receiving this letter. Where appropriate, statements should be submitted under oath. Because the Commission only enters into pre-probable cause conciliation in matters that it believes have a reasonable opportunity for settlement, it may proceed to the next step in the enforcement process if a mutually acceptable conciliation agreement cannot be reached within sixty days. *See* 52 U.S.C. § 30109(a), 11 C.F.R. Part 111 (Subpart A). Conversely, if your clients are not interested in pre-probable cause conciliation, the Commission may conduct formal discovery or proceed to the next step in the enforcement process. Please note that once the Commission enters the next step in the enforcement process, it may decline to engage in further settlement discussions until after making a probable cause finding. Pre-probable cause conciliation and other enforcement procedures are detailed in the Commission's "Guidebook for Complainants and Respondents on the FEC Enforcement Process," which is available on the Commission's website at http://www.fec.gov/em/respondent_guide.pdf.

Please note that your clients have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519.

In the meantime, this matter will remain confidential in accordance with 52 U.S.C. §§ 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. Please be advised that although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.¹

¹ The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

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We look forward to your response.

On behalf of the Commission,

A handwritten signature in black ink, appearing to read "J.E. Trainor, III". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

James E. "Trey" Trainor III
Chairman

Enclosures
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Ambulatory Surgery Center Association **MUR:** 7768
PAC (ASCAPAC) and John Greenwich
in his official capacity as treasurer

I. INTRODUCTION

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities.¹ The Audit Division of the Federal Election Commission ("Commission") referred Ambulatory Surgery Center Association PAC ("ASCAPAC" or "the Committee"), which is the separate segregated fund of The Ambulatory Surgery Center Association, to the Commission's Office of the General Counsel for apparent violations of the Federal Election Campaign Act of 1971, as amended (the "Act") stemming from a Commission audit of the Committee's 2015-2016 activities. On August 22, 2019, the Commission approved the Proposed Final Audit Report finding that the Committee had improperly accepted \$80,028 in prohibited contributions, failed to properly disclose \$187,623 in receipts, and made untimely deposits of \$84,333 in receipts.

Based on available information, the Commission finds reason to believe that ASCAPAC violated 52 U.S.C. §§ 30118(a), 30104(b), 30102(h)(1) and 11 C.F.R. § 103.3(a).

¹ See 52 U.S.C. § 30109(a)(2).

II. FACTUAL AND LEGAL ANALYSIS

A. Background

ASCAPAC registered with the Commission on May 25, 2006, as the separate segregated fund of The Ambulatory Surgical Center Association. John Greenwich is the Committee's treasurer. During the 2016 election cycle, ASCAPAC had receipts of \$374,329.73 and disbursements of \$289,757.66.

B. Analysis

1. Acceptance of Prohibited Contributions

In general, a political committee may not accept a contribution from a corporation.² A limited liability company ("LLC") that has elected to be treated as a corporation by the Internal Revenue Service, or has publicly traded shares, is considered to be a corporation and may not make contributions.³ A contribution from an LLC that is treated as a partnership by the Internal Revenue Service is considered a contribution from the partnership.⁴ As a partnership contribution, the contribution is apportioned among the partners according to instructions from

² 52 U.S.C. § 30118(a). Political committees that refrain from making contributions to candidates and restrict their activity to making independent expenditures ("IEOPCs," or "independent expenditure only political committees") may accept contributions from corporations and labor organizations. *See* Advisory Opinion 2010-11 (Commonsense Ten) at 3 (in which the Commission determined that "corporations, labor organizations and political committees . . . may make unlimited contributions to [political committees] that make only independent expenditures.").

³ *See* 11 C.F.R. § 110.1(g)(3).

⁴ 11 C.F.R. § 110.1(g)(2).

the partnership.⁵ No portion of a contribution may be made by a partner that is a corporation.⁶

A partnership in which each partner is a corporation may not make contributions at all.⁷

The Commission's audit initially determined that the committee received 102 contributions totaling \$93,023 from apparent prohibited sources, including corporations and various types of LLCs.⁸ The Committee was given the opportunity to demonstrate that these apparent prohibited sources, including the LLCs, were in fact eligible to make contributions.⁹ Following consideration of the materials submitted by the Committee, the Audit Division staff determined that some of the LLCs were eligible contributors, and the Commission approved a finding that ASCAPAC received contributions totaling \$80,028 from prohibited sources.¹⁰

In response to both the Draft Final Audit Report and the notification of the referral, the Committee argued that it accepted the contributions in good faith and any violation was inadvertent.¹¹ The Committee pointed out that it took corrective action by refunding the full amount of the LLC contributions, totaling \$80,028, and that the Commission should therefore take no further action in this matter.¹² The Committee also restated its claim previously argued during the audit phase that it believed that \$40,398 of the contributions at issue were legal

⁵ See 11 C.F.R. § 110.1(e)(1)-(2).

⁶ 11 C.F.R. § 110.1(e)(2)(ii).

⁷ See Advisory Opinion 2001-07 at 8 (Nuclear Management Company PAC) (concluding that LLC treated as partnership and wholly owned by corporations may not contribute to nonconnected political committee).

⁸ Audit Referral AR 19-03 at 3.

⁹ *Id.* at 3-9.

¹⁰ *Id.* at 10.

¹¹ ASCAPAC Resp. at 2.

¹² *Id.*

because the LLC contributors did not file tax returns as corporations.¹³ But the submission did not provide any new documentation to support its claim or address the corporate status of the partners in these partnerships.¹⁴

The Commission's audit determined that ASCAPAC accepted \$80,028 in corporate contributions and no new information has been provided to demonstrate that this finding was incorrect. In fact, the respondent has refunded the subject contributions.¹⁵ Accordingly, the Commission finds reason to believe that ASCAPAC and John Greenwich in his official capacity as treasurer, violated 52 U.S.C. § 30118(a) by accepting prohibited contributions.

2. Failure to Properly Disclose Contributions

The Act requires committee treasurers to file reports of receipts and disbursements in accordance with the provisions of 52 U.S.C. § 30104(b). For each itemized contribution, the committee must provide the following information:

- The contributor's full name and address (including zip code);
- The contributor's occupation and the name of his or her employer (for individual contributors);
- The date of receipt (the date the committee received the contribution);
- The amount of the contribution; and
- The calendar year-to-date total of all contributions from the same individual.¹⁶

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1.

¹⁶ 11 C.F.R. §§ 100.12 and 104.3(a)(4) and 52 U.S.C. § 30104(b)(3)(A).

During audit fieldwork, Audit staff initially identified 124 contributions totaling \$193,623 that were incorrectly disclosed or missing the required disclosure information.¹⁷ The errors in reporting these contributions included:¹⁸

- 58 contributions that incorrectly disclosed contributors' names;
- 42 contributions that incorrectly disclosed contribution dates;
- 53 contributions that incorrectly disclosed partnership attributions.¹⁹

Based on the documentation submitted by ASCAPAC, the Audit staff agreed that two contributions totaling \$5,000 were correctly disclosed.²⁰ Following consideration of all of the materials submitted by the Committee, the Commission approved a finding that ASCAPAC failed to correctly disclose contributions totaling \$187,623 on its disclosure reports.²¹

ASCAPAC states that it has updated its policies and procedures, created new compliance and information-sharing systems, engaged in an internal review of 2017 and 2018 contributions, and contracted with an outside vendor to ensure compliance with FEC regulations.²² However, while ASCAPAC did amend its disclosure reports to correct the reporting for \$67,508 in improperly reported contributions, it did not comply with the Interim Audit Report recommendation to amend its disclosure reports as to an additional \$120,115 in contributions.²³

¹⁷ Audit Referral AR 19-03 at 11.

¹⁸ *Id.* at 12.

¹⁹ Some of the 124 misreported contributions contained multiple errors of different types.

²⁰ Audit Referral AR 19-03 at 12.

²¹ *Id.* at 14.

²² ASCAPAC Resp. at 3.

²³ Audit Referral AR 19-03 at 11.

In response to the notification of the audit referral, ASCAPAC argued only the disclosure shortcomings were inadvertent errors and the staff made good faith efforts to collect and report the requisite data.²⁴ ASCAPAC made similar arguments during the audit process. The number and different types of errors and the lack of complete corrective action suggests that the Commission should pursue this matter. Accordingly, the Commission finds reason to believe that ASCAPAC and John Greenwich in his official capacity as treasurer, violated 52 U.S.C. § 30104(b) by failing to correctly disclose contributions totaling \$187,623.

3. Failure to Timely Deposit Receipts

A political committee must designate one or more State Banks, federally chartered depository institutions, or federally insured depository institutions, as its campaign depository or depositories. *See* 52 U.S.C. § 30102(h)(1). A contribution received by a political committee must be deposited in an account at a committee's campaign depository within ten (10) days of the committee treasurer's receipt of that contribution. 11 C.F.R. § 103.3(a).

The Audit staff determined that ASCAPAC did not deposit 106 contributions totaling \$84,333 within 10 days of receipt.²⁵ This amount represented 23 percent of ASCAPAC's receipts from individuals.²⁶ Specifically, the audit determined that the untimely deposits were made between 14 and 74 days after the date of the actual contribution.²⁷ In response to the Interim and Draft Final Audit Reports, ASCAPAC indicated that it was working to improve its

²⁴ ASCAPAC Resp. at 3.

²⁵ Audit Referral AR 19-03 at 15.

²⁶ *Id.*

²⁷ *Id.* at 16.

compliance, but did not provide any information to challenge the audit determination regarding its untimely deposits. The Commission approved a Final Audit Report finding that ASCAPAC untimely deposited contributions totaling \$84,333.²⁸

In response to notification of the referral, ASCAPAC again maintained that it was its policy and practice to deposit contributions within ten days of receipt.²⁹ ASCAPAC also maintained that some portion of the untimely deposits identified during the audit were timely deposited within ten days from the date of the actual receipt (as opposed to the date the check was written), but that the Committee failed to maintain records that could prove the actual date of receipt.³⁰ In any event, the Committee maintained that any untimely deposits were inadvertent technical errors and did not warrant further Commission action.³¹

ASCAPAC has taken corrective action with its deposit procedures, but it nevertheless failed to timely deposit 23 percent of its receipts from individual contributors during the audit period. Further, ASCAPAC's contention that some of the deposits were incorrectly identified as untimely due to misdated checks or delays in mailing is not credible. A large portion of the deposits (65 contributions) were made well after the check dates (between 20 and 74 days) and in any event ASCAPAC has submitted no documentation supporting this claim.

Accordingly, the Commission finds reason to believe that ASCAPAC and John Greenwich in his official capacity as treasurer, violated 52 U.S.C. § 30102(h)(1) and 11 C.F.R. § 103.3(a) by failing to timely deposit \$84,333 in receipts.

²⁸ Audit Referral AR 19-03 at 17.

²⁹ ASCAPAC Resp. at 3.

³⁰ *Id.*

³¹ *Id.*