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DIVISION OF SOCIAL JUSTICE
CHARITIES BUREAU

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June 14, 2018

Commissioner Caroline C. Hunter, Chair
Commissioner Ellen L. Weintraub, Vice Chair
Commissioner Matthew S. Petersen
Commissioner Steven T. Walther
Lisa J. Stevenson, Acting General Counsel

Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Referral of the Donald J. Trump Foundation, Trump Organization, Donald J. Trump for America, and their agents, and Bradley T. Crate in his official capacity as treasurer.

Dear Commissioners and Ms. Stevenson:

The Charities Bureau of the New York State Attorney General's Office ("OAG") is responsible for regulating New York State charitable organizations, ensuring their compliance with governing rules and law, and representing the interests of charitable beneficiaries. On June 14, 2018, the OAG filed a petition for involuntary dissolution against the Donald J. Trump Foundation (the "Foundation"), a New York not-for-profit corporation, in New York State court.¹ The petition and accompanying papers set forth facts that the OAG uncovered during the course of an investigation of the Foundation with respect to potential violations of New York law governing related party transactions, the administration of charitable assets, and the management and oversight of the not-for-profit corporations (the "Investigation").

As detailed in the petition, the Charities Bureau has concluded that the Foundation and its directors and officers violated multiple sections of New York state law, including provisions that prohibit foundations from engaging in self-dealing, from wasting charitable assets, and from violating the Internal Revenue Code by, among other things, making expenditures to influence the

¹ A copy of the petition and the Affirmation of Assistant Attorney General Steven Shiffman ("Shiffman Aff.") and the Memorandum of Law are attached hereto.

outcome of an election. I write to refer to the Federal Election Commission (the “Commission”) evidence of possible violations of the Federal Election Campaign Act (“FECA” or the “Act”) by the Foundation and Trump Campaign uncovered during the course of the Investigation.

The Investigation acquired substantial credible evidence that the Foundation disbursed in excess of \$2.8 million to influence the 2016 Republican presidential primary election at the direction and under the control of senior leadership of the Trump presidential campaign committee and apparently with the candidate’s knowledge and approval.² As such, the Foundation made – and the committee knowingly accepted – prohibited, excessive, and unreported in-kind contributions during the 2016 presidential election cycle. Moreover, the evidence of coordination and control further indicates that the Foundation and campaign may have violated the so-called soft money provisions of the Act as amended by the Bipartisan Campaign Reform Act of 2002 (“BCRA”). Finally, we refer certain additional evidence relating to a \$25,000 prohibited contribution the Foundation made in 2013 to the political committee of another candidate for public office for any further action that the Commission may deem warranted under the circumstances.

FACTUAL BACKGROUND

The Foundation is recognized as tax-exempt under Section 501(c)(3) of the Internal Revenue Code and is classified as a private foundation under Section 509(a) of the Code. As such, it may not “participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of . . . any candidate for public office.”³ In accordance with the Code and New York State law, the Foundation’s certificate of incorporation provides that “[n]o part of the property . . . of the corporation shall be diverted in any manner directly or indirectly or otherwise inure to the benefit of any member, trustee, director or officer of the corporation or any private individual.”⁴ The certificate of incorporation further provides that “[n]o part of the activities of the corporation shall be . . . participating or intervening in (including the publication or distribution of statements) any political campaign on behalf of any candidate for public office.”⁵

The Investigation obtained compelling evidence that Donald J. Trump for President, Inc.⁶ (the “Trump Campaign”) extensively directed and coordinated the Foundation’s activities in connection with a nationally televised charitable fundraiser for the Foundation in Des Moines, Iowa on January 28, 2016 (the “Iowa Fundraiser”), including the timing, recipients, and amounts of disbursements of the proceeds from that event. As was well-publicized at the time, and as the Investigation confirmed, then-candidate Trump decided to hold the Fundraiser at the same time as

² The OAG received documents from the Foundation and certain other third parties during the course of its investigation, but did not request or receive documents directly from the Trump Campaign.

³ See IRS Revenue Ruling 2007-41, 2007-25 I.R.B. (June 18, 2007) available at <https://www.irs.gov/pub/irs-drop/r-07-41.pdf>; see also 26 U.S.C. § 501(c)(3).

⁴ Shiffman Aff., Ex. 2, Donald J. Trump Foundation Certificate of Incorporation, dated Feb. 2, 1987 (“Certificate of Incorporation”), at Section Sixth; N.Y. Not-For-Profit Corp. Law §§ 406 & 515(a) (“N-PCL”).

⁵ Shiffman Aff., Ex. 2, Certificate of Incorporation at Section Seventh; N-PCL § 406.

⁶ Donald J. Trump for President, Inc., FEC Form 1, Statement of Organization, June 29, 2016.

a televised debate of the Republican presidential candidates, in which Mr. Trump declined to participate.⁷ The events took place less than one week before the February 1, 2016 Iowa caucuses.

According to its filing with the Charities Bureau, the Foundation “held [the] nationally televised fundraiser in Iowa to raise funds for veterans’ organizations . . . [and] created a website to allow donors to make charitable contributions online.”⁸ The Investigation found that, in fact, the Iowa Fundraiser was planned, organized, financed, and directed by the Trump Campaign, with administrative assistance from the Foundation. The event was billed as the “Donald J. Trump Special Event for Veterans,” and the website through which the public could get tickets for the event listed a Campaign staffer – the Iowa Deputy State Director for Donald J. Trump for President, Inc. – as the event “Organizer.” Brad Parscale, a Trump Campaign consultant who eventually became the Trump Campaign’s digital media director (and is now Mr. Trump’s re-election campaign manager), created the event website, located at DonaldTrumpForVets.com, which featured the name of the Foundation at the top of the home page and informed visitors that “the Donald J. Trump Foundation is a 501(c)(3) nonprofit organization.”⁹ Executives of the Trump Organization, including Allen Weisselberg, its Executive Vice President and CFO, and Jeff McConney, its Senior Vice President and Controller – both of whom regularly performed tasks for the Foundation – assisted Mr. Parscale in connection with the website project.¹⁰

At the televised fundraising event, the podium was decorated with a sign that borrowed Trump Campaign themes and slogans, displaying the DonaldTrumpForVets.com website on a blue placard with a red border and star pattern identical to the design of Trump Campaign signs and billboards, with Mr. Trump’s name in capital letters and his trademarked campaign slogan, Make America Great Again!¹¹

The Fundraiser reaped approximately \$5.6 million in tax-free donations, some of which went directly from the private donors to veterans charity groups. Of that total, \$2.823 million was contributed to the Foundation.¹²

⁷ See, e.g., “Trump Campaign Statement on Fox News Debate,” Donald J. Trump for President website, Jan. 26, 2016, <http://goo.gl/8Rhm8g>; Philip Rucker, Dan Balz, and Jenna Johnson, *Trump Says He Won’t Participate in GOP Debate on Fox News*, WASH. POST, Jan. 26, 2016, available at https://www.washingtonpost.com/politics/trump-says-he-wont-participate-in-gop-debate-on-fox-news/2016/01/26/58fa0b2e-c490-11e5-a4aa-f25866ba0dc6_story.html?utm_term=.8d08e6a3f2de; Maggie Haberman and Nick Corasaniti, *Donald Trump, In Feud With Fox News, Shuns Debate*, N.Y. TIMES, Jan. 26, 2016, available at <https://www.nytimes.com/2016/01/27/us/politics/trump-feud-fox-debate.html>.

⁸ Shiffman Aff., Ex. 10, 2016 Form CHAR410-A, Part G, Line 3(c).

⁹ Shiffman Aff., Ex. 7, Transcript of Jeff McConney at 134-35.

¹⁰ Shiffman Aff., Ex. 6, Transcript of Allen Weisselberg at 36-37. In addition, on the day of the Iowa Fundraiser, January 28, 2016, Mr. Weisselberg and Mr. McConney flew to Des Moines, Iowa, to be present with the Foundation’s checkbook at the Fundraiser in case Foundation grants were to be disbursed that night. See Shiffman Aff., Ex. 6, Weisselberg Tr. at 29-32, 36-37, 39-40; Shiffman Aff., Ex. 7, McConney Tr. at 128-30. Mr. McConney understood that he was attending the Fundraiser on behalf of the Foundation. McConney Tr. at 133; Weisselberg Tr. at 29-32.

¹¹ See http://a.abcnews.com/images/Nightline/160129_ntl_debate_1239_16x9_992.jpg (photograph of event podium and candidate). Mr. Trump received a trademark for the well-known Make America Great Again slogan in 2013. See U.S. Patent and Trademark Office, Trademark Electronic Search System Entry for “Make America Great Again,” Registration No. 4773272, available via at <https://www.uspto.gov/trademarks-application-process/search-trademark-database>. The registration application confirms that the purpose of the original mark was for “Political action committee services, namely, promoting public awareness of political issues” and “Fundraising in the field of politics.”

¹² See Shiffman Aff., Ex. 14, Document entitled Veterans Fundraiser January 28, 2016.

Following the Fundraiser, senior Trump Campaign staff dictated the manner in which the Foundation would disburse those proceeds, including the timing, amounts, and recipients of the grants. The Investigation found that Trump Campaign staff instructed the Foundation to make five grants in Iowa right before the February 1, 2016 Iowa caucuses, the first nominating contest of the presidential primaries for the 2016 presidential election. On January 29, 2016, Corey Lewandowski, then Mr. Trump's campaign manager, emailed Mr. Weisselberg to ask, "Is there any way we can make some disbursements [from the proceeds of the fundraiser] this week while in Iowa? Specifically on Saturday [January 30th]." ¹³ Mr. Weisselberg, who testified that he understood that Mr. Lewandowski "wanted some checks with him when he went [to Iowa]," ¹⁴ wrote back to Mr. Lewandowski asking the Trump campaign manager "to put together a list of the Iowa veterans organizations you have in mind along with dollar amounts. . . . [Will] give them to the boss." ¹⁵ Later that same day, Mr. Lewandowski emailed Mr. McConney a list of veterans organizations, created by Trump Campaign staff and approved by Mr. Trump, that should receive the grants from the Foundation. ¹⁶

The Foundation then permitted the Trump Campaign to exhibit and award enlarged presentation copies of supposed Foundation checks to grant recipients at Trump Campaign rallies for the political benefit of Mr. Trump and to support his campaign for President. Mr. Trump held several such political rallies in Iowa in the days leading to and including the date of the Iowa caucuses, February 1, 2016. During those campaign appearances, Mr. Trump personally distributed the presentation copies of Foundation checks to Iowa veterans groups in his capacity both as Foundation president and presidential candidate. The Foundation's name and address were printed on the enlarged presentation checks, along with the Trump Campaign slogan, "Make America Great Again!" Mr. Trump's name in large letters, with a smaller reference to the DonaldTrumpForVets.com website. ¹⁷

On January 29, 2016, at a Trump Campaign rally in Council Bluffs, Iowa, Mr. Trump delivered an enlarged copy of a \$100,000 check to Partners for Patriots. ¹⁸ Jerry Falwell, Jr., making a campaign appearance with Mr. Trump, touted Mr. Trump as a candidate, stating, "I mean, how often do you see a presidential candidate giving money away instead of taking it. I think that is wonderful." Mr. Falwell went on, "we have got a group here today that is going to receive the second disbursement of that six million dollars that was raised the other night. If that group would come on the stage now, it's called Partners for Patriots." At the time that Mr. Trump gave the check copy to Partners for Patriots, however, the Foundation was still unaware that the Trump Campaign had selected Partners for Patriots to receive the funds. ¹⁹ The actual payment was

¹³ Shiffman Aff., Ex. 15, Email exchange between Allen Weisselberg and Corey Lewandowski dated January 29, 2016.

¹⁴ Shiffman Aff., Ex. 6, Weisselberg Tr. at 133.

¹⁵ *Id.*

¹⁶ Shiffman Aff., Ex. 16, Email from Corey Lewandowski to Jeff McConney dated January 29, 2016.

¹⁷ See <https://goo.gl/Jo2Mb8> (photograph of Mr. Trump and presentation check at campaign event at Orpheum Theatre in Sioux City, Iowa on January 31, 2016); <https://goo.gl/RiZ4g1> (photograph of Mr. Trump and presentation check at campaign event at Adler Theater in Davenport, Iowa on January 30, 2016).

¹⁸ See <https://www.c-span.org/video/?403936-1/donald-trump-campaign-rally-council-bluffs-iowa>.

¹⁹ Shiffman Aff., Ex. 26, Email exchange between Corey Lewandowski and Jeff McConney dated February 8, 2016.

requested by the Trump Campaign and issued by check from the Foundation's account only on February 10, 2016.²⁰

On January 30, 2016, at a Trump Campaign event in Davenport, Iowa, the campaign staged the disbursement of another enlarged presentation check for \$100,000 to the Puppy Jake Foundation, another veterans' charity. Video of the event shows Mr. Trump presenting an enlarged copy of the check to the recipient foundation and receiving a round of applause from the audience for doing so.²¹ The pattern repeated the next day, January 31, 2016, when Mr. Trump announced at a Trump Campaign rally in Sioux City, Iowa a Foundation grant of \$100,000 to Support Siouxland Soldiers, again presenting an enlarged promotional version of a supposed Foundation check emblazoned with his campaign slogan.²²

On February 1, 2016, Mr. Trump awarded another enlarged presentation copy of a \$100,000 check to the Mulberry Street Veterans Shelter at a Trump Campaign rally in Cedar Rapids, Iowa. During the rally, Mr. Trump himself drew a connection between the distribution of checks and his political polling numbers:

In lieu of the [Republican presidential primary] debate, I said let's have a rally for the veterans. . . . At that rally, we raised in one hour six million dollars. . . . So what we did, we raised this money, and we are giving it out, and we just gave out a check for a hundred thousand dollars a little while ago, and we are giving out another check, and they can bring it up and we are going to deliver it right here. . . . We have so many of these checks. They are all over the place. We are giving them out. This was in lieu, and, by the way, the poll numbers just came down from New Hampshire, I went through the roof. I think they respect the fact that I, that we stand up for our rights So, congratulations to Mulberry Street.²³

That same day, Mr. Trump also presented a \$100,000 check to Americans For Independent Living (also known as Americans for Equal Living) at a campaign rally in Waterloo, Iowa.²⁴

From the beginning, the Foundation and the Trump Campaign communicated about the handling of disbursements from the Fundraiser, and continued to do so for months after the Fundraiser was held. Records obtained from the Foundation reveal that the Foundation ceded control over the distribution of its charitable funds to senior staff of the Trump Campaign. For example, at the outset of the Iowa campaign events that featured the Foundation disbursements, Mr. Weisselberg of the Foundation asked Mr. Lewandowski, the campaign manager, to "start

²⁰ Shiffman Aff., Ex. 22, Document entitled Donald J. Trump Foundation Inc. List of Contributions to Veterans 2016 and accompanying check images.

²¹ See https://www.youtube.com/watch?v=Am9d_5vu-BU.

²² See <http://www.dailymail.co.uk/news/article-3426562/Even-Melania-campaigns-Donald-Trump-uses-family-invites-children-aboard-private-jet-minute-push-Iowa.html>.

²³ See <https://www.youtube.com/watch?v=WPnzNomBjuE>.

²⁴ See <https://www.gettyimages.com/detail/news-photo/check-is-presented-to-americans-for-independent-living-a-news-photo/507895720#/check-is-presented-to-americans-for-independent-living-a-veterans-by-picture-id507895720>.

thinking how you want to distribute the funds collected for the Vets.”²⁵ In the ensuing email exchange, as noted above, Mr. Lewandowski made it clear that he wanted the first disbursements to be made “while in Iowa” on the Saturday before the Iowa caucus.²⁶ Similarly, on February 16, 2016, Mr. McConney wrote Mr. Lewandowski on behalf of the Foundation seeking further direction from the Trump Campaign concerning the Foundation’s fundraising activities and charitable disbursements: “Do you have a list of which veterans charities you want these funds sent to and how much for each charity?? . . . Lastly, how much longer do you want to keep the TrumpForVets website up and running?”²⁷

On May 31, 2016, after press reports about the Foundation’s failure to disburse all of the charitable funds it had received during the Iowa fundraiser,²⁸ the charitable giving of the Foundation again became the centerpiece to a Trump Campaign political event at which Mr. Trump promoted his candidacy in announcing additional grants of Foundation money to veterans groups. At that event, Mr. Trump discussed the presidential campaign while identifying the groups to receive those residual funds.²⁹ And as with the Iowa events, the Trump Campaign’s slogan was prominently displayed in connection with the announcement of Mr. Trump’s charitable giving.³⁰ Mr. Trump also challenged the press to compare his efforts to those of his political opponent: “When I raise money for the veterans, and it’s a massive amount of money, find out how much Hillary Clinton’s given to the veterans. Nothing.”³¹ At the press conference, Mr. Trump invited a veteran, Al Baldasaro (a Republican member of the New Hampshire state legislature who worked on the Trump campaign during the primary), to address the reporters. During his speech, Mr. Baldasaro applauded Mr. Trump’s fundraising efforts for the veterans charities, and repeated his endorsement of Mr. Trump’s candidacy.³² That same month, the Trump Campaign uploaded to its

²⁵ Shiffman Aff., Ex. 15, Email exchange between Allen Weisselberg and Corey Lewandowski dated January 29, 2016.

²⁶ *Id.*

²⁷ Shiffman Aff. Ex. 19, Email from Jeff McConney to Corey Lewandowski, copy to Allen Weisselberg, dated February 16, 2016.

²⁸ David Fahrenthold, *Trump said he raised \$6 million for veterans. Now his campaign says it was less.* David Fahrenthold, WASH. POST, May 21, 2016, available at https://www.washingtonpost.com/politics/trump-said-he-raised-6-million-for-vets-now-his-campaign-says-it-was-less/2016/05/20/871127a8-1d1f-11e6-b6e0-c53b7ef63b45_story.html?utm_term=.aa71f0258643; *Four months after fundraiser, Trump says he gave \$1 million to veterans group*, WASH. POST, May 24, 2016, available at https://www.washingtonpost.com/news/post-politics/wp/2016/05/24/four-months-later-donald-trump-says-he-gave-1-million-to-veterans-group/?noredirect=on&utm_term=.0e21597aab8f.

²⁹ *Transcripts, Trump Gives Account of Veterans Fundraiser*, CNN, May 31, 2016, available at <http://transcripts.cnn.com/TRANSCRIPTS/160531/ath.01.html>; David Fahrenthold, *Trump Announced His Gifts to Veterans. Here’s What We Learned*, WASH. POST, May 31, 2016, available at https://www.washingtonpost.com/news/post-politics/wp/2016/05/30/tomorrow-trump-will-give-more-details-about-his-donations-to-vets-heres-what-we-still-dont-know/?utm_term=.044b61514083.

³⁰ David Fahrenthold and Jose A. DelReal, *Trump Rails Against Scrutiny Over Delayed Donations to Veterans Groups*, WASH. POST, May 31, 2016, available at https://www.washingtonpost.com/news/post-politics/wp/2016/05/31/trump-rails-against-scrutiny-over-delayed-donations-to-veterans-groups/?utm_term=.cfbdefb8845e.

³¹ <https://bit.ly/2ImPa64> at 14:00.

³² *Id.* at 18:40.

website a chart identifying the recipients of the charitable, tax-free contributions received during the “Donald J. Trump Veteran Fundraiser” in Iowa five months earlier.³³

All of the grants issued by the Foundation from the proceeds of the Iowa Fundraiser – which did not include any funds donated by Mr. Trump personally – were selected by the Trump Campaign, with the only approval by the Foundation coming from Mr. Trump (who served as President of the Board and signed each check distributing the proceeds from the Fundraiser), whose political campaign both controlled and benefitted from the manner in which the grants were disbursed. The Foundation Board never met to discuss the Foundation’s involvement in the Fundraiser or any of the Trump Campaign events at which the proceeds from it were disbursed. Nor did the Board ever approve the grants that were made from the proceeds. And as a consequence, the Trump Campaign coopted the benefit of a tax-free, charitable giving process to its political ends.³⁴

The Foundation engaged in unlawful political activity within the Commission’s jurisdiction on at least one other occasion. On September 9, 2013, the Foundation issued a check in the amount of \$25,000 to “And Justice for All,” a Florida political organization that supported the re-election of Pam Bondi to the position of Florida Attorney General. On March 23, 2016, the day after a *Washington Post* story revealed some of the details of this transaction and reported that a government watchdog group had filed a complaint about the contribution, the Foundation filed an IRS Form 4720 disclosing the transaction, and Mr. Trump paid the applicable excise tax.

LEGAL ANALYSIS

The Commission exercises exclusive civil jurisdiction to interpret and enforce the provisions of the Act and the Commission’s implementing regulations.³⁵ This referral does not purport to address every respect in which the evidence here submitted or otherwise available to the Commission may implicate the federal campaign finance laws. Nonetheless, the following assessment gives OAG reason to believe that the Foundation and the Trump Campaign may have violated federal laws within the Commission’s enforcement jurisdiction. These violations may have been knowing and willful given the well-established prohibition on accepting excessive or corporate in-kind contributions.

1. The Foundation Made Prohibited and Excessive In-Kind Contributions to the Trump Campaign that It Knowingly Accepted and Failed to Report.

The circumstances recited above demonstrate that the Foundation disbursed at the direction of the Trump Campaign more than \$2.8 million the Foundation had raised during the campaign-

³³ <https://goo.gl/C6KdXN> (archive copy of May 30, 2016 Trump Campaign webpage featuring chart of Foundation grants); *see also* <https://goo.gl/5k4Tuk> (archive copy of May 24, 2016, Trump Campaign webpage featuring CBS press report on statements of Mr. Lewandowski regarding Mr. Trump’s contributions to veterans groups).

³⁴ In fact, at the time of the Fundraiser, Mr. Trump had a significant financial stake in the prosperity of his presidential campaign committee, having already provided \$17.5 million in personal loans toward his public promise to self-fund – all the more reason to spend tax-exempt charitable donations of others, rather than his own campaign funds, on costly political activities.

³⁵ 52 U.S.C. § 30106(b)(1).

sponsored fundraising event in Iowa. Approximately \$500,000 of those grants were vigorously promoted by the candidate and other campaign staff and speakers during a series of campaign rallies in Iowa on the eve of the Iowa caucuses—the first nominating contest of the 2016 presidential primary season. The Investigation further obtained compelling evidence that these expenditures were made at the behest and direction of Trump Campaign staff and for the specific purpose of benefitting Mr. Trump’s performance in the Iowa caucuses specifically and as a federal candidate generally.³⁶

Federal law prohibits corporations from making contributions from their general treasury funds in connection with any election of a candidate for federal office.³⁷ This prohibition upon corporate contributions includes not-for-profit corporations, which are further prohibited from engaging in political activity pursuant to the Internal Revenue Code. Nor may a candidate or political committee knowingly accept a corporate contribution.³⁸ An expenditure made in coordination with a candidate or authorized committee is an in-kind contribution to that candidate or committee and must be reported as an expenditure made by that candidate or committee.³⁹ An “expenditure” under the Act is any “payment, distribution . . . or gift of money or anything of value . . . made by any person for the purpose of influencing any election for federal office” or “a written contract, promise, or agreement” to do so.⁴⁰ Such a payment or disbursement of a thing of value is “coordinated” if it is “made in concert or cooperation with or at the request or suggestion of” the candidate or his campaign.⁴¹

A. The Foundation Made an Expenditure when It Disbursed in Excess of \$2.8 Million for the Purpose of Influencing the Presidential Election.

As noted, the terms “contribution” and “expenditure” include gifts or payments of money or “anything of value” so long as they are made “for the purpose of influencing” the election of any person to Federal office.⁴² The phrase “anything of value” is construed broadly, and includes goods or services provided without charge or at less than the usual and normal charge.⁴³

The facts and circumstances developed in the Investigation amply demonstrate that the Trump Campaign specifically orchestrated the Iowa Fundraiser and subsequent campaign events for its political benefit. In particular, the campaign events where Mr. Trump personally distributed promotional checks from the Foundation to veterans groups at official campaign rallies, just days in advance of the Iowa caucuses, underscore that the grants were intended to benefit Mr. Trump’s

³⁶ Additional evidence beyond what the OAG collected from the Foundation may be in the custody of the Trump Campaign, including, without limitation, evidence relating to the use of the list of donors to the website created by Mr. Parscale in connection with the Iowa fundraiser, www.donaldtrumpforvets.com.

³⁷ 52 U.S.C. § 30118(a).

³⁸ *Id.*

³⁹ 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20.

⁴⁰ 52 U.S.C. §§ 30101(9), 30118(a).

⁴¹ 52 U.S.C. § 30101(17)(B); *see* 11 C.F.R. § 109.20(a).

⁴² *See* 52 U.S.C. § 30101(8)(A)(i), (9)(a)(i); 11 C.F.R. §§ 100.7(a)(1), 100.8(a)(1). Any contribution or expenditure is required to be disclosed by the receiving and disbursing committee. 52 U.S.C. § 30104(b); 11 CFR §§ 104.3(a)-(b), 104.13. The Trump Campaign apparently did not report any amounts related to the distribution of the grants as a contribution of the Trump Foundation.

⁴³ 11 CFR §§ 100.7(a)(1)(iii)(A), 100.8(a)(1)(iv)(A).

ambitions as candidate – that is, for the purpose of influencing the presidential election – and thus constitute expenditures under the Act.

For these same reasons, the OAG has concluded within its own state enforcement authority that the charitable disbursements of the Foundation constitute impermissible political expenditures to promote and benefit the Trump Campaign and Mr. Trump’s political ambitions, notwithstanding that the grants were made not to the Trump Campaign, but to recipient charities identified by the Trump Campaign.⁴⁴ That finding appears consistent with the FECA, given the broad statutory and regulatory definitions of “contribution” and “expenditure,” which include “directly or indirectly” providing “anything of value”—here, the enormous promotional value afforded the candidate through symbolic distribution during campaign events of the tax-deductible proceeds of others’ charitable giving—beyond merely the campaign’s direct receipt of a payment or money. Therefore, given that the grants were made at the explicit direction of the Trump Campaign—indeed, at the direction of the campaign manager, who specified their distribution on the weekend before the Iowa caucus—there appears to be a compelling factual basis to conclude that the payments were “made . . . for the purpose of influencing any election for federal office.”⁴⁵

In response to certain Advisory Opinion Requests concerning whether federal officeholders’ participation in charitable events resulted in contributions or expenditures by or on behalf of the candidate, the Commission has examined the degree to which the requestors’ involvement in those events related to their candidacy and campaign activity or, rather, their status as officeholder.⁴⁶ Because the degree of separation that the requestors stipulated to when obtaining those Advisory Opinions differs radically from the circumstances uncovered in the Investigation, they do not appear to afford any protection against a Commission enforcement action here. By way of example, the Commission explained in Advisory Opinion 1999-34 that “[t]he question of whether the event or your participation in the event is also for the purpose of promoting your candidacy may be answered by considering the various features of the event and its promotion, and the role of the Committee.” In that Opinion, the officeholder’s participation was intended to benefit local elementary schools and charitable organizations organized under 501(c)(3), not the re-election campaign as candidate, because, among other stipulated facts, the event would be held several months before the relevant primary election and “the disbursement of the proceeds will be controlled by each benefitting PTA or other [charitable] organization.”⁴⁷ In contrast, “a candidate’s participation in an event *as a candidate* would cause the Commission to determine the event was in connection with an election.”⁴⁸ Here there can be no genuine question that the rallies and events at which Mr. Trump and other campaign speakers promoted his Foundation’s philanthropic giving were Trump Campaign events that Mr. Trump attended in his capacity as a candidate for federal office. Moreover, the campaign committee’s extensive coordination of all the material elements of the featured charitable giving further confirms that publicizing the gifts of the Foundation in the context of a political event was intended to serve the purpose of promoting and advancing Mr. Trump’s prospects as a federal candidate in the looming election contest.

⁴⁴ See Petition at 33-60.

⁴⁵ 52 U.S.C. §§ 30101(9), 30118(a).

⁴⁶ See, e.g., Advisory Op. 1999-11 (Byrum); Advisory Op. 1999-34 (Bilirakas).

⁴⁷ Advisory Op. 1999-34 at 5.

⁴⁸ *Id.* at 5 n.3 (citing Advisory Op. 1999-2 (Premera) at 4).

B. The Trump Campaign Directed and Coordinated with the Foundation in Making Expenditures to Benefit the Campaign.

The Investigation uncovered evidence of extensive coordination between the senior-most members of the Trump Foundation and the Trump Campaign regarding both the Iowa fundraiser and the distribution of the charitable proceeds the Foundation received as a result.

The Act provides that “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate.”⁴⁹ The Commission’s coordination regulations distinguish coordinated expenditures generally from expenditures for coordinated communications specifically.⁵⁰ It appears that the disbursements that are central to this matter would be governed by those provisions of the Act and Commission regulations that address coordinated expenditures generally, that is, 52 U.S.C. § 30116(a)(7)(B)(i) and 11 C.F.R. § 109.20, not the coordinated communications regulation at 11 C.F.R. § 109.21.⁵¹

In addition to the facts already related, the Investigation obtained other evidence that the Trump Campaign played the lead role in determining the fate of the grants. For example, Campbell Burr, a Trump Campaign staffer, sent several emails to, among others, Mr. McConney and Mr. Lewandowski, with subjects such as “Vet Donations” and “Updated Vet Donations List.”⁵² Ms. Burr addressed the recipients as the “Team” and provided “an updated list of checks that have been sent to the veterans groups.”⁵³ In that email, she also noted that several of the donations on the list were “going out today,” reflecting the control of the campaign staff over the disbursements.⁵⁴ Mr. Weisselberg, the Trump Organization’s EVP and CFO, admitted that he understood that Ms. Burr was assisting Mr. Lewandowski in making “sure these funds got to where they had to get to.”⁵⁵ In addition, on March 22, 2016, Mr. Lewandowski wrote to Mr. Weisselberg

⁴⁹ *Id.* § 30116(a)(7)(B)(i).

⁵⁰ Compare 11 C.F.R. § 109.20, with *id.* § 109.21.

⁵¹ Nonetheless, the conduct prong of the coordinated communication regulation at 11 C.F.R. § 109.21(d) identifies several activities that the Commission has indicated would constitute actionable coordination even in the circumstance of public communications. First, the grants can fairly be said to have been “created, produced, or distributed at the request or suggestion of” the Trump Campaign. Indeed, the Trump Campaign selected all the grant recipients and the amounts they would receive. *Id.* § 109.21(d)(1)(i). Second, the Campaign was materially involved in determining the content, intended audience, and timing of the grant presentations and payments. *Id.* § 109.21(d)(2)(i)-(v). The metadata from the file containing the list of veterans organizations that Mr. Trump allegedly approved to receive grants confirms that the list was created by the campaign. Mr. Lewandowski sent this list to the Foundation “staff”—that is, Trump Organization personnel whose responsibilities included performing work for the Foundation—who assisting with cutting the checks for the grants. See Shiffman Aff., Ex. 16, Email from Corey Lewandowski to Jeff McConney, dated January 29, 2016 (with metadata for the attachment). Third, there appears to have been substantial discussion between the Foundation and the Trump Campaign about these grants, as “information about the candidate’s . . . plans, projects, activities, or needs [was] conveyed to [the Foundation], and that information [was] material to the creation, production, or distribution” of the grants. *Id.* § 109.21(d)(3). If the level of coordinated activity would be sufficient to satisfy the elevated degree of cooperation necessary to satisfy the conduct prong of the coordinated communication regulation, it should amply satisfy the definition of coordination under the regulatory provision of general application at 11 C.F.R. § 109.20.

⁵² See Shiffman Aff., Ex. 20, Email from Jeff McConney to Larry Glick and Deborah Tarasoff, dated March 7, 2016.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Shiffman Aff., Ex. 6, Weisselberg Tr. 164.

and Mr. McConney, asking that a check for \$100,000 be sent to the Marine Corp Law Enforcement Foundation, and noting that the media has been asking if they received money from the Foundation.⁵⁶ Mr. Weisselberg and Mr. McConney complied and cut a check the same day.⁵⁷

In sum, the factual record revealed in the publicly available information, the internal written communications of the relevant staff and managers, and the testimonial admissions of relevant witnesses all support the conclusion that the Trump Campaign and the Foundation extensively coordinated the decision to conduct the fundraiser in lieu of attending the Iowa debate and in turn the manner in which they would then spend those donated funds, calculated to influence positively the prospects of then-candidate Trump in the imminent caucuses and presidential election.⁵⁸

2. The Trump Campaign's Control Over the Foundation's Activities May Also Violate the Soft Money Prohibitions of the Act

As amended under BCRA, the Act prohibits a candidate or committee from soliciting, receiving, or directing another person to make a contribution, donation, or transfer of funds, or any other thing of value, that is not subject to the prohibitions, limitations, and reporting requirements of the Act. This "soft-money ban" also applies to entities that are directly or indirectly established, financed, maintained, or controlled by a candidate or committee. The Commission has developed ten non-exclusive factors (collectively, the "EFMC factors"), set out in 11 C.F.R. § 300.2(c)(2), to determine whether a person or entity (the "sponsor") "directly or indirectly established, financed, maintained or controlled" another person or entity under 52 U.S.C. § 30125. These factors are examined in the context of the overall relationship between the sponsor and the entity to determine whether the presence of any factor or factors is evidence that the sponsor "directly or indirectly established, financed, maintained or controlled" the entity.

Mr. Trump's eponymous Foundation, although formed well prior to his announcement of candidacy, was nonetheless established by him, and during the 2016 presidential campaign he was authorized to, and did, exercise considerable control over all aspects of its activities as the Board President. The evidence collected in the Investigation further reflects that Mr. Trump personally was consulted in connection with the grants and authorized those disbursements, signing and delivering checks and the cover correspondence.⁵⁹ Moreover, the Foundation received a substantial amount of donations, over \$2.8 million, as a result of the January 28, 2016 fundraiser

⁵⁶ Shiffman Aff., Ex. 21, Email from Corey Lewandowski to Allen Weisselberg, dated March 22, 2016.

⁵⁷ *Id.*; Shiffman Aff., Ex. 22, The Donald J. Trump Foundation Inc. List of Contributions to Veterans; Shiffman Aff., Ex. 23, Email from Jeff McConney to Deborah Tarasoff, dated March 22, 2016.

⁵⁸ In addition to the prohibition against making or accepting a corporate in-kind contribution, the Act prohibits corporations, including their officers, directors, or other representative agents, from facilitating the making of contributions to federal candidates and committees. *See* 11 C.F.R. § 114.2(f)(1). Facilitation includes "using corporate . . . resources or facilities to engage in fundraising activities in connection with any federal election" and covers, among other things, ordering staff to plan, organize, or carry out a fundraising project as part of their work responsibilities using corporate resources and the use of corporate facilities in connection with fundraising activities. As noted, the Trump Organization and Foundation authorized the use of staff time to assist and administer the Iowa fundraiser at the direction of the Trump Campaign and subsequent grant awards as instructed by the Trump Campaign, resulting in in-kind contributions to the campaign.


⁵⁹ *See, e.g.*, Shiffman Aff., Ex. 20, Emails between Mr. Lawrence Glick and others dated March 7, 2016.

that the Trump Campaign planned and organized in connection with the pending presidential election. Further, as explained, the Foundation's disbursements of more than \$2.8 million in grants were undertaken at the express direction and control of the Trump Campaign and, once more, in connection with the pending presidential election. Given this and other evidence of direction and control by Mr. Trump, the Trump Campaign, and their agents, it appears that the Foundation was established, financed, maintained, or controlled by Mr. Trump and the Trump Campaign within the meaning of the BCRA soft-money provisions—thus subjecting the Foundation and its agents to those limits and prohibitions as well.⁶⁰

CONCLUSION

The Investigation revealed many instances of close coordination between the Trump Campaign and the Foundation with respect to the Iowa Fundraiser and subsequent distributions, as well as use of the Foundation's assets—both its checkbook and its personnel—to influence the 2016 presidential campaign, activities that implicate 52 U.S.C. §§ 30101(17)(B) and 30125 and 11 C.F.R. §§ 109.20(a) and 300.2, among other provisions of the Act and the Commission's implementing regulations.

Should you have any questions or wish to obtain additional information concerning the OAG Investigation, please contact me at (212) 416-8401.

Sincerely,

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⁶⁰ For these reasons, the exception in the Act and Commission regulations permitting federal candidates to make certain solicitations on behalf of charitable organizations without regard to the prohibitions and limits of the Act are inapplicable here. See 52 U.S.C. § 30125; 11 C.F.R. § 300.65. That safe harbor does not apply where a charity's activities are taken "in connection with" a federal election, as in this case. See 11 C.F.R. § 300.65(a)(1), (2)(ii), (d).