

August 18, 2016

The Honorable John A. Koskinen  
Commissioner  
Internal Revenue Service  
1111 Constitution Ave., N.W.  
Washington, DC 20224

**By electronic mail ([IRS.Commissioner@IRS.gov](mailto:IRS.Commissioner@IRS.gov)) and First Class mail**

Re: Supplement to Complaint Against the Center to Protect Patient Rights/American Encore and Sean Noble

Dear Commissioner Koskinen:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully writes to supplement its May 7, 2014 complaint against the Center to Protect Patient Rights (“CPPR”), now known as American Encore, and its president, Sean Noble, for violating the Internal Revenue Code (“tax code”) and 18 U.S.C. § 1001 by falsely asserting on multiple tax returns it engaged in no political activity in 2010. CREW also writes to supplement its request that the IRS determine if CPPR violated its tax-exempt status under section 501(c)(4) of the tax code.<sup>1</sup>

As CREW explained in its initial complaint, although Mr. Noble made those statements to the Internal Revenue Service (“IRS”) under penalty of perjury, he directly contradicted them in a March 2014 interview, admitting CPPR in fact engaged in extensive political activity during the 2010 elections by researching and producing political advertisements and paying other groups to run them in competitive House races.<sup>2</sup> CREW filed its initial IRS complaint based on those statements and simultaneously filed a complaint with the Federal Election Commission (“FEC”) alleging that three groups CPPR paid to broadcast the ads violated federal campaign finance law by failing to disclose that CPPR’s contributions specifically funded the ads.

The three groups and CPPR initially denied any of the contributions were earmarked for political advertisements. Nevertheless, in June 2015 the FEC unanimously found reason to believe the three groups violated the law and launched a formal investigation. Perhaps trying to avoid a thorough investigation, the groups immediately told the FEC they wished to settle the matter, and each subsequently entered into conciliation agreements with the FEC, agreeing to pay a total of \$233,000 in civil penalties and to amend their FEC disclosure reports of the 2010 political activity.

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<sup>1</sup> CREW submits this letter in lieu of Form 13909; a copy is being sent to the Dallas office. CREW’s initial complaint is available at [http://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2016/07/20021954/5-7-14\\_IRS\\_Complaint\\_Koch\\_Brothers\\_Sean\\_Noble.pdf](http://s3.amazonaws.com/storage.citizensforethics.org/wp-content/uploads/2016/07/20021954/5-7-14_IRS_Complaint_Koch_Brothers_Sean_Noble.pdf).

<sup>2</sup> Eliana Johnson, *Inside the Koch-Funded Ads Giving Dems Fits*, *National Review Online*, March 31, 2014 (attached as Exhibit E to CREW’s initial complaint).

Information provided to the FEC during its review and the amended disclosure reports even more clearly demonstrate that CPPR and Mr. Noble made false statements on CPPR's tax returns. The FEC review revealed for the first time that Mr. Noble both directed CPPR's contributions to the three groups and helped produce and target the ads as an undisclosed subcontractor to the media firms the groups hired to create the ads – a fact critical to the FEC's determination there was reason to believe CPPR's contributions were earmarked for political activity. Furthermore, CPPR's earmarking was confirmed by the first set of amended reports, recently filed under penalty of perjury by one of the groups CPPR funded, that now admit that CPPR contributed millions of dollars for the purpose of furthering specific independent expenditures that expressly advocated the election or defeat of federal candidates in 2010. CPPR's and Mr. Noble's claims that CPPR engaged in no political activity at all, therefore, are almost certainly false.

In all, the three groups determined they spent \$13,007,867 on political activity paid for by CPPR, and it is not known how much more money CPPR spent on politics in 2010. In addition to taking action based on CPPR's apparent false statements that it had not conducted any political activity, the IRS also should conduct a full audit to determine whether CPPR engaged in more political activity than is permitted, and thus violated its tax-exempt status.

### **Additional Background**

Based on Mr. Noble's interview, CREW filed a complaint on May 7, 2014 with the FEC alleging that the American Future Fund ("AFF"), Americans for Job Security ("AJS"), and the 60 Plus Association ("60 Plus") violated the Federal Election Campaign Act ("FECA") and FEC regulations by failing to disclose that CPPR funded many of the political advertisements they ran in House races in 2010.<sup>3</sup>

The FECA requires every group that spends more than \$250 in independent expenditures expressly advocating the election or defeat of a federal candidate during a calendar year to file reports with the FEC identifying each person who made a contribution in excess of \$200 to the person filing the report "which was made for the purpose of furthering an independent expenditure."<sup>4</sup> FEC regulations interpret these provisions to require the reports to disclose contributors who gave the money "for the purpose of furthering the reported independent expenditure."<sup>5</sup> The FECA also requires a person who makes "electioneering communications" totaling \$10,000 or more during a calendar year to file reports disclosing the names and addresses of all contributors who contributed a total of \$1,000 or more to the organization

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<sup>3</sup> See <http://eqs.fec.gov/eqsdocsMUR/16044397100.pdf>.

<sup>4</sup> 52 U.S.C. §§ 30104(c)(1), (c)(2)(C).

<sup>5</sup> 11 C.F.R. § 109.10(e)(1)(vi).

making the electioneering communication.<sup>6</sup> FEC regulations require the reports to disclose contributors who gave “for the purpose of furthering electioneering communications.”<sup>7</sup>

During 2010, AFF, AJS, and 60 Plus each filed reports with the FEC disclosing millions of dollars of spending on independent expenditures and electioneering communications in House races. AFF reported spending \$8,313,866 on these political activities, AJS reported spending \$4,506,513, and 60 Plus reported spending \$7,096,131.<sup>8</sup> None of these reports disclosed any contributors. CPPR, however, disclosed on its 2010 Form 990 tax return that in 2010 it made \$11,685,000 in grants to AFF, \$8,990,000 in grants to 60 Plus, and \$4,828,000 in grants to AJS.<sup>9</sup>

CREW’s FEC complaint, based on Mr. Noble’s statements in the March 2014 interview, alleged that the three groups violated federal campaign finance law by failing to disclose that CPPR’s contributions were earmarked to pay for the ads, and that the groups, their presidents, CPPR, and Mr. Noble conspired to violate the law.<sup>10</sup> AFF, AJS, 60 Plus, and CPPR all filed responses to the complaint claiming that none of CPPR’s grants were earmarked to pay for the political advertisements. CPPR asserted that none of its grants were “earmarked for any particular project, purpose, or advertisement” and were instead explicitly made as “unrestricted, general support grants.”<sup>11</sup> As proof, CPPR pointed to transmittal letters asserting each grant was a “general support grant.”<sup>12</sup> The three recipient groups similarly maintained they did not solicit or accept any earmarked grants, also noting the transmittal letters and their organizational policies.<sup>13</sup>

CPPR’s response, however, also divulged for the first time that Mr. Noble’s consulting firm, Noble Associates, played an important role in selecting the House races in which the ads ran and in producing the ads themselves.<sup>14</sup> According to CPPR and Mr. Noble, Noble Associates, serving as a subcontractor to the media consultants of AFF, AJS, and 60 Plus, “helped to produce advertisements and determine advertisement placement strategy” for the groups.<sup>15</sup> Mr. Noble thus both (1) decided which groups received CPPR’s grants and (2) helped choose the races in which the groups would run ads and helped make the ads themselves. Because Mr. Noble personally participated on both ends of the activity, he knew how the money

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<sup>6</sup> 52 U.S.C. § 30104(f)(1)-(2). An electioneering communication is a broadcast, cable, or satellite ad that stops short of expressly advocating for or against a candidate but clearly refers to a candidate, is broadcast within 60 days of a general election, and is targeted at the relevant electorate. 52 U.S.C. § 30104(f)(3)(A).

<sup>7</sup> 11 C.F.R. § 104.20(c)(9).

<sup>8</sup> Federal Election Commission, MUR No. 6816, First General Counsel’s Report (“FEC First General Counsel’s Report”), Apr. 7, 2015, at 8, available at <http://eqs.fec.gov/eqsdocsMUR/16044397246.pdf>.

<sup>9</sup> *Id.*; CPPR 2010 Form 990 (amended), Schedule I (attached as Exhibit A to CREW’s initial complaint).

<sup>10</sup> See <http://eqs.fec.gov/eqsdocsMUR/16044397100.pdf>.

<sup>11</sup> FEC First General Counsel’s Report, at 4.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 5-8, 18-19.

<sup>14</sup> Response of CPPR/American Encore and Sean Noble in MUR 6816, June 19, 2014, at 2-3, 10-11, available at <http://eqs.fec.gov/eqsdocsMUR/16044397186.pdf>.

<sup>15</sup> *Id.* at 3; FEC First General Counsel’s Report, at 10 (quoting Mr. Noble’s sworn affidavit).

would be spent, and CPPR's contributions can be treated as earmarked for the political advertising.

Relying in part on this new information, the FEC's Office of General Counsel recommended finding reason to believe the three groups violated the law by failing to disclose CPPR as the contributor who paid for the ads.<sup>16</sup> The FEC voted 5-0 on June 23, 2015 to follow that recommendation and open an investigation, and authorized the use of compulsory process to conduct it.<sup>17</sup> Within two weeks, all three groups told the FEC they wanted to resolve the matter through conciliation.<sup>18</sup> Although the groups continued to maintain in the conciliation process that CPPR had not earmarked any money for particular political ads, the FEC's Office of General Counsel determined there was a reasonable basis for concluding CPPR provided funds to the groups "for the purpose of furthering" independent expenditures and electioneering communications.<sup>19</sup>

In the conciliation agreements themselves, each of the three groups similarly denied they violated the law but agreed to pay civil penalties and amend their FEC disclosure reports. In the conciliation agreement AFF signed, it asserted that "[f]or the purpose of settling this matter, AFF will no longer contest the Commission's conclusion that a portion of the grant funding that CPPR provided to AFF was for the purpose of furthering specific independent expenditures."<sup>20</sup> AJS and 60 Plus each stated it agreed to pay a penalty and amend its reports "[s]olely in the interest in resolving this matter, and without admitting or conceding any violation of law."<sup>21</sup> Despite trying to have it both ways, the groups agreed to pay a total of \$233,000 in civil penalties, and each group committed to amending its FEC disclosure reports "to reflect CPPR as a donor with respect to the relevant independent expenditures" and, for 60 Plus, with respect to the relevant electioneering communications.<sup>22</sup>

The groups also calculated how much money they each spent on independent expenditures and electioneering communications using funds provided by CPPR. AFF determined it spent \$6,427,422 on CPPR-funded independents expenditures, AJS calculated it spent \$2,291,060 on them, and 60 Plus concluded it spent \$4,049,608 on CPPR-funded

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<sup>16</sup> FEC First General Counsel's Report, at 21-22.

<sup>17</sup> Federal Election Commission, MUR No. 6816, Certification, June 23, 2015, *available at* <http://eqs.fec.gov/eqsdocsMUR/16044397270.pdf>.

<sup>18</sup> Federal Election Commission, MUR No. 6816, Second General Counsel's Report ("FEC Second General Counsel's Report"), Feb. 12, 2016, at 2, n.2, *available at* <http://eqs.fec.gov/eqsdocsMUR/16044397329.pdf>.

<sup>19</sup> *Id.* at 4, 5, 6-7.

<sup>20</sup> Federal Election Commission, MUR No. 6816, AFF Conciliation Agreement, ¶ IV.10, *available at* <http://eqs.fec.gov/eqsdocsMUR/16044397356.pdf>.

<sup>21</sup> Federal Election Commission, MUR No. 6816, AJS Conciliation Agreement, ¶ V, *available at* <http://eqs.fec.gov/eqsdocsMUR/16044397368.pdf>; Federal Election Commission, MUR No. 6816, 60 Plus Conciliation Agreement, ¶ V, *available at* <http://eqs.fec.gov/eqsdocsMUR/16044397382.pdf>.

<sup>22</sup> AFF Conciliation Agreement, ¶ V.III; AJS Conciliation Agreement, ¶ V.III; 60 Plus Conciliation Agreement, ¶ V.III.

independent expenditures and \$239,777 on CPPR-funded electioneering communications.<sup>23</sup> In all, the groups determined they spent \$13,007,867 on political activity paid for by CPPR.

The disclosure reports each group either has filed or will soon file in accordance with those agreements and under penalty of perjury confirm that CPPR did, in fact, earmark millions of dollars in funds for political advertisements. AFF filed the first two of those amended reports on July 29, 2016, with Donna Smith signing for AFF under penalty of perjury.<sup>24</sup> The instructions for those reports require the filer to provide identifying information for “each contribution over \$200 that was made for the purpose of furthering the independent expenditures.”<sup>25</sup> Accordingly, in those reports, AFF disclosed a total of \$6,875,000 in contributions from CPPR that correspond to \$6,427,422 of the independent expenditures disclosed in those reports.<sup>26</sup>

AJS and 60 Plus have not filed their amended FEC disclosure reports yet because their conciliation agreements allowed them more time to file than AFF. To fulfill their obligations under the conciliation agreements, however, those reports also will have to disclose millions of dollars of contributions from CPPR that correspond to AJS’s and 60 Plus’s spending on independent expenditures and electioneering communications.

As CREW explained in its initial complaint, CPPR initially filed its 2010 Form 990 tax return in November 2011,<sup>27</sup> and filed an amended 2010 tax return in May 2013.<sup>28</sup> On both of the 2010 tax returns, signed by Mr. Noble under penalty of perjury, Mr. Noble and CPPR answered “no” to the question: “Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office?”<sup>29</sup> CPPR also did not submit a Schedule C, on which tax-exempt organizations report to the IRS and the public their political campaign activities. CPPR reported making \$44,599,946 in grants to tax-exempt organizations in 2010, all of which CPPR claimed were for “general support,” and reported spending a total of \$60,245,391 that year.<sup>30</sup>

The evidence described above even more clearly demonstrates that CPPR and Mr. Noble made false statements on CPPR’s tax returns by claiming CPPR did not engage in any political activity at all in 2010, when in fact it earmarked \$13 million for independent expenditures and electioneering communications run by AFF, AJS, and 60 Plus. The evidence also calls into

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<sup>23</sup> AFF Conciliation Agreement, ¶ IV.9; AJS Conciliation Agreement, ¶ IV.5; 60 Plus Conciliation Agreement, ¶ IV.5.

<sup>24</sup> AFF, FEC Form 5, 2010 October Quarterly Report, Amended, July 29, 2016, available at <http://docquery.fec.gov/pdf/168/201607299021961168/201607299021961168.pdf>; AFF, FEC Form 5, 2010 Year-End Report, Amended, July 29, 2016, available at <http://docquery.fec.gov/pdf/191/201607299021961191/201607299021961191.pdf>.

<sup>25</sup> Federal Election Commission, Form 5 Instructions, at 2, available at <http://www.fec.gov/pdf/forms/fecfrm5i.pdf>.

<sup>26</sup> AFF, FEC Form 5, 2010 October Quarterly Report, Amended, July 29, 2016; AFF, FEC Form 5, 2010 Year-End Report, Amended, July 29, 2016; AFF Conciliation Agreement, ¶ IV.9; FEC Second General Counsel’s Report, at 2.

<sup>27</sup> CPPR 2010 Form 990 (initial), at 1 (excepts attached as Exhibit D to CREW’s initial complaint).

<sup>28</sup> CPPR 2010 Form 990 (amended), at 1.

<sup>29</sup> CPPR 2010 Form 990 (initial), Part IV, Question 3; CPPR 2010 Form 990 (amended), Part IV, Question 3.

<sup>30</sup> CPPR 2010 Form 990 (amended), Part I, Line 18, Part IX, Line 25, and Schedule I.

question whether CPPR violated its tax-exempt status. CPPR spent at least \$13 million on political activity through AFF, AJS, and 60 Plus, and it is unknown how much more CPPR spent on politics, either itself or through other grants.

### **Potential Violations**

#### **26 U.S.C. § 7206**

Under the Code, any person who “[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter,” is guilty of a felony and subject to up to three years in prison and a fine of up to \$100,000.<sup>31</sup> On CPPR’s 2010 tax returns, Mr. Noble and CPPR represented CPPR engaged in no political activity at all that year, but CPPR’s earmarking of contributions to AFF, AJS, and 60 Plus to pay for independent expenditures and electioneering communications clearly is political. Mr. Noble first described the earmarking in the news report, and it is further demonstrated by the information revealed in the FEC’s review, in the conciliation agreements themselves, and in the amended disclosure reports.

Mr. Noble and CPPR’s misrepresentations appear to be willful. Not only was Mr. Noble involved in every step of CPPR’s political activities in 2010, he also knew that, as a subcontractor to AFF, AJS, and 60 Plus’s media consultants, he helped choose the races in which those groups broadcast political advertisements and helped produce them. Mr. Noble even had an opportunity to correct the original false statement when CPPR filed an amended return in 2013, yet failed to make any changes acknowledging CPPR’s extensive political activity. As a result, by falsely claiming CPPR engaged in no political activity in 2010 and by failing to report the amount of political activity in which it engaged, CPPR willfully filed a false return in violation of 26 U.S.C. § 7206.

#### **26 U.S.C. § 6652**

Under the Code, a tax-exempt organization that, without reasonable cause, fails to include any of the information required on a Form 990 tax return, or fails to provide the correct information, is liable for civil penalties.<sup>32</sup> By falsely claiming CPPR engaged in no political activity in 2010 and by failing to report the amount of political activity in which it engaged, CPPR violated 26 U.S.C. § 6652.

#### **18 U.S.C. § 1001**

Federal law prohibits anyone from “knowingly and willfully” making “any materially false, fictitious, or fraudulent statement or representation” in any matter within the jurisdiction of

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<sup>31</sup> 26 U.S.C. § 7206(1).

<sup>32</sup> 26 U.S.C. §§ 6652(c)(1)(A)(ii), 6652(c)(4).

the executive, legislative, or judicial branch.<sup>33</sup> By falsely claiming CPPR engaged in no political activity in 2010 and by failing to report the amount of political activity in which it engaged, Mr. Noble and CPPR violated 18 U.S.C. § 1001.

26 U.S.C. § 501(c)(4)

Section 501(c)(4) provides tax-exempt status to organizations “not organized for profit but operated exclusively for the promotion of social welfare.”<sup>34</sup> IRS regulations interpret the statute to mean a section 501(c)(4) organization must be “primarily engaged in promoting in some way the common good and general welfare of the people of the community.”<sup>35</sup> The regulations further provide that “direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office” does not promote social welfare.<sup>36</sup>

The IRS has not further defined the “primary activity” standard, and provides only that all the facts and circumstances are to be taken into account in determining the “primary activity” of a section 501(c)(4) organization.<sup>37</sup> Internal IRS training materials, however, assert section 501(c) organizations (other than section 501(c)(3) charities) “may generally make expenditures for political activities as long as such activities, in conjunction with any other non-qualifying activities, do not constitute the organization’s *primary activity* (51%).”<sup>38</sup>

It remains unclear how much political activity CPPR engaged in during 2010 (although it is certainly more than what CPPR claimed). At a minimum, the \$13,007,867 CPPR spent on earmarked grants to AFF, AJS, and 60 Plus is political activity. In all, CPPR made \$44,599,946 in grants to other organizations, many of which also engaged in political activities in 2010, and CPPR itself engaged in activities that could be political. Accordingly, the IRS should conduct an audit to determine if CPPR violated its tax-exempt status.

### Conclusion

This remains a simple case of lying to the IRS. Mr. Noble and CPPR claimed on CPPR’s 2010 tax returns the organization engaged in no political activity at all, while in reality – as admitted by Mr. Noble himself and demonstrated both by information revealed in the FEC investigation and in the amended FEC disclosure reports – CPPR spent millions of dollars researching, creating, and paying to broadcast political advertisements. The IRS should

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<sup>33</sup> 18 U.S.C. § 1001(a)(2).

<sup>34</sup> 26 U.S.C. § 501(c)(4).

<sup>35</sup> Treas. Reg. § 1.501(c)(4)-1(a)(2)(i). By allowing section 501(c)(4) organizations to be only “primarily” engaged in social welfare, the regulation misinterprets the plain meaning of the word “exclusively” in the statute. This complaint analyzes ADI’s conduct using the “primarily” standard. Under a correct interpretation of the statute, ADI’s political spending unquestionably would violate its tax-exempt status.

<sup>36</sup> Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

<sup>37</sup> Rev. Rul. 68-45, 1968-1 C.B. 259.

<sup>38</sup> Exempt Organizations Determinations Unit 2, Student Guide, Training 29450-002 (Rev. 9-2009), at 7-19 (emphasis added), available at [http://www.taxanalysts.com/www/freecfiles.nsf/Files/EO%204.pdf/\\$file/EO%204.pdf](http://www.taxanalysts.com/www/freecfiles.nsf/Files/EO%204.pdf/$file/EO%204.pdf).



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investigate Mr. Noble and CPPR, and should it find they made false or incomplete statements on their tax returns, take appropriate action, including but not limited to referring this matter to the Department of Justice for prosecution. The IRS also should audit CPPR to determine if it violated its tax-exempt status, and should the IRS find that it did, take appropriate action.

Thank you for your prompt attention to this matter.

Sincerely,



Noah Bookbinder  
Executive Director  
Citizens for Responsibility and Ethics in Washington

Encls.

cc: IRS-EO Classification