

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL’S REPORT

MUR: 7153

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DATE ACTIVATED: 02/06/2018

ELECTION CYCLE: 2016

EXPIRATION OF SOL: 02/20/20 – 11/08/21

COMPLAINANTS:

Tony Dane

Jack A. Shulman¹

Jill Stein

William Pflaum

RESPONDENTS:Hillary for America and Elizabeth Jones in her
official capacity as treasurer

Boston Globe Media Partners, LLC

Jim Messina

John Harwood

Jonathan Mantz

Maggie Haberman

NBC Universal

Paul Begala

Peter Huffman

Politico

Priorities USA Action and Greg Speed in his
official capacity as treasurer

The Hill

The New York Times

Univision

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30101(8)(A)(i), (B)(i)

52 U.S.C. § 30101(9)(B)(i)

52 U.S.C. § 30104(b)(3)(A)

¹ In the First General Counsel’s Report in MURs 6940, 7097, 7146, 7160, & 7193 (Correct the Record, *et al.*), we noted that we had administratively severed from some of those matters the allegations that Hillary for America impermissibly coordinated with Priorities USA Action into this matter, which involves similar allegations. First General Counsel’s Rpt. at 1 n.2, MURs 6940, 7097, 7146, 7160, & 7193. Consequently, the complainant in MUR 7097, Jack A. Shulman; the complainant in MUR 7160, William Pflaum; the complainant in MUR 7193, Jill Stein; and the respondents in MUR 7160, Jim Messina, Jonathan Mantz, and Paul Begala, who were either officers or advisors to Priorities USA, are now parties in this matter. References in this Report to the “Complaint” refer to the Complaint in MUR 7153, unless otherwise specified.

52 U.S.C. § 30116(a)(1)(A), (a)(7)(B)(i), (f)

52 U.S.C. § 30118(a)

52 U.S.C. § 30120

52 U.S.C. § 30125(e)(1)(A)

11 C.F.R. § 100.52(d)

11 C.F.R. § 100.73

11 C.F.R. § 100.74

11 C.F.R. § 100.94

11 C.F.R. § 104.3(a)

11 C.F.R. § 109.21

11 C.F.R. § 110.1(b)

11 C.F.R. § 110.9

11 C.F.R. § 110.11

11 C.F.R. § 114.2

11 C.F.R. § 300.61

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter involves allegations that Hillary for America and Elizabeth Jones in her official capacity as treasurer (“HFA”), the authorized committee of Hillary Clinton’s 2016 presidential campaign, violated provisions of the Federal Election Campaign Act of 1971, as amended (the “Act”), relating to a variety of interactions with other Respondents.

First, the Complaint alleges that HFA impermissibly coordinated with reporters from news organizations such as the *New York Times*, the *Boston Globe*, CNBC, Univision, and with an individual who wrote an op-ed in *The Hill*.² Second, the Complaint alleges that HFA failed to report an in-kind contribution from CNN contributor Donna Brazile in the form of a debate question she emailed to HFA in advance of a presidential debate. Third, the Complaint alleges that HFA coordinated with, and failed to report in-kind contributions from, various filmmakers

² Hereinafter, the *New York Times*, *Politico*, *The Hill*, the *Boston Globe*, CNBC, Univision, Maggie Haberman, John Harwood, and Peter Huffman are collectively referred to as “Media Respondents.”

1 who produced videos for a project titled “Filmmakers for Hillary.” Fourth, the Complaint and
 2 relevant portions of the MUR 7097, 7160, and 7193 Complaints³ allege that HFA impermissibly
 3 coordinated with Priorities USA Action and Greg Speed in his official capacity as treasurer
 4 (“Priorities”), an independent expenditure-only political committee.

5 Respondents generally deny the allegations. Among other things, they assert that the
 6 contacts between HFA and the Media Respondents were protected by the press exemption; that
 7 the provision of a debate question was not a contribution under the Act; that the activities of the
 8 filmmakers were covered by the Act’s volunteer services and uncompensated internet activity
 9 exemptions; and that the alleged interactions between HFA and Priorities did not result in a
 10 contribution. HFA also requests that the Commission “exercise its discretion” and dismiss the
 11 Complaint because it “relies exclusively on personal emails that Russian security agencies stole
 12 from [HFA’s] campaign chair, John Podesta,” which were disseminated by WikiLeaks and other
 13 platforms.⁴ HFA further argues that admitting the documents would “detract from the FEC’s
 14 core purpose of ensuring election integrity.”⁵ Relatedly, Priorities states that the authenticity of
 15 some of the hacked materials cannot be confirmed or verified.⁶

³ See *supra* note 1.

⁴ MUR 7153 HFA Resp. at 1 (Dec. 14, 2016) (“HFA Resp.”); see *infra* notes 60-63 and accompanying text; see also OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY ASSESSMENT: ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS at 2-3 (Jan. 6, 2017) (“ICA”) (describing the 2016 Russian election interference operation); SPECIAL COUNSEL ROBERT S. MUELLER, III, U.S. DEP’T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION at 3 (Mar. 22, 2019) (vol. 1) (same) (“SCR”). We note that one of the hacked documents cited by the Complaint, an internal memo pertaining to the allegations involving HFA and Priorities, not only originates from a state-sponsored cyberattack but also appears to be a privileged attorney-client communication. See *infra* notes 131-133 and accompanying text.

⁵ HFA Resp. at 1.

⁶ MUR 7160 Priorities Resp. at 1 (Nov. 15, 2016); MUR 7193 Priorities Resp. at 1 (Dec. 6, 2016).

1 For the reasons set forth below, we do not recommend pursuing these allegations. First,
2 the press exemption applies to some of the alleged activities relating to HFA's interactions with
3 the Media Respondents, and the remaining allegations concerning the Media Respondents are
4 vague, speculative, and otherwise unsupported by the available information. Therefore, we
5 recommend that the Commission find no reason to believe that the Media Respondents violated
6 52 U.S.C. §§ 30116(a)(1)(A) and 30118(a) by making excessive or corporate contributions; no
7 reason to believe that HFA violated 52 U.S.C. §§ 30116(f) and 30118(a) by knowingly accepting
8 excessive and corporate contributions from the Media Respondents; and no reason to believe that
9 HFA violated 52 U.S.C. § 30104(b)(3)(A) by failing to report in-kind contributions from the
10 Media Respondents.

11 Second, although the available information suggests that HFA accepted an in-kind
12 contribution from Brazile in the form of a debate question sent in advance of the debate, in light
13 of the overall circumstances, including the origin of the hacked email which forms the sole basis
14 for the allegation, we recommend that the Commission exercise its prosecutorial discretion and
15 dismiss the allegations that HFA violated 52 U.S.C. §§ 30104(b)(3)(A) and 30116(f) by
16 knowingly accepting and failing to report an excessive in-kind contribution, and issue a letter of
17 caution to HFA.

18 Third, with respect to the filmmaking project, the available information suggests that
19 HFA failed to report in-kind contributions from volunteer filmmakers and knowingly accepted
20 excessive contributions from them, in violation of 52 U.S.C. §§ 30104(b)(3)(A) and 30116(f),
21 and that HFA violated 52 U.S.C. § 30120 by failing to include proper disclaimers. In addition, it
22 appears that HFA violated 52 U.S.C. §§ 30104(b) and 30116(f) by knowingly accepting and
23 failing to report an excessive in-kind contribution from another political committee related to the

1 filmmaking project. But, in light of the overall circumstances, including the origin of a hacked
 2 email which forms the sole basis for the allegations, we recommend that the Commission dismiss
 3 the allegations as a matter of prosecutorial discretion and issue a letter of caution to HFA.

4 Fourth, the available information does not suggest that HFA solicited, received, directed,
 5 transferred, or spent non-federal funds arising out of its interactions with Priorities. Therefore,
 6 we recommend that the Commission dismiss the allegation that HFA violated 52 U.S.C.
 7 § 30125(e). However, the available information does suggest that HFA made, and Priorities
 8 knowingly accepted, unreported and potentially excessive in-kind contributions, in the form of
 9 donor information, in violation of 52 U.S.C. §§ 30104(b), 30116(a)(1)(C), and (f). Yet, because
 10 the chief support for the allegations is a hacked memo that appears to be privileged, as well as
 11 several other hacked emails, we recommend the Commission dismiss the allegations as a matter
 12 of prosecutorial discretion, and issue letters of caution to HFA and Priorities. Finally, because
 13 the Complaints do not appear to allege a cognizable violation against them, we recommend that
 14 the Commission dismiss the allegations that individual Respondents who worked for Priorities,
 15 Jim Messina, Jonathan Mantz, and Paul Begala, violated the Act.

16 **II. FACTUAL BACKGROUND AND LEGAL ANALYSIS**

17 **A. The Commission Should Find No Reason to Believe that HFA Impermissibly** 18 **Coordinated with Media Respondents**

19 **1. Factual Background**

20 The Complaint cites to an October 9, 2016, news article by *The Intercept*.⁷ The article
 21 linked to and published excerpts from hacked documents that, to an extent, show the inner

⁷ Compl. at 2 (Oct. 17, 2016); *see also* Glenn Greenwald and Lee Fang, *Exclusive: New Email Leak Reveals Clinton Campaign's Cozy Press Relationship*, THE INTERCEPT, Oct. 9, 2016 (Attach. 1 to the Complaint), *available*

1 workings of Clinton's pre-campaign activities by her personal aides and the activities of her
 2 official presidential campaign.⁸ These documents include strategy memos about shaping news
 3 media coverage⁹ and memos discussing off-the-record events with journalists.¹⁰ The memos
 4 include a January 2015 strategy memo, which may have been written by Nick Merrill, then-
 5 Clinton aide and future HFA press secretary.¹¹ It references a plan for Clinton aides to "place" a
 6 story with a "friendly journalist" to generate interest in the potential campaign and also to "reach
 7 industry people for recruitment purposes."¹² It identifies Maggie Haberman as the ideal
 8 journalist; at the time, she worked for *Politico* but would soon leave to join the *New York*
 9 *Times*.¹³ In February 2015, Haberman published two articles for the *New York Times* with
 10 purported inside information about Clinton's pre-campaign activities.¹⁴ The Complaint asserts
 11 that this was "clear coordination."¹⁵

at <https://theintercept.com/2016/10/09/exclusive-new-email-leak-reveals-clinton-campaigns-cozy-press-relationship/>.

⁸ Four of the documents were provided to *The Intercept* as an exclusive by Guccifer 2.0, an online persona allegedly controlled by Russian military intelligence, and one document was published on DCLeaks, a website similar to WikiLeaks, also allegedly controlled by Russian military intelligence. Compl., Attach. 1 at 2, 7; see ICA at 2-3; SCR at 41-44.

⁹ *E.g.*, Compl., Attach. 1 at 7-8 (advising Clinton aides to give reporters "something to cover other than the unhelpful stories about the foundation, emails, etc.").

¹⁰ *E.g.*, *id.* at 5-7 (discussing "off-the-record dinner with key national reporters"). There is also a "Press and Surrogate Plan" outlining a strategy for defending Clinton against attacks regarding her use of a private email server as Secretary of State. See *id.* at 4. This document uses campaign jargon and consists mostly of lists of names grouped under headings such as "Progressive Helpers" and "Columnist/Pundit Calls." *Id.*

¹¹ *Id.* at 2-3 (reporting that Merrill's production of the document is shown by document metadata). The memo was dated before Clinton filed her statement of candidacy for President with the Commission. See Hillary Clinton Statement of Candidacy (Apr. 13, 2015).

¹² Compl., Attach. 1 at 2.

¹³ *Id.* at 3 ("We have had her tee up stories for us before and have never been disappointed.").

¹⁴ Maggie Haberman, *Hillary Clinton Begins Process of Vetting – Herself*, N.Y. TIMES, Feb. 20, 2015; Maggie Haberman, *Hillary Clinton Aides are in Talks to Fill Top Campaign Roles*, N.Y. TIMES, Feb. 27, 2015; see also Compl., Attach. 1 (referencing and linking to the two Haberman articles).

¹⁵ Compl. at 2.

In addition, the Complaint mentions an unspecified Fox News report in which CNBC's John Harwood allegedly "advises" HFA, arguing that "any reporting he does is as a surrogate for the campaign" and "needs to be reported."¹⁶ Further, without providing specifics, the Complaint alleges that the *New York Times* was a "surrogate" for HFA and allowed the campaign "to edit quotes, possibly unprecedented for the newspaper"; that the *Boston Globe* agreed to help Clinton "pump up" her campaign; and that Univision "collaborated" with HFA to attack her general election opponent Donald J. Trump.¹⁷

Finally, attached to the Complaint is a hacked HFA email commenting on an op-ed supporting Clinton that was published in *The Hill* on October 2, 2015, written by Peter Huffman, a financial adviser who previously worked for the Clinton Foundation. The email was sent by Adrienne Elrod, HFA's Director of Strategic Communications, to John Podesta, HFA's Campaign Chair:

John –

You may recall connecting Peter Huffman and me a few months ago, b/c he wanted to draft an op-ed defending the CF from attacks.

Finally....we have an op-ed that ran in The Hill over the weekend. Woohoo.
 Better late than never!¹⁸

The Complaint alleges that Huffman's apparent contact with HFA prior to drafting the op-ed was a "clear violation of FEC regulations."¹⁹

¹⁶ *Id.*

¹⁷ *Id.* at 2-3.

¹⁸ *Id.* at 1; *id.*, Attach. 3.

¹⁹ Compl. at 1.

2. Legal Analysis

The Act defines a contribution 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.”²⁰ Further, the Act limits the amount an individual may contribute to an authorized committee per election (\$2,700 during the 2016 cycle) and provides that no candidate or committee shall knowingly accept an excessive contribution.²¹ In addition, the Act prohibits corporations from making contributions to a candidate or authorized committee and similarly provides that no person shall knowingly accept a prohibited corporate contribution.²² Political committees are required to report the identifying information of each person who makes an aggregate contribution in excess of \$200 within the calendar year (or election cycle, in the case of an authorized committee), together with the date and amount of any such contribution.²³

The Act and Commission regulations, however, exempt from the definitions of contribution and expenditure “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.”²⁴ This exclusion is generally referred to as the “press exemption” or the “media exemption.” The Commission has determined whether the exemption applies by first assessing

²⁰ 52 U.S.C. § 30101(8)(A)(i); *see also id.* § 30101(9)(A)(i) (defining “expenditure” as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office”).

²¹ 52 U.S.C. § 30116(a)(1)(A), (f); *see also* 11 C.F.R. §§ 110.1(b), 110.9; *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015).

²² 52 U.S.C. § 30118(a); *see also* 11 C.F.R. § 114.2.

²³ 52 U.S.C. § 30104(b)(3)(A); *see also* 11 C.F.R. § 104.13(a).

²⁴ 52 U.S.C. § 30101(9)(B)(i) (expenditures); *see* 11 C.F.R. § 100.73 (contributions).

whether the entity that engaged in the challenged activity is a “press entity.”²⁵ Second, the Commission determines the scope of the exemption by applying the two-part analysis presented in *Reader’s Digest Ass’n v. FEC*: (1) whether the entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the entity is acting within its “legitimate press function.”²⁶ To determine whether the press entity is acting within its legitimate press function, the Commission considers whether the entity’s materials are available to the general public and whether the materials are comparable in form to those ordinarily issued by the entity.²⁷

As discussed below, the press exemption clearly applies to some of the alleged activities presented by the Complaint, and the remaining allegations are vague, speculative, and otherwise unsupported by the available information. First, the *New York Times*, *Boston Globe*, CNBC, *Politico*, *The Hill*, and Univision are qualifying press entities.²⁸ “[T]he Commission has focused on whether the entity in question produces on a regular basis a program that disseminates news stories, commentary, and/or editorials.”²⁹ That description applies to each of these Respondent

²⁵ See, e.g., Advisory Op. 2011-11 at 6-7 (Colbert) (“AO”) (collecting cases); AO 2010-08 at 5-6 (Citizens United); AO 2005-16 at 5 (Fired Up!).

²⁶ See *Reader’s Digest*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); AO 2011-11 at 7-9 (Colbert); AO 2010-08 at 6-7 (Citizens United); AO 2005-16 at 6 (Fired Up!).

²⁷ AO 2010-08 at 6 (Citizens United).

²⁸ The Media Respondent entities assert that they are bona fide press entities. See *Boston Globe Media Partners, LLC Resp.* at 4 (Nov. 17, 2016); *NBCUniversal Media, LLC Resp.* at 1 (Nov. 21, 2016); *The Hill Resp.* at 3 (Nov. 28, 2016); *Univision Communications, Inc. Resp.* at 2 (Nov. 30, 2016); *New York Times Resp.* at 1 (Mar. 16, 2018). In prior enforcement matters, the Commission has recognized that several of these Respondents were “press entities” entitled to the media exemption. See, e.g., MUR 5117 (*New York Times, et al.*) (finding no reason to believe the *New York Times* and *Boston Globe* violated Act); MUR 4929 (*NBC, Inc., et al.*) (same, with respect to CNBC, *New York Times*, and *Boston Globe*).

²⁹ Advisory Op. 2010-08 at 5 (Citizens United).

1 entities.³⁰ Second, there is no suggestion or information that the entities were owned or
 2 controlled by a political party, political committee, or candidate.³¹ Third, there is no indication
 3 that the Respondent entities acted outside of their legitimate press functions in connection with
 4 the events described in the Complaint.

5 Regarding the two articles written by Maggie Haberman in the *New York Times*, they
 6 were available to the general public and appear to be comparable in form to those ordinarily
 7 published by the *New York Times*. Moreover, they each appear to contain original commentary,
 8 an activity specifically protected by the Act's statutory text.³² As for the off-the-record events
 9 referenced in the *Intercept* article cited by the Complaint, neither the article nor the Complaint
 10 point to any reporting that potentially arose from these events. The available information
 11 suggests that the named reporters' attendance at these events involved legitimate press functions,
 12 such as research for later press stories.³³ The *Intercept* article suggests that events of this nature
 13 are not unusual, pointing to an example involving a Republican candidate.³⁴

14 Regarding the op-ed published by *The Hill*, it was available to the general public and
 15 appears to be comparable in form to other editorials published by *The Hill*.³⁵ Moreover, the Act

³⁰ See Boston Globe Media Partners Resp. at 4 (describing regular program of news reporting); The Hill Resp. at 3 (same); NBCUniversal Media Resp. at 1 (same); Univision Communications Resp. at 2 (same).

³¹ See Boston Globe Media Partners Resp. at 4 (denying ownership by a party, committee, or candidate); The Hill Resp. at 3 (same); Univision Communications Resp. at 2-3 (same); New York Times Resp. at 1 (same).

³² See 52 U.S.C. § 30101(9)(B)(i); see also Compl., Attach. 1 at 4 (describing the articles as "more sophisticated, nuanced, and even somewhat more critical than what the Clinton memo envisioned").

³³ The Commission has explained that the press exemption "'assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns.'" AO 2011-11 at 6 (quoting H.R. REP. NO. 93-1239, at 4 (1974)).

³⁴ Compl., Attach. 1 at 8. The article states that HFA's press interactions were "certainly not unique to the Clinton campaign." *Id.*

³⁵ The Hill Resp. at 3.

specifically exempts any “commentary” or “editorial” distributed by a “newspaper.”³⁶ To the extent that the author was promoting a candidate, the Commission has stated that a publication need not be free of bias in order to qualify for the press exemption.³⁷ Each of the above-referenced activities fall within the press exemption.

Finally, the Complaint includes a series of unsupported allegations.³⁸ For instance, the Complaint asserts that “Fox News reported that CNBC’s John Harwood advises [HFA]” and argues that “[t]his collaboration needs to be reported.”³⁹ The Complaint does not submit any description of the alleged activity and does not identify a specific Fox News report.⁴⁰ Similarly, the Complaint alleges that the *New York Times* allowed HFA to edit quotes and acted as a “surrogate” for the Clinton campaign, the *Boston Globe* agreed to “pump up” the Clinton campaign, and that Univision “collaborated” with HFA to attack Trump.⁴¹ Because the Complaint lacks information to support these allegations, and we are aware of none, there is insufficient indication that the alleged activity occurred.⁴²

³⁶ 52 U.S.C. § 30109(9)(B)(i).

³⁷ Advisory Op. 2005-19 at 5 (Inside Track Productions) (citing First General Counsel’s Report, MUR 5449 (CBS Broadcasting, Inc.)).

³⁸ Compl. at 2.

³⁹ *Id.*

⁴⁰ *Id.*; see 11 C.F.R. § 111.4(d)(2) (“Statements which are not based upon personal knowledge should be accompanied by an identification of the source of information which gives rise to the complainants belief in the truth of such statements.”). We found a contemporaneous Fox News article suggesting that Harwood emailed HFA “on some occasions to request an interview and other times to offer advice,” and the only example of advice identified in the article was an email to HFA warning that “Ben Carson could give you real trouble.” *Bias Alert: WikiLeaks Exposes Media’s Secret Support of Clinton*, FOX NEWS, Oct. 12, 2016. NBC Universal asserts that Harwood “did not serve as an advisor to or a surrogate for the [Clinton] campaign.” NBCUniversal Media, LLC Resp. at 1.

⁴¹ Compl. at 2-3.

⁴² See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12546 (Mar. 16, 2007) (explaining that a finding of “no reason to believe” is appropriate where “[a] complaint alleges a violation but is either not credible or is so vague that an investigation would be effectively impossible”).

Therefore, we recommend that the Commission find: (1) no reason to believe that the *New York Times*, *Politico*, Maggie Haberman, *The Hill*, Peter Huffman, CNBC, John Harwood, the *Boston Globe*, and Univision violated 52 U.S.C. §§ 30116(a)(1)(A) or 30118(a) by making excessive or corporate contributions; (2) no reason to believe that HFA violated 52 U.S.C. §§ 30116(f) or 30118(a) by knowingly accepting excessive and corporate contributions from these Media Respondents; and (3) no reason to believe that HFA violated 52 U.S.C. § 30104(b)(3)(A) by failing to report in-kind contributions from these Media Respondents.

B. The Commission Should Exercise Prosecutorial Discretion to Dismiss the Allegations that HFA Accepted and Failed to Report In-Kind Contributions in the Form of Donna Brazile's Provision of Debate Questions

1. Factual Background

According to hacked documents published on WikiLeaks and attached to the Complaint, on March 12, 2016, Donna Brazile, then-vice chair of the Democratic National Committee and a CNN contributor, sent HFA an email with a question she expected would be asked at an upcoming Democratic primary debate sponsored by CNN.⁴³ The Complaint cites to one such question involving the death penalty, but we are aware of at least three other questions on a variety of topics.⁴⁴ Presumably, CNN prepared the debate question and Brazile, as a CNN contributor, procured it, but Brazile sent the email from her account at her firm Brazile and Associates, LLC.⁴⁵ The subject line of the email stated: "From time to time I get the questions in advance."⁴⁶ The question presented in Brazile's email was asked in a similar, though not

⁴³ Compl. at 2 (citing a reply to Brazile's email from Jennifer Palmieri, HFA's Director of Communications); *id.*, Attach. 5 (including apparent text of Palmieri's reply and Brazile's original email).

⁴⁴ Compl., Attach 5.

⁴⁵ Compl. at 2.

⁴⁶ *Id.*

1 exact, form at the debate.⁴⁷ We do not know whether or how HFA officials may have used the
 2 information provided by Brazile to prepare Clinton for the debates, but another email attached to
 3 the Complaint directs another individual at HFA to send Clinton's apparently prepared answer to
 4 a death penalty question to Brazile.⁴⁸

5 The Complaint argues that "[r]igging a debate . . . is definitely coordination and may be
 6 illegal because it helps rig the results of an election."⁴⁹ HFA argues there was no contribution,
 7 citing to the Commission's regulation on "coordinated communications," which, according to
 8 HFA, requires that the campaign provide, rather than receive, information from a third-party in
 9 order for there to be a coordination.⁵⁰

10 2. Legal Analysis

11 Under Commission regulations defining "contribution," "anything of value" includes all
 12 in-kind contributions, such as "the provision of any goods or services without charge or at a
 13 charge that is less than the usual and normal charge for such goods or services."⁵¹ The
 14 Commission has concluded that the provision of certain information, including a contact list,
 15 research, and descriptions and analysis of poll results, may be things of value subject to the Act's
 16 reporting requirements, source prohibitions, and amount limitations.⁵²

⁴⁷ See Transcript, CNN.COM, <http://transcripts.cnn.com/TRANSCRIPTS/1603/13/se.02.html> (Democratic Presidential Town Hall at Ohio State University on March 13, 2016).

⁴⁸ Compl., Attach 5.

⁴⁹ Compl. at 2.

⁵⁰ HFA Resp. at 3 (citing 11 C.F.R. 109.21(c)).

⁵¹ 11 C.F.R. § 100.52(d) ("Examples of such goods or services include, but are not limited to: Securities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists."). Other examples of in-kind contributions include coordinated communications, subject to a three-part test codified at 11 C.F.R. § 109.21, and coordinated expenditures, defined at 11 C.F.R. § 109.20(a).

⁵² See Factual & Legal Analysis at 7-8, MUR 7271 (DNC) (research services); Factual & Legal Analysis at 13-20, MUR 6414 (Carnahan) (research services); Advisory Op. 1990-12 at 2 (Strub) (description and

For instance, in MUR 5409 (Norquist, *et al.*), the Commission concluded that a master contact list of political activists was “something of value, meeting the Act’s broad definition of contribution,” given that a corporation had “utilized its resources to obtain and compile” the materials; the materials contained “information that may [have been] of value in connection with the [] election”; and it appeared the materials were not “readily or publicly available.”⁵³ The Commission found reason to believe that the respondents in MUR 5409 violated the prohibition on corporate contributions but took no further action because the value of the materials at issue appeared to be limited.⁵⁴ In Advisory Opinion 1990-12 (Strub), a campaign asked the Commission if a violation would result if a volunteer in possession of poll results, which he had commissioned for his own potential candidacy, used those results in connection with his work as a volunteer for the campaign.⁵⁵ The Commission concluded that an in-kind contribution would result if the volunteer were to impart “any data or analysis of the results,” or were to use such

analysis of poll results); First Gen. Counsel’s Rpt. at 8-10, MUR 5409 (Norquist, *et al.*) (dispositive Commission opinion) (list of activists); Certification, MUR 5409 ¶ 2 (Norquist, *et al.*) (Oct. 20, 2004).

⁵³ First Gen. Counsel’s Rpt. at 8-10, MUR 5409 (Norquist, *et al.*) (dispositive Commission opinion) (internal quotation marks omitted); Certification ¶ 2, MUR 5409 (Norquist, *et al.*) (Oct. 20, 2004). Similarly, in MUR 7271 (DNC, *et al.*), the Commission concluded that opposition research services performed by the staff of a foreign embassy on behalf of a political committee “is a thing of value” subject to the foreign national prohibition. Factual & Legal Analysis at 7, MUR 7271 (DNC) (citing Factual & Legal Analysis at 13-20, MUR 6414 (Carnahan) (explaining that a committee’s receipt of opposition research services without paying the usual or normal charge may result in an in-kind contribution)). The available information in MUR 7271 suggested that the embassy had “utilized its resources and expended funds for opposition research . . . at no charge.” *Id.* at 7-8 (quotations omitted).

⁵⁴ First Gen. Counsel’s Rpt. at 10-11, MUR 5409 (Norquist, *et al.*); Certification ¶ 2, MUR 5409 (Norquist, *et al.*).

⁵⁵ The Act and Commission regulations exempt from the definition of contribution “the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee.” 52 U.S.C. § 30101(8)(B)(i); 11 C.F.R. § 100.74. However, the Commission has long held that, even in the context of volunteer services, the provision of goods by a volunteer is not covered by the exemption. *See, e.g.*, AO 1982-04 (Apodaca) at 3; Factual & Legal Analysis at 5, MURs 5987, 5995, and 6015 (Clinton, *et al.*).

1 information “to advise [the] campaign on matters such as campaign strategy or creating media
2 messages.”⁵⁶

3 While the Commission has not previously considered whether a debate question could be
4 a contribution, the debate questions at issue here appear to be a thing of value, the provision of
5 which without charge would constitute a contribution. Similar to the materials provided in MUR
6 5409 (Norquist), the debate question was apparently created by CNN using its corporate
7 resources, contained information that might help the campaign, and was not readily or publicly
8 available.⁵⁷ Presumably, Brazile provided HFA with the questions in advance to give Clinton an
9 advantage in the debate, thus seeking to provide value to the campaign. Like the campaign
10 volunteer in Advisory Opinion 1990-12 who acquired poll results before joining the campaign,
11 Brazile appears to have obtained the debate question through her position with CNN, separate
12 from any relationship she may have had with the campaign at the time. Therefore, by providing
13 HFA with the debate question without charge, Brazile appears to have made an in-kind
14 contribution to HFA. Moreover, the responsive email, which asked HFA staff to send Clinton's
15 answer to a death-penalty question to Brazile, appears to indicate HFA's knowing acceptance of
16 the contribution Brazile provided.

⁵⁶ AO 1990-12 at 2 (Strub).

⁵⁷ Under Commission regulations, funds provided to defray costs incurred in staging candidate debates generally are neither contributions nor expenditures. 11 C.F.R. §§ 100.92 and 100.154. However, the staging organization must not structure the debate to promote or advance one candidate over another to avoid making a prohibited contribution. *See* 11 C.F.R. § 100.13(b)(2); Factual & Legal Analysis at 12, MUR 6869R and 6842R (Commission on Presidential Debates) (“The purpose of this rule was to ‘provide a specific exception so that certain nonprofit organizations and news media may stage debates, without being deemed to have made prohibited corporate contributions to the candidates taking part in the debate.’”) (citation omitted). The Complaint makes no allegation that CNN was aware of or participated in sending the debate question to HFA and we are not aware of any information suggesting CNN's knowledge or participation. CNN is not a respondent in this matter and we do not make any recommendations as to CNN.

Although the record before the Commission suggests that HFA accepted an in-kind contribution from Brazile, an investigation would be necessary to determine whether the value exceeded the \$2,700 individual contribution limit.⁵⁸ However, because Brazile's aggregate primary contributions exceeded the \$200 threshold, regardless of the value of the debate question, HFA should have reported the in-kind contribution.⁵⁹

On balance, however, given the provenance of the hacked emails which form the sole basis for the allegation stated in the Complaint, we recommend that the Commission dismiss the violations as a matter of prosecutorial discretion. The case law indicates that federal agencies may consider stolen documents in administrative proceedings, as long as the as the agency was not involved in the underlying criminal act.⁶⁰ The facts presented in those matters, however, do not involve state-sponsored efforts that the U.S. Intelligence Community and Department of Justice have deemed an attack on the American democratic process.⁶¹ In *S. Bay Daily Breeze*, which involved a government agency's consideration of documents that an employee had stolen from his employer's desk, the Ninth Circuit rejected the employer's challenge, on Fourth

⁵⁸ See 52 U.S.C. § 30116(a)(1)(A), (f); 11 C.F.R. §§ 110.1(b), 110.9; *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015).

⁵⁹ HFA 2015 Amended Oct. Q Rpt. at 11500 (July 5, 2016) (\$100 contribution from Brazile on Sept. 29, 2015, for the primary election); HFA 2015 Amended July Q Rpt. at 1741 (Sept. 3, 2015) (\$250 contribution from Brazile on May 13, 2015, for the primary election). As noted above, all political committees are required to report the identification of each person whose contribution or contributions aggregate in excess of \$200 per calendar year or per election cycle in the case of an authorized committee, together with the date of receipt and amount of any such contributions. 52 U.S.C. § 30104(B)(3)(A); 11 C.F.R. § 104.3.

⁶⁰ See, e.g., *Nat'l Labor Relations Bd. v. S. Bay Daily Breeze*, 415 F.2d 360, 364 (9th Cir. 1969); *Knoll Associates, Inc. v. Fed. Trade Comm'n*, 397 F.2d 530, 533 (7th Cir. 1968); cf. *U.S. v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003) ("A search by a private person does not implicate the Fourth Amendment unless he acts as an instrument or agent of the government. For a private person to be considered an agent of the government, we look to two critical factors: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the private actor's purpose was to assist law enforcement efforts rather than to further his own ends."); *U.S. v. Jarrett*, 338 F.3d 339, 344-45 (4th Cir. 2003) (same).

⁶¹ ICA at 1; see SCR at 3, 13.

Amendment grounds, of the agency's use of the illegally obtained evidence, stating that "civil and criminal remedies are readily available to deal with such conduct, and we have been provided with no persuasive evidence that those remedies are or will be ineffective."⁶² That is not the case where the theft occurs as a result of foreign state-sponsored activity. The Commission has itself observed, against the backdrop of such activity, that foreign cyberattacks "present unique challenges to both criminal prosecution and civil enforcement," and "fulfilling its 'obligation to preserve the basic conception of a political community' under section 30121 cannot hinge solely on prosecution of foreign violators abroad," but instead "requires that countermeasures be taken within the United States."⁶³

Accordingly, we recommend that the Commission exercise its prosecutorial discretion and dismiss the allegation that HFA violated 52 U.S.C. § 30116(f) by knowingly accepting an excessive in-kind contribution, and dismiss the allegation that HFA violated 52 U.S.C. § 30104(b)(3)(A) by failing to report an in-kind contribution.⁶⁴ We also recommend that the Commission send a letter of caution to HFA.

C. The Commission Should Exercise Prosecutorial Discretion to Dismiss the Allegations that HFA Accepted and Failed to Report In-Kind Contributions Arising out of the Filmmakers for Hillary Project, and Failed to Include Adequate Disclaimers on the Project Website and Videos

1. Factual Background

Attached to the Complaint is a hacked September 2015 memo by Laura Peterson, HFA's Director of Content and Creative, sent by email to senior HFA officials, outlining a "new project

⁶² 415 F.2d at 364.

⁶³ Advisory Op. 2018-12 at 8 (DDC) (quoting *Bluman*, 800 F. Supp. 2d at 287 (D.D.C. 2011)).

⁶⁴ *See Heckler v. Chaney*, 470 U.S. 821 (1985).

digital is proposing: Filmmakers for Hillary.”⁶⁵ As part of the Filmmakers for Hillary project (“FFH Project”), HFA proposed to “enlist talented filmmakers to help tell the untold story, make policy compelling, capture a moment on the campaign trail, and help people get to know our candidate’s background and beliefs.”⁶⁶ The basic mechanics of the FFH Project were described as follows:

[HFA’s] digital team will work across the campaign to compile a list of topics Once a filmmaker has chosen a topic, they will pitch that topic to the campaign. We will approve the topic and concept or try to guide them in another direction. We will then offer them further background or connect them with a subject matter expert on the campaign if desired. They will cast their film, spend time working on it (using us as a resource when helpful) and return with a final cut Filmmakers will have final artistic say over their product, but the campaign will be able to decide whether or not to share that final product publicly.⁶⁷

The memo makes clear that HFA “can and should be involved in shaping content and messaging when possible.”⁶⁸ The memo proposes that HFA “will publish the short films through a TBD campaign digital platform (though could also provide as an exclusive to press).”⁶⁹

Publicly available information suggests that a number of videos were created, produced, and distributed in a manner consistent with the FFH Project as proposed in the September 2015 memo.⁷⁰ For example, a website titled “Filmmakers for Hillary” (“FFH Website”) embedded approximately 100 short videos supporting Clinton that were produced by various filmmakers

⁶⁵ Compl., Attach. 4.

⁶⁶ *Id.* at 1.

⁶⁷ *Id.* at 2 (emphasis added).

⁶⁸ *Id.*

⁶⁹ *Id.* at 3.

⁷⁰ The Complaint does not identify any video that may have been created or distributed pursuant to HFA’s FFH Project. The Response neither confirms nor denies the existence of the FFH project and, as such, provides no indication whether any film was created, produced, or distributed under that project.

1 and published on other digital platforms (such as YouTube or Vimeo⁷¹); some of the embedded
 2 videos linked to paid Vimeo accounts.⁷² It is unclear who controlled the FFH Website or curated
 3 the videos posted on it. Neither the current nor archived versions of the FFH Website include a
 4 disclaimer or copyright notice. The website at one time stated that the project was “independent”
 5 of HFA, described itself as a “coalition of creatives committed to electing Hillary Clinton as
 6 President of the United States,” and listed Tanya Selvaratnam, an “independent producer,” as a
 7 co-founder.⁷³

8 Most of the embedded videos on the FFH Website do not contain disclaimers identifying
 9 who paid for the films or whether they were authorized by Clinton or HFA. Some of the videos,
 10 however, do contain disclaimers or other text indicating that some other group, besides HFA,
 11 was responsible for the video. For instance, one video, titled “Official ‘Pantsuit Power’ Flash
 12 Mob for Hillary,” contains a disclaimer indicating that it was paid for by Humanity for Progress,
 13 with a web address of HumanityforHillary.com, and the disclaimer states that the communication
 14 was not authorized by any candidate.⁷⁴ The Humanity for Progress website lists Tanya

⁷¹ Vimeo is a video-sharing platform; a Vimeo “PRO” account costs \$240 per year. Video Storage, Professional Review Tools, and More | Vimeo PRO, <https://vimeo.com/professionals> (last visited Mar. 29, 2018).

⁷² See <http://www.filmmakersforhillary.com> (last visited May 21, 2020); Archived Homepage, FILMMAKERS FORHILLARY.COM, <https://web.archive.org/web/20161108124834/http://www.filmmakersforhillary.com/> (archived version from Nov. 8, 2016) (not including working links to the archived array of videos); see, e.g., 11th Street, #Girls4Hillary #FilmMakersForHillary, VIMEO (Oct. 7, 2016), <https://vimeo.com/185983027> (last visited May 22, 2020) (linked from FFH Website and posted on 11th Street’s Vimeo PRO account); Munschkin Productions, HRC: San Francisco Bus to Reno, VIMEO (Sept. 7, 2016), <https://vimeo.com/181843933> (last visited May 22, 2020) (linked from FFH Website and posted on Munschkin Production’s Vimeo PRO account). As of the date of this Report, most video embeds remaining on the FFH Website link to videos hosted on YouTube. Earlier iterations of the live FFH website linked to more than 30 videos posted to the Vimeo PRO account of “FilmMakers for Progress,” which no longer appears to exist. This office has screenshots on file showing the videos as they appeared on Vimeo under the “FilmMakers for Progress” PRO account.

⁷³ Neither the current FFH Website nor the archived version includes the “About” page, though this office has a screenshot, taken Dec. 12, 2017, of the “About” page formerly at <http://www.filmmakersforhillary.com/about>.

⁷⁴ Official ‘Pantsuit Power’ Flash Mob for Hillary, <http://www.filmmakersforhillary.com> (last visited May 21, 2020).

Selvaratnam as a senior producer.⁷⁵ Although the Humanity for Progress website did not and does not contain a disclaimer,⁷⁶ it appears to be the website of a “hybrid” political committee (with a “Carey” non-contribution account) that registered with the Commission on June 10, 2016, and terminated on April 25, 2017.⁷⁷ During the 2016 election, Humanity for Progress reported independent expenditures for “social media communication” totaling \$191,221, all supporting Clinton with Art Not War identified as the vendor.⁷⁸ Art Not War, on its website, states that it “[c]reated the Humanity for Hillary campaign concept and name,” as well as “all original video content, from conception, to scripting, casting, and all aspects of production,” and that it “[o]rganized Filmmakers for Hillary, a group of 100 accomplished filmmakers who made content for our campaign.”⁷⁹

Several of the videos on the FFH Website appear to have been professionally produced using external production facilities or resources, such as a music video with an original new song from Le Tigre recorded at a New York City music studio.⁸⁰ The “Official ‘Pantsuit Power’ Flash Mob for Hillary” video, mentioned above, featured 150 people performing a dance routine

⁷⁵ About Us, <http://humanityforhillary.com/about> (last visited May 21, 2020).

⁷⁶ See Archived Homepage, HUMANITYFORHILLARY.COM, <https://web.archive.org/web/20160921195358/http://humanityforhillary.com> (archived version from Sept. 21, 2016).

⁷⁷ See Humanity for Progress Statement of Org. (June 10, 2016); Humanity for Progress Termination Approval (Apr. 25, 2017); see also Press Release, FEC Statement on *Carey v. FEC*, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), available at <http://www.fec.gov/press/press2011/20111006postcarey.shtml>.

⁷⁸ Humanity for Progress, 2015-16 Independent Expenditures, https://www.fec.gov/data/independent-expenditures/?committee_id=C00619593&two_year_transaction_period=2016&cycle=2016&data_type=processed&is_notice=true.

⁷⁹ Cultural Campaigns: Humanity for Hillary Campaign, ART NOT WAR, <https://artnotwar.com/portfolio/humanity-for-hillary/> (last visited May 21, 2020).

⁸⁰ See Le Tigre/Laura Parnes – “I’m with Her” – Web Version, <http://www.filmmakersforhillary.com/> (last visited May 21, 2020) (including credits stating, “[v]ocals recorded ... at Oscilloscope Studio, NYC”).

1 in New York's Union Square Park, with credits to multiple choreographers, stylists, editors, and
2 camera operators (including a Steadicam operator). Many videos on the FFH Website, by
3 contrast, do not similarly include professional credits and do not appear to have been made
4 utilizing professional services.

5 HFA does not appear to have reported any disbursements made or contributions received
6 for any activity associated with videos posted to the FFH Website.⁸¹ The Complaint alleges that,
7 "because [HFA is] contacting film makers and asking them to create films that they scripted, it is
8 coordination."⁸² HFA responds that "mere discussion" "about how to encourage filmmakers to
9 become involved in the campaign" "presents no apparent violation of the Act."⁸³ The Response
10 references the volunteer services and uncompensated internet activity exemptions, but without
11 specifying how either might apply.⁸⁴

12 2. Legal Analysis

13 The available information suggests that HFA conceived of the FFH Project as a campaign
14 project and that it was realized by the distribution of approximately 100 videos. It appears that
15 some of the videos were created, produced, and distributed online by individual volunteers, some
16 of whom appear to have made unreported (and potentially excessive) in-kind contributions to
17 HFA in the form of expenses incurred on behalf of the campaign. The FFH Website and videos
18 lacked disclaimers to indicate HFA's authorization. Regarding videos paid for by Humanity for

⁸¹ This is based on a search of HFA's itemized disbursements and contributions using names of filmmakers, crewmembers, and any other listed entities on the FFH website, including Humanity for Hillary and Art Not War.

⁸² Compl. at 2.

⁸³ HFA Resp. at 3.

⁸⁴ See *id.* at 3 n.15 (citing 52 U.S.C. § 30101(8)(B)(i) and 11 C.F.R. § 100.94).

Progress, it appears that Humanity for Progress made, and HFA accepted, excessive unreported in-kind contributions in the form of coordinated communications.

a. Volunteers' In-kind Contributions

The Act exempts from the definition of contribution “the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee.”⁸⁵ “The exception for volunteer activities is restricted to donations of the volunteer’s own time and services and does not generally exempt actual costs incurred on behalf of a Federal candidate or political party committee.”⁸⁶ Thus, any costs incurred by such individuals in the course of performing their voluntary services “must be within the donor’s limits and may not be contributed by any corporation or labor union or other person who is prohibited by the Act from making a contribution.”⁸⁷

The Commission’s regulations also provide that when an individual or a group of individuals, acting independently or in coordination with any candidate, authorized committee, or political party committee, engages in internet activities for the purpose of influencing a federal election, neither of the following is a contribution: (1) the individual’s uncompensated personal services related to such internet activities; and (2) the individual’s use of equipment or services for uncompensated internet activities, regardless of who owns the equipment and services.⁸⁸ For purposes of this exception, the term “internet activities” includes, but is not limited to, “creating, maintaining, or hosting a Web site; paying a nominal fee for the use of another person’s Web

⁸⁵ See 52 U.S.C. § 30101(8)(B)(i); *see also* 11 C.F.R. § 100.74.

⁸⁶ AO 2007-08 at 4 n.2 (King).

⁸⁷ AO 1982-04 at 3 (Apodaca).

⁸⁸ 11 C.F.R. § 100.94.

1 site; and any other form of communication distributed over the Internet.”⁸⁹ The term “equipment
 2 and services” includes, but is not limited to, “computers, software, Internet domain names,
 3 Internet Service Providers (ISP), and any other technology that is used to provide access to or
 4 use of the Internet.”⁹⁰ The uncompensated internet activity exception does not exempt from the
 5 definition of “contribution” any payments made for public communications, other than a nominal
 6 fee.⁹¹

7 The videos described above align with the FFH Project as proposed in HFA’s hacked
 8 memo. Assuming that HFA controlled the approval and distribution of these videos by volunteer
 9 filmmakers, as proposed in the memo, it appears that the individual filmmakers,⁹² engaged in
 10 voluntary activities on behalf of the campaign without compensation. Accordingly, the value of
 11 their services is not a contribution under the Act.⁹³ However, HFA would have been required to
 12 pay for any costs (other than the “equipment and services” costs included within the volunteer
 13 internet activities exception) that the filmmakers incurred in producing the videos and report
 14 such payments as disbursements, or report such costs as in-kind contributions.⁹⁴ It does not

⁸⁹ *Id.* § 100.94(b).

⁹⁰ *Id.* § 100.94(c).

⁹¹ *Id.* § 100.94(e)(1).

⁹² Humanity for Progress, as a political committee, is not an “individual” and is not exempt from the definition of “contribution” under the uncompensated volunteer internet exception at 11 C.F.R. § 100.94. AO 2008-10 at 8 (VoterVoter.com) (concluding that the exception “do[es] not apply to political committees”); *see infra* Part II.C.2.b.

⁹³ *See* 52 U.S.C. § 30101(8)(B)(i); *see also* 11 C.F.R. § 100.74.

⁹⁴ *See* Factual & Legal Analysis at 5, MURs 5987, 5995, and 6015 (Clinton, *et al.*) (determining that a performing artist’s uncompensated performance at a campaign event fell within the purview of the volunteer services exemption, and that no contribution resulted because the campaign “paid for all the costs associated with the production”); AO 2007-08 at 4 (King) (concluding that uncompensated performances by entertainers at campaign events would fall within the exemption as long as “all costs associated with the performances themselves (such as expenses for the rental of the venue and the performers’ travel) would be paid for by the [campaign]”); AO 1982-04 at 3 (Apodaca) (concluding that volunteer labor by various contractors to renovate a campaign’s

1 appear that HFA reported any payments associated with the videos. Thus, it appears that HFA
 2 failed to report in-kind contributions from the volunteer individual filmmakers.

3 Further, some of the videos appear to have involved production costs exceeding the
 4 filmmakers' individual contribution limits.⁹⁵ However, without more information about specific
 5 costs incurred by the volunteer filmmakers, it is unclear whether any of these individuals made,
 6 and HFA accepted, excessive contributions.

7 In addition, because it appears that the videos and FFH Website align with the FFH
 8 Project as proposed in HFA's hacked memo, they appear to have been authorized by HFA and,
 9 therefore, were subject to the applicable disclaimer requirements. Commission regulations
 10 provide that all "public communications" by a political committee and "all Internet websites of
 11 political committees available to the general public" shall include disclaimers that follow the
 12 requirements stated in the regulation, including, if applicable, that the communication is
 13 authorized by a candidate.⁹⁶ Commission regulations specify that the term "public
 14 communication" includes "communications placed for a fee on another person's Web site."⁹⁷
 15 Many of the videos were placed for a fee on Vimeo.com, and thus would have been public
 16 communications subject to the disclaimer requirements.⁹⁸ Neither those videos nor the FFH

headquarters would fall within the exemption, but that "[a]ny materials used in the renovation which were donated to the Committee must be reported as an in-kind contribution to the Committee").

⁹⁵ For instance, the Le Tigre music video states that it was made, in part, with the use of a professional music recording studio. Le Tigre/Laura Parnes – "I'm with Her" – Web Version, <http://www.filmmakersforhillary.com/> (last visited May 21, 2020).

⁹⁶ 11 C.F.R. § 110.11(a)-(c); *see also* 52 U.S.C. § 30120.

⁹⁷ *See* 11 C.F.R. § 100.26.

⁹⁸ *See* Internet Communications, 70 Fed. Reg. 18,589, 18,605 (Apr. 12, 2006) (explaining that, notwithstanding volunteers' entitlement to contribution exception at 11 C.F.R. § 100.94, "[i]f a political committee pays the costs of setting up a website or controls the overall content, however, the website may need to carry an appropriate disclaimer").

Website, however, contained a disclaimer regarding the payor or HFA's authorization of the communications.

In conclusion, it appears that HFA violated 52 U.S.C. § 30104(b)(3)(A) by failing to report in-kind contributions from the volunteer filmmakers, violated 52 U.S.C. § 30116(f) by knowingly accepting excessive contributions from volunteer filmmakers, and violated 52 U.S.C. § 30120 by failing to include proper disclaimers on the FFH Website and videos.

b. Coordinated Contributions

Under the Act, an expenditure made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate or a candidate's authorized committee is treated as a contribution to that candidate.⁹⁹ The Commission's regulations provide a three-part test for determining when a communication is a "coordinated communication," which is treated as an in-kind contribution.¹⁰⁰ To be considered a coordinated communication, it must: (1) be paid for by a third party; (2) satisfy one of five "content" standards in 11 C.F.R. § 109.21(c); and (3) satisfy one of five "conduct" standards in 11 C.F.R. § 109.21(d).¹⁰¹ All three prongs must be satisfied for a communication to be considered a "coordinated communication."¹⁰²

⁹⁹ 52 U.S.C. § 30116(a)(7)(B)(i); *see also* 11 C.F.R. § 109.20(a).

¹⁰⁰ 11 C.F.R. § 109.21(a), (b)(1).

¹⁰¹ *Id.* § 109.21(a). The five types of conduct that satisfy the conduct prong are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) use of a common vendor; and (5) use of a former employee or independent contractor. *Id.* § 109.21(d)(1)-(5). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *See id.* § 109.21(d)(6).

¹⁰² *Id.* § 109.21(a); *see also* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 453 (Jan. 3, 2003).

Humanity for Progress reported independent expenditures totaling \$191,221 for communications supporting Clinton.¹⁰³ These communications appear to meet the three-part coordinated communications test. First, the “payment” prong is satisfied because Humanity Progress reported paying for the videos. Second, the “content” prong is satisfied because these were “public communications”¹⁰⁴ that expressly advocated the election or defeat of a clearly identified candidate for federal office.¹⁰⁵

As for the conduct prong, it appears that HFA and Humanity for Progress satisfy at least the “request or suggestion” standard at 11 C.F.R. § 109.21(d)(1).¹⁰⁶ Not only did the videos that Humanity for Progress made and distributed on Vimeo and the FFH Website closely follow the concept described in the September 2015 internal HFA memo, but it appears that Humanity for Progress took an active role in organizing the FFH Project. Humanity for Progress reported independent expenditures totaling \$191,221 for “social media communication” to a vendor called

¹⁰³ Humanity for Progress, 2015-16 Independent Expenditures, https://www.fec.gov/data/independent-expenditures/?committee_id=C00619593&two_year_transaction_period=2016&cycle=2016&data_type=processed&is_notice=true.

¹⁰⁴ Many of the videos were hosted on a paid Vimeo account. *Supra* notes 71-72 and accompanying text; *see* 11 C.F.R. § 100.26 (defining “public communication” to include internet communications “placed for a fee on another person’s Web site”); Internet Communications, 71 Fed. Reg. at 18,595 (explaining that there is no “minimum threshold amount” for placing the communication on another person’s website).

¹⁰⁵ 11 C.F.R. § 109.21(c)(3); *see also id.* § 100.17 (defining independent expenditure as an expenditure for “a communication expressly advocating the election or defeat of a clearly identified candidate” that is not coordinated with a candidate).

¹⁰⁶ The “request or suggestion” conduct standard is satisfied when the communication “is created, produced, or distributed at the request or suggestion of a candidate [or] authorized committee” or “at the suggestion of a person paying for the communication and the candidate [or] authorized committee . . . assents to the suggestion.” 11 C.F.R. § 109.21(d)(1)(i)-(ii). The standard is satisfied by the payor’s assent to the candidate’s suggestion (or vice versa) “whether or not there is agreement or formal collaboration.” *Id.* § 109.21(d); *see also id.* § 109.21(e) (“Agreement or formal collaboration between the [payor] and the [candidate] is not required for a communication to be a coordinated communication”). There is no legal or functional difference in this context between a suggestion from the candidate and a suggestion from the payor to which the candidate assents. Coordinated and Independent Expenditures, 68 Fed. Reg. at 432 (“Assent to a suggestion is merely one from of a request.”); *see* 11 C.F.R. § 109.21(d)(1)(i)-(ii).

1 Art Not War and on Art Not War's website, it states that the group "[o]rganized Filmmakers for
 2 Hillary."¹⁰⁷ Accordingly, based on the available information, there is a reasonable basis to infer
 3 that Humanity for Progress acted at the request or suggestion of HFA in creating, producing, or
 4 distributing the videos. This sequence of events represents "something more than what one
 5 might call passive simultaneous action."¹⁰⁸

6 Because all three prongs of the coordinated communication test appear to have been met,
 7 it appears that Humanity for Progress made, and HFA accepted, an unreported, excessive in-kind
 8 contribution in violation of 52 U.S.C. §§ 30104(b) and 30116(f).

9 * * *

10 As described above, the Commission may consider stolen documents in administrative
 11 proceedings, as long as the agency was not involved in the underlying criminal act.¹⁰⁹ However,
 12 the stolen HFA memo, which forms the sole basis for determining that HFA had a role in the
 13 creation, production, or distribution of the videos, was the product of a foreign state-sponsored
 14 effort to interfere with the American democratic process. In light of these circumstances, we
 15 recommend that the Commission exercise its prosecutorial discretion and dismiss the allegations
 16 that HFA violated 52 U.S.C. § 30104(b)(3)(A) by failing to report in-kind contributions from
 17 individual filmmakers; violated 52 U.S.C. § 30116(f) by knowingly accepting excessive
 18 contributions from individual filmmakers, violated 52 U.S.C. § 30120 by failing to include
 19 proper disclaimers; violated 52 U.S.C. § 30104(b) by failing to report an in-kind contribution

¹⁰⁷ *Supra* notes 78-79.

¹⁰⁸ Hearing before the Subcomm. on Privileges and Elections of the S. Comm. on Rules and Admin., 94th
 Cong. 145 (Feb. 18, 1976) (testimony of Antonin Scalia, Asst. Att'y Gen.) (discussing difference between
 coordinated and independent expenditures).

¹⁰⁹ *Supra* notes 60-63 and accompanying text.

from another political committee; and violated 52 U.S.C. § 30116(f) by knowingly accepting an excessive contribution from another political committee.¹¹⁰ We do, however, recommend that the Commission caution HFA regarding the apparent violations.

D. The Commission Should Exercise Prosecutorial Discretion to Dismiss the Allegations Concerning the Relationship Between HFA and Priorities

1. Factual Background

Priorities is an independent expenditure-only political committee that registered with the Commission in April 2011.¹¹¹ During the 2016 election, the vast majority of the committee's reported spending activity supported Clinton.¹¹² Relying on hacked internal communications of the Clinton campaign published by Wikileaks, the Complaint alleges that HFA impermissibly "coordinated" with Priorities in violation of the Act.¹¹³

First, the Complaint in MUR 7153 attaches a news article that quotes and describes a memorandum to senior HFA officials prepared by HFA's counsel, Marc E. Elias of Perkins Coie LLP, dated April 21, 2015, describing an arrangement between HFA and Priorities whereby HFA would assist Priorities with its fundraising activities.¹¹⁴ The memo, sent shortly after

¹¹⁰ See *Heckler*, 470 U.S. 821.

¹¹¹ See Priorities USA Action Statement of Organization (April 29, 2011).

¹¹² See, e.g., Priorities USA Action 24/48 Hour Rpt. of Independent Expenditures (Nov. 4, 2016). Priorities reported total contributions of \$186,799,354 during the 2016 election cycle. Priorities USA Action, 2015 Year-End Rpt. at 3 (Jan. 31, 2016); Priorities USA Action, 2016 Year-End Rpt. at 3 (Jan. 31, 2017). The vast majority of the committee's receipts were received in the form of six-, seven-, and eight-figure contributions.

¹¹³ MUR 7153 Compl. at 2; MUR 7160 Compl. ¶ 17 (Oct. 24, 2016); MUR 7193 Compl. ¶ 12 (Nov. 7, 2016); see MUR 7097 Compl. at 1-2 (July 6, 2016). In the previous sections of this Report, citations to "Complaint" or "Response" referred to MUR 7153, citations in this section of the Report distinguish between the four relevant filings. See *supra* note 1. Furthermore, textual references in this section of the Report to the "Complaint" (without specifying the MUR number) refer to the Complaint in MUR 7153.

¹¹⁴ MUR 7153 Resp., Attach. B (Ashe Schow, *Team Clinton Taught Staff How to Coordinate With Super PACs Without Getting Prosecuted*, THE OBSERVER, Oct. 11, 2016), available at <https://observer.com/2016/10/team-clinton-taught-staff-how-to-coordinate-with-super-pacs-without-getting-prosecuted/>. Only the first page is attached to the Complaint. It shows the newspaper title, headline, author, and date.

Clinton declared her candidacy, advises that HFA may identify donor prospects for Priorities and provide information about the prospects such as their backgrounds and how much to solicit from them.¹¹⁵ In addition, the memo states that HFA staff may “speak to prospective donors about Priorities — either before or after Priorities’ contact with the donor,” and that HFA may send “thank you” messages to individuals who ultimately made contributions to Priorities.¹¹⁶ The memo advised that HFA should include a “hard money ask (for \$5,000 or less)” during the course of any conversation with prospective Priorities donors.¹¹⁷ HFA’s counsel was apparently also advising Priorities, and separately advised Priorities staff, not to “tell prospective donors that they [were] soliciting funds on behalf of or at the request, suggestion, or direction [of HFA].”¹¹⁸

Second, the Complaints in MUR 7160 and MUR 7193 quote a hacked email from Guy Cecil, reportedly the Chief Strategist for Priorities, to John Podesta, HFA’s Campaign Chair, dated November 19, 2015, regarding a meeting that Podesta apparently attended with another Priorities official.¹¹⁹ Cecil apologized for having initially sent Podesta to the wrong address, but there is no information about the content of the meeting.¹²⁰

Third, the Complaints in MUR 7160 and MUR 7193 quote a hacked email from Dennis Cheng, reportedly HFA’s Finance Director, to Podesta’s assistant to recommend that Podesta call

¹¹⁵ *See id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ Email from Cecil to Podesta, Nov. 19, 2015 (quoted by MUR 7160 Compl. ¶ 18; MUR 7193 Compl. ¶ 10).

¹²⁰ *Id.*

1 and thank Priorities donors who made six- and seven-figure contributions.¹²¹ Cheng flagged
 2 three donors who were “very important Priorities USA calls that ideally John can make.”¹²² The
 3 MUR 7193 Complaint asserts that the hacked emails “show consistent, repeated efforts by the
 4 Clinton campaign to collaborate with Super PACs on . . . fundraising.”¹²³ The Complaint in
 5 MUR 7097 alleges general financial impropriety between HFA and Priorities, as to an
 6 unspecified \$75 million of Priorities’ funds.¹²⁴

7 2. Legal Analysis

8 Although the Complaint frames the allegations in terms of whether HFA and Priorities
 9 engaged in impermissible “coordination,” the question presented is whether HFA violated the
 10 Act’s soft money prohibition, 52 U.S.C. § 30125(e), or whether HFA made, and Priorities
 11 accepted, unreported and excessive in-kind contributions in the form of donor information.¹²⁵

12 Although the Complaint appears to view any solicitation by Clinton and HFA personnel
 13 to Priorities as a violation of the Act, the Commission has explained that, under the soft money
 14 provision, federal candidates and their agents may solicit contributions of up to \$5,000 from
 15 individuals (other than foreign nationals or federal contractors) and from federal political
 16 committees to an independent expenditure-only political committee.¹²⁶ There is no information

¹²¹ Email from Cheng to Podesta, Feb. 2, 2016 (quoted by MUR 7160 Compl. ¶ 17; MUR 7193 Compl. ¶ 9).

¹²² *Id.*

¹²³ MUR 7193 Compl. ¶ 12.

¹²⁴ MUR 7097 Compl. at 1-2.

¹²⁵ 52 U.S.C. § 30125(e)(1)(A); *see also* 11 C.F.R. § 300.61. The Act prohibits candidates, individuals holding federal office, their agents, and entities directly or indirectly established, financed, maintained or controlled (“EFMC’d”) by or acting on behalf of any candidate or individual holding federal office from soliciting, receiving, directing, transferring, or spending funds in connection with a federal election unless the funds are subject to the Act’s limitations, prohibitions, and reporting requirements.

¹²⁶ AO 2011-12 (Majority PAC and House Majority PAC) at 4.

1 in the Complaint that HFA or its agents solicited funds in excess of \$5,000.¹²⁷ Thus, we
2 recommend the Commission dismiss the allegation that HFA violated 52 U.S.C. § 30125(e)
3 through its interactions with Priorities.

4 Alternatively, the Complaint could be read to allege that HFA made unreported and
5 excessive contributions to Priorities by providing Priorities with names of prospective donors,
6 background information about them, and calculations of the optimal amounts to ask these donors
7 to contribute.¹²⁸ Under this analysis, the available information appears to indicate that HFA did
8 make an in-kind contribution equaling the value of the donor information as well the resources
9 that HFA expended, such as staff wages, to generate, compile, arrange, and deliver this
10 information to Priorities.¹²⁹ HFA's provision of such information to Priorities, apparently at no
11 charge, would have relieved Priorities "of the expense that it would otherwise incur to obtain
12 such materials" and would therefore, constitute an in-kind contribution.¹³⁰ This arrangement
13 appears to have occurred on an ongoing basis. Thus, it appears the HFA made, and Priorities
14 accepted, unreported and potentially excessive contributions, in violation of 52 U.S.C.
15 §§ 30104(b) and 30116(a)(1)(C), (f).

¹²⁷ For example, the April 21, 2015, memo referenced in the MUR 7153 Complaint specifically advised that HFA should include a "hard money ask (for \$5,000 or less)" during the course of any conversation with prospective Priorities donors. Schow, *THE OBSERVER*, Oct. 11, 2016. Moreover, the available information does not indicate that HFA itself received, transferred, or spent non-federal funds for, to, or on behalf of Priorities.

¹²⁸ *See* MUR 7153 Compl., Attach. 1.

¹²⁹ *Cf.* First Gen. Counsel's Report at 10, MUR 5409 (Norquist) (adopted as dispositive) (finding that contact lists provided to a campaign without charge were "of value" because they "may at least point [the campaign] in the direction of persons who might help [its] election efforts.").

¹³⁰ AO 2007-22 at 6 (Hurysz); *see also* AO 1992-33 at 3 (DNC/RNC) ("As a general rule, an in-kind donation for Federal elections is treated as if funds equal to the value of the donation were received by the committee and then the committee expended those funds to purchase the goods or services.").

1 However, we do not recommend that the Commission pursue the allegations because the
 2 hacked memo, which is the factual core for the allegations as to this issue, appears to be covered
 3 by the attorney-client privilege. This privilege “protects confidential communications between
 4 attorney and client for the purpose of legal advice.”¹³¹ The memo communicates legal advice
 5 from attorney to client and therefore falls squarely within the privilege. Although the memo was
 6 stolen and published on the internet,¹³² courts have determined that the privilege is “not waived
 7 through public disclosure of a stolen document,”¹³³ and thus, the privilege continues to apply to
 8 the leaked HFA memo, despite it having been made public.

9 Given the privileged nature of the stolen memo, as well as the fact that the memo and
 10 other documents cited in the Complaint originated from a state-sponsored cyberattack that was
 11 part of an effort to interfere with the American democratic process, consistent with the prior
 12 discussions of other allegations,¹³⁴ we recommend that the Commission exercise its prosecutorial
 13 discretion to dismiss the allegations that HFA and Priorities violated 52 U.S.C. §§ 30104(b),
 14 30116(a)(1)(C), (f).¹³⁵ However, we recommend the Commission issue letters of caution to HFA
 15 and Priorities.

¹³¹ *Dukes v. Wal-Mart Stores, Inc.*, No. 01-cv-2252 CRB JSC, 2013 WL 1282892, at *4 (N.D. Cal. Mar. 26, 2013) (citing *Upjohn v. U.S.*, 449 U.S. 383, 389 (1981)).

¹³² *See supra* note 4 and accompanying text.

¹³³ *Sackman v. Liggett Grp., Inc.*, 173 F.R.D. 358, 365 (E.D.N.Y. 1997); *see Dukes*, 2013 WL 1282892, at *5; *Sackman v. Liggett Group, Inc.*, 173 F.R.D. 358, 365 (E.D. N.Y. 1997); *Smith v. Armour Pharm. Co.*, 838 F. Supp. 1573, 1577 (S.D. Fla. 1993) (“Although in practical terms the document has lost any semblance of confidentiality, the Court in legal terms must recognize that the client has not intentionally waived the privilege.”); *In re Grand Jury Proceedings Involving Berkley & Co., Inc.*, 466 F. Supp. 863, 868 (D. Minn. 1979); *In re Dayco Corp. Derivative Sec. Litig.*, 102 F.R.D. 468, 470 (S.D. Ohio 1984); *see also* J. Weinstein & M. Berger, *Weinstein’s Evidence*, ¶ 503(a)(4)[01] at 503–31 (1982 ed.) (“Communications which were intended to be confidential but are intercepted despite reasonable precautions remain privileged.”).

¹³⁴ *See supra* notes 60-63, 109 and accompanying text.

¹³⁵ *Heckler*, 470 U.S. 821.

1 Additionally, because the Complaint does not appear to allege a cognizable violation
 2 against them, we recommend that the Commission dismiss the allegations that individual
 3 Respondents who worked for Priorities, Jim Messina, Jonathan Mantz, and Paul Begala, violated
 4 the Act in connection with Priorities' fundraising interactions with HFA.

5 **III. RECOMMENDATIONS**

- 6 1. Find no reason to believe that the *New York Times*, *Politico*, Maggie Haberman,
 7 *The Hill*, Peter Huffman, CNBC, John Harwood, the *Boston Globe*, and Univision
 8 violated 52 U.S.C. §§ 30116(a)(1)(A), 30118(a) by making excessive or corporate
 9 contributions;
- 10 2. Find no reason to believe that Hillary for America and Elizabeth Jones in her
 11 official capacity as treasurer violated 52 U.S.C. §§ 30104(b)(3)(A), 30116(f),
 12 30118(a) by knowingly accepting or failing to report excessive or corporate in-
 13 kind contributions from media entities;
- 14 3. Dismiss the allegations that Hillary for America and Elizabeth Jones in her
 15 official capacity as treasurer violated 52 U.S.C. §§ 30104(b)(3)(A), 30116(f) by
 16 knowingly accepting and failing to report an excessive in-kind contribution in the
 17 form of a debate question, and send a letter of caution to Hillary for America;
- 18 4. Dismiss the allegations that Hillary for America and Elizabeth Jones in her
 19 official capacity as treasurer violated 52 U.S.C. §§ 30104(b)(3)(A), 30116(f) by
 20 knowingly accepting and failing to report excessive in-kind contributions from
 21 volunteer filmmakers, and send a letter of caution to Hillary for America;
- 22 5. Dismiss the allegation that Hillary for America and Elizabeth Jones in her official
 23 capacity as treasurer violated 52 U.S.C. § 30120 by failing to include proper
 24 disclaimers on the Filmmakers for Hillary website and videos, and send a letter of
 25 caution to Hillary for America;
- 26 6. Dismiss the allegations that Hillary for America and Elizabeth Jones in her
 27 official capacity as treasurer violated 52 U.S.C. §§ 30104(b), 30116(f) by
 28 knowingly accepting and failing to report an excessive in-kind contribution from
 29 another political committee, and send a letter of caution to Hillary for America;
- 30 7. Dismiss the allegation that Hillary for America and Elizabeth Jones in her official
 31 capacity as treasurer violated 52 U.S.C. § 30125(e) by soliciting, receiving,
 32 directing, transferring, or spending non-federal funds arising out of its interactions
 33 with Priorities USA Action;
- 34 8. Dismiss the allegations that Hillary for America and Elizabeth Jones in her
 35 official capacity as treasurer made, and Priorities USA Action and Greg Speed in

his official capacity as treasurer knowingly accepted, unreported and excessive contributions, in the form of donor information, in violation of 52 U.S.C. §§ 30104(b), 30116(a)(1)(C), (f), and send letters of caution to Hillary for America and Priorities USA Action.

9. Dismiss the allegations that Jim Messina, Jonathan Mantz, and Paul Begala violated the Act in connection with Priorities USA Action's fundraising interactions with Hillary for America;


10. Approve the attached Factual and Legal Analysis;

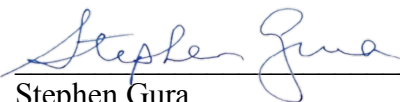
11. Approve the appropriate letters; and


12. Close the file.


Lisa J. Stevenson
Acting General Counsel

Date: 9/25/2020


Charles Kitcher
Acting Associate General Counsel
for Enforcement


Stephen Gura
Deputy Associate General Counsel


Jin Lee
Acting Assistant General Counsel


Claudio J. Pavia
Acting Assistant General Counsel

Attachment:
Factual and Legal Analysis

Dickerson Office
 ELW edits 6/7/21
 ELW additional edit 7/8/21

**FEDERAL ELECTION COMMISSION
 FACTUAL AND LEGAL ANALYSIS**

Respondents: Hillary for America and Elizabeth Jones MUR 7153
 in her official capacity as treasurer
 Boston Globe Media Partners, LLC
 Jim Messina
 John Harwood
 Jonathan Mantz
 Maggie Haberman
 NBC Universal
 Paul Begala
 Peter Huffman
 Politico
 Priorities USA Action and Greg Speed
 in his official capacity as treasurer
 The Hill
 The New York Times
 Univision

I. INTRODUCTION

This matter was generated by complaints filed with the Federal Election Commission by Tony Dane, Jack A. Shulman, Jill Stein, and William Pflaum,¹ alleging that Hillary for America and Elizabeth Jones in her official capacity as treasurer (“HFA”), the authorized committee of Hillary Clinton’s 2016 presidential campaign, violated provisions of the Federal Election Campaign Act of 1971, as amended (the “Act”), relating to a variety of interactions with other Respondents.

First, the Complaint alleges that HFA impermissibly coordinated with reporters from news organizations such as the *New York Times*, the *Boston Globe*, CNBC, Univision, and with

¹ The Commission administratively severed allegations that Hillary for America impermissibly coordinated with Priorities USA Action from MURs 7097, 7160, and 7193 into this matter. Consequently, the complainant in MUR 7097, Jack A. Shulman; the complainant in MUR 7160, William Pflaum; the complainant in MUR 7193, Jill Stein; and the respondents in MUR 7160, Jim Messina, Jonathan Mantz, and Paul Begala, are now parties in this matter. References to the “Complaint” refer to the Complaint in MUR 7153, unless otherwise specified.

an individual who wrote an op-ed in *The Hill*.² Second, the Complaint alleges that HFA failed to report an in-kind contribution from CNN contributor Donna Brazile in the form of a debate question she emailed to HFA in advance of a presidential debate. Third, the Complaint alleges that HFA coordinated with, and failed to report in-kind contributions from, various filmmakers who produced videos for a project titled “Filmmakers for Hillary.” Fourth, the Complaint and relevant portions of the MUR 7097, 7160, and 7193 Complaints³ allege that HFA impermissibly coordinated with Priorities USA Action and Greg Speed in his official capacity as treasurer (“Priorities”), an independent expenditure-only political committee.

Respondents generally deny the allegations. Among other things, they assert that the contacts between HFA and the Media Respondents were protected by the press exemption; that the provision of a debate question was not a contribution under the Act; that the activities of the filmmakers were covered by the Act’s volunteer services and uncompensated internet activity exemptions; and that the alleged interactions between HFA and Priorities did not result in a contribution. HFA also requests that the Commission “exercise its discretion” and dismiss the Complaint because it “relies exclusively on personal emails that Russian security agencies stole from [HFA’s] campaign chair, John Podesta,” which were disseminated by WikiLeaks and other platforms.⁴ HFA further argues that admitting the documents would “detract from the FEC’s

² Hereinafter, the *New York Times*, *Politico*, *The Hill*, the *Boston Globe*, CNBC, Univision, Maggie Haberman, John Harwood, and Peter Huffman are collectively referred to as “Media Respondents.”

³ See *supra* note 1.

⁴ MUR 7153 HFA Resp. at 1 (Dec. 14, 2016) (“HFA Resp.”); see also OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY ASSESSMENT: ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS at 2-3 (Jan. 6, 2017) (“ICA”) (describing the 2016 Russian election interference operation); SPECIAL COUNSEL ROBERT S. MUELLER, III, U.S. DEP’T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION at 3 (Mar. 22, 2019) (vol. 1) (same) (“SCR”). The Commission notes that one of the hacked documents cited by the Complaint, an internal memo pertaining to the allegations involving HFA and Priorities, not only originates from a state-sponsored cyberattack but also appears to be a privileged attorney-client communication.

core purpose of ensuring election integrity.”⁵ Relatedly, Priorities states that the authenticity of some of the hacked materials cannot be confirmed or verified.⁶

For the reasons set forth below, the Commission has determined not to pursue these allegations and closes the file as to all Respondents.

II. FACTUAL BACKGROUND AND LEGAL ANALYSIS

A. The Commission Finds No Reason to Believe that HFA Impermissibly Coordinated with Media Respondents

1. Factual Background

The Complaint alleges that HFA coordinated with various media entities and journalists. As support, the Complaint cites to an October 9, 2016, news article by *The Intercept*.⁷ The article linked to and published excerpts from hacked documents. Based on one such document, the Complaint alleges that Maggie Haberman, a journalist for the *New York Times*, published two stories “on behalf of” Clinton’s campaign.⁸ The Complaint asserts that this was “clear coordination.”⁹

In addition, the Complaint mentions an unspecified Fox News report in which CNBC’s John Harwood allegedly “advises” HFA, arguing that “any reporting he does is as a surrogate for the campaign” and “needs to be reported.”¹⁰ Further, without providing specifics, the Complaint

⁵ HFA Resp. at 1.

⁶ MUR 7160 Priorities Resp. at 1 (Nov. 15, 2016); MUR 7193 Priorities Resp. at 1 (Dec. 6, 2016).

⁷ Compl. at 2 (Oct. 17, 2016); *see also* Glenn Greenwald and Lee Fang, *Exclusive: New Email Leak Reveals Clinton Campaign’s Cozy Press Relationship*, THE INTERCEPT, Oct. 9, 2016 (Attach. 1 to the Complaint), available at <https://theintercept.com/2016/10/09/exclusive-new-email-leak-reveals-clinton-campaigns-cozy-press-relationship/>.

⁸ Compl. at 2; *id.*, Attach. 1 (referencing and linking to the two Haberman articles); *see* Maggie Haberman, *Hillary Clinton Begins Process of Vetting – Herself*, N.Y. TIMES, Feb. 20, 2015; Maggie Haberman, *Hillary Clinton Aides are in Talks to Fill Top Campaign Roles*, N.Y. TIMES, Feb. 27, 2015.;

⁹ Compl. at 2.

¹⁰ *Id.*

1 alleges that the *New York Times* was a “surrogate” for HFA and allowed the campaign “to edit
 2 quotes”; that the *Boston Globe* agreed to help Clinton “pump up” her campaign; and that
 3 Univision “collaborated” with HFA to attack her general election opponent Donald J. Trump.¹¹

4 Finally, the Complaint alleges that HFA coordinated with Peter Huffman on an op-ed he
 5 wrote supporting Clinton that was published in the *The Hill* on October 2, 2015. To support this
 6 allegation, the Complaint attached a hacked HFA email between HFA officials. The Complaint
 7 asserts that Huffman’s apparent contact with HFA prior to drafting the op-ed was a “clear
 8 violation of FEC regulations.”¹²

9 2. Legal Analysis

10 The Act defines a contribution as “any gift, subscription, loan, advance, or deposit of
 11 money or anything of value made by any person for the purpose of influencing any election for
 12 Federal office.”¹³ Further, the Act limits the amount an individual may contribute to an
 13 authorized committee per election (\$2,700 during the 2016 cycle) and provides that no candidate
 14 or committee shall knowingly accept an excessive contribution.¹⁴ In addition, the Act prohibits
 15 corporations from making contributions to a candidate or authorized committee and similarly
 16 provides that no person shall knowingly accept a prohibited corporate contribution.¹⁵ Political
 17 committees are required to report the identifying information of each person who makes an

¹¹ *Id.* at 2-3.

¹² Compl. at 1.

¹³ 52 U.S.C. § 30101(8)(A)(i); *see also id.* § 30101(9)(A)(i) (defining “expenditure” as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office”).

¹⁴ 52 U.S.C. § 30116(a)(1)(A), (f); *see also* 11 C.F.R. §§ 110.1(b), 110.9; *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015).

¹⁵ 52 U.S.C. § 30118(a); *see also* 11 C.F.R. § 114.2.

1 aggregate contribution in excess of \$200 within the calendar year (or election cycle, in the case
2 of an authorized committee), together with the date and amount of any such contribution.¹⁶

3 The Act and Commission regulations, however, exempt from the definitions of
4 contribution and expenditure “any news story, commentary, or editorial distributed through the
5 facilities of any broadcasting station, newspaper, magazine, or other periodical publication,
6 unless such facilities are owned or controlled by any political party, political committee, or
7 candidate.”¹⁷ This exclusion is generally referred to as the “press exemption” or the “media
8 exemption.” The Commission has determined whether the exemption applies by first assessing
9 whether the entity that engaged in the challenged activity is a “press entity.”¹⁸ Second, the
10 Commission determines the scope of the exemption by applying the two-part analysis presented
11 in *Reader’s Digest Ass’n v. FEC*: (1) whether the entity is owned or controlled by a political
12 party, political committee, or candidate; and (2) whether the entity is acting within its “legitimate
13 press function.”¹⁹ To determine whether the press entity is acting within its legitimate press
14 function, the Commission considers whether the entity’s materials are available to the general
15 public and whether the materials are comparable in form to those ordinarily issued by the
16 entity.²⁰

17 As discussed below, the press exemption clearly applies to some of the alleged activities
18 presented by the Complaint, and the remaining allegations are vague, speculative, and otherwise

¹⁶ 52 U.S.C. § 30104(b)(3)(A); *see also* 11 C.F.R. § 104.13(a).

¹⁷ 52 U.S.C. § 30101(9)(B)(i) (expenditures); *see* 11 C.F.R. § 100.73 (contributions).

¹⁸ *See, e.g.*, Advisory Op. 2011-11 at 6-7 (Colbert) (“AO”) (collecting cases); ;AO 2005-16 at 5 (Fired Up!).

¹⁹ *See Reader’s Digest*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); AO 2011-11 at 7-9 (Colbert); AO 2005-16 at 4 (Fired Up!).

²⁰ AO 2005-16 at 4 (Fired Up!).

1 unsupported by the available information. First, the *New York Times*, *Boston Globe*, CNBC,
 2 *Politico*, *The Hill*, and Univision are all qualifying press entities.²¹ “[T]he Commission has
 3 focused on whether the entity is in the business of producing on a regular basis a program that
 4 disseminates news stories, commentary, and/or editorials.”²² That description applies to each of
 5 these Respondent entities.²³ Second, there is no suggestion or information that the entities were
 6 owned or controlled by a political party, political committee, or candidate.²⁴ Third, there is no
 7 indication that the Respondent entities acted outside of their legitimate press functions in
 8 connection with the events described in the Complaint. Further, the *New York Times* articles
 9 written by Maggie Haberman and the op-ed published by Peter Huffman were available to the
 10 general public and appear to be comparable in form to others ordinarily issued by those entities.
 11 They contain either original commentary or editorial content, activities specifically exempt by
 12 the Act’s statutory text.²⁵ Moreover, to the extent that either author was promoting a candidate,
 13 the Commission has stated that a publication need not be free of bias in order to qualify for the
 14 press exemption.²⁶

²¹ The Media Respondent entities assert that they are bona fide press entities. *See* Boston Globe Media Partners, LLC Resp. at 4 (Nov. 17, 2016); NBCUniversal Media, LLC Resp. at 1 (Nov. 21, 2016); The Hill Resp. at 3 (Nov. 28, 2016); Univision Communications, Inc. Resp. at 2 (Nov. 30, 2016); New York Times Resp. at 1 (Mar. 16, 2018). In prior enforcement matters, the Commission has recognized that several of these Respondents were “press entities” entitled to the media exemption. *See, e.g.*, MUR 5117 (New York Times, *et al.*) (finding no reason to believe the *New York Times* and *Boston Globe* violated Act); MUR 4929 (NBC, Inc., *et al.*) (same, with respect to CNBC, *New York Times*, and *Boston Globe*).

²² \AO 2008-14 at 4 (Melothe, Inc).

²³ *See* Boston Globe Media Partners Resp. at 4 (describing regular program of news reporting); The Hill Resp. at 3 (same); NBCUniversal Media Resp. at 1 (same); Univision Communications Resp. at 2 (same).

²⁴ *See* Boston Globe Media Partners Resp. at 4 (denying ownership by a party, committee, or candte); The Hill Resp. at 3 (same); Univision Communications Resp. at 2-3 (same); New York Times Resp. at 1 (same).

²⁵ *See* 52 U.S.C. § 30101(9)(B)(i); *see also* Compl., Attach. 1 at 4 (describing the NYT articles as “more sophisticated, nuanced, and even somewhat more critical than what the Clinton memo envisioned”).

²⁶ Advisory Op. 2005-19 at 5 (Inside Track Productions) (citing First General Counsel’s Report, MUR 5449 (CBS Broadcasting, Inc.)).

Finally, the Complaint includes a series of unsupported allegations.²⁷ For instance, the Complaint asserts that “Fox News reported that CNBC’s John Harwood advises [HFA]” and argues that “[t]his collaboration needs to be reported.”²⁸ The Complaint does not submit any description of the alleged activity and does not identify a specific Fox News report.²⁹ Similarly, the Complaint alleges that the *New York Times* allowed HFA to edit quotes and acted as a “surrogate” for the Clinton campaign, the *Boston Globe* agreed to “pump up” the Clinton campaign, and that Univision “collaborated” with HFA to attack Trump.³⁰ Because the Complaint lacks information to support these allegations, and the Commission is aware of none, there is insufficient indication that the alleged activity occurred.³¹

Therefore, the Commission finds: (1) no reason to believe that the *New York Times*, *Politico*, Maggie Haberman, *The Hill*, Peter Huffman, CNBC, John Harwood, the *Boston Globe*, and Univision violated 52 U.S.C. §§ 30116(a)(1)(A) or 30118(a) by making excessive or corporate contributions; (2) no reason to believe that HFA violated 52 U.S.C. §§ 30116(f) or 30118(a) by knowingly accepting excessive and corporate contributions from these Media

²⁷ Compl. at 2.

²⁸ *Id.*

²⁹ *Id.*; see 11 C.F.R. § 111.4(d)(2) (“Statements which are not based upon personal knowledge should be accompanied by an identification of the source of information which gives rise to the complainants belief in the truth of such statements.”). The Commission is aware of a contemporaneous Fox News article suggesting that Harwood emailed HFA “on some occasions to request an interview and other times to offer advice,” but the only example of advice identified in the article was an email to HFA warning that “Ben Carson could give you real trouble.” *Bias Alert: WikiLeaks Exposes Media’s Secret Support of Clinton*, FOX NEWS, Oct. 12, 2016. NBC Universal asserts that Harwood “did not serve as an advisor to or a surrogate for the [Clinton] campaign.” NBCUniversal Media, LLC Resp. at 1.

³⁰ Compl. at 2-3.

³¹ See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12546 (Mar. 16, 2007) (explaining that a finding of “no reason to believe” is appropriate where “[a] complaint alleges a violation but is either not credible or is so vague that an investigation would be effectively impossible”).

Respondents; and (3) no reason to believe that HFA violated 52 U.S.C. § 30104(b)(3)(A) by failing to report in-kind contributions from these Media Respondents.

B. The Commission Dismisses the Remaining Allegations as a Matter of Prosecutorial Discretion

The Complaint alleges that HFA coordinated with Donna Brazile, then-vice chair of the Democratic National Committee and a CNN contributor, when she sent HFA an email with a question she expected would be asked at an upcoming Democratic primary debate sponsored by CNN.³² In addition, the Complaint alleges that HFA coordinated with various individual filmmakers on a project called “Filmmakers for Hillary” (“FFH Project”) and that that resulted in a number of disclaimer and reporting violations.³³ Finally, the Complaint alleges that HFA impermissibly “coordinated” with Priorities,³⁴ an independent-expenditure-only committee that supported Clinton’s 2016 campaign.³⁵

First, the Commission must consider the source of the documents that form the basis of these allegations. It is the well-documented and unanimous opinion of the U.S. Intelligence Community and the U.S. Department of Justice³⁶ that these documents were stolen by the Russian Federation and distributed specifically to interfere in the 2016 presidential election. Some Commissioners believe that this fact alone justifies our invocation of prosecutorial discretion, while others consider it one factor in the overall analysis. Moreover, all of these

³² Compl. at 2.

³³ *Id.* at 2.

³⁴ MUR 7153 Compl. at 2; MUR 7160 Compl. ¶ 17 (Oct. 24, 2016); MUR 7193 Compl. ¶ 12 (Nov. 7, 2016); *see* MUR 7097 Compl. at 1-2 (July 6, 2016).

³⁵ *See* Priorities USA Action Statement of Organization (April 29, 2011); Priorities USA Action 24/48 Hour Rpt. of Independent Expenditures (Nov. 4, 2016). Priorities reported total contributions of \$186,799,354 during the 2016 election cycle. Priorities USA Action, 2015 Year-End Rpt. at 3 (Jan. 31, 2016); Priorities USA Action, 2016 Year-End Rpt. at 3 (Jan. 31, 2017).

³⁶ ICA at 2-3 (Jan. 6, 2017) (“ICA”); SCR at 3.

1 allegations either have already slipped past our five-year statute of limitations or will soon do so.
2 In addition, the memo written by HFA's legal counsel regarding Priorities USA's fundraising
3 activities is subject to the attorney-client privilege.

4 In these circumstances the Commission exercises its prosecutorial discretion and
5 dismisses these allegations.³⁷

6 Additionally, because the Complaint is silent as to any specific violations they are alleged
7 to have committed, the Commission dismisses the allegations that individual Respondents who
8 worked for Priorities, Jim Messina, Jonathan Mantz, and Paul Begala, violated the Act in
9 connection with Priorities' fundraising interactions with HFA.

³⁷ See *Heckler v. Chaney*, 470 U.S. 821 (1985).

(SMB, ELW, and STW Edits 5/13/2021)

Cooksey Office

**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

Respondents: Hillary for America and Elizabeth Jones MUR 7153
in her official capacity as treasurer
Boston Globe Media Partners, LLC
Jim Messina
John Harwood
Jonathan Mantz
Maggie Haberman
NBC Universal
Paul Begala
Peter Huffman
Politico
Priorities USA Action and Greg Speed
in his official capacity as treasurer
The Hill
The New York Times
Univision

I. INTRODUCTION

This matter was generated by complaints filed with the Federal Election Commission by Tony Dane, Jack A. Shulman, Jill Stein, and William Pflaum,¹ alleging that Hillary for America and Elizabeth Jones in her official capacity as treasurer (“HFA”), the authorized committee of Hillary Clinton’s 2016 presidential campaign, violated provisions of the Federal Election Campaign Act of 1971, as amended (the “Act”), relating to a variety of interactions with other Respondents.

First, the Complaint alleges that HFA impermissibly coordinated with reporters from news organizations such as the *New York Times*, the *Boston Globe*, CNBC, Univision, and with

¹ The Commission administratively severed allegations that Hillary for America impermissibly coordinated with Priorities USA Action from MURs 7097, 7160, and 7193 into this matter. Consequently, the complainant in MUR 7097, Jack A. Shulman; the complainant in MUR 7160, William Pflaum; the complainant in MUR 7193, Jill Stein; and the respondents in MUR 7160, Jim Messina, Jonathan Mantz, and Paul Begala, are now parties in this matter. References to the “Complaint” refer to the Complaint in MUR 7153, unless otherwise specified.

an individual who wrote an op-ed in *The Hill*.² Second, the Complaint alleges that HFA failed to report an in-kind contribution from CNN contributor Donna Brazile in the form of a debate question she emailed to HFA in advance of a presidential debate. Third, the Complaint alleges that HFA coordinated with, and failed to report in-kind contributions from, various filmmakers who produced videos for a project titled “Filmmakers for Hillary.” Fourth, the Complaint and relevant portions of the MUR 7097, 7160, and 7193 Complaints³ allege that HFA impermissibly coordinated with Priorities USA Action and Greg Speed in his official capacity as treasurer (“Priorities”), an independent expenditure-only political committee.

Respondents generally deny the allegations. Among other things, they assert that the contacts between HFA and the Media Respondents were protected by the press exemption; that the provision of a debate question was not a contribution under the Act; that the activities of the filmmakers were covered by the Act’s volunteer services and uncompensated internet activity exemptions; and that the alleged interactions between HFA and Priorities did not result in a contribution. HFA also requests that the Commission “exercise its discretion” and dismiss the Complaint because it “relies exclusively on personal emails that Russian security agencies stole from [HFA’s] campaign chair, John Podesta,” which were disseminated by WikiLeaks and other platforms.⁴ HFA further argues that admitting the documents would “detract from the FEC’s

² Hereinafter, the *New York Times*, *Politico*, *The Hill*, the *Boston Globe*, CNBC, Univision, Maggie Haberman, John Harwood, and Peter Huffman are collectively referred to as “Media Respondents.”

³ See *supra* note 1.

⁴ MUR 7153 HFA Resp. at 1 (Dec. 14, 2016) (“HFA Resp.”); see also OFFICE OF THE DIR. OF NAT’L INTELLIGENCE, INTELLIGENCE COMMUNITY ASSESSMENT: ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS at 2-3 (Jan. 6, 2017) (“ICA”) (describing the 2016 Russian election interference operation); SPECIAL COUNSEL ROBERT S. MUELLER, III, U.S. DEP’T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION at 3 (Mar. 22, 2019) (vol. 1) (same) (“SCR”). The Commission notes that one of the hacked documents cited by the Complaint, an internal memo pertaining to the allegations involving HFA and Priorities, not only originates from a state-sponsored cyberattack but also appears to be a privileged attorney-client communication.

core purpose of ensuring election integrity.”⁵ Relatedly, Priorities states that the authenticity of some of the hacked materials cannot be confirmed or verified.⁶

For the reasons set forth below, the Commission has determined not to pursue these allegations and closes the file as to all Respondents.

II. FACTUAL BACKGROUND AND LEGAL ANALYSIS

A. The Commission Finds No Reason to Believe that HFA Impermissibly Coordinated with Media Respondents

1. Factual Background

The Complaint alleges that HFA coordinated with various media entities and journalists. As support, the Complaint cites to an October 9, 2016, news article by *The Intercept*.⁷ The article linked to and published excerpts from hacked documents. Based on one such document, the Complaint alleges that Maggie Haberman, a journalist for the *New York Times*, published two stories “on behalf of” Clinton’s campaign.⁸

The Complaint asserts that this was “clear coordination.”⁹

In addition, the Complaint mentions an unspecified Fox News report in which CNBC’s John Harwood allegedly “advises” HFA, arguing that “any reporting he does is as a surrogate for the campaign” and “needs to be reported.”¹⁰ Further, without providing specifics, the Complaint

⁵ HFA Resp. at 1.

⁶ MUR 7160 Priorities Resp. at 1 (Nov. 15, 2016); MUR 7193 Priorities Resp. at 1 (Dec. 6, 2016).

⁷ Compl. at 2 (Oct. 17, 2016); *see also* Glenn Greenwald and Lee Fang, *Exclusive: New Email Leak Reveals Clinton Campaign’s Cozy Press Relationship*, THE INTERCEPT, Oct. 9, 2016 (Attach. 1 to the Complaint), available at <https://theintercept.com/2016/10/09/exclusive-new-email-leak-reveals-clinton-campaigns-cozy-press-relationship/>.

⁸ Compl. at 2; *id.*, Attach. 1 (referencing and linking to the two Haberman articles); *see* Maggie Haberman, *Hillary Clinton Begins Process of Vetting – Herself*, N.Y. TIMES, Feb. 20, 2015; Maggie Haberman, *Hillary Clinton Aides are in Talks to Fill Top Campaign Roles*, N.Y. TIMES, Feb. 27, 2015.;

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1 alleges that the *New York Times* was a “surrogate” for HFA and allowed the campaign “to edit
 2 quotes, possibly unprecedented for the newspaper”; that the *Boston Globe* agreed to help Clinton
 3 “pump up” her campaign; and that Univision “collaborated” with HFA to attack her general
 4 election opponent Donald J. Trump.¹¹

5 Finally, the Complaint alleges that HFA coordinated with Peter Huffman on an op-ed he
 6 wrote supporting Clinton that was published in the *The Hill* on October 2, 2015. To support this
 7 allegation, the Complaint attached a hacked HFA email between HFA officials.

8 The Complaint contends that Huffman’s apparent contact with HFA prior to drafting the op-ed
 9 was a “clear violation of FEC regulations.”¹²

10 2. Legal Analysis

11 The Act defines a contribution as “any gift, subscription, loan, advance, or deposit of
 12 money or anything of value made by any person for the purpose of influencing any election for
 13 Federal office.”¹³ Further, the Act limits the amount an individual may contribute to an
 14 authorized committee per election (\$2,700 during the 2016 cycle) and provides that no candidate
 15 or committee shall knowingly accept an excessive contribution.¹⁴ In addition, the Act prohibits
 16 corporations from making contributions to a candidate or authorized committee and similarly
 17 provides that no person shall knowingly accept a prohibited corporate contribution.¹⁵ Political

¹¹ *Id.* at 2-3.

¹² Compl. at 1.

¹³ 52 U.S.C. § 30101(8)(A)(i); *see also id.* § 30101(9)(A)(i) (defining “expenditure” as “any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office”).

¹⁴ 52 U.S.C. § 30116(a)(1)(A), (f); *see also* 11 C.F.R. §§ 110.1(b), 110.9; *Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold*, 80 Fed. Reg. 5750, 5752 (Feb. 3, 2015).

¹⁵ 52 U.S.C. § 30118(a); *see also* 11 C.F.R. § 114.2.

1 committees are required to report the identifying information of each person who makes an
2 aggregate contribution in excess of \$200 within the calendar year (or election cycle, in the case
3 of an authorized committee), together with the date and amount of any such contribution.¹⁶

4 The Act and Commission regulations, however, exempt from the definitions of
5 contribution and expenditure “any news story, commentary, or editorial distributed through the
6 facilities of any broadcasting station, newspaper, magazine, or other periodical publication,
7 unless such facilities are owned or controlled by any political party, political committee, or
8 candidate.”¹⁷ This exclusion is generally referred to as the “press exemption” or the “media
9 exemption.” The Commission has determined whether the exemption applies by first assessing
10 whether the entity that engaged in the challenged activity is a “press entity.”¹⁸ Second, the
11 Commission determines the scope of the exemption by applying the two-part analysis presented
12 in *Reader’s Digest Ass’n v. FEC*: (1) whether the entity is owned or controlled by a political
13 party, political committee, or candidate; and (2) whether the entity is acting within its “legitimate
14 press function.”¹⁹ To determine whether the press entity is acting within its legitimate press
15 function, the Commission considers whether the entity’s materials are available to the general
16 public and whether the materials are comparable in form to those ordinarily issued by the
17 entity.²⁰

¹⁶ 52 U.S.C. § 30104(b)(3)(A); *see also* 11 C.F.R. § 104.13(a).

¹⁷ 52 U.S.C. § 30101(9)(B)(i) (expenditures); *see* 11 C.F.R. § 100.73 (contributions).

¹⁸ *See, e.g.*, Advisory Op. 2011-11 at 6-7 (Colbert) (“AO”) (collecting cases); ; AO 2005-16 at 5 (Fired Up!).

¹⁹ *See Reader’s Digest*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); AO 2011-11 at 7-9 (Colbert); AO 2005-16 at 4 (Fired Up!).

²⁰ AO 2005-16 at 4 (Fired Up!).

As discussed below, the press exemption clearly applies to some of the alleged activities presented by the Complaint, and the remaining allegations are vague, speculative, and otherwise unsupported by the available information. First, the *New York Times*, *Boston Globe*, CNBC, *Politico*, *The Hill*, and Univision are qualifying press entities.²¹ “[T]he Commission has focused on whether the entity is in the business of producing on a regular basis a program that disseminates news stories, commentary, and/or editorials.”²² That description applies to each of these Respondent entities.²³ Second, there is no suggestion or information that the entities were owned or controlled by a political party, political committee, or candidate.²⁴ Third, there is no indication that the Respondent entities acted outside of their legitimate press functions in connection with the events described in the Complaint. Further, the *New York Times* articles written by Maggie Haberman and the op-ed published by Peter Huffman were available to the general public and appear to be comparable in form to others ordinarily issued by those entities. They contain either original commentary or editorial content, activities specifically exempt by the Act’s statutory text.²⁵ Moreover, to the extent that either author was promoting a candidate,

²¹ The Media Respondent entities assert that they are bona fide press entities. *See* Boston Globe Media Partners, LLC Resp. at 4 (Nov. 17, 2016); NBCUniversal Media, LLC Resp. at 1 (Nov. 21, 2016); The Hill Resp. at 3 (Nov. 28, 2016); Univision Communications, Inc. Resp. at 2 (Nov. 30, 2016); New York Times Resp. at 1 (Mar. 16, 2018). In prior enforcement matters, the Commission has recognized that several of these Respondents were “press entities” entitled to the media exemption. *See, e.g.*, MUR 5117 (*New York Times, et al.*) (finding no reason to believe the *New York Times* and *Boston Globe* violated Act); MUR 4929 (*NBC, Inc., et al.*) (same, with respect to CNBC, *New York Times*, and *Boston Globe*).

²² Advisory Op. 2008-14 at 4 (Melothe, Inc.).

²³ *See* Boston Globe Media Partners Resp. at 4 (describing regular program of news reporting); The Hill Resp. at 3 (same); NBCUniversal Media Resp. at 1 (same); Univision Communications Resp. at 2 (same).

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the Commission has stated that a publication need not be free of bias in order to qualify for the press exemption.²⁶

Finally, the Complaint includes a series of unsupported allegations.²⁷ For instance, the Complaint asserts that “Fox News reported that CNBC’s John Harwood advises [HFA]” and argues that “[t]his collaboration needs to be reported.”²⁸ The Complaint does not submit any description of the alleged activity and does not identify a specific Fox News report.²⁹ Similarly, the Complaint alleges that the *New York Times* allowed HFA to edit quotes and acted as a “surrogate” for the Clinton campaign, the *Boston Globe* agreed to “pump up” the Clinton campaign, and that Univision “collaborated” with HFA to attack Trump.³⁰ Because the Complaint lacks information to support these allegations, and the Commission is aware of none, there is insufficient indication that the alleged activity occurred.³¹

Therefore, the Commission finds: (1) no reason to believe that the *New York Times*, *Politico*, Maggie Haberman, *The Hill*, Peter Huffman, CNBC, John Harwood, the *Boston Globe*,

²⁶ Advisory Op. 2005-19 at 5 (Inside Track Productions) (citing First General Counsel’s Report, MUR 5449 (CBS Broadcasting, Inc.)).

²⁷ Compl. at 2.

²⁸ *Id.*

²⁹ *Id.*; see 11 C.F.R. § 111.4(d)(2) (“Statements which are not based upon personal knowledge should be accompanied by an identification of the source of information which gives rise to the complainants belief in the truth of such statements.”). The Commission is aware of a contemporaneous Fox News article suggesting that Harwood emailed HFA “on some occasions to request an interview and other times to offer advice,” but the only example of advice identified in the article was an email to HFA warning that “Ben Carson could give you real trouble.” *Bias Alert: WikiLeaks Exposes Media’s Secret Support of Clinton*, FOX NEWS, Oct. 12, 2016. NBC Universal asserts that Harwood “did not serve as an advisor to or a surrogate for the [Clinton] campaign.” NBCUniversal Media, LLC Resp. at 1.

³⁰ Compl. at 2-3.

³¹ See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12546 (Mar. 16, 2007) (explaining that a finding of “no reason to believe” is appropriate where “[a] complaint alleges a violation but is either not credible or is so vague that an investigation would be effectively impossible”).

1 and Univision violated 52 U.S.C. §§ 30116(a)(1)(A) or 30118(a) by making excessive or
 2 corporate contributions; (2) no reason to believe that HFA violated 52 U.S.C. §§ 30116(f) or
 3 30118(a) by knowingly accepting excessive and corporate contributions from these Media
 4 Respondents; and (3) no reason to believe that HFA violated 52 U.S.C. § 30104(b)(3)(A) by
 5 failing to report in-kind contributions from these Media Respondents.

6 **B. The Commission Dismisses the Remaining Allegations as a Matter of**
 7 **Prosecutorial Discretion**

8 The Complaint alleges that HFA coordinated with Donna Brazile, then-vice chair of the
 9 Democratic National Committee and a CNN contributor, when she sent HFA an email with a
 10 question she expected would be asked at an upcoming Democratic primary debate sponsored by
 11 CNN.³² In addition, the Complaint alleges that HFA coordinated with various individual
 12 filmmakers on a project called “Filmmakers for Hillary” (“FFH Project”).³³ Finally, the
 13 Complaint alleges that HFA impermissibly “coordinated” with Priorities,³⁴ an independent-
 14 expenditure-only committee that supported Clinton’s 2016 campaign.³⁵ In light of the imminent
 15 statute of limitations and other priorities on the Commission’s docket, the Commission exercises
 16 its prosecutorial discretion and dismisses these allegations.³⁶

³² Compl. at 2.

³³ *Id.* at 2.

³⁴ MUR 7153 Compl. at 2; MUR 7160 Compl. ¶ 17 (Oct. 24, 2016); MUR 7193 Compl. ¶ 12 (Nov. 7, 2016);
 see MUR 7097 Compl. at 1-2 (July 6, 2016).

³⁵ See Priorities USA Action Statement of Organization (April 29, 2011); Priorities USA Action 24/48 Hour
 Rpt. of Independent Expenditures (Nov. 4, 2016). Priorities reported total contributions of \$186,799,354 during the
 2016 election cycle. Priorities USA Action, 2015 Year-End Rpt. at 3 (Jan. 31, 2016); Priorities USA Action, 2016
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MUR 7153 (Hillary for America, *et al.*)

Factual & Legal Analysis

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1 Additionally, because the Complaint does not appear to allege a cognizable violation
2 against them, the Commission dismisses the allegations that individual Respondents who worked
3 for Priorities, Jim Messina, Jonathan Mantz, and Paul Begala, violated the Act in connection
4 with Priorities' fundraising interactions with HFA.

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I. INTRODUCTION

This matter was generated by complaints filed with the Federal Election Commission by Tony Dane, Jack A. Shulman, Jill Stein, and William Pflaum,¹ alleging that Hillary for America and Elizabeth Jones in her official capacity as treasurer (“HFA”), the authorized committee of Hillary Clinton’s 2016 presidential campaign, violated provisions of the Federal Election Campaign Act of 1971, as amended (the “Act”), relating to a variety of interactions with other Respondents.

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For the reasons set forth below, the Commission has determined not to pursue these allegations and closes the file as to all Respondents.

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10 2. Legal Analysis

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committees are required to report the identifying information of each person who makes an aggregate contribution in excess of \$200 within the calendar year (or election cycle, in the case of an authorized committee), together with the date and amount of any such contribution.¹⁶

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¹⁶ 52 U.S.C. § 30104(b)(3)(A); *see also* 11 C.F.R. § 104.13(a).

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 8 description of the alleged activity and does not identify a specific Fox News report.²⁹ Similarly,
 9 the Complaint alleges that the *New York Times* allowed HFA to edit quotes and acted as a
 10 “surrogate” for the Clinton campaign, the *Boston Globe* agreed to “pump up” the Clinton
 11 campaign, and that Univision “collaborated” with HFA to attack Trump.³⁰ Because the
 12 Complaint lacks information to support these allegations, and the Commission is aware of none,
 13 there is insufficient indication that the alleged activity occurred.³¹

²⁶ Advisory Op. 2005-19 at 5 (Inside Track Productions) (citing First General Counsel’s Report, MUR 5449 (CBS Broadcasting, Inc.)).

²⁷ Compl. at 2.

²⁸ *Id.*

²⁹ *Id.*; see 11 C.F.R. § 111.4(d)(2) (“Statements which are not based upon personal knowledge should be accompanied by an identification of the source of information which gives rise to the complainants belief in the truth of such statements.”). The Commission is aware of a contemporaneous Fox News article suggesting that Harwood emailed HFA “on some occasions to request an interview and other times to offer advice,” but the only example of advice identified in the article was an email to HFA warning that “Ben Carson could give you real trouble.” *Bias Alert: WikiLeaks Exposes Media’s Secret Support of Clinton*, FOX NEWS, Oct. 12, 2016. NBC Universal asserts that Harwood “did not serve as an advisor to or a surrogate for the [Clinton] campaign.” NBCUniversal Media, LLC Resp. at 1.

³⁰ Compl. at 2-3.

³¹ See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12546 (Mar. 16, 2007) (explaining that a finding of “no reason to believe” is appropriate where “[a] complaint alleges a violation but is either not credible or is so vague that an investigation would be effectively impossible”).

Therefore, the Commission finds: (1) no reason to believe that the *New York Times*, *Politico*, Maggie Haberman, *The Hill*, Peter Huffman, CNBC, John Harwood, the *Boston Globe*, and Univision violated 52 U.S.C. §§ 30116(a)(1)(A) or 30118(a) by making excessive or corporate contributions; (2) no reason to believe that HFA violated 52 U.S.C. §§ 30116(f) or 30118(a) by knowingly accepting excessive and corporate contributions from these Media Respondents; and (3) no reason to believe that HFA violated 52 U.S.C. § 30104(b)(3)(A) by failing to report in-kind contributions from these Media Respondents.

B. The Commission Dismisses the Remaining Allegations as a Matter of Prosecutorial Discretion

The Complaint alleges that HFA coordinated with Donna Brazile, , then-vice chair of the Democratic National Committee and a CNN contributor, when she sent HFA an email with a question she expected would be asked at an upcoming Democratic primary debate sponsored by CNN.³² In addition, the Complaint alleges that HFA coordinated with various individual filmmakers on a project called “Filmmakers for Hillary” (“FFH Project”).³³ Finally, the Complaint alleges that HFA impermissibly “coordinated” with Priorities,³⁴ an independent-expenditure-only committee that supported Clinton’s 2016 campaign.³⁵

³² Compl. at 2. (

³³ *Id.* at 2.

³⁴ MUR 7153 Compl. at 2; MUR 7160 Compl. ¶ 17 (Oct. 24, 2016); MUR 7193 Compl. ¶ 12 (Nov. 7, 2016); *see* MUR 7097 Compl. at 1-2 (July 6, 2016).

³⁵ *See* Priorities USA Action Statement of Organization (April 29, 2011); Priorities USA Action 24/48 Hour Rpt. of Independent Expenditures (Nov. 4, 2016). Priorities reported total contributions of \$186,799,354 during the 2016 election cycle. Priorities USA Action, 2015 Year-End Rpt. at 3 (Jan. 31, 2016); Priorities USA Action, 2016 Year-End Rpt. at 3 (Jan. 31, 2017).

1 These allegations rely solely on information obtained from hacked documents.
2 Specifically, these documents were stolen and released through foreign-state-sponsored hacking
3 operations that the U.S. Intelligence Community and Department of Justice have deemed an
4 attack on the American democratic process.³⁶ The Commission has observed, against the
5 backdrop of such activity, that foreign cyberattacks “present unique challenges to both criminal
6 prosecution and civil enforcement,” and “fulfilling its ‘obligation to preserve the basic
7 conception of a political community’ under section 30121 cannot hinge solely on prosecution of
8 foreign violators abroad,” but instead “requires that countermeasures be taken within the United
9 States.”³⁷ The Commission declines to consider enforcement action against U.S. citizens based
10 on information derived from an illegal foreign attempt to interfere in our elections. Under these
11 circumstances, the Commission exercises its prosecutorial discretion and dismisses these
12 allegations.³⁸

13 Additionally, because the Complaint does not appear to allege a cognizable violation
14 against them, the Commission dismisses the allegations that individual Respondents who worked
15 for Priorities, Jim Messina, Jonathan Mantz, and Paul Begala, violated the Act in connection
16 with Priorities’ fundraising interactions with HFA.

³⁶ ICA at 1; *see* SCR at 3, 13.

³⁷ Advisory Op. 2018-12 at 8 (DDC) (quoting *Bluman*, 800 F. Supp. 2d at 287 (D.D.C. 2011)).

³⁸ *See* *Heckler v. Chaney*, 470 U.S. 821 (1985).