FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

FEB 25 2015

Ruth Crawford McClung
P.O. Box 40544
Tucson, AZ 85717

RE: MUR 6405

Dear Ms. McClung:

On October 28, 2010, the Federal Election Commission notified you of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended. On February 10, 2015, the Commission found, on the basis of the information in the complaint, and information provided by other respondents, that there is no reason to believe that you received an excessive contribution in the form of a coordinated communication. 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) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

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

Sincerely,

Mark Allen
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Friends of John McCain Inc. and Keith A. Davis in his official capacity as Treasurer
John McCain
Ruth McClung for Congress and Anne Loftfield in her official capacity as Treasurer
Ruth McClung
Kelly for Congress and Kristen L. Smith in her official capacity as Treasurer
Jesse Kelly

MUR: 6405

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission (the "FEC" or "Commission") by the Democratic Congressional Campaign Committee, alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by Friends of John McCain Inc. and Keith A. Davis in his official capacity as treasurer ("McCain Committee"), John McCain, Ruth McClung for Congress and Anne Loftfield in her official capacity as treasurer ("McClung Committee"), Ruth McClung, Kelly for Congress and Kristen L. Smith in her official capacity as treasurer ("Kelly Committee"), and Jesse Kelly.[1]

In October 2010, Senator John McCain's authorized campaign committee aired two television advertisements in which McCain and then-Arizona Senator Jon Kyl appeared together and urged the election of the Republican candidates in Arizona's 7th and 8th Congressional districts, Ruth McClung and Jesse Kelly, respectively, and the defeat of

[1] On September 1, 2014, the Act was transferred from Title 2 of the United States Code to new Title 52 of the United States Code.

McClung's and Kelly's opponents.[2] The Complaint alleges that the McCain campaign coordinated the advertisements with McClung and Kelly, which resulted in McCain making an excessive in-kind contribution to each. Further, the Complaint alleges that the advertisement caused McCain's authorized committee to "violate[] the conditions" of its *authorized committee status because* 52 U.S.C. § 30102(e)(3) *(formerly* 2 U.S.C. § 432(e)(3)) prohibits a political committee that "supports . . . more than one candidate" from being an authorized committee.[3]

In response to the Complaint, the McCain Committee denies that the advertisements were coordinated, and argues that the Complaint does not explain how the "coordinated communications" conduct standards were met or allege any coordination-related facts. McCain Resp. at 2 (Dec. 13, 2010). With respect to the allegation that the committee violated its authorized committee status, the McCain Committee argues that the ads at issue were consistent with its status because the communications ultimately supported Senator McCain's candidacy and because the committee was permitted to sponsor independent communications that referenced other candidates. *Id.* at 2-6.

For the reasons set forth below, the Commission (1) finds no reason to believe that McCain and the McCain Committee made, and McClung, the McClung Committee, Kelly, and the Kelly Committee received an excessive contribution in the form of a coordinated communication; and (2) dismisses the allegation that the McCain Committee violated 52

[2] McCain was a candidate for re-election in 2010; Kyl, therefore, was not a candidate in the 2010 election. McClung and Kelly each lost their election.

[3] Because of Senator McCain's knowledge of campaign finance law, the Complaint requests that the Commission determine whether the violations were knowing and willful. Compl. at 3-4 (Oct. 21, 2010).

U.S.C. § 30102(e)(3) (formerly 2 U.S.C. § 432(e)(3)) by running ads that "support" another candidate.

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

Senator McCain was a candidate for re-election in 2010. Ruth McClung and Jesse Kelly were 2010 Congressional candidates in Arizona's 7th and 8th Congressional districts, respectively. On or about October 18, 2010, the McCain Committee began airing two television advertisements titled "Vote Ruth McClung" and "Vote Jesse Kelly," featuring Senator McCain and his fellow Arizona Senator, Jon Kyl. McCain and Kyl are seated next to each other in front of a solid black background and speak directly to the camera for the duration of the advertisements. For the first five seconds of each advertisement, a caption appears at the bottom of the screen identifying the Senators as "Arizona Senators Jon Kyl and John McCain."

The scripts of the advertisements are as follows.

Script for "Vote Ruth McClung"

McCain:	Arizonians are struggling, yet Raul Grijalva voted for the failed stimulus, Obamacare, and tax increases that have devastated our state and nation.
Kyl:	Grijalva even led the call for a boycott of our own State that costs Arizona jobs and millions of dollars, hurting us all.
McCain:	We urge you to elect Ruth McClung. She'll do what's right for Arizona.[4] I'm John McCain and

[4] While McCain recites this sentence the following text appears on the screen: "Please elect Ruth McClung. What's right for Arizona." (emphasis in original).

I approve this message.

See http://www.youtube.com/watch?v=MEDoaGQE8_I.

Script for "Vote Jesse Kelly"

McCain:	While Arizona families are struggling, Gabrielle Giffords voted for the failed liberal Pelosi-Obama agenda.
Kyl:	She voted for the failed stimulus package and Obamacare, and received a grade of "F" from the National Taxpayers Union for supporting so much spending and debt.
McCain:	Gabrielle Giffords is out of step with Arizona. And that's why we need Jesse Kelly in Congress.[5] I'm John McCain and I approve this message.

See http://www.youtube.com/watch?v=pWYD1JuRYWw.html/.

At the end of each advertisement, the following written message appears on the screen along with footage of Senator McCain outdoors, looking into the camera:

VOTE TUESDAY
November 2nd

ARIZONA'S
JOHN McCAIN
U.S. SENATE

JohnMcCain.com
Text McCain to 69872 (MYUSA)

AUTHORIZED BY JOHN MCCAIN, PAID FOR BY FRIENDS OF JOHN MCCAIN.

The McCain Committee disclosed that it made independent expenditures for "media" and "media production" totaling $183,744 on October 19, 2010, in support of Ruth McClung

[5] While McCain recites this sentence the following text appears on the screen: "Please elect Jesse Kelly. What's right for Arizona." (emphasis in original).

and Jesse Kelly ($91,872 for each). *See* Friends of John McCain Inc. 2010 Post-Gen. Report at 267-70 (Dec. 2, 2010).

B. Analysis

The Complaint alleges that the McCain Committee coordinated the television advertisements with McClung and Kelly, respectively, resulting in the McCain Committee making an excessive in-kind contribution to each campaign and violating the conditions of its authorized committee status. Compl. at 3. Under the Act, a candidate's authorized campaign committee may contribute up to $2,000 per election to another candidate's authorized campaign committee.[6] 52 U.S.C. § 30102(e)(3)(B) (formerly 2 U.S.C. § 432(e)(3)(B)). A contribution includes a gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing a federal election. 52 U.S.C. § 30101(8)(A)(i) (formerly 2 U.S.C. § 431(8)(A)(i)). The term "anything of value" includes in-kind contributions. 11 C.F.R. § 100.52(d)(1). In-kind contributions include 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." 52 U.S.C. § 30116(a)(7)(B)(i) (formerly 2 U.S.C. § 441a(a)(7)(B)(i)).

Under 11 C.F.R. § 109.21, a communication is coordinated if it: (1) is paid for by a person other than the candidate or candidate's committee; (2) satisfies one or more of the four content standards set forth at 11 C.F.R. § 109.21(c); and (3) satisfies one or more of the six conduct standards set forth at 11 C.F.R. § 109.21(d). Expenditures for communications that

[6] The Complaint cites to the contribution limit at 52 U.S.C. § 30116(a)(1) (formerly 2 U.S.C. § 441a(a)(1)); however, the applicable limit for contributions by an authorized campaign committee to another authorized campaign committee is at 52 U.S.C. § 30102(e)(3)(B) (formerly 2 U.S.C. § 432(e)(3)(B)).

are coordinated with a candidate or a candidate's authorized committee are considered contributions to that candidate. 52 U.S.C. § 30116(a)(7)(B)(i) (formerly 2 U.S.C. § 441a(a)(7)(B)(i)). Thus, if the McCain Committee coordinated the advertisements with the Kelly or McClung committees, the costs of the advertisements are an in-kind contribution from the McCain Committee, and could not exceed the $2,000 contribution limit.

The available information does not show that the communications were coordinated. The first prong of the coordinated communication test is satisfied because the McCain Committee is a third-party payor with respect to the portion of the ads that benefitted the Kelly and McClung committees. The second prong, the content standard, is also satisfied because each advertisement contains express advocacy under 11 C.F.R. § 100.22(a). *See* 11 C.F.R. § 109.21(c)(3). Commission regulations set forth that "expressly advocating" includes any communication that uses phrases such as "vote for the President," "re-elect your Congressman," "Smith for Congress," *inter alia.* 11 C.F.R. § 100.22(a). The "Vote Jesse Kelly" advertisement expressly advocated the election of Kelly by asking the viewer to "Please elect Jesse Kelly;" and the "Vote Ruth McClung" advertisement expressly advocated McClung's election by stating "We urge you to elect Ruth McClung."

Although the payment and content prongs of the coordinated communications regulations appear to be satisfied in this matter, the available information does not indicate that the conduct prong is met. 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 available information does not present specific facts indicating that the conduct prong is met, and the McCain Committee has specifically denied that the conduct prong is satisfied under 11 C.F.R. § 109.21(d). In a sworn declaration, Mark A. Buse, campaign manager for the McCain Committee during the 2010 general election period, denies that the advertisements at issue were created at the request or suggestion of, or with the material involvement of, any agent of Jesse Kelly for U.S. Congress or Ruth McClung for Congress. *See* McCain Resp., Buse Decl. ¶¶ 4-7. Buse also avers that the McCain Committee did not employ the services of any former employee or independent contractor of Jesse Kelly for U.S. Congress or Ruth McClung for Congress, and had no common vendors with the campaigns. *See id.* ¶¶ 8-9.

Given these denials and the absence of any other information indicating coordination, it does not appear that the advertisements at issue constituted coordinated communications that resulted in excessive contributions. Accordingly, the Commission finds no reason to

believe that McCain and the McCain Committee made, and that Ruth McClung and Ruth McClung for Congress or Anne Loftfield in her official capacity as treasurer or Jesse Kelly and Kelly for Congress and Kristen L. Smith in her official capacity as treasurer received an excessive contribution in the form of a coordinated communication.

The Complaint also alleges that the McCain Committee jeopardized its authorized committee status by providing "support" to the McClung and Kelly campaigns in violation of 2 U.S.C. § 432(e)(3) (now 52 U.S.C. § 30102(e)(3)), an allegation that may not require coordination between the committees. In response to this allegation, the McCain Committee argues that the advertisements at issue were consistent with its authorized committee status because the communications "ultimately furthered Senator McCain's candidacy, and references to other candidates were critical to that objective" and because the Committee is permitted to sponsor independent communications that reference other candidates.

The Act provides that "[n]o political committee which supports or has supported more than one candidate may be designated as an authorized committee." *See* 52 U.S.C. § 30102(e)(3)(A), (B) (formerly 2 U.S.C. § 432(e)(3)(A), (B)); 11 C.F.R. § 102.13(c)(1), (2). Neither the Act nor the corresponding regulations define the term "support," but 52 U.S.C. § 30102(e)(3)(B) (formerly 2 U.S.C. § 432(e)(3)(B)) does specify that "the term 'support' does *not* include a contribution by any authorized committee in amounts of $2,000 or less to an authorized committee of any other candidate." 52 U.S.C. § 30102(e)(3)(B) (formerly 2 U.S.C. § 432(e)(3)(B)); *see also* 11 C.F.R. § 102.13(c)(2). The question presented by this allegation is whether 52 U.S.C. § 30102(e)(3)(B) (formerly 2 U.S.C. § 432(e)(3)(B)) prohibits an authorized committee of a federal candidate — in this case the McCain Committee — from

"supporting" another federal candidate by paying for independent communications that expressly advocate that candidate's election.

Although this precise question has not been addressed by the Supreme Court, the Supreme Court has clarified the state of the law concerning independent expenditures in a number of other contexts.[7] Specifically, in *Buckley v. Valeo*, the Supreme Court struck down limits on independent expenditures for most individuals and groups. *See* 424 U.S. 1 (1976). In doing so, the Court distinguished between the potential for corruption that attaches to contributions and coordinated expenditures, and those that might develop from independent expenditures, finding that independent expenditures do not present a danger of corruption. *See id.* at 20-47.[8]

Subsequently, in *Colorado Republican Federal Campaign Committee v. FEC* (*Colorado I*), 518 U.S. 604 (1996),the Court found that the potential for or appearance of

[7] The Commission has determined in an enforcement matter that 2 U.S.C. § 432(e) (now 52 U.S.C. § 30102(e)) precluded a candidate's "principal campaign committee from making expenditures on behalf of another candidate, thus supporting more than one candidate, and still remaining a principal campaign committee." *See* Conciliation Agreement ¶ IV.13, MUR 2841 (Jenkins) (Dec. 11, 1992) (finding probable cause to believe that an authorized committee violated Section 432(e) by paying for newspaper ads endorsing and advocating the nomination of another candidate). In a subsequent enforcement matter, the Commission rejected OGC's recommendation based on the Commission's reasoning in MUR 2841, though the four Commissioners did not agree on the reasoning for that decision. *See* MUR 3676 (Stupak) (Jan. 11, 1995) (rejecting OGC's recommendation that an authorized committee, which made an independent expenditure supporting another candidate, violated 2 U.S.C. § 432(e)(3) and thereby jeopardized its own authorized committee status).

[8] In a subsequent enforcement matter, MUR 3676 (Stupak), Commissioner Thomas issued a Statement of Reasons dated February 8, 1995, in which he stated that, "[i]n light of the Supreme Court's decision in *Buckley v. Valeo*, its immediate impact on Congress, the scant legislative history of § 432(e)(3) [now 52 U.S.C. § 30102(e)(3)], and the incongruous results which flow from the Office of General Counsel's construction, I cannot believe that Congress intended § 432(e)(3) [now 52 U.S.C. § 30102(e)(3)] to prohibit the making of independent expenditures by authorized political committees." Thomas Statement of Reasons at 5 (citing *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989) (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) ("'Frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.'").

corruption — which the *Buckley* Court found sufficient to justify limiting contributions — was not present to an extent that would justify limiting independent spending by political parties on behalf of their candidates. *Id.* at 617-19. Accordingly, the Court concluded that the First Amendment precludes application of limits to independent campaign expenditures by political parties. *Id.*

Recently, in *Citizens United v. FEC*, the Supreme Court reaffirmed that "independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption," and thus cannot constitutionally be limited. 558 U.S. 310, 357 (2010).

It is unlikely that independent spending by authorized committees would be deemed more potentially corrupting than independent expenditures by individuals, political parties, or corporations, each of which has been found to have a constitutional right to make unlimited independent expenditures. Therefore, the Commission dismisses the allegation that John McCain and Friends of John McCain Inc. and Keith A. Davis in his official capacity as treasurer violated 52 U.S.C. § 30102(e)(3)(A) (formerly 2 U.S.C. § 432(e)(3)(A)).