FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

W. Ryan Teague, General Counsel
Freedom's Watch
401 9th Street, NW #700
Washington, DC 20004

DEC 15 2008

RE: MUR 5999

Dear Mr. Teague:

On May 1, 2008, the Federal Election Commission notified you of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On November 13, 2008, the Commission found, on the basis of the information in the complaint, and information provided by you and the National Republican Congressional Campaign Committee, that there is no reason to believe Freedom's Watch violated 2 U.S.C. § 441b. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Tracey Ligon, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Stephen A. Gura
Deputy Associate General Counsel
for Enforcement

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Freedom's Watch, Inc. **MUR:** 5999

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I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by the Democratic Congressional Campaign Committee alleging violations of the Federal Election Campaign Act of 1971 ("the Act"), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), by Freedom's Watch, Inc. ("FW").

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Summary

This matter involves an allegation that FW coordinated with the National Republican Congressional Committee ("NRCC") in running an advertisement entitled "Family Taxes" that criticized the legislative voting record of Don Cazayoux, the Democratic candidate for the 6th Congressional District in Louisiana in the special general election held on May 3, 2008. In support of this allegation, the complaint asserts that FW "appears to be" coordinating its advertisements with the Republican Party because a script dated April 13, 2008, it provided to television stations in Louisiana contained "metadata indicating NRCC authorship." The complaint explains that the script was in Microsoft Word format, and if one were to open the script and click on "File," "Properties," then "Summary," one would see "NRCC" in the title field. The complaint asserts that the presence of the NRCC metadata in the FW script is *prima facie* evidence of coordination, as "[i]t shows that the NRCC was involved somehow in the very content of the ad." The complaint further alleges that the facts that FW "is run by a former

senior NRCC employee, and has spent lavishly in House races while the NRCC's budget is stretched thin, show the motive and opportunity for coordination."

In response to the complaint, FW asserts that the existence of "NRCC" in the metadata of the script, which was entitled "Family Taxes," has a reasonable explanation that requires dismissal of the complaint. FW explains that it hired Patrick McCarthy, a partner with Designated Market Media, LLC, to produce the advertisement, and that Mr. McCarthy did work for the NRCC in 2006, but not in 2007 or 2008. The response explains that in preparing "Family Taxes," Mr. McCarthy took a template he had used for the NRCC in 2006 or earlier, wrote over the old script, and prepared an entirely original script for FW. The response states that Mr. McCarthy admits he did not know "NRCC" existed on the script's metadata before the script was released.

The response includes a sworn affidavit from Mr. McCarthy, in which he avers the following: (1) he used the same word processing template that he used when working for the NRCC in 2006; (2) he deleted the words on the template and created "Family Taxes" for FW; (3) neither he nor anyone in his firm had worked for or is working for the NRCC in 2007 or 2008 or had any contact with NRCC in 2007 or 2008 about the Family Taxes script or any other script; (4) Designated Market Media, LLC, signed and acknowledged the "Freedom's Watch Firewall Policy" which specifically prohibits any FW vendor from engaging in any communications that would constitute coordination; (5) he had no communications with the NRCC regarding the preparation of the "Family Taxes" script or for any other script for a FW advertisement nor did he have any communications with the NRCC regarding any other matter pertaining to FW's plans or strategies.

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With respect to the complaint's allegation that coordination occurred because FW "is run by a former senior NRCC employee," FW states that Carl Forti is its Executive Vice President of Issue Advocacy, not its "head," as the complaint alleges. The response further states that Mr. Forti did work for the NRCC prior to 2007, but ended his employment there on or about December 31, 2006. Included with the response was a sworn affidavit from Mr. Forti, in which he avers that he had no communications with the NRCC regarding the script for "Family Taxes" or any other script for a FW advertisement. Both Messrs. McCarthy and Forti aver that the NRCC did not provide them with any computer, word processing software or any data files to assist FW in preparing the "Family Taxes" or any other communication.

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The NRCC also responded to the complaint, asserting that neither it nor any of its agents coordinated with FW in connection with any federal election. The NRCC further points out that several news articles covered the DNCC's allegations, and reported that an outside vendor [Mr. McCarthy], who had been a media vendor for the NRCC during the 2006 election cycle, "explained on record that he pulled up an old template from his NRCC days and wrote the Louisiana script over it, then saved the file and sent it to the TV stations." *See GOP accused of FEC violation; Activist group linked to ad, The Washington Times*, April 17, 2008; *Democrats Accuse GOP Campaign Arm of Covertly Writing Ad, The Washington Post*, April 16, 2008.

A. **Legal Analysis**

Under the Federal Election Campaign Act of 1971 as amended ("Act"), no corporation may make a contribution, including an in-kind contribution, in connection with any election to any federal office. 2 U.S.C. § 441b. FW's disclosure reports indicate that it is a qualified non-profit corporation ("QNC") making communications pursuant to 11 C.F.R. § 114.10. Although QNCs may make independent expenditures and electioneering communications using general

treasury funds, they remain subject to the prohibitions on direct and in-kind corporate contributions. *See* 11 C.F.R. § 114.10(d)(3).

The Act defines in-kind contributions as, *inter alia*, expenditures made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a national, State, or local committee of a political party." 2 U.S.C. § 441a(a)(7)(B)(ii). Under the Commission's regulations, a communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three-part test: (1) payment by a third-party; (2) satisfaction of one of four "content" standards; and (3) satisfaction of one of six "conduct" standards.[1] *See* 11 C.F.R. § 109.21.

In this matter, the first prong of the coordinated communication test is satisfied because FW is a third-party payor. The second prong of this test, the content standard, is also satisfied because the ad at issue meets the definition of "electioneering communication" under 11 C.F.R. § 100.29 because it was a broadcast communication that refers to a clearly identified candidate for Federal office, that was publicly distributed within 60 days before a general election, and was targeted to the relevant electorate. *See* 11 C.F.R. § 109.21(c)(1). The ad also meets the definition of "public communication" under 11 C.F.R. § 100.26 because it refers to a clearly

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[1] After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. *See Shays v. F.E.C.*,508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard , and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. F.E.C.*, ___ F.3d ___, (D.C. Cir. 2008). This decision does not impact this matter, however, because the communication at issue meets other parts of the content standard which the appellate court did not criticize or invalidate, and because the regulation was found invalid for being too permissive, the Commission may rely upon the parts of the regulation that were not called into question in the court's decision.

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identified candidate for public office (Don Cazayoux), and appeared within 90 days of the special general election. *See* 11 C.F.R. § 109.21(c)(4).

While the content prong of the coordinated communications regulations appears to be satisfied in this matter, the conduct prong does not. The conduct prong is satisfied where any of the following types of conduct occurs: (1) the communication was created, produced or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; (5) the payor employed a former employee or independent contractor of the candidate who used or conveyed material information about the campaign's plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (6) the payor republished campaign material. *See* 11 C.F.R. § 109.21(d).

The conduct prong of the coordinated communications regulations does not appear to be satisfied in this matter. The only information of coordination alleged in the complaint is the metadata, for which FW has provided a reasonable explanation. Furthermore, FW has specifically denied facts that would give rise to a conclusion that the conduct prong is satisfied pursuant to 11 C.F.R. § 109.21(d). Specifically, FW has refuted any implication that the communication at issue was created at the request or suggestion of, with the material involvement of, or after substantial discussions with, the NRCC. FW also asserts that, although

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it employs former employees of the NRCC, those employees did not receive any information about the content of the "Family Taxes" ad from the NRCC. Given that there is no probative information of coordination, and FW has provided specific sworn denials of the existence of coordination, there is no basis to open an investigation in this matter. Thus, there is no reason to believe that Freedom's Watch, Inc. violated 2 U.S.C. § 441b by making a prohibited contribution to the National Republican Congressional Committee in the form of a coordinated communication.

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