PERKINSCOIE

700 13th Street, NW
Suite 600
Washington, D.C. 20005-3960

T +1.202.654.6200
F +1.202.654.6211
PerkinsCoie.com

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Marc Erik Elias
MElias@perkinscoie.com
D. +1.202.434.1609
F. +1.202.654.9126

BY HAND DELIVERY

Jeff S. Jordan, Esq.
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: MUR 7146

Dear Mr. Jordan:

We write as counsel to Hillary for America (the "Campaign"), the authorized campaign committee of Secretary Hillary Clinton, and Jose Villarreal in his official capacity as Treasurer (together "Respondents) in response to the complaint filed by the Campaign Legal Center ("Complainant") on October 6, 2016 (the "Complaint"). As the Complaint fails to set forth sufficient facts which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971 ("FECA" or "the Act"), as amended, the Commission should immediately dismiss the Complaint and close the file.

LEGAL ANALYSIS

"The Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]."[1] The Complaint erroneously alleges that the Campaign received excessive in-kind contributions in the form of coordinated expenditures from Correct the Record, a *Carey* or hybrid committee. The allegations stem from a fundamental misreading of the Act and its accompanying regulations, as interpreted by the Federal Election Commission ("FEC"). In fact, the Campaign maintained an aggressive compliance program and at all times adhered to its federal campaign finance law obligations. All of the activities discussed in the Complaint either did not qualify as "contributions" or were paid for by the Campaign according to their fair market value. As a result, the Campaign did not receive in-kind contributions from Correct the Record, nor did it fail to meet its reporting obligations.

[1] Statement of Reasons of Commissioners Mason, Sandstrom, Smith, and Thomas at 1, Matter Under Review 4960 (Dec. 21, 2000).

The Complaint posits that the following activities by Correct the Record gave rise to violations of the Act:

- Producing web videos;[2]
- Publishing websites in support of the Campaign;[3]
- Tweeting a message about Secretary Clinton that was "identical" to a Campaign staffer's tweet "around the same time;"[4]
- Posting positive comments about Secretary Clinton "on social media platforms like Twitter, Facebook, Reddit, and Instagram;"[5]
- Commissioning and distributing on its website a poll regarding Secretary Clinton's debate performance;[6]
- Sending "an email to supporters" that included a hyperlink to a Campaign web video;[7]
- Contacting reporters with information supporting the Campaign[8] or criticizing the Campaign's primary[9] or general election opponents;[10]
- Providing "on-camera media training" to supporters of the Campaign[11] and connecting those supporters to local media outlets;[12]
- Hiring "trackers" to attend and film campaign events for candidates for President;[13]
- Supporting the publication of an op-ed by Brad Woodhouse[14] and an op-ed by Jennifer Granholm;[15] and

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[2] Compl. ¶¶ 5, 21, 30, 35, 43, 49, 53, 61, 64-65, 67.
[3] *Id.* ¶¶ 19, 46-48, 58, 66.
[4] *Id.* ¶ 26.
[5] *Id.* ¶¶ 40-42, 44, 52, 61.
[6] *Id.* ¶ 31.
[7] *Id.* ¶ 20.
[8] *Id.* ¶¶ 5, 21, 28-29, 32, 45, 61.
[9] *Id.* ¶¶ 22-23, 34, 37.
[10] *Id.* ¶¶ 25, 47-48, 55-56, 60.
[11] *Id.* ¶¶ 5, 15.
[12] *Id.* ¶¶ 5, 51.
[13] *Id.* ¶¶ 16-17.
[14] *Id.* ¶ 57.
[15] *Id.* ¶ 62.

- Placing content on their Facebook page.[16]

As discussed in detail below, each of these activities is either exempt from the definition of "contribution" under the Act and accompanying regulations, as interpreted by the FEC, or was paid for by the Campaign. At no time did the Campaign coordinate with Correct the Record with respect to the creation or dissemination of a "public communication" or "electioneering communication" nor did it receive an in-kind contribution.

1. As communications other than "public communications" may be coordinated, the Complaint fails to set forth specific facts establishing that the Campaign received an in-kind contribution from Correct the Record.

None of the expenditures by Correct the Record for communications described in the Complaint qualify as coordinated communications. A communication is coordinated and results in an in-kind contribution if it meets three prongs: (1) it must be paid for by a person other than the candidate, authorized committee, or political party; (2) it must satisfy one or more content standards; and (3) it must satisfy one or more conduct standards.[17] The content prong can be satisfied in one of five ways.[18] One of the five content standards is met when a communication qualifies as an "electioneering communication," meaning it was publicly distributed by a television station, radio station, cable television station, or satellite system within 60 days before a general election or 30 days of a primary election.[19] The Complaint does not identify any communication distributed by or through a platform described in Section 100.29; there is no allegation that the Campaign coordinated an "electioneering communication."

The remaining four content standards require that a communication be a "public communication," defined as a "communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising."[20] A communication qualifies as a "mass mailing" or "telephone bank" only if it consists of more than 500 "substantially similar" messages distributed through the specified media over a 30-day period.[21] Emails and other internet communications are specifically excluded from the definitions of "mass mailing" and "telephone bank."[22] As the Complaint does not allege or provide any facts suggesting that Correct the Record made more than 500 "substantially similar" phone calls in contacting reporters or connecting surrogates to media outlets, the Commission

[16] *Id.* ¶ 67.
[17] 11 C.F.R. § 109.21.
[18] *Id.* § (c).
[19] *See id.* §§ 109.21(c)(1), 100.29.
[20] *See id.* §§109.21(c)(2)-(5), 100.26.
[21] *Id.* §§ 100.27-100.28.
[22] *Id.*

should not find reason to believe that such communications qualify as a "public communication.[23]

Also excluded from the Commission's definition of "public communication" are "communications over the Internet, except for communications placed for a fee on another person's Web site."[24] As all but four[25]of the expenditures for communications described in the Complaint were "communications over the Internet" and the communications were not distributed by or through the channels specified in Section 100.26, the Complaint fails to provide any facts showing that the Campaign and Correct the Record produced or distributed a coordinated communication.[26] Nor did Correct the Record's training activities result in a contribution.[27] The Campaign did not participate in the trainings, and did not provide any suggestions or direction to Correct the Record with respect to these activities.

a. The Commission has repeatedly and consistently recognized the breadth of the "Internet Exemption" and its importance in fostering political speech.

The Complaint erroneously advances a cramped interpretation of the Commission's Internet rules that deviates significantly from Commission precedent and the First Amendment principles it was designed to protect.[28] The Complaint's omission of an unbroken string of recent and relevant Commission decisions and reports from the Office of General Counsel ("OGC") results in an incomplete and inadequate statement of the law.

The Complaint misunderstands Section 100.26's broad exclusion of Internet communications from the definition of "public communication" and the coordination rules. It incorrectly assumes that only communications within Section 100.94's exemption for personal volunteer Internet activity are free from regulation, and that Section 109.20 allows the Commission to re-capture those same Internet communications that are *per se* excluded from the definition of "coordinated communication" at Section 109.21.[29]

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[23] In addition, communicating with reporters is also exempt from the definition of "contribution" under the "media exemption." *See* 11 C.F.R. §100.73.
[24] 11 C.F.R. § 100.26.
[25] Compl. ¶¶ 57, 62 (op-eds), 57-58 (research books).
[26] Compl. ¶¶ 5, 21, 30, 35, 43, 49, 53, 61, 64-65, 67 (web videos); *id.* ¶¶ 19, 46-48, 58, 66 (websites); *id.* ¶ 26 (tweet); *id.* ¶¶ 40-42, 44, 52, 61 (comments on social media platforms); *id.* ¶ 31 (website); *id.* ¶ 20 (email and embedded link).
[27] Compl. ¶¶ 5, 15, 51.
[28] *See id.* ¶¶ 81 n.116, 93-95.
[29] *See id.* ¶¶ 93-94.

Yet this is the very opposite of the "restrained regulatory approach" the Commission took when it wrote these rules.[30] First, the Commission has consistently interpreted Section 100.26's "placed for a fee" language to mean what it says—that it captures Internet communications one pays to *place,* not to *produce*.[31] The Commission has not considered an online communication to be an in-kind contribution even when it included a slickly produced video,[32] was sent over a rented email list,[33] or was built by paid staff.[34] Likewise, the Commission unanimously concluded that Internet activity facilitated through the purchase of a domain for a considerable sum of money was "not a contribution or expenditure under the Internet exemption rules."[35] In decision after decision, the FEC has indicated that research, production, and distribution costs related to an Internet communication do not result in contributions.[36]

Second, the Commission has consistently refused to use Section 109.20 to capture Internet communications that are excluded from regulation under Sections 100.26 and 109.21.[37] When it explained the coordination rules, the Commission said clearly that "section 109.20 addresses expenditures ***that are not made for communications*** but that are coordinated with a candidate, authorized committee, or political party."[38] The Commission reiterated this distinction when it

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[30] *Internet Communications*, 71 Fed. Reg. 18589, 18605 (Apr. 12, 2006).
[31] *See, e.g.*, FEC Matter Under Review 6657 (Akin for Senate), First General Counsel's Report at 6-7 (Sept. 17, 2013).
[32] FEC Matter Under Review 6722 (House Majority PAC), General Counsel's Report (Aug. 6, 2013).
[33] FEC Matter Under Review 6657 (Akin for Senate), General Counsel's Report at 6-7 (May 16, 2013).
[34] FEC Matter Under Review 6414 (Carnahan in Congress Committee *et al.*), General Counsel's Report at 12 (Apr. 11, 2012).
[35] FEC Matter Under Review 6849 (Kansans for Tiahart), Statement of Reasons of Commissioner Goodman at 1-2 (March 29, 2016) (citing FEC Matter Under Review 6772 (Obama for America), Factual and Legal Analysis at 3-4 (Oct. 7, 2015).
[36] FEC Matter Under Review 6722 (House Majority PAC), General Counsel's Report (Aug. 6, 2013) (video placed on YouTube for no fee is not a public communication); FEC Matter Under Review 6522 (Lisa Wilson-Foley for Congress, et al.) General Counsel's Report at 7 (Feb. 5, 2013) (YouTube and Facebook postings and a website fail the content prong of the coordinated communications test because they are not placed for a fee on another's Web site and are therefore not public communications); FEC Matter Under Review 6657 (Akin for Senate), First General Counsel's Report (May 16, 2013) (5-0 vote) (FEC "has narrowly interpreted the term Internet communication 'placed for a fee,' and has not construed that phrase to cover payments for services necessary to make an Internet communication.") (citing Factual and Legal Analysis at 11, MUR 6414 (Carnahan in Congress Committee et al.), and Factual and Legal Analysis at 8, MUR 6477 (Turn Right USA)); FEC Matter Under Review 6477 (Turn Right USA), General Counsel's Report at 8 (Dec. 27, 2011) (video posted on a website for which respondent paid no fee did not satisfy the content prong of the coordinated communication test); FEC Matter Under Review 6414 (Carnahan in Congress), General Counsel's Report at 12 (Apr. 11, 2012) (a website is not a public communication even though researchers were paid to help build it); *see also Internet Communications*, 71 Fed. Reg. 18589, 18595 (May 12, 2006) ("[P]osting a video on a Web site does not result in a 'public communication' unless it is placed on another person's Web site for a fee," even if costs were incurred to film the video).
[37] *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 425 (Jan. 3, 2003); *see also* FEC Matter Under Review 6037 (Democratic Party of Oregon), First General Counsel's Report (Sept. 17, 2009).
[38] *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 425 (Jan. 3, 2003).

flatly rejected an argument analogous to Complainant's. Concluding that expenditures for communications that did not meet the test in Section 109.21 were not subject to the general coordination provision, OGC said Section 109.20 "applies **only to those coordinated expenditures which are not made for communications**" and that the provision "is inapplicable here."[39] Thus, Section 109.20 cannot reach the Internet communications that Correct the Record produced and distributed itself.

[39] FEC Matter Under Review 6037 (Democratic Party of Oregon), First General Counsel's Report at 13 (Sept. 17, 2009) (emphasis added); *see also id.*, Certification (Nov. 17, 2009) (5-0 vote).

Finally, the Complaint also takes fragments from the 2006 Explanation and Justification for the Internet rules that are meant to keep campaigns from concealing their own paid activities, and turns it into a sweeping "rule" that would capture and treat as contributions all Internet communications by third parties that are affected by nonpublic campaign information.[40] The Complaint cites the examples of a campaign paying a blogger to write a message, and buying computers for individuals to engage in volunteer Internet activities, noting that in each case the campaign would be making a reportable "expenditure."[41] Yet, these examples simply support the common-sense conclusion that a campaign must report those expenditures it actually makes. In no way do they support taking third-party Internet communications, not placed for a fee, and subjecting them to the coordination rules.

The Complaint therefore errs in alleging that the Campaign received in-kind contributions in the form of research and production related to, and online dissemination of, web videos, websites (including one featuring poll results), social media posts, supporter emails, and contacts with reporters. All of these communications qualify as Internet activities under the regulation's inclusive and non-exhaustive definition and the Commission's subsequent enforcement actions. The Campaign did not violate the Act by coordinating such activities. And, as the Complaint fails to allege or show that any of the communications involved the payment of a fee to post content on another's website, there is no reason for the Commission to believe that these activities resulted in "public communications" or an in-kind contribution.

When the Commission wrote the Internet rules in 2006, it reached an informed and well-reasoned judgment that online activities were fundamentally different than television, radio, direct mail and other media which make up the bread-and-butter of campaigns, and which for that reason are specifically regulated by the current coordination rules.[42] The Complainants want the Commission to reverse this judgment through the back door, through enforcement—not through rulemaking with notice and comment, which would provide the regulated community fair notice of the prohibitions they seek to impose.

b. The op-eds are exempt from the definition of a "contribution."

The media exemption at 11 C.F.R. § 100.73 exempts from the definition of "contribution" "any cost incurred in covering or carrying a news story, commentary, or editorial." This rule extends to content disseminated over the Internet, as were the two op-eds discussed in the Complaint,[43] as such communications are "viewable by the general public and akin to a periodical or news

[40] *See* 71 Fed. Reg. at 18604-05; Compl. ¶ 94.
[41] Compl. ¶ 94.
[42] *See* 71 Fed. Reg. at 18,590 (citing *Reno v. ACLU,* 521 U.S. 844 (1997)).
[43] *See* Compl. ¶¶ 57, 62.

program distributed to the general public."[44] And, it is immaterial under the rule that content lacks objectivity or even expressly advocates the election or defeat of a clearly identified candidate.[45] Thus, the costs incurred by Correct the Record in writing op-eds in support of Secretary Clinton are not contributions because they fall under the "media exemption."[46]

c. The limited distribution of research books to media entities is not a "public communication" and does not result in a coordinated communication.

The costs incurred by Correct the Record to distribute research materials to a limited number of press entities were not expenditures for a "public communication" and thus do not qualify as coordinated communications under Section 109.21.[47] As discussed above, the term "public communication" is defined in Section 100.26 of the Commission's regulations, and is limited to forms of paid mass communication that involve the "distribution of content through an entity ordinarily owned or controlled by another person."[48] A limited direct distribution of research materials to press entities is not the kind of mass communication contemplated in the Act. Nor is a limited distribution of research material a form of "general public political advertising," as the communication was neither advertising, "let alone advertising that is aimed at the general public."[49] Further, as Correct the Record did not distribute more than 500 copies of the research materials, the communication cannot be construed to be a "mass mailing."[50]

2. Because the Campaign paid fair market value for research and tracking materials, the Complaint fails to allege specific facts that would give the Commission reason to believe that the Campaign received an in-kind contribution.

The Complaint alleges that the Campaign violated the Act by receiving tracking and research services from Correct the Record, but at the same time it concedes that the Campaign paid for these services.[51] The FEC reports show that on June 1, 2015, the Campaign paid $275,615.43 for

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[44] FEC Adv. Op. 2005-16 (Fired Up) (citing FEC Adv. Op. 2000-13 (iNEXTV)).
[45] *See* FEC Matter Under Review 5540 (CBS Broadcasting, Inc.), First General Counsel's Report at 5 (May 17, 2005) ("Even seemingly biased stories or commentary [] can fall within the media exemption.").
[46] In addition, the placement of the op-eds involved a *de minimis* use of resources. *See generally* FEC Matter Under Review 6849 (Kansans for Tiahart), First General Counsel's Report at 9 n.38 (May 13, 2015); *see also* FEC Matter Under Review 6795 (CREW), First General Counsel's Report at 2, 4 (Dec. 17, 2014).
[47] *See* Compl. ¶¶ 57-58.
[48] 71 Fed. Reg. at 18594.
[49] Concurring Statement of Vice Chair Hunter and Commissioners Goodman and Petersen, FEC Adv. Op. 2016-21 (Great America PAC).
[50] *See* 11 C.F.R. § 100.27.
[51] *See* Compl. ¶¶ 18, 33.

research.[52] On July 17, 2015, the Campaign paid $6,346 for "research services."[53] These payments, which are in no way insubstantial, show that the Campaign compensated Correct the Record for the non-communicative expenses from which it benefited. The Complaint offers no basis to question the sufficiency of these payments.

Exempt from the definition of "contribution" is the purchase of goods or services at the "usual and normal charge," meaning the "price of those goods in the market from which they ordinarily would have been purchased."[54] A committee that pays the fair market value of an item does not receive a contribution.[55] This rule applies even if the services might have only one potential seller and one potential buyer; in 2010, the FEC found no reason to believe that a federal campaign committee received an improper in-kind contribution when it purchased a fundraising database, a redesign of the candidate's website, domain names, and other campaign materials featuring that candidate's campaign logo from the candidate's state committee on the day she announced her candidacy for federal office. The FEC dismissed the complaint, as there was "no information to suggest that the amount paid by the federal committee for the assets was not fair market value."[56] Here, the Complaint fails to allege specific facts that would give the Commission reason to believe that the Campaign did not pay fair market value for the tracking and research services it received from Correct the Record. "Unwarranted legal conclusions from asserted facts" or "mere speculation" are not sufficient to support finding reason to believe that Respondents violated the Act.[57]

CONCLUSION

The Complaint fails to allege specific facts that would give the Commission reason to believe that the Campaign impermissibly coordinated the production or dissemination of "public communications" or that the Campaign received an in-kind contribution in the form of discounted goods or services. As a result, the Campaign did not receive an excessive or impermissible contribution and complied with its reporting obligations. Thus, the Commission should reject the Complaint's request for an investigation, find no reason to believe that a violation of the Act or Commission regulations has occurred, and immediately dismiss this matter and close the file.

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[52] Correct the Record, FEC Form 3X, Schedule A, line 17 at 8 (July 31, 2015), http://docquery.fec.gov/pdf/419/201507319000556419/201507319000556419.pdf#navpanes=0.

[53] Correct the Record, FEC Form 3X, Schedule A, line 17 at 17 (Dec. 31, 2015), http://docquery.fec.gov/pdf/110/201601319004983110/201601319004983110.pdf#navpanes=0.

[54] 11 C.F.R. § 100.52(d).

[55] *See* FEC Adv. Op. 2002-14 (Libertarian National Committee) (purchase of advertising space from committee only results in contribution if payment is less than the usual and normal charge); FEC Adv. Op. 2010-30 (Citizens United) (rental of email list to committees at usual and normal charge does not result in an expenditure).

[56] Matter Under Review 6216 (Coakley for Senate) Statement of Reasons at 6 (Sept. 8, 2010).

[57] FEC Matter Under Review 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 (Dec. 21, 2000).

We appreciate the Commission's consideration of this response.

Very truly yours,

Marc E. Elias
Counsel to Respondents