FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

John J. White, Jr.
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121 Third Avenue, PO Box 908
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SEP - 3 2009

RE: MUR 6141
Media Plus+, Inc.

Dear Mr. White:

On December 9, 2008, the Federal Election Commission notified your client, Media Plus+, Inc., of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On August 26, 2009, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe your client 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 me at (202) 694-1650.

Sincerely,

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: MediaPlus+, Inc. **MUR:** 6141

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission by Derek Humphrey, *see* 2 U.S.C. § 437g(a)(1), alleging that MediaPlus+, Inc. ("MediaPlus") extended credit to Friends of Dave Reichert and Paul Kilgore, in his official capacity as treasurer, ("Committee") when it arranged to purchase television advertising time on behalf of the Committee in October and November 2008, which, according to the complaint, resulted in a prohibited corporate contribution to the Committee in violation of 2 U.S.C. § 441b, a provision of the Federal Election Campaign Act of 1971, as amended ("the Act"). Because the Committee allegedly did not have sufficient cash on hand and MediaPlus did not require advance payment for the purchase of airtime, the complaint concludes that the extension of credit was not commercially reasonable or in the ordinary course of business. If a contribution resulted from the extension of credit, then the Committee also failed to report this contribution by MediaPlus in its reports filed with the Commission, in violation of 2 U.S.C. § 434(b).

The Committee and MediaPlus (collectively the "Respondents") submitted a joint response to the complaint asserting that the arrangement between them was in the ordinary course of business and on terms substantially similar to those made to MediaPlus' non-political clients. The response includes a sworn declaration from MediaPlus' President that describes the company's current business practices with clients and broadcast stations in support of the assertion that the arrangement with the Committee was commercially reasonable. In a sworn

declaration, a Committee staff member also explains that when he discussed the possibility of increasing the campaign's media buys, MediaPlus provided him with examples of commercial clients to which MediaPlus extended credit in a similar manner. The response also lists the payments the Committee made to MediaPlus revealing that the extension of credit at issue was paid within four months of the broadcast dates and most payments were made within the broadcaster's 30-day credit period for payment of its invoices.

As set forth in further detail below, based on the available information, including the response and attached declarations from the Respondents denying the allegations, there is no information to indicate that the Respondents may have violated the Act as alleged in the complaint. Accordingly, the Commission finds no reason to believe that MediaPlus+, Inc. violated 2 U.S.C. § 441b.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Summary

Dave Reichert was the Republican candidate for Washington's 8th Congressional District during the 2008 election cycle. MediaPlus provided media buying services to the Committee during Reichert's federal campaigns in the 2004, 2006 and 2008 election cycles to purchase advertising time on local and cable television stations.[1]

The complaint alleges that MediaPlus made a prohibited corporate contribution to the Committee during the 2008 election cycle by extending credit outside of the normal course of business. According to the complaint, MediaPlus arranged to purchase approximately $1.1

[1] MediaPlus was incorporated in the State of Washington in 1983 and according to its website, is "the Pacific Northwest's largest independent media consulting, planning and buying firm." *See Washington Secretary of State*, http://www.secstate.wa.gov/corps/corps_search.aspx; *Media Plus Home Page*, http://www.mediaplussea.com.

million in advertising for the Committee from October 20 through November 4, 2008, which was at least $580,000 more than the Committee's reported cash on hand at the time. Under the arrangement at issue in the complaint, television broadcast stations, not named in the complaint, apparently extended credit to MediaPlus and did not require advance payment for airing the Committee's advertisements. In turn, MediaPlus extended credit to the Committee by not requiring payment from the Committee prior to purchasing air time on these stations. The complaint states that MediaPlus "may not normally grant credit like this to its non-political clients," and because the Committee may not have had sufficient cash on hand during the previous quarter, the complaint concludes that MediaPlus' extension of credit was not commercially reasonable or in the ordinary course of business.[2] The complaint further alleges that if a contribution resulted from the extension of credit, then the Committee also failed to report this contribution by MediaPlus in its reports filed with the Commission in violation of 2 U.S.C. § 434. The complaint requests that the Commission open an investigation to determine whether MediaPlus extends credit to its customers in the normal course of business, whether MediaPlus' extension of credit to the Committee was commercially reasonable, and requests the maximum civil penalty should the Commission confirm that a violation occurred.

Respondents submitted a joint response denying the allegations in the complaint and asserting that the arrangement between the Committee and MediaPlus was in the ordinary course of business and on terms substantially similar to those MediaPlus made to non-political clients.

[2] Although the complaint cites no authority for the proposition that credit is not normally extended for media buys, the response includes a press article indicating that opponent Darcy Burner's media vendor was offered similar credit as well by KOMO-TV, one of the television stations that extended credit for Reichert's ads. However, the same article indicates that "[m]ost political campaigns pay for their ads up front" and that buying television slots on credit is "a practice that is relatively uncommon for political advertising." Emily Heffter, *Burner loans campaign $140,000 for ads, Move follows record fundraising, Spending indicates tight 8th District race*, SEATTLE TIMES, October 21, 2008.

In a sworn declaration, MediaPlus President, Kathy Neukirchen, states that the company did not offer terms to the Committee that it did not also extend to its non-political clients in the ordinary course of business. She explains that based on MediaPlus' longstanding relationship with certain broadcasters and the size of its buys, broadcasters have regularly extended credit to MediaPlus for periods of 30-60 days from the date of the broadcast for payment, with larger advertising buys obtaining even longer credit of up to 90 days. In turn, after evaluating the credit risk for its clients, MediaPlus will often extend credit to some of its clients. Neukirchen explains that evaluating a client's credit risk includes examining any past relationship with the client, as well as the general reputation of the client and its decision makers. She states that in over 20 years of business, only one commercial client failed to pay MediaPlus and that no noncommercial or political client has ever failed to pay the company for its services.

Contrary to the complaint's assertions, Respondents explain that extensions of credit for broadcast time are "an established part of the advertising industry" and cite to a Federal Communications Commission ("FCC") opinion letter as support for this assertion. *See In re Beth Daly*, 7 FCC Rcd 1442, 1992 FCC LEXIS 707 (Feb. 6, 1992). They explain that according to FCC authority, broadcasters must extend credit to commercial and noncommercial and political clients in the same manner, indicating that the FCC contemplates that broadcasters extend credit to clients. Consistent with this view, MediaPlus reportedly placed about $20 million in advertising throughout the Pacific Northwest during 2008 and broadcast stations extended credit for a number of MediaPlus' media buys during the 2008 election, including media buys involving non-federal candidates.

With regard to the credit extended to the Committee, Respondents explain that the Committee approached MediaPlus about increasing its ad buys late during the 2008 general election cycle but that it did not have sufficient cash on hand to pay for the buys in advance. The Committee told MediaPlus that it had fundraising plans to pay for the cost of the advertising. MediaPlus explains that it chose to extend credit to the Committee based on an established relationship with the Committee over the 2004 and 2006 election cycles during which the campaign met all of its financial obligations to them as well as based on its work with the Committee early during the 2008 election cycle. MediaPlus further explains that the credit extended to the Committee was below what MediaPlus usually extends to commercial clients. In a sworn declaration, Committee staff member Kevin Kelly explained that MediaPlus provided him with examples of commercial clients to which MediaPlus extended credit in a similar manner and that he understood the arrangement extended by MediaPlus was also available to nonpolitical clients. Those examples were not attached to or detailed in the response.

According to MediaPlus, the advertising buys in question fell within the November broadcast month, which covered the period of October 27, 2008 through the election. The Committee committed to buy airtime in the amount of $413,897 during that time period, which included MediaPlus' commissions, but the response did not specify the final amount the Committee ultimately owed during this time period. The response indicates that the Committee placed advertising in the amount of $413,897, but because "[b]roadcasters do not always broadcast correctly all advertising to which a client, commercial or political has committed . . ." and "[o]nly the ads actually aired are paid for," the actual amount paid by the Committee is often different than the amount it committed to buy.

The Committee paid for the media buys that had been provided on credit in what appear to have been three payments totaling $360,832 made between October 31 and December 1, 2008, as listed below.

DATE	AMOUNT
10/31/2008	$157,087
11/24/2008	$160,000
12/01/2008	$43,745[3]
TOTAL	$360,832

Although payment to the broadcast stations would not be due until 30 days from receipt of a correct invoice from the broadcasters, the Committee made at least 2 payments to MediaPlus before receipt of the invoices:[4] $157,087 on October 31, 2008, which was within four days of the start of the broadcast period and $160,000 on November 24, 2008. *See* 2008 Year End Report. As of January 2009, the Committee had paid all amounts due to the broadcasters, which was within the credit period extended by the broadcasters, and the Committee only owed MediaPlus a smaller amount ($19,103) for commissions. The Committee's 2009 April Quarterly Report indicates that the remaining amounts due to MediaPlus for the commissions were paid in

[3] According to Neurkirchen's declaration, the Committee made a payment in the amount of $51,129 on January 15, 2009, which is not reflected in the Committee's reports filed with the Commission. The Office of General Counsel offered the Respondents an opportunity to clarify their response in connection with the payments pertaining to the Committee's advertising MediaPlus placed from October 27, 2008 through the general election, particularly with regard to the January 15 payment. In response, counsel for the Respondents submitted a letter that explained that the $51,129 figure previously provided was incorrect. Rather, the correct amount of the payment was $43,745.10 made on December 1, 2008, which was disclosed in the Committee's 2008 Year End Report filed with the Commission.

[4] Because Media Plus received invoices from the broadcasters in December, its payment to the broadcast stations was not due until January 2009.

full on March 31, 2009. In addition, while the total cost of the ad buys for the time period in question was $413,897, only $379,935 of that amount ($360,832 identified in chart above + $19,103 in commissions) was due to MediaPlus while the rest was for media production services provided by a sub-vendor, Victory Group. The payment to Victory Group, in the amount of $33,961, which was disclosed in the Committee's 2009 April Quarterly Report, taken together with payments in the amount of $379,935 made to MediaPlus brings the total amount at issue to $413,896.[5]

B. Analysis

The Act prohibits corporations from making contributions in connection with federal elections. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b)(1). Similarly, the Act prohibits committees from knowingly accepting prohibited contributions. *See* 2 U.S.C. § 441(b). A "contribution" is defined as "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Commission regulations provide that a commercial vendor's extension of credit will not be considered a contribution so long as it is made in the ordinary course of business and the terms are substantially similar as those provided to non-political clients of similar risk and with an obligation of similar size.[6] 11 C.F.R. §§ 100.55, 116.3(b). As a business incorporated in the State of Washington, MediaPlus would have made prohibited corporate contributions to the Committee if the extensions of credit were not made in the ordinary course of business. 2 U.S.C. § 441b.

[5] The original response identified $413,897 in media buys, but the $1 difference "appears to be due to rounding."

[6] "Commercial vendor" is defined as "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those services." 11 C.F.R. § 116.1(c).

The complaint raises the question whether MediaPlus extended credit to the Committee outside the ordinary course of business, which resulted in a prohibited contribution. An extension of credit includes, but is not limited to, any agreement between the creditor and political committee that full payment is not due until after the creditor provides goods or services to the political committee. *See* 11 C.F.R. § 116.1(e). In assessing whether a commercial vendor extended credit in the ordinary course of business, and thus did not make a contribution, the Commission will consider: (1) whether the commercial vendor followed its established procedures and its past practice in approving the extension of credit; (2) whether the commercial vendor received prompt payment in full if it previously extended credit to the same candidate or political committee; and (3) whether the extension of credit conformed to the usual and normal practice in the commercial vendor's trade. *See* 11 C.F.R. § 116.3(c). The regulations further provide that the Commission may rely on regulations prescribed by the FCC, among other Federal agencies, to determine whether extensions of credit by the entities regulated by those Federal agencies were made in the ordinary course of business. *See* 11 C.F.R. § 116.3(d).

Reviewing the information presented according to the three considerations set forth in section 116.3(c), we conclude that MediaPlus' extension of credit to the Committee appears to have been made in the ordinary course of business and did not result in a prohibited corporate contribution to the Committee. First, MediaPlus explains that as a commercial vendor, it followed its established procedures and past practice, and there is no information suggesting otherwise. 11 C.F.R. § 116.3(c)(1). MediaPlus explains that prior to extending credit to the Committee it followed its past practice and evaluated the Committee's credit risk, including the company's past business relationship with the Committee during the 2004 and 2006 election

cycles just as it would any other client. *Supra* at 4-5. It also noted that the credit it extended to the Committee was "well below what MediaPlus+ extends to commercial clients." Publicly available information also appears to support Respondents' sworn assertions that MediaPlus followed established procedures and past practices in making the extension of credit to the Committee. News reports from the 2006 election cycle questioning similar arrangements that MediaPlus made on behalf of Mike McGavick's campaign for U.S. Senate in 2006 reveal that Neukirchen made the same assertions to the press as she has made to the Commission in this case. At the time, she explained that MediaPlus was "a heavy buyer in the local market with established credit" and that all of MediaPlus' contracts were "Net 30," a "type of trade credit where the payment is due in full 30 days after the item is purchased." *See* Josh Feit, ***Borrowed Time, McGavick Buys TV Ads on Credit and Fails to Disclose How Much He Borrowed,*** *available at* http://www.thestranger.com/seattle/Content?oid=34022; Definition of "Net 30," http://www.businessdictionary.com/definition/net-30.html. Neukirchen made the same statements in a letter to the editor dated May 23, 2006, adding that "it is a big misconception that all political advertising must be paid in advance." *See* http://www.thestranger.com/seattle/letters-to-the-editor/Content?oid=37077.

Second, there is no information to contradict MediaPlus' assertion that it received prompt payment in full from the Committee for its media buys during the 2004 and 2006 election cycles such that the credit extended to the Committee during the 2008 election cycle was the result of a good payment history during past election cycles. *See* 11 C.F.R. § 116.3(c)(2). The Respondents did not provide documentation, other than Neukirchen's sworn declaration, in support of this assertion, but we have no information suggesting otherwise.

Finally, contrary to the assertions in the complaint, there is nothing to demonstrate that MediaPlus' extension of credit did not conform to the usual and normal practice in the industry. 11 C.F.R. § 116.3(c)(3). Instead, it appears that credit arrangements for broadcast time is part of the ordinary course of business for both MediaPlus and other vendors in the industry. While the Complainant claims that broadcasting stations typically require advance payments from political committees, the General Manager for KOMO-TV, one of the stations used by the Committee to air its ads, indicated to the press that the station was not engaging in "anything unusual" in not requiring advance payments from MediaPlus, that "the station sometimes bills buyers it has a good relationship with," that "KOMO regularly works with MediaPlus," and that it offered the same arrangement to Reichert's opponent, Darcy Burner. Emily Heffter, *Burner loans campaign $140,000 for ads, Move follows record fundraising, Spending indicates tight 8th District race*, SEATTLE TIMES, October 21, 2008; Andrew Noyes, *Reichert Ad Buy, Opponent's Loan Spice Up Race in Wash.*, NATIONAL JOURNAL'S CONGRESS DAILY, October 22, 2008. In addition, broadcasting station representatives have reportedly stated that "Media Plus can buy on credit, because they have established credit." *Feit, supra.* A sales manager from one broadcasting station (KIRO) explained that "[g]enerally political campaigns don't have established credit" . . . "[b]ut [candidates] can always use an agency with established credit." *Id.*

Further, FCC authority suggests that the FCC contemplates that advance payments may not always be required or appropriate. The FCC requires that charges to candidates be comparable to those made to other commercial advertisers. *See* 47 U.S.C. § 315(b). Therefore, broadcasters can require advance payments from a political candidate, but only if it would also require advance payments from a similarly situated commercial entity. *See* 47 U.S.C. § 312(a)(7)

(broadcaster may not adopt policies that impede a federal candidate's reasonable access to its broadcast facilities and cannot require advance payments from federal candidates more than seven days in advance of the first broadcast date); *In re Request for Ruling on Advance Payment of Political Advertising of Beth Daly, Great American Media, Inc.*, 7 FCC Rcd. 5989, 5990 (Aug. 14, 1992) (clarifying that broadcasting station must apply its customary payment/credit policies equally to political and commercial advertisers). The FCC has indicated that it "has no formal policy regarding advance payments," and that a station cannot treat similarly situated commercial advertisers and candidates differently. *In re Beth Daly*, 7 FCC Rcd 1442, 1992 FCC LEXIS 707 (Feb. 6, 1992). This FCC Opinion goes on to provide the following example: "if a candidate, or a candidate's agency has an established credit history (and is responsible for payment), we believe that requiring advance payment is inappropriate if the station would not so treat commercial advertisers or their representatives under the station's customary payment/credit policies."

Similarly, the Commission has no policy regarding advance payments and has typically decided extension of credit matters based upon an analysis of whether the vendor followed its ordinary course of business. In some cases, the Commission has authorized investigations to determine whether the vendor followed its ordinary course of business and whether industry standards were followed. *See, e.g.*, MUR 3638 (Republican Challengers Committee) (Commission found reason to believe, authorized an investigation to determine the vendor's practices and direct mail industry standards, and later found probable cause to believe a violation had occurred but took no further action); MURs 5069 and 5132 (Acevedo Vila) (Commission found reason to believe and authorized investigation where, among other things, the record

contained conflicting information about the normal industry practice. The investigation revealed credible evidence provided by the Respondents that it was the usual and normal practice for advertising agencies in Puerto Rico to pay media outlets for media time in advance and bill clients later.); MURs 5112 and 5383 (Federer for Congress) (the Commission initially found reason to believe that the vendor violated the Act when it advanced payments to print books where the advance was not in the ordinary course of business). The Commission has also found reason to believe that respondents violated the Act where a respondent asserts that credit was extended in the ordinary course of business but does not provide any information to substantiate its assertion where there is conflicting publicly available information and inconsistencies in the Committee's disclosure reports. *See, e.g.*, MUR 4803 (Tierney for Congress), John Tierney for Congress Committee and Tierney for Congress Factual and Legal Analysis at 16-20. In these cases, the information available at the reason to believe stage was insufficient to show that the ordinary course of business was followed.

By contrast, the Commission has made no-reason to believe findings in matters where there is credible information that the vendor followed its own practices and where even though the record lacked information on industry standards, there was no information available indicating that industry standards may not have been followed. *See, e.g.*, MUR 6023 (John McCain 2008 and Loeffler Group LLP) (Commission found no reason to believe based on assertions and documentation concerning the vendor's own practices); MUR 5496 (Huffman for Congress) (Commission found no reason to believe a violation occurred based on information pertaining to the vendor's ordinary course of business); MUR 4989 (Dole/Kemp '96) (Commission found no reason to believe based on documentation provided regarding vendor's

credit policies with regard to other customers that showed extension of credit was in the ordinary course of business).[7]

Here, the complaint questions the circumstances surrounding MediaPlus' extension of credit to the Committee late during the general election cycle. Both the Committee and MediaPlus have submitted sworn statements containing details about the credit arrangement at issue. There is also publicly available information in support of the vendors' assertions that it followed its ordinary course of business, that extensions of credit for media buys are part of industry practice, and there is no available information to contradict the Respondents' contentions. The fact that the Committee paid most of the amount due to the broadcasting stations before receipt of any invoices, and that all amounts due to MediaPlus and its sub-vendor were paid within four months, also provide support for the Committee's good credit standing and that the extension of credit was commercially reasonable.[8] In light of these facts, there is insufficient information upon which to initiate an investigation into whether MediaPlus and the Committee may have violated the Act in connection with the extension of credit. Accordingly, the Commission finds no reason to believe that MediaPlus+, Inc. violated 2 U.S.C. § 441b.

[7] In the context of Advisory Opinions, the Commission has found arrangements where the vendor incurred initial expenses were not prohibited contributions where it constituted normal industry practice and the credit was extended in the ordinary course of business. *See* Advisory Opinion 1979-36 (Fauntroy) (approving financial agreement with direct mail vendor where arrangements were made within the ordinary course of business); *see also* 1986-22 (WREX-TV) (approving discounts or rebates to political candidates where made on the same terms and conditions as to other advertisers); 1994-10 (Franklin National Bank) (concluding that bank's fee waivers were not in violation of the Act where such waivers were based on a pre-existing business relationship, using the same considerations as with other clients).

[8] In past cases in which the Commission determined that in-kind contributions resulted, the cases involved long delays in payment that did not appear commercially reasonable. *See* MUR 5396 (Bauer for President 2000) (respondents entered into conciliation agreement to resolve, *inter alia*, 441a and 441b violations resulting from extensions of credit from three different vendors totaling over $700,000 and owed for periods between 105 to 235 days); MUR 5047 (Clinton/Gore '96) (the Commission found reason to believe that the committee and two of its vendors violated section 441b by accepting or making illegal corporate extensions of credit totaling over $900,000 that were unresolved for four months or longer, but took no further action because the debts had been paid in full and some debt collection activity had occurred).