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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5024
DATE COMPLAINT FILED: May 31, 2000
DATES OF NOTIFICATION: June 8, 2000
DATE ACTIVATED: July 26, 2001¹
DATE REASSIGNED: April 15, 2002

EXPIRATION OF STATUTE OF
LIMITATIONS: April 21, 2005

COMPLAINANTS: Anthony S. Cicatiello and Kean for Congress

RESPONDENTS: Council for Responsible Government, Inc. and its
Accountability Project
Gary Glenn (internally generated)
William "Bill" Wilson (internally generated)

RELEVANT STATUTES
AND REGULATIONS:

2 U.S.C. § 431(4)(A)
2 U.S.C. § 431(8)(A)(i)
2 U.S.C. § 431(9)(A)(i)
2 U.S.C. § 431(11)
2 U.S.C. § 431(17)
2 U.S.C. § 431(18)
2 U.S.C. § 433
2 U.S.C. § 434
2 U.S.C. § 441b
2 U.S.C. § 441d
11 C.F.R. § 100.22
11 C.F.R. § 100.23

INTERNAL REPORTS CHECKED: FEC Disclosure Reports

FEDERAL AGENCIES CHECKED: Internal Revenue Service

¹ On September 18, 2001, Kean for Congress Committee filed a civil action pursuant to 2 U.S.C. § 437g(a)(8)(A). See *Kean for Congress Committee v. FEC*, Civil Action No. 01CV01979 (D.D.C.). The action was voluntarily dismissed on February 4, 2002.

1
2 **I. INTRODUCTION**

3
4 This matter was initiated by a complaint filed by Anthony S. Cicatiello and Kean for
5 Congress ("Complainants") against the Council for Responsible Government, Inc. and its
6 Accountability Project ("Respondent").² Respondent was incorporated in Virginia on May 2,
7 2000 and is registered with the Internal Revenue Service under section 527 of the Internal
8 Revenue Code ("IRC"). It is a nonmember corporation whose activities are conducted by its
9 Board of Directors. Respondent's articles of incorporation state that it shall not expressly
10 advocate the election or defeat of any clearly identified candidate for public office. See
11 Attachment 1.

12 According to available information, Gary Glenn and Bill Wilson were two of
13 Respondent's corporate officers during the time of the activity at issue in this matter. Gary
14 Glenn appears on corporate documents as Chairman or Vice Chairman of Respondent's Board of
15 Directors, while Bill Wilson appears on those documents as a member of Respondent's Board of
16 Directors and as Secretary/Treasurer.

17 Complainants allege that Respondent made illegal corporate contributions by funding and
18 mailing brochures that expressly advocated Tom Kean Jr.'s defeat in New Jersey's June 6, 2000
19 Republican primary election.³ In addition, Complainants contend that Respondent's principal
20 purpose is to influence elections and, therefore, Respondent should be required to register with
21 the Commission as a political committee and to disclose its contributions and expenditures.

² Kean for Congress is the principal campaign committee of Tom Kean Jr., an unsuccessful candidate for the Republican nomination for Congress in New Jersey's Seventh Congressional District. The complaint does not state whether Cicatiello is associated with Kean for Congress, but news reports describe him as an advisor to former New Jersey Governor Thomas H. Kean, the father of Tom Kean Jr.

³ Complainants provided color photocopies of Respondent's brochures by letter dated June 2, 2000.

1 Finally, Complainants state that Respondent might have coordinated its expenditures with other
2 federal candidates.

3 **II. FACTUAL AND LEGAL ANALYSIS**⁴

4 **A. Law**

5
6 **1. Corporate Contributions/Expenditures**

7 The Federal Election Campaign Act of 1971, as amended ("the Act"), generally prohibits
8 corporations from making contributions or expenditures in connection with elections to any
9 political office, including primary elections. 2 U.S.C. § 441b(a). That provision also prohibits
10 any officer or any director of any corporation from consenting to any contribution or expenditure
11 by the corporation. *Id.*

12 In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("MCFL"), the
13 Supreme Court held that a corporate expenditure for a general public communication, if made
14 independent of a candidate and/or his campaign committee, "must constitute 'express advocacy'
15 in order to be subject to the prohibition of § 441b." *Id.* at 249. In so holding, the Court relied on
16 its earlier decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), in which it "adopted the 'express
17 advocacy' requirement to distinguish the discussion of issues and candidates from more pointed
18 exhortations to vote for particular persons." *MCFL* at 249. The communication in *MCFL*
19 consisted of a newsletter with a headline on the front page stating, "EVERYTHING YOU NEED
20 TO KNOW TO VOTE PRO-LIFE," and with additional language stating, "[n]o pro-life
21 candidate can win in November without your vote in September." *Id.* at 243-4. "VOTE PRO-

⁴ All of the events relevant to this matter occurred prior to November 6, 2002, the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all references or statements of law in this report regarding the Federal Election Campaign Act of 1971, as amended, pertain to that statute as it existed prior to the effective date of BCRA. Similarly, all references or statements of law regarding the Commission's regulations pertain to the 2002 edition of Title 11, Code of Federal Regulations, published prior to the Commission's promulgation of any regulations under BCRA.

LIFE” was printed in large bold-faced print on the back page, and a coupon was provided that could be removed and taken to the polls to remind voters who the “pro-life” candidates were. The Court concluded that the newsletter contained express advocacy because it “provides in effect an explicit directive: vote for these (named) candidates.” The court noted that the fact that the message is marginally less direct than “Vote for Smith” did not change its essential nature. *Id.* at 249.

In 1995, the Commission promulgated 11 C.F.R. § 100.22 to provide guidance on the issue of express advocacy in accordance with judicial interpretations, including *Buckley* and *MCFL*. The first part of this regulation, tracking *Buckley* and *MCFL*, defines “expressly advocating” as a communication that uses phrases such as “vote for the President,” or “support the Democratic nominee” . . . , which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified⁵ candidate(s)” 11 C.F.R. § 100.22(a).⁶

⁵ The term “clearly identified” means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as “the President,” “your Congressman,” or “the incumbent,” or through an unambiguous reference to his or her status as a candidate such as “the Democratic presidential nominee” or “the Republican candidate for Senate in the State of Georgia.” 2 U.S.C. § 431(18); 11 C.F.R. § 100.17.

⁶ The second part of the regulation, 11 C.F.R. § 100.22(b), was based on the definition of express advocacy set forth by the United States Court of Appeals for the Ninth Circuit in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). This regulation has been the subject of several legal challenges regarding its constitutionality. The First and Fourth Circuits have determined that the regulation is unconstitutional. *Maine Right to Life v. FEC*, 98 F.3d 1 (1st Cir. 1996) and *Virginia Society for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001). Moreover, in an opinion concerning a challenge to a similar definition of express advocacy in a California state statute, the Ninth Circuit recently explained that while a communication may be considered “as a whole” in determining whether it contains express advocacy, “a close reading of *Furgatch* indicates that we presumed express advocacy must contain some explicit words of advocacy.” *Calif. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1097 (9th Cir. 2003) (emphasis in original). 11 C.F.R. § 100.22(b) has not been challenged in the Third Circuit, which includes the State of New Jersey, the jurisdiction in which the relevant events in this matter occurred.

1 **2. Independent Expenditure/Coordination**

2 The term “independent expenditure” means an expenditure by a person expressly
3 advocating the election or defeat of a clearly identified candidate which is made without
4 cooperation or consultation with any candidate, or any authorized committee or agent of such a
5 candidate, or which is not made in concert with, or at the request or suggestion of, any candidate,
6 or any authorized committee or agent of such candidate. 2 U.S.C. § 431(17). Pursuant to
7 2 U.S.C. § 434(c), every person other than a political committee who makes independent
8 expenditures aggregating in excess of \$250 during a calendar year shall file a signed statement or
9 report with the Commission. The term “person” includes a corporation. 2 USCA § 431(11).

10 Expenditures made by any person in cooperation, consultation, or concert, with, or at the
11 request or suggestion of, a candidate, his authorized political committees, or their agents, shall be
12 considered to be a contribution to such candidate. 2 U.S.C. § 441a(a)(7)(B)(i).

13 **3. Political Committee**

14 The Act requires any organization that qualifies as a political committee to register with
15 the Commission and file periodic reports of all receipts and disbursements. 2 U.S.C. §§ 433 and
16 434. The Act defines a political committee as “any committee, club, association, or other group
17 of persons which receives contributions or makes expenditures aggregating in excess of \$1,000
18 during a calendar year.” 2 U.S.C. § 431(4)(A).

19 In *Buckley v. Valeo*, 424 U.S. 1 (1976) (“*Buckley*”), the Supreme Court construed the
20 Act’s references to “political committee” in such a manner as to prevent their “reach [to] groups
21 engaged purely in issue discussion.” The Court recognized that “[t]o fulfill the purpose of the
22 Act [the designation ‘political committee’] should encompass organizations that are under the

1 control of a candidate or the major purpose of which is the nomination or election of a
2 candidate.” *Id.* at 79.

3 In *MCFL*, the Supreme Court addressed whether a non-profit advocacy corporation that
4 had made more than \$1,000 in independent expenditures was a political committee. The Court
5 noted that the “central organizational purpose” of *MCFL*, which it found to be issue advocacy,
6 did not meet the *Buckley* definition of a political committee, i.e., it was not controlled by a
7 candidate and did not have as a major purpose the nomination or election of a candidate. *Id.* at
8 252, n.6. The *MCFL* Court noted, however, that should the organization’s “independent
9 spending become so extensive that the organization’s major purpose may be regarded as
10 campaign activity, the corporation would be classified as a political committee.” *Id.* at 262.

11 In *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996) (*en banc*), the court held that the
12 Commission’s application of the “major purpose” test to find political committee status in
13 MUR 2804 was inappropriate. The court held that the statutory language defining “political
14 committee” is not ambiguous, 101 F.3d at 740, but further noted that the Supreme Court’s
15 discussion of “major purpose” in *Buckley* and *MCFL* applied only to independent expenditures,
16 not to coordinated expenditures and direct contributions. *Id.* at 741-42. However, the Supreme
17 Court subsequently vacated this decision for other reasons and remanded it to the Commission
18 without ruling on the criteria for an organization to be deemed a “political committee.” *See FEC*
19 *v. Akins, et al.*, 524 U.S. 11 (1998).⁷

⁷ The Commission issued an Advance Notice of Proposed Rulemaking seeking comments on whether to revise its regulations defining “political committee.” *See* Definition of Political Committee, 66 Fed. Reg. 13681 (March 7, 2001). The rulemaking has been held in abeyance.

1 **4. Disclaimer**

2 The Act provides that any person making an expenditure for the purpose of financing
3 communications expressly advocating the election or defeat of a clearly identified candidate
4 through any outdoor advertising facility or any other type of general public political advertising,
5 if not authorized by a candidate, an authorized political committee of a candidate, or its agents,
6 shall clearly state the name of the person who paid for the communication and state whether the
7 communication is authorized by any candidate or candidate's committee. 2 U.S.C. § 441d(a).
8 *See* 11 C.F.R. § 110.11(a)(1).

9 **B. Complaint**

10 Complainants assert that Respondent funded brochures that expressly advocated Tom
11 Kean Jr.'s defeat. Complainants provided two color brochures, each consisting of two pages,
12 with their complaint. The first page of one of the brochures ("Brochure 1") shows two
13 apparently identical photographs of Tom Kean Jr., one large photograph covering the whole page
14 and a much smaller photograph superimposed on the larger one. See Attachment 2. In both
15 photographs, Tom Kean Jr. is wearing a business suit with a campaign button or sticker on the
16 left breast pocket of his suit jacket that states "Tom Kean Jr. for Congress." The following
17 statement is superimposed over the photographs:

18 **TOM KEAN, JR.**

19 No experience. Hasn't lived in New Jersey for 10 years.
20 It takes more than a name to get things done.

21
22 The second page of Brochure 1 (did not include photographs) continues:

23 **NEVER.** Never worked in New Jersey. Never ran for office.
24 Never held a job in the private sector. Never paid New Jersey
25 property taxes. Tom Kean Jr. may be a nice young man and you
26 may have liked his dad a lot—but he needs more experience
27 dealing with local issues and concerns. For the last 5 years he has
28 lived in Boston while attending college. Before that, he lived in

1 Washington. New Jersey faces some tough issues. We can't
2 afford on-the-job training. Tell Tom Kean Jr. . . New Jersey
3 needs New Jersey leaders.
4

5 (Emphasis in original.) The following disclaimer appears at the bottom of the second page of
6 Brochure 1: "Paid for by the Accountability Project of the CRG."

7 The other brochure ("Brochure 2") shows a full-page photograph of Tom Kean Jr. on the
8 first page. See Attachment No. 3. The photograph appears to be the same photograph with the
9 "Tom Kean Jr. for Congress" campaign button or sticker used in Brochure 1. The following text
10 is superimposed over the photograph:

11 For the last 5 years Tom Kean Jr. has lived in Massachusetts.
12 Before that, he lived in Washington, D.C. And all the time Tom
13 Kean lived in Massachusetts and Washington, he never held a job
14 in the private sector. And until he decided to run for Congress—
15 Tom never paid property taxes. No experience. **TOM KEAN**
16 **MOVED TO NEW JERSEY TO RUN FOR CONGRESS.**
17 New Jersey faces some difficult problems. Improving schools,
18 keeping taxes down, fighting overdevelopment and congestion.
19 Pat Morrissey has experience dealing with important issues. It
20 takes more than a name to get things done. Tell Tom Kean
21 Jr. . . . **NEW JERSEY NEEDS NEW JERSEY LEADERS.**
22

23 (Emphasis in original.) The following disclaimer appears on the bottom of the page: "Paid for
24 by the Accountability Project of the CRG."

25 The second page of Brochure 2 shows four photographs almost evenly distributed over
26 the full face of the page. The photographs are of former professional basketball player Larry
27 Bird, of the Boston Celtics; Senator Edward "Ted" Kennedy; what appears to be a statue of a
28 Revolutionary War "Minuteman"; and what appears to be the same photograph of Tom Kean Jr.
29 with the "Tom Kean Jr. for Congress" campaign button or sticker. Superimposed over the
30 photographs is the following statement: "What do all these things have in common? They all
31 have homes in Massachusetts."

1 According to Complainants, the language in Respondent's brochures parallels the "vote
2 Pro Life" flyer in *MCFL*, because the brochures state Respondent's position that "New Jersey
3 needs New Jersey leaders," and then seek to "identify Tom Kean [Jr.] as the candidate who does
4 NOT have New Jersey 'experience'" (emphasis in original). Thus, Complainants contend that
5 the "Tell Tom Kean Jr." language, in essence, is an electoral directive equivalent to the "vote Pro
6 Life" language in *MCFL*.

7 Additionally, Complainants contend that Respondent's brochures, like the *MCFL* flyer,
8 should not be regarded "as a mere discussion of public issues that by their very nature raise the
9 names of certain politicians." *MCFL* at 249. Rather, Complainants assert that the brochures do
10 not purport to discuss any issue other than Tom Kean Jr.'s qualifications to hold federal office.

11 In addition to their assertions regarding the brochures, Complainants contend that
12 Respondent should register as a political committee because Respondent's "major purpose" is
13 political activity. To support their position, Complainants refer to two newspaper articles,
14 included with the complaint. The first article, entitled "*Conservative group rallying behind*
15 *Ferguson*," is undated and does not identify the publication in which it appeared.⁸ The article
16 reported on the brochures at issue, noting that Respondent was "blanketing" the congressional
17 district with leaflets attacking Kean and another Republican congressional candidate, New Jersey
18 State Assemblyman Joel Weingarten.⁹ According to the article, Respondent stated that it had
19 spent \$65,000 in New Jersey's Seventh Congressional District and was prepared to spend
20 \$100,000 more in the next two weeks. The article further noted that Respondent's goal in
21 distributing the brochures was to hurt the chances of Weingarten and Kean in the June 6 primary,

⁸ This Office located a copy of the article, which appeared in the May 24, 2000 edition of the Star-Ledger, a Newark, New Jersey newspaper. The article was written by Josh Margolin, of the Star-Ledger staff.

⁹ The complaint only attached brochures referring to Kean.

1 while boosting the fortunes of Mike Ferguson, another of Kean's opponents in the Republican
2 primary. Gary Glenn, a member of Respondent's Board of Directors, is quoted in the article as
3 stating that "[t]he very purpose of our group is to influence the outcome of elections."
4 Mr. Glenn is further quoted as stating: "[T]he outcome we hope to bring about is the election of a
5 congressman whose values are consistent with our philosophy. Clearly, we believe
6 Mr. Ferguson is a candidate whose record and philosophy is consistent with our philosophy."¹⁰
7 Bill Wilson, another member of Respondent's Board of Directors is quoted as stating, "All we
8 have done is used our First Amendment right (to free speech) to inject our ideas into the debate."
9 Finally, the article reported that Ferguson disavowed any involvement or support for the
10 brochures.

11 The other article, entitled "*Independent mailings raise suspicions in Republican primary*
12 *race*," is dated May 23, 2000 and is written by Laurence Arnold of the Associated Press. The
13 name of the publication is indecipherable. According to the article, Respondent denied having a
14 favorite candidate in the New Jersey Republican primary, but skeptics did not believe
15 Respondent because the brochures criticized only three of the four candidates.¹¹ The article also
16 quoted Wilson as stating that the Respondent's members share a political agenda of "free-market
17 economics, traditional cultural values and a desire for strong accountability by elected officials."
18 He is further reported to have stated that Respondent hopes to raise and spend \$3 million in 2000
19 for primary and general election campaigns.

20 Based on the articles, Complainants assert that Respondent's major purpose is political
21 activity and it should be required to register with the Commission, disclose its donors, and

¹⁰ Ferguson won the Republican primary election and the general election for the congressional seat.

¹¹ Again, it appears that not all the brochures described in this news account were attached to the complaint.

1 observe contribution limits and prohibitions. Finally, Complainants maintain that if Respondent
2 coordinated its activities with any federal candidate, the communications must be reported by
3 that candidate as an in-kind contribution.¹²

4 **C. Response**

5 Respondent asserts that its brochures constitute issue advocacy, not express advocacy.
6 Respondent argues that its brochures contain none of the explicit words or phrases listed in
7 *Buckley's* footnote 52. Respondent also disputes Complainants' interpretation of *MCFL*.
8 Respondent argues that the communications at issue in *MCFL* provided an explicit directive to
9 vote for the named candidates and thus, in accord with *Buckley*, were characterized as express
10 advocacy. According to Respondent, its brochures, in contrast, contain no electoral directive.

11 Citing *FEC v. Christian Action Network*, 894 F. Supp. 946, *aff'd per curiam*, 92 F.3d
12 1178 (4th Cir. 1996) and *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997),
13 Respondent further argues that its brochures do not mention voters, the electorate, or the
14 election, and that the brochures are not directed at any particular group.¹³ The statement "Tell
15 Tom Kean Jr.," according to Respondent, could be more readily interpreted as a suggestion that
16 the reader telephone, write, or e-mail Tom Kean Jr. Thus, Respondent maintains that its
17 brochures constitute issue advocacy. Respondent asserts that the issues it advocated are that
18 congressional representatives should be (1) tax-paying members of the citizenry they represent
19 and (2) elected based on their qualifications and experience, not based on their family ties.

¹² Complainants did not identify a specific candidate or political committee with which Respondent may have coordinated its activities.

¹³ In the *Christian Action Network* ("CAN") cases, the court found that *CAN*-sponsored advertisements criticizing what it described as then-presidential candidate William Clinton's purportedly "pro-homosexual agenda" did not constitute express advocacy.

Respondent also asserts that it is not a "political committee," as defined by the Act, and that consequently it is not required to register with and report to the Commission. According to Respondent, its major purpose is not to elect or defeat candidates. Rather, citing the news articles attached to the complaint, Respondent contends that its mission includes promotion of free-market economics, traditional cultural values, a desire for strong accountability by elected officials, and opposition to abortion. According to Respondent, it attempts to influence the outcomes of elections as an "incidental means" of achieving its social objectives.

D. Analysis

Based on the available information, it does not appear that Respondent coordinated the brochures with any candidate, authorized committee, or agent of a candidate or authorized committee. However, the brochures attached to the complaint do appear to have been independent expenditures. Accordingly, this Office recommends that the Commission make findings under two alternative theories; first, that as a corporation Respondent made prohibited expenditures for the brochures, in violation of 2 U.S.C. § 441b, and failed to report those expenditures, in violation of 2 U.S.C. § 434(c); second, that as a political committee Respondent failed to register and report, in violation of 2 U.S.C. §§ 433 and 434.

1. The Brochures Do Not Appear To Have Been Coordinated

In the absence of specific facts indicating that Respondent coordinated the brochures with a federal candidate, there does not appear to be information sufficient to sustain a finding of reason to believe that the brochures were corporate contributions.¹⁴

¹⁴ Although the news articles attached to the complaint refer to Respondent's support for candidate Michael Ferguson, the articles also reported that Ferguson denied any involvement or support for the brochures, and that he appealed to Respondent to stop sending "anonymous and negative" mailings.

1 **2. The Brochures Attached To The Complaint Contain Express**
2 **Advocacy**

3
4 As the available information indicates that the expenditures were independent, the
5 expenditures "must constitute express advocacy in order to be subject to the prohibition of
6 § 441b." *See MCFL* at 249. The brochures contain express advocacy under section 100.22(a) of
7 the Commission's regulations because the brochures contain individual words, which in context
8 can have no other reasonable meaning than to urge the election or defeat of one or more clearly
9 identified candidate. 11 C.F.R. § 100.22(a).

10 In particular, both brochures prominently display a photograph of Tom Kean Jr. with his
11 campaign button or sticker stating "Tom Kean Jr. for Congress." The photograph and the words
12 on the campaign button or sticker on Kean's jacket clearly identify Kean as a congressional
13 candidate. Brochure 1 has the photograph and campaign button or sticker "Tom Kean Jr. for
14 Congress" on the first page of the two-page brochure, along with language charging that Kean
15 has no experience and has not lived in New Jersey for 10 years. This display is immediately
16 followed by the highlighted word "NEVER." on top of the following page. The photograph of
17 Kean wearing the campaign button or sticker (which contains words expressly advocating
18 Kean's election), when read in conjunction with the highlighted word "NEVER." (followed by a
19 period), in context can have no other reasonable meaning than to advocate Kean's defeat. Seen
20 in close juxtaposition to the picture of Kean wearing his own campaign button or sticker,
21 "NEVER" is the equivalent of drawing an "X", or a circle with a slash, over the campaign
22 button or sticker. "NEVER" is Brochure 1's call to action. It is an exhortation to defeat, or vote
23 against, Kean.

24 Similarly, highlighted language in Brochure 2 has no other reasonable meaning than
25 advocacy of Kean's defeat. The pertinent language in Brochure 2 specifically refers to Kean's

1 candidacy in stating, **"TOM KEAN MOVED TO NEW JERSEY TO RUN FOR**
2 **CONGRESS,"** and later on the same page, in the same prominent typeface, it declares, **"NEW**
3 **JERSEY NEEDS NEW JERSEY LEADERS."** In between these statements, Brochure 2's text
4 casts Kean as an interloper who had not lived in New Jersey for over five years, who lacked
5 political experience, and who, "until he decided to run for Congress . . . never paid property
6 taxes." After identifying certain difficult issues facing New Jersey (schools, taxes,
7 overdevelopment, congestion), Brochure 2 compares Kean's asserted lack of experience
8 unfavorably to the experience of one of Kean's opponents by stating, "Pat Morrissey has
9 experience dealing with important issues." In short, Brochure 2 clearly identifies Kean as a
10 candidate for Congress; it prominently describes him as not being from New Jersey and as being
11 inexperienced, rather than a leader, and then tells the reader that **"NEW JERSEY NEEDS NEW**
12 **JERSEY LEADERS."** This is no different than identifying Kean as "pro-choice" or "pro-life"
13 and then telling the reader to "vote pro-choice" or "vote pro-life." 11 C.F.R. § 100.22(a).
14 Moreover, as the regulation makes clear, the use of a slogan rather than the use of the word
15 "vote" in and of itself makes no difference.¹⁵ In addition, the main text of Brochure 2 is
16 superimposed on the same photograph of Kean wearing his own campaign button or sticker that
17 was used in Brochure 1. Thus, it too is the equivalent of drawing an "X" over the "Tom Kean Jr.
18 for Congress" campaign button or sticker; it is an exhortation to defeat, or vote against, Kean.
19

¹⁵ Similarly, although less dramatically, Brochure 1 identifies Kean, through the photograph, as a candidate for Congress and describes him as having never worked or paid property tax in New Jersey and as a "nice young man" who "needs more experience", before closing with the tag line, "New Jersey needs New Jersey leaders." Kean is again identified as being neither from New Jersey nor a leader.

1 Contrary to Respondent's assertion, the brochures do not constitute issue advocacy.¹⁶

2 Although Brochure 2 lists some public policy issues, it does so only in the context of
3 commenting on Kean's inexperience. It presents no positions on the issues.

4 A number of consequences under the Act follow from the conclusion that the brochures
5 contain express advocacy. Either the brochures constituted corporate independent expenditures
6 in violation of 2 U.S.C. § 441b(a), or they provide evidence that Respondent may in fact have
7 been a political committee. Either way, the expenditures for the brochures were not properly
8 reported to the Commission and did not contain adequate disclaimers.

9 **3. Theory One: Respondents Violated 2 U.S.C. § 441b(a).**

10 By making the above corporate expenditures to create and distribute the brochures,
11 Respondent made illegal expenditures. Therefore, this Office recommends that the Commission
12 find reason to believe that Respondent violated section 441b(a) of the Act.

13 Additionally, as a "person" under the Act, Respondent is required to disclose its
14 independent expenditures if those aggregate expenditures exceeded \$250 within a calendar year.
15 See 2 U.S.C. §§ 431(11) and 434(c); 11 C.F.R. § 109.2(a). As previously stated, the available
16 information indicates that the expenditures for the brochures exceeded \$250. Respondent did not
17 report the expenditures. Therefore, this Office recommends that the Commission also find
18 reason to believe that Respondent violated 2 U.S.C. § 434(c).

19 According to available information, Bill Wilson and Gary Glenn were two of
20 Respondent's corporate officers at the time of the activity at issue. Gary Glenn was

¹⁶ This fact presents a major distinction between these brochures and the advertisement in the *CAN* cases, where there was issue advocacy. The *CAN* court concluded that the advertisement addressed political issues, by informing the public on what the organization believed to be the "gay agenda" of the Democratic candidates. Specifically, the court concluded that the ad questioned whether homosexuals should be afforded protection under federal civil rights laws and whether they should be integrated into the armed services or permitted to adopt children. 894 F. Supp. 946, 953; 110 F.3d 1049, 1060.

1 Respondent's Chairman or Vice Chairman of the Board of Directors, and Bill Wilson was a
2 member of the Board of Directors and Secretary/Treasurer. Based on the information provided
3 in the complaint, both individuals appear to have consented to the expenditures in question. As
4 noted earlier, newspaper articles discussing the brochures, which were attached to the complaint,
5 included statements from these corporate officials that appear to support the creation and
6 distribution of the brochures. See "*Conservative group rallying behind Ferguson*," *supra*, at 9.
7 The Act prohibits any officer or any director of any corporation from consenting to any
8 contribution or expenditure by the corporation. 2 U.S.C. § 441b(a). Therefore, this Office
9 recommends that the Commission find reason to believe that Bill Wilson and Gary Glenn
10 violated section 441b(a) of the Act.¹⁷

11 **4. Theory Two: Political Committee**

12 As an alternative to finding that Respondent made unlawful corporate expenditures, the
13 Commission may find that Respondent was a political committee under the Act and therefore
14 subject to the Act's registration and reporting requirements. To be considered a political
15 committee it must be determined whether Respondent's activities satisfy both the statutory
16 definition and the Supreme Court's "major purpose" test for a political committee.

17 **(a) Statutory Definition**

18 Based on the available information, it is likely that the expenditures exceeded the
19 statutory threshold of \$1,000. 2 U.S.C. § 431(4)(A). According to newspaper articles attached
20 to the complaint, Respondent is reported to have spent \$65,000 in New Jersey's Seventh
21 Congressional District. According to the articles, Respondent was "blanketing" the

¹⁷ Wilson and Glenn were not made respondents at the time of the complaint in this matter; these individuals are being internally generated as respondents.

1 congressional district with the brochures, indicating that Respondent distributed a significant
2 number of brochures.

3 (b) Major Purpose

4 The remaining issue is whether Respondent's "major purpose" is to influence elections.¹⁸
5 *See Buckley* at 78-80. The available information indicates that, unlike the purpose of the non-
6 profit corporation in *MCFL*, Respondent's major purpose was indeed to influence elections. The
7 complaint cited to statements by one of Respondent's board members, Gary Glenn, that "[t]he
8 very purpose of our group is to influence the outcome of elections." He is further reported to
9 have said, "[t]he outcome we hope to bring about is the election of a congressman whose values
10 are consistent with our philosophy. Clearly, we believe Mr. Ferguson is a candidate whose
11 record and philosophy is consistent with our philosophy." As important, there is no indication
12 that Respondent had engaged in any other type of activity. Therefore, it appears that
13 Respondent's purpose was to influence elections.

14 (c) Registration and Reporting

15 As a political committee, Respondent was required to register with the Commission and
16 file periodic reports. *See* 2 U.S.C. §§ 433 and 434. Since Respondent has not done so, this
17 Office recommends that the Commission find reason to believe that Respondent violated
18 2 U.S.C. §§ 433 and 434.

19 **5. Disclaimer**

20 As the brochures contained express advocacy, they were required to have a disclaimer.
21 *See* 2 U.S.C. § 441d(a). Each of the brochures contained the following disclaimer: "Paid for by
22 the Accountability Project of the CRG." However, that disclaimer is incomplete because it failed

¹⁸ Since the activity at issue involves independent expenditures, application of the major purpose test is consistent with the en banc D.C. Circuit's *Akins* decision.

to state whether the brochures were authorized by a candidate or candidate's committee.

Therefore, this Office recommends that the Commission find reason to believe that Respondent violated 2 U.S.C. § 441d(a).

III. PROPOSED DISCOVERY

IV. RECOMMENDATIONS

1. Find reason to believe that the Council for Responsible Government and its Accountability Project violated 2 U.S.C. § 433.
2. Find reason to believe that the Council for Responsible Government and its Accountability Project violated 2 U.S.C. § 434.

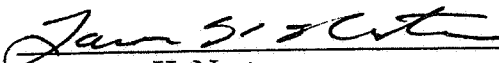
¹⁹ William Hillman appears as a director on Respondent's articles of incorporation and as an officer and director on Respondent's 2001 annual report on file with Virginia's State Corporation Commission. Hillman was not internally generated as a respondent because the available information does not show that he consented to the creation or distribution of the brochures.

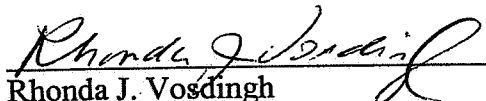
First General Counsel's Report

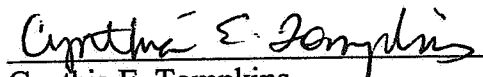
3. Find reason to believe that the Council for Responsible Government and its Accountability Project violated 2 U.S.C. § 441b(a).
4. Find reason to believe that the Council for Responsible Government and its Accountability Project violated 2 U.S.C. § 441d(a).
5. Find reason to believe that William "Bill" Wilson violated 2 U.S.C. § 441b(a).
6. Find reason to believe that Gary Glenn violated 2 U.S.C. § 441b(a).
7. Approve the attached Factual and Legal Analyses.
8. Approve a document subpoena to Council for Responsible Government and its Accountability Project, and deposition subpoenas to Bill Wilson, Gary Glenn, and William Hillman.
9. Approve written questions to Council for Responsible Government and its Accountability Project, Bill Wilson, Gary Glenn, and William Hillman.
10. Approve the appropriate letters.

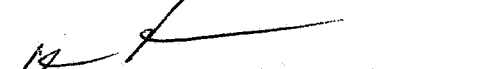
9/3/03

Date


Lawrence H. Norton
General Counsel


Rhonda J. Vosdingh
Associate General Counsel
for Enforcement


Cynthia E. Tompkins
Assistant General Counsel


Kamau Philbert
Attorney

Attachments:

1. Respondent's Articles of Incorporation
2. Brochure 1

- 1 3. Brochure 2
- 2 4. Factual and Legal Analyses (3)