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December 6, 2012

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COMMITTEE ON ETHICS

BY E-MAIL AND HAND DELIVERY

Ms. Deborah Mayer
Director of Investigations
Committee on Ethics
U.S. House of Representatives
1015 Longworth Building
Washington, D.C. 20515

Re: Review No. 12-9525

Dear Ms. Mayer:

On behalf of our client, Representative Aaron Schock, we previously provided the Committee with a copy of the submission we made to the Office of Congressional Ethics in the above-captioned matter. That submission explains in detail why no violation of law occurred, and describes the novel issues of law raised in this matter, all of which are presently pending before the Federal Election Commission. We write today simply to highlight a few points concerning OCE's report in this matter.

First, a number of OCE's key factual findings appear to derive from its disturbing practice of drawing a "negative inference" based on the refusal of a third-party witness to submit to an interview. Representative Schock is not responsible for any witness's decision to decline an interview. Indeed, in the one instance that OCE requested that we ask a third-party witness to submit to an interview, we did so on behalf of Representative Schock. In other instances in which OCE draws a "negative inference," no such request to counsel was even made.

In a court of law, an adverse inference may sometimes be drawn against a party where that party itself engages in misconduct or refuses to testify. But to draw an adverse inference

prejudicial to Representative Schock not because of his own actions but because of the actions of a third-party witness disregards the most fundamental principles of due process. We respectfully submit that the Committee on Ethics should not follow OCE in this peculiar and improper practice.

Second, we take issue with OCE's mischaracterizations of its own record testimony concerning the 18th District Republican Central Committee (the "18th District Committee"). OCE asserts in its report, without foundation, that Representative Schock's Campaign Director and Chief of Staff "appear to have had complete authority to make the contribution [to CPA] despite neither having a formal role with the committee."[1] Yet OCE itself later correctly notes that in his interview with OCE, Representative Schock explained that the Chairman of the 18th District Committee, Mike Bigger, had told him that the 18th District Committee intended to make a contribution to CPA.[2]

Likewise, OCE's own report of its interview with Representative Schock's Chief of Staff reflects his testimony that Mr. Bigger told Representative Schock of his intent to have the 18th District Committee contribute to CPA.[3] In light of Mr. Bigger's decision to make the contribution, the suggestion that "complete authority" to make contributions resided with Representative Schock's Campaign Director and Chief of Staff is incorrect. As for the mechanics of making the contribution, the Campaign Director explained in her interview with OCE that she helped set up and administer the joint fundraising committee of which the 18th District Committee is a part and therefore routinely handled transactions with the 18th District Committee.[4]

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[1] OCE Report at 13 n. 54.

[2] *Id.* at 15, para. 63.

[3] OCE Memorandum of Interview with Chief of Staff to Rep. Schock, para. 18-20.

[4] OCE Memorandum of Interview of Campaign Director, para. 12.

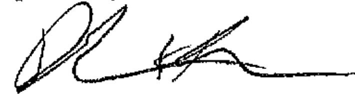
The material facts are not seriously in dispute, and OCE's attempts to conjure factual inconsistencies are unavailing. Representative Schock told OCE that he did not solicit a contribution from the 18th District Committee to CPA. Nothing in the record presented by OCE contradicts his statement. Moreover, as OCE notes in its report, a letter to OCE from counsel to Mr. Bigger specifically confirmed Representative Schock's account. OCE simply chose to ignore it.

The central issue in this matter is not factual but legal. The question is what, if any, restrictions are imposed by the federal campaign finance laws on a Member of Congress's ability to seek support by a fellow Member for a federal independent expenditure-only committee. That is a question of first impression. OCE's report neither acknowledges nor responds to the legal arguments we made in our submission, and instead relies entirely on a single FEC advisory opinion that did not even involve a Member-to-Member solicitation.

In a matter such as this one that turns on a pure question of campaign finance law, and that relates to political activities having no connection to official duties, we respectfully submit that the FEC is the appropriate venue in which to resolve that legal question. The FEC is at this very moment deliberating on the legal issues presented here.

Thank you again for your attention to this matter.

Respectfully submitted,



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July 17, 2012

BY E-MAIL AND HAND DELIVERY

Mr. Kedric Payne
Office of Congressional Ethics
United States House of Representatives
425 3rd Steet, SW
Washington, DC 20024

Re: Request for Information, Review No. 12-9525

Dear Mr. Payne:

On behalf of our client, Representative Aaron Schock, we write to request that OCE close its file in the above-captioned matter with no further action. We respectfully submit that OCE should conclude that it does not have jurisdiction over this matter, and should allow the federal agency that is charged with subject matter expertise concerning the campaign finance laws, the Federal Election Commission ("FEC"), to resolve the novel campaign finance law questions presented here.

OCE's request for information in this matter apparently arose from a news report in *Roll Call*, and a complaint filed with the FEC, both of which suggested that Rep. Schock had asked Rep. Eric Cantor to help raise funds for a federal "independent expenditure-only" committee that was running television ads in support of Adam Kinzinger. Rep. Schock's conversation with Rep. Cantor bore no relation to any official duty or responsibility of either Member, and therefore is outside OCE's jurisdiction.

Even if OCE were to conclude that it had jurisdiction over this matter, determining the precise contours of the legal rules governing a Member's efforts to raise funds for an independent expenditure-only committee is not an appropriate role for OCE. The questions of campaign finance law that are at issue in this matter are best resolved by the FEC.

This is not a matter in which OCE is reviewing a Member's conduct with respect to settled law. Indeed, the FEC itself has yet to promulgate regulations governing independent expenditure-only committees. While the FEC issued an advisory opinion allowing Members of

Congress to raise funds for independent expenditure-only committees, subject to certain conditions,[1] it is questionable whether that advisory opinion, which in any event does not have the legal force of a statute or regulation, even correctly describes the applicable law. Independent expenditure-only committees did not exist at the time that Congress enacted the restrictions on officeholders' solicitation of "soft money" in the Bipartisan Campaign Reform Act of 2002 ("BCRA"). How those restrictions operate in a post-*Citizens United* world is a disputed question that will be litigated before the FEC and may ultimately need to be resolved in the courts.

If OCE nonetheless chooses to stand in the place of the FEC and to render its own opinion regarding the application of BCRA's restrictions on officeholder solicitations to independent expenditure-only committees, OCE can and should dismiss this matter because Rep. Schock did not violate those restrictions.

I. OCE should dismiss this Review as outside of the Office's jurisdiction

OCE Rules state that the OCE Board "shall only review information related to allegations within the Office's jurisdiction," and that "the Staff shall determine whether the alleged conduct falls within the jurisdiction of the Board." OCE Rule 1(3). That jurisdiction encompasses violations of "a law, rule, regulation, or other standard of conduct in effect at the time the conduct occurred and applicable to the subject *in the performance of his or her duties or the discharge of his or her responsibilities*." *Id.* (emphasis added).

The conduct at issue in this matter — raising funds for an independent expenditure-only committee — does not relate in any way to Rep. Schock's duties or responsibilities as a Member of the House. In some cases, campaign finance activity could relate to a Member's official duties or responsibilities. For example, there could be a nexus between campaign fundraising, on the one hand, and lobbying or the awarding of appropriations earmarks on the other. No such nexus exists in this case, however. Rep. Schock's communication with Rep. Cantor related to a purely political matter — their common desire to see Adam Kinzinger elected to Congress.

The House Ethics Manual discusses at some length the ways in which campaign finance activities may relate to a Member's official duties. For example, the Ethics Manual outlines the rules governing fundraising using federal resources, such as federal buildings and official stationery, as well as rules restricting soliciting campaign contributions from Congressional employees. The Ethics Manual also address prohibitions on linking contributions and official action or special access. Again, there is no suggestion of any such nexus here.

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[1] Advisory Opinion 2011-12 (Majority PAC)

We recognize that House Rules contain a general requirement that Members conduct themselves "at all times in a manner that shall reflect creditably on the House," House Rule 23, cl. 1, and that the House Committee on Ethics has stated that, "[a]ccordingly, in violating FECA or another provision of statutory law, a Member or employee may also violate these provisions of the House rules and standards of conduct." Manual, at 122. The House Committee on Ethics has also recognized, however, that matters of campaign finance law, without a nexus to official duties, should not be investigated by the House under its general jurisdiction:

> Alleged violations of campaign laws have never been the sole basis for the Committee initiating a Preliminary Inquiry. Such matters have only been considered as a an adjunct to other issues. In view of the statutory authority of the FEC, it is appropriate for the Committee to continue this practice. This is not to suggest that the Committee has adopted or should adopt a policy to defer its investigative activities to Federal agencies given parallel jurisdiction by law. Rather, such matters should continue to be pursued once the Committee has initiated a Preliminary Inquiry.

Statement of the Committee on Standards of Official Conduct Regarding Complaints Against Representative Newt Gingrich, at 53-54 (March 8, 1990). Similarly, OCE should dismiss this review because the alleged campaign finance law violation is the *sole* basis for the review.

Moreover, as noted above, OCE's rules do not afford OCE plenary authority to review any conduct that it deems not to reflect creditably on the House, but rather authorizes review only of those matters that are "applicable to the subject in the performance of his or her duties or the discharge of his or her responsibilities." Fundraising for an independent expenditure-only committee that is wholly unrelated to official activities therefore does not fall within OCE's jurisdiction.

A decision by OCE that it lacks jurisdiction does not mean that the underlying allegation will go unaddressed. There is a pending FEC complaint, to which Rep. Schock has responded, concerning the very same matter that is the subject of this OCE review.

II. Representative Schock's activities did not violate federal election law

Because there was no violation of a "law, rule, regulation, or other standard of conduct," OCE should dismiss this matter.

A. Background

The Illinois Republican primary between Adam Kinzinger and Representative Don Manzullo appeared to be a close race in the weeks prior to the March 20, 2012 election.

Rep. Schock supported Mr. Kinzinger in the race and sought to assist Mr. Kinzinger in his challenge to Rep. Manzullo. Rep. Schock learned of advertisements that the Campaign For Primary Accountability ("CPA"), an anti-incumbent independent expenditure-only committee, had aired against Rep. Manzullo, and believed that CPA needed additional funds to be able to air the advertisements again prior to the election.

Shortly before the March 20 election, Rep. Schock learned that the 18th District Republican Central Committee ("18th District Committee"), a local political party committee in Illinois, was planning to make a $25,000 donation to CPA from its federal account. He helps raise funds for the 18th District Committee's federal account through the Schock Victory Committee, an FEC-registered joint fundraising committee. Rep. Schock is associated with the 18th District Committee through this fundraising connection, but he does not hold any positions on the committee and does not have the authority to make decisions concerning how the committee spends its funds.

With knowledge of the $25,000 commitment from the 18th District Committee, Rep. Schock reached out to House Majority Leader Eric Cantor to see if Rep. Cantor could raise additional funds to support pro-Kinzinger ads by CPA. As reported in the *Roll Call* article, Rep. Schock spoke with Rep. Cantor about the tight Illinois race and CPA's efforts and said something along the lines of "Look, I'm going to do $25,000 for the Kinzinger campaign for the television campaign ... Can you match that?"[2]

Rep. Schock knew that Rep. Cantor might have several options for tapping federal funds that could be used to make a contribution to CPA. For example, Rep. Cantor could authorize contributions to CPA from his candidate committee or his leadership PAC. He could also raise funds from his own network of hard money donors. He could have met the $25,000 target suggested by Rep. Schock in any number of different ways, tapping one or more sources of funds, and relying exclusively on hard money sources. Rep. Schock did not learn that a $25,000 contribution was made from a hard money account of ERIC PAC, Rep. Cantor's federal leadership PAC, until after the March 20 election.

Rep. Schock also reached out to David Herro, an Illinois businessman, who Rep. Shock knew was supportive of Mr. Kinzinger. Rep. Schock discussed with Mr. Herro the need for funds to support Mr. Kinzinger's efforts, but mentioned neither CPA specifically nor any dollar amounts. A member of Rep. Schock's campaign staff contacted Mr. Herro with

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[2] Jan Stanton, *Eric Cantor Gave $25K to Anti-Incumbent PAC to Aid Adam Kinzinger*, Roll Call, April 6, 2012. While Rep. Schock likely did say something along the lines of "I'm going to do $25,000," he had in mind his knowledge that the 18th District Committee, for which he raised funds, intended to make a $25,000 contribution to CPA. The Roll Call article incorrectly stated that Rep. Schock's leadership PAC made a $25,000 contribution to CPA.

information about CPA and how to make contributions to the entity. Rep. Schock's staff also did not suggest, request, or recommend any contribution amounts. FEC records indicate that Mr. Herro made a $35,000 contribution to CPA.

B. Applicable Law

BCRA established limitations on the solicitation of soft money donations by national political parties, federal candidates, and federal officeholders. *See* 2 U.S.C. § 441i(a), (e). It amended the Federal Election Campaign Act to provide that a federal officeholder shall not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office, including funds for any Federal election activity, *unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act.*" *Id.* § 441i(e)(A) (emphasis added).

With regard to the limits placed on the solicitation of funds, FEC regulations define "to solicit" to mean:

> to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. A solicitation is an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. A solicitation may be made directly or indirectly. The context includes the conduct of persons involved in the communication. A solicitation does not include mere statements of political support or mere guidance as to the applicability of a particular law or regulation.

11 C.F.R. § 300.2(m).

Section 441i(e) focuses on the solicitation of donations by elected officials. Because § 441i(e) was enacted prior to the U.S. Supreme Court's decision in *Citizens United v. FEC*, and other decisions that led to the establishment of independent expenditure-only committees, neither § 441i(e) nor any other FECA provision or FEC regulation address how an officeholder's solicitation for independent expenditure-only committees should be treated under the law.

In Advisory Opinion 2011-12 (Majority PAC), the FEC considered the application of BCRA's soft money solicitation restrictions to solicitations for federally registered independent expenditure-only committees. The FEC concluded that federal officeholders and candidates may not solicit unlimited funds for independent expenditure-only committees, but

may solicit up to $5,000 per calendar year from permissible sources, which corresponds to the limit placed on contributions to traditional multicandidate committees. *See* AO 2011-12 (Majority PAC), at 3-4. The FEC reached that conclusion even though independent expenditure-only committees are subject to no limits on donations. The absence of a limit on donations suggests that even the solicitation of a specific sum that exceeded $5,000 would be a permissible solicitation of funds that are "subject to the limitations, prohibitions, and reporting requirements of this Act" because no limitation or prohibition would apply to the funds.

The FEC's legal conclusion in Advisory Opinion 2011-12 is therefore very much in dispute. Moreover, it is well-settled that an FEC advisory opinion does not have the legal force of a state statute or regulation. An advisory opinion alone cannot serve as the basis for an enforcement action. The FEC itself repeatedly has acknowledged that fact. *See, e.g.*, Statement of Reasons of Chairman Peterson and Commissioners Hunter and McGahn, MUR 5625 (Aristotle International, Inc.) at 2, n.3 ("Of course, it is well-established that advisory opinions cannot be used as a sword, but instead are merely a shield from burdensome Commission enforcement action."); FEC Advisory Opinion 2006-10 (EchoStar) ("After all, the Commission may not use 'advisory opinions to establish rules of conduct.' Instead, the Commission establishes rules of conduct by rulemaking.").

The FEC has yet to promulgate a regulation that adapts its restrictions on officeholder fundraising activities to the new legal landscape that followed *Citizens United*. It would hardly be appropriate for OCE to attempt to fill the gap in the regulations, much less to rely on a questionable FEC advisory opinion as the basis for doing so.

C. Analysis

1. Representative Schock's communication with Representative Cantor was not even a solicitation under FEC regulations

Representative Schock spoke with Rep. Cantor about fundraising efforts for a primary election in Illinois involving a candidate both individuals supported. During this conversation, however, Rep. Schock did not "solicit" a contribution from Rep. Cantor within the meaning of FEC regulations.

Rep. Schock did not "ask, request, or recommend" that Rep. Cantor "make a contribution" from his own funds or from any particular committee he controlled, and therefore he did not "solicit" Rep. Cantor under § 300.2(m). Instead, Rep. Schock asked whether Rep. Cantor could match a fundraising target of $25,000. Rep. Schock approached Rep. Cantor after he learned that a local political party committee intended to make a permissible $25,000 contribution to CPA. Rep. Schock intended to inquire whether Rep. Cantor could raise similar funds for CPA. Rep. Schock knew that Rep. Cantor had a number of ways to raise funds for this purpose, and he did not specifically ask for or expect that support would originate from any

particular source. Section 300.2(m) covers requests to "make a contribution" and not a simple request to raise funds that might result in contributions from others.

Members of Congress, particularly those who are raising funds for the national party committees of both parties, routinely set fundraising targets for one another. When such targets are set, individual Members are left to decide how best to meet those targets, whether through contributions from committees they control or with federal funds they solicit from others.

When Rep. Schock said something along the lines of "I'm going to do $25,000 for the Kinzinger campaign ... Can you match that?," he was not saying that he had made a contribution of that size, because he had not. That $25,000 commitment was not from Rep. Schock or any committee controlled by him, but from the 18th District Committee, which shared his interest in supporting Mr. Kinzinger. Therefore, a request to "match that" or "do that" was not a specific request for Rep. Cantor to "make a contribution" from his own funds or from a committee he controls. "Construed as reasonably understood in the context in which it is made," which in this case is a Member speaking with a Member about organizing support for another candidate, this communication did not contain "a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value." *See* 11 C.F.R. § 300.2(m). As recognized by the FEC, "[t]he context of a communication is often important because ... words that would by their plain meaning normally be understood as a solicitation, may not be a solicitation when considered in context." *Definitions of "Solicit" and "Direct,"* 71 Fed. Reg. 13926, 13929 (March 20, 2006) (Explanation and Justification for 11 C.F.R. § 300.2(m), (n)).

Rep. Schock's communication with Rep. Cantor about finding support for Mr. Kinzinger was not an attempt to covertly or "indirectly" request a contribution from Rep. Cantor personally. He was clearly asking Rep. Cantor to raise funds for CPA's ads in support of Mr. Kinzinger, and he said so directly. He neither expressed nor even had a preference as to how Rep. Cantor would raise the funds. Under § 300.2(m), Rep. Schock's request to Rep. Cantor was neither a direct nor an indirect solicitation. Therefore, the restrictions on solicitations found in § 441i(e) do not apply here.

2. BCRA's soft money solicitation restrictions do not apply to Member-to-Member communications

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court reviewed challenges to BCRA, including to the national party and officeholder soft money solicitation restrictions in 2 U.S.C. § 441i. The Court upheld the solicitation restrictions, reasoning that the governmental purpose in preventing corruption caused by soft money solicitations justified the limitations. *McConnell*, 540 U.S. at 154-61, 181-84. The core anti-corruption purposes of the law simply do not apply to Member-to-Member activity, however. Indeed, applying the

solicitation restrictions of BCRA to a Member-to-Member solicitation of federal funds would violate the First Amendment because of the absence of any risk of corruption.

The *McConnell* Court found that BCRA's soft money restrictions were constitutionally justified by the Government's "important interest in preventing corruption and the appearance of corruption." *Id.* at 142. The Court focused on forms of corruption that BCRA's soft money solicitation restrictions attempt to prevent, none of which apply to Member-to-Member fundraising communications, particularly where the funds at issue are federally regulated and reported contributions.

With regard to officeholder solicitations, the Court found that "[l]arge soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder." *Id.* at 182. As the district court in *McConnell* recognized, the focus here is on the potential corruption through solicitation of contributions from *public donors*: "it is hardly a novel or implausible proposition that a federal candidate's solicitation of large donations from *wealthy individuals, corporations and labor organizations*—whether or not the funds are used 'for the purpose of influencing' a federal election—can raise an appearance of corruption of the candidate." *McConnell v. FEC*, 251 F. Supp. 2d 176, 420 (D.D.C. 2003) (Henderson, J., concurring in judgment in part and dissenting in part) (emphasis added) (citing *U.S. v. UAW*, 352 U.S. 567, 576 (1957)). Member-to-Member solicitations do not raise the "same corruption concerns" of improper influence by the donor that the *McConnell* Court was addressing.

The *McConnell* Court also stated that "restrictions on solicitations are justified as valid anti-circumvention measures. ... Without some restriction on solicitations, federal candidates and officeholders could easily avoid FECA's contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities." *McConnell*, 540 U.S. at 182-83. In passing BCRA's solicitation provisions, Congress was not attempting to prevent Members of Congress from circumventing limits placed on contributions *from other Members* through requests of contributions from those Members to outside organizations. The absence of any potential for corruption in that situation would not justify the restriction, and it was certainly not addressed as a supporting factor by the *McConnell* Court.

It is common for national political parties, often operating through officers who are Members of Congress, to set fundraising goals or targets for other Members. Because these fundraising goals anticipate multiple permissible contributions, the aggregate, target numbers provided to Members may well be above the limits placed on an individual or entity's separate contributions to the recipient committee. If OCE were to conclude that Rep. Schock's request that Rep. Cantor raise $25,000 for a pro-Kinzinger ad violated § 441i, that would imply that the long-standing and common practice of Member-to-Member hard money fundraising requests and targets for national party committees are likewise prohibited. That is not a proposition that the FEC has previously adopted, nor do we believe it has even been suggested. And for good

reason. Nothing in BCRA or FEC regulations prohibits a Member of Congress from suggesting a hard money fundraising target for another Member.

3. Representative Schock's communication with Mr. Herro did not violate § 441i(e)

With respect to Rep. Schock's communications with Mr. Herro about raising funds for CPA, Rep. Schock did not recommend a specific dollar figure to Mr. Herro. A conversation about the general need to raise funds to support a candidate, where no specific donation amounts are discussed or anticipated, simply does not fall under restrictions found in § 441i(e). The FEC's recent interpretation of those restrictions as applied to solicitations for independent expenditure-only committees, which limits specific requests for contributions to $5,000, also does not apply to conversations where donation amounts are not discussed or anticipated.

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Rep. Schock asked Rep. Cantor to meet a fundraising target for an independent expenditure-only committee. Rep. Cantor in turn made a donation drawn from federal funds. Rep. Schock also discussed general fundraising needs to support an Illinois candidate with Mr. Herro, and there was no discussion of specific dollar amounts. Mr. Herro subsequently made a permissible contribution to an independent expenditure-only committee. The political contributions related to this review were permissible and fully disclosed with the FEC. Likewise, Rep. Schock's communications related to these contributions were permissible. No violation of FECA resulted, and OCE therefore should dismiss this matter without further action.

Respectfully submitted,

Robert K. Kelner