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**FACT**

FOUNDATION FOR  
ACCOUNTABILITY  
AND CIVIC TRUST

OFFICE OF GENERAL  
COUNSEL

October 31, 2016

Lisa J. Stevenson, Esq.  
Acting General Counsel  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

**MUR # 7188**

**Re: Complaint against LuAnn Bennett for Congress, the Democratic  
Congressional Campaign Committee (DCCC), and Hillary For America**

Dear Ms. Stevenson,

The Foundation for Accountability and Civic Trust (FACT) is a nonprofit organization dedicated to promoting accountability, ethics, and transparency in government and civic arenas. We achieve this mission by hanging a lantern over public officials who put their own interests over the interests of the public good. This complaint is filed by FACT, pursuant to 52 U.S.C. § 30109(a)(1), against LuAnn Bennett for Congress, the Democratic Congressional Campaign Committee (DCCC), and Hillary For America, for violations of the Federal Election Campaign Act, as amended.

On or about Sept. 30, 2016, LuAnn Bennett for Congress and the DCCC began airing the first of two hybrid advertisements supporting the candidacy of LuAnn Bennett, titled "Stand Up," which can be viewed on YouTube at <https://www.youtube.com/watch?v=xpHOFcWY30s>.

The first 21 seconds of the Bennett/DCCC "Stand Up" advertisement are devoted exclusively to tying Bennett's opponent, Representative Barbara Comstock to Donald Trump. The following 5 seconds supporting Bennett's candidacy for Congress with the statement "...we need LuAnn Bennett, standing up to Trump and Comstock." The final 3 seconds consist of Bennett's stand-by-your-ad message. The advertisement's written disclaimer reads: "Approved by LuAnn Bennett. Paid for by LuAnn Bennett for Congress and DCCC." The advertisement consists solely of messaging focused on individual candidates: Trump, Comstock, and Bennett, and does not mention either the Republican or Democratic Parties.

This advertisement includes a disclaimer that is appropriate for a hybrid ad benefiting Bennett and the DCCC, and media reports indicate that the DCCC and its candidates are characterizing ads such as the Bennett/DCCC ad as a hybrid ad.

[www.factdc.org](http://www.factdc.org)

1717 K Street NW, Suite 900, Washington, D.C., 20006

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be very specifically about Trump policy,” the consultant continued, to avoid falling afoul of rules governing in-kind contributions, since Trump is a candidate on the ballot this year.

Hybrid ads do come with complications. The phrasing needs to be just right, focusing equally on local candidates and broader references, to qualify as hybrids. Sources described an intensive vetting process for the ads, which includes the DCCC’s research and legal departments.

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The DCCC declined to comment on its strategy.

This type of ads [*sic*] has been a boon to some of Democrats’ latest-breaking House campaigns, many of which are low on cash.

Scott Bland, “*Dems use loophole to pump millions into fight for the House*,” Politico (Oct. 18, 2016), <http://www.politico.com/story/2016/10/democrats-house-campaign-money-229957>.

Bennett was specifically mentioned in the Politico Report, which noted that she had benefited from the DCCC ads:

This type of ads has been a boon to some of Democrats’ latest-breaking House campaigns, many of which are low on cash. Democrat LuAnn Bennett, the beneficiary of the anti-Comstock ad in Virginia, had just \$90,000 in her campaign account at the end of September, while Comstock had \$1.9 million, according to campaign finance reports filed last weekend. But since that last week of September, Bennett and the DCCC have aired over \$470,000 worth of TV ads together, with more likely coming.

Scott Bland, “*Dems use loophole to pump millions into fight for the House*,” Politico (Oct. 18, 2016), <http://www.politico.com/story/2016/10/democrats-house-campaign-money-229957>.

There is no “new legal guidance” from the Commission on this subject. The referenced “decade-old FEC precedent” does *not* permit the DCCC to substitute the standard “generic party reference” with material expressly advocating the defeat of Donald Trump while still attributing a portion of the costs of the advertisement to the DCCC. These ads are not clever hybrid ads that are legally permissible, but rather, are run-of-the-mill coordinated communications that yield excessive and illegal contributions to the identified Democratic candidates and Hillary Clinton. There is no “legal loophole” here; the DCCC and its candidates are simply breaking the law.

In fact, the *Politico* report suggests that the DCCC and its candidates have knowingly adopted this new tactic in spite of the fact that there is no legal justification for it, and that the illegal ads are a calculated risk undertaken for one very simple reason: the Democratic candidates’ House campaigns “are low on cash.”

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According to information provided by broadcast and cable stations, Luann Bennett for Congress and the DCCC have spent at least \$702,324 on television advertising jointly paid for by that candidate and the DCCC from September 1, 2016, through the filing of this Complaint. We have reason to believe this figure will grow between now and Election Day.

“Hybrid ads” (or “hybrid communications”) are “communications that refer *both* to one or more clearly identified Federal candidates and generically to candidates of a political party.” Notice of Proposed Rulemaking on Hybrid Communications, 72 Fed. Reg. 26,569, 26,770 (May 10, 2007) (emphasis added). *See also* Statement of Reasons of Chair Ellen L. Weintraub and Commissioners Cynthia L. Bauerly and Steven T. Walther; Audit of McCain-Palin 2008, Inc. and McCain-Palin Compliance Fund, Inc. at 1 (Feb. 4, 2013) (“Hybrid Communications are communications made by a political party (1) that refer to one or more clearly identified Federal candidates *and* (2) that also generically refer to other candidates of a political party without clearly identifying them.”) (emphasis added); Statement of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky on Final Audit Report on Bush-Cheney '04, Inc. (March 22, 2007) (noting the “‘generic reference’ *requirement*, which *requires* that the communication ‘generically refer[] to other candidates of the Federal candidate’s party’)” (emphasis added). The generic reference to candidates of a political party committee is critical to the concept of hybrid ads because that portion of the ad is attributable to the party committee only because the political party derives proportional benefit from the advertisement’s generic party references. Without the generic party references, the political party committee derives no benefit from its portion of the advertisement, and the costs of the political party’s portion must be paid for as a coordinated party expenditure or classified as an in-kind contribution to the clearly identified candidate.

The Bennett/DCCC advertisement contains no discernible portion that can be reasonably characterized as benefiting the Democratic Party’s congressional candidates as a whole. There is no message in support of the Democratic Party’s congressional candidates, and no message in opposition to the Republican Party’s congressional candidates. **Never before has a party committee substituted the accepted “generic party reference” in its portion of a hybrid ad with material that does nothing more than reference and attack a single candidate, in this case, presidential candidate Donald Trump.** As a result, the costs of these ads are not properly attributed between the clearly identified congressional candidate and the DCCC, because the only persons who may reasonably expect to derive any benefit from this advertisement are Luann Bennett and Hillary Clinton.

### Legal Background

While the concept of multi-purpose communications with allocated costs have existed for decades, the more modern practice of dividing the costs of hybrid broadcast ads between candidates and party committees first developed in the 2004 presidential campaign, and the legalities of that practice were addressed by the Commission in a series of decisions made in 2006-2007. The basic legal question that arises in the context of hybrid ads is whether one entity is paying for a benefit derived by another regulated entity while failing to treat that benefit as a contribution or coordinated expense. The law of hybrid broadcast ads is the product of two

regulatory provisions, a 2006 advisory opinion, two audits, and subsequent practice conforming to the Commission's precedents.

### ***Commission Regulations***

Commission regulations provide that "[e]xpenditures, including in-kind contributions, independent expenditures, and coordinated expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived." 11 C.F.R. § 106.1(a)(1). "For example, in the case of a publication or broadcast communication, the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates." *Id.*

A separate regulation addresses political party committee phone bank communications that refer to a clearly identified Federal candidate and "another reference that generically refers to other candidates of the Federal candidate's party without clearly identifying them." 11 C.F.R. § 106.8(a). Under this regulation, 50% of the cost of the phone bank is attributable to the clearly identified candidate, while the remaining 50% is not attributable to the candidate and may be paid by the party committee without reimbursement. The party committee's payment for the candidate-attributable portion may be reimbursed by the clearly identified Federal candidate (essentially creating a hybrid ad), treated as an in-kind contribution from the party committee to the clearly identified Federal candidate (subject to the relevant contribution limits), or classified as a party coordinated expenditure (subject to the relevant party coordinated expenditure limits). 11 C.F.R. § 106.8(b).

### ***2004 Presidential Campaign***

In 2004, Bush-Cheney '04 Inc. and the Republican National Committee, and Kerry-Edwards 2004 Inc. and the Democratic National Committee, produced and aired what came to be known as "hybrid ads." The costs of these hybrid ads were divided between the presidential campaign and the national party committee using a time-space allocation that attributed the presidential campaign portion of the advertisement to the presidential campaign, and the generic party portion to the national party committee. Both 2004 presidential campaigns received public funding.

### ***2006 Advisory Opinion***

In 2006, the Commission approved Advisory Opinion 2006-11 (Washington Democratic State Central Committee) and permitted a state party and federal candidate to evenly divide the costs of a mass mailing that "expressly advocate[d] the election of one clearly identified Federal candidate, as well as the elections of other candidates of the Democratic party who are referred to only generically." Advisory Opinion 2006-11 at 1 (emphasis added). The Commission noted that "[o]ne example of such a message would be: 'Vote for John Doe and our great Democratic team.'" *Id.* at 1 fn. 1. The Commission acknowledged that 11 C.F.R. § 106.1 and 11 C.F.R. § 106.8 were not "directly applicable" and that "[n]either the Act nor Commission regulations definitely address the appropriate allocation of payments for the type of mass mailings described





Along with two of my colleagues, I voted that the 50-50 split between Bush-Cheney '04 and the RNC for the cost of these "hybrid ads" was impermissible. As a result, I believe Bush-Cheney '04 failed to honor its commitment to abide by the expenditure limit. Moreover, both Bush-Cheney '04 and the RNC violated the coordinated contributions [sic] limits. Thus, I dissented from an earlier Commission vote approving the finding that the General Committee complied with the expenditure limit. And I will not approve a Final Audit Report that contains that finding.

Statement of Commissioner Ellen L. Weintraub on the Report of the Audit Division on Bush-Cheney '04, Inc. at 1.

The Kerry-Edwards 2004 Audit Report was considered at a later open session, roughly two months later. The final report contained the exact same language regarding the Commissioners' 3-3 division on the issue of hybrid ads that appeared in the Bush-Cheney '04, Inc. Audit Report, and was approved by the Commission by a 5-0 vote. With respect to the hybrid ad issue, the Kerry-Edwards 2004 Audit Report, like the Bush-Cheney '04 Audit Report, included the finding that the presidential campaign complied with the expenditure limit. Commissioner Weintraub voted to approve the Kerry-Edwards 2004 Audit Report, despite her earlier insistence that she could "not approve a Final Audit Report that contains that finding."

#### *2007 Notice of Proposed Rulemaking*

Subsequently, the Commission issued a Notice of Proposed Rulemaking regarding the proper attribution of hybrid communications. See Notice of Proposed Rulemaking on Hybrid Communications, 72 Fed. Reg. 26,569 (May 10, 2007). The 2007 NPRM defines hybrid communications as "communications that refer both to one or more clearly identified Federal candidates and generically to candidates of a political party." *Id.* at 26,570. The NPRM also indicates that the political party portion of a hybrid ad "generically refers to other candidates of a political party without clearly identifying them." *Id.* at 26,569.

The Commission's proposed rule "would address the attribution of disbursements for a public communication made by any national, State, district, or local party committee, including national congressional campaign committees and convention committees ..., that contain[] a generic party reference also refers to only one clearly identified Federal candidate, such as 'Show your support for Senator X and our other great Democratic candidates.'" *Id.* at 26,571. The focus of the NPRM was not on whether hybrid ads should be permitted, but rather, how disbursements for hybrid ads should be attributed. As noted in the NPRM, "[t]he proposed rule discussed below presents alternative methods for attributing the disbursements for various forms of hybrid communications made by political party committees, and would supersede and replace current 11 CFR 106.8." *Id.* at 26,570.

The Commission received comments and held a public hearing on July 11, 2007, but no final rule was ever issued.

## *2013 Consideration of McCain-Palin 2008, Inc., Audit Report*

The Audit Report for McCain-Palin 2008, Inc., did not contain findings pertaining to the hybrid ads paid for by McCain-Palin 2008 and the Republican National Committee. The three Democratic Commissioners objected to this "omission" and noted that "the issue of how political party committees attribute disbursements for Hybrid Communications remains of paramount concern." Statement of Reasons of Chair Ellen L. Weintraub and Commissioners Cynthia L. Bauerly and Steven T. Walther; Audit of McCain-Palin 2008, Inc. and McCain-Palin Compliance Fund, Inc. at 2.

### Conclusion

Since 2004, both parties have continued to distribute hybrid broadcast ads. Drawing on the 2004 audits, hybrid ads have generally reflected the generic party reference standard emphasized by the three Democratic Commissioners – that is, generic party references that explicitly reference "Democrats" and "Republicans" has been the norm.

**The Bennett/DCCC advertisement at issue is *not* a hybrid ad. While it is paid for by a candidate and a party committee, it contains absolutely no generic party reference that is fairly or reasonably attributable to the DCCC. Instead of a generic party reference, the DCCC's portion of the ad consists solely of material attacking Donald Trump. Accordingly, the DCCC's costs in connection with this advertisement are not properly attributed to the DCCC.**

If the advertisement at issue does not qualify as a hybrid ad, it is simply a coordinated communication. The portion of this ad that was paid for by the DCCC *could* be paid for by the DCCC as a party coordinated expenditure pursuant to 11 C.F.R. §§ 109.32 – 109.37. The ad's disclaimer indicates, and media reports confirm, however, that these advertisements are not party coordinated expenditures. To the extent that the DCCC has exceeded its assigned party coordinated expenditure limit with respect to Luann Bennett, the DCCC's payment for this advertising is an in-kind contribution to Luann Bennett for Congress and is subject to the national party committee's contribution limit of \$5,000 per election.

In addition, and in light of the close and ongoing coordination occurring between the DCCC and Hillary For America, Luann Bennett for Congress and the DCCC have also paid for a public communication that is coordinated with Hillary For America.<sup>1</sup> Unless the Democratic National Committee assigned some or all of its coordinated expenditure limit to the DCCC, the full amount of the cost of the Trump portion of this advertisement is properly classified an in-kind contribution to Hillary For America.

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<sup>1</sup> The advertisement was paid for by a political party committee or its agent, satisfies one or more content standards (the communication expressly advocates the defeat of Donald Trump, and/or references a Presidential candidate during the relevant covered period), and satisfies one or more conduct standards (material involvement and substantial discussion). See 11 C.F.R. § 109.37; see also 11 C.F.R. § 109.21.

For the reasons set forth above, we urge the Commission to find reason to believe violations of the law occurred, investigate the charges raised, and impose all appropriate penalties.

Sincerely,



Matthew G. Whitaker, Executive Director  
Foundation for Accountability & Civic Trust  
1717 K Street NW, Suite 900  
Washington, D.C. 20006

**VERIFICATION**

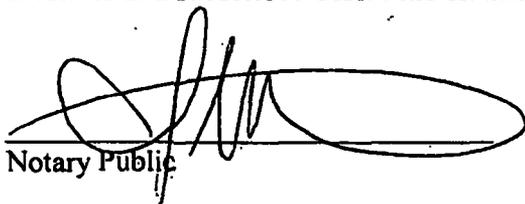
The Complainant listed below hereby verifies that the statements made in the attached complaint are, upon information and belief, true.

Sworn pursuant to 18 U.S.C. § 1001.

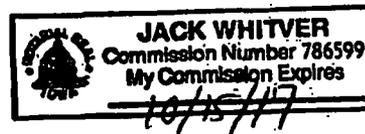


Matthew G. Whitaker, Executive Director  
Foundation for Accountability & Civic Trust  
1717 K Street NW, Suite 900  
Washington, D.C. 20006

Sworn to and subscribed before me on this 31st day of October 2016



Notary Public



## Attachment A

Dems Use Loophole To Pump Millions Into Fight For The House: By invoking Donald Trump and Republicans, the party is stretching its cash to compete in a slew of unexpectedly competitive races.

By Scott Bland

10/18/16 05:23 PM EDT

<http://www.politico.com/story/2016/10/democrats-house-campaign-money-229957>

The Democratic Party is directing millions of extra dollars to its House candidates this fall by way of a legal loophole that has helped them bypass the typical limits on coordinated spending between parties and candidates — all while linking some vulnerable Republicans to Donald Trump.

Typically, Federal Election Commission regulations limit parties to just \$48,100 of spending in direct coordination with most House candidates. But under a decade-old FEC precedent, candidates who word their TV ads a certain way — including references to generic “Democrats” and “Republicans” as well as specific candidates — can split the cost of those ads with their party, even if that means blowing past the normal coordinated spending caps.

Story Continued Below

To date, more than a dozen Democratic challengers are benefiting from such “hybrid” advertising, getting extra hundreds of thousands of dollars apiece from the Democratic Congressional Campaign Committee. The technique has been a small but consistent part of Democratic strategy in recent years, but new legal guidance has also allowed Democrats to share costs on ads linking their opponents to Trump on policy.

“You have a historically unpopular Republican presidential nominee, which increases the appeal of doing this sort of thing,” said a Democratic operative. “If you can find a way now that you only have to pay 50 percent of an ad, and link your opponent to Trump, and that makes strategic sense in the district, that’s a no-brainer.”

The cost-sharing has turned into a critical tool for the DCCC, as it suddenly tries to compete in more districts and support little-known challengers made unexpectedly viable by Trump’s late slide.

The ads that qualify for cost-splitting do exactly what Democrats already want to: nationalize House races and try to saddle local candidates — from Iowa to Nevada — with the Republican Party’s general unpopularity. And the influx of funds from the DCCC directly into candidate advertising has helped the party grow the battleground map, even including districts where the candidates themselves are perilously low on cash.

In one dramatic case, the DCCC appears set to spend over 30 times the FEC limit on normal coordinated expenditures to help former Democratic Rep. Brad Schneider of Illinois run TV ads against his better-funded opponent. The key is in the wording of the ads, which lump together GOP Rep. Bob “Dold and the Republicans.”

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The DCCC and candidates around the country have split over \$5.4 million on ad costs so far, according to a source tracking House ad spending, with millions more to come. The DCCC and Schneider have together booked more than \$3.2 million of advertising together through Election Day. Other candidates continue to book hundreds of new hybrid ad reservations every week.

Increasingly, some of the ads are naming Trump directly instead of linking GOP incumbents to generic "Washington Republicans." One in Northern Virginia charges GOP Rep. Barbara Comstock with having the same agenda as Trump on abortion and Planned Parenthood. "The legal logic is that it's half an issue ad paid for by the DCCC and half a candidate ad paid for by the candidate," said a second Democratic consultant, who has been involved in the production of hybrid ads in 2016. "The language has to be very specifically about Trump policy," the consultant continued, to avoid falling afoul of rules governing in-kind contributions, since Trump is a candidate on the ballot this year.

Hybrid ads do come with complications. The phrasing needs to be just right, focusing equally on local candidates and broader references, to qualify as hybrids. Sources described an intensive vetting process for the ads, which includes the DCCC's research and legal departments. And the wording can get clunky. Meeting the hybrid requirements is why, when President Barack Obama appeared in a Schneider TV ad this week, he awkwardly shoehorned Schneider's party into his endorsement. "Vote for Brad Schneider and the Democrats," Obama says in the ad. Hybrid ads have typically been deployed only in districts that lean strongly toward one party, making links to "Democrats" or "Republicans" damaging to local candidates. But Trump's massive unpopularity has made more districts fruitful ground for the advertising technique. "We can only do it in certain districts," said a third Democratic operative. "But it's increasing numbers of districts as Trump's numbers fall."

The DCCC declined to comment on its strategy.

This type of ads has been a boon to some of Democrats' latest-breaking House campaigns, many of which are low on cash. Democrat LuAnn Bennett, the beneficiary of the anti-Comstock ad in Virginia, had just \$90,000 in her campaign account at the end of September, while Comstock had \$1.9 million, according to campaign finance reports filed last weekend. But since that last week of September, Bennett and the DCCC have aired over \$470,000 worth of TV ads together, with more likely coming.

Bennett is one of more than a half-dozen top Democratic House candidates who started the final six weeks of the campaign with less than \$150,000 in their accounts, which wouldn't cover even a week of heavy TV advertising in some places. Many of them started their campaigns late or weren't initially considered marquee recruits, leaving them short on funds when the national political environment started to turn in Democrats' direction.

The DCCC, however, just announced a record \$21 million raised in September, with a hefty \$45.5 million on hand at the end of that month. Democrats have long noted that money would be a limiting factor on just how far the party could stretch its House hopes this year. But the hybrid ads are helping the committee save some money while contesting an increasing number of House districts, many of which are in some of the country's most expensive media markets.

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Since that last week of September, Democrat LuAnn Bennett and the DCCC have aired over \$470,000 worth of TV ads together, with more likely coming.

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Since the hybrid ads are coordinated directly with candidates, who are guaranteed the “lowest unit rate” on ads from TV stations, the DCCC isn’t paying premium outside-group rates to spend that money on TV. When the DCCC airs independent expenditure ads separately from the candidates in these districts, it will usually pay a higher rate than a candidate even to run an ad on the exact same program.

“It is one of our shields against the insane amounts of outside money coming into these districts,” said a fourth Democratic strategist.

Florida Democrat Stephanie Murphy started her House campaign only in June but has since benefited from over \$270,000 in ads partially funded by the DCCC in Orlando, some of which say that veteran GOP Rep. John Mica “and Donald Trump share the same harmful policies.” Donald Trump's 'rigged' election

Michigan’s Suzanna Shkreli, whose campaign kicked off in July and has recently generated enthusiasm among Democrats watching the House landscape for late opportunities, is another who appears to be leaning on the technique. In upstate New York, Democrat Colleen Deacon has tried to jolt her underdog campaign by linking GOP Rep. John Katko to Trump’s foreign policy views.

And Doug Applegate, a Southern California Democrat and first-time candidate making a surprisingly strong run against GOP Rep. Darrell Issa, has been one of the biggest beneficiaries of the DCCC’s emphasis on hybrids. An ad-buyer estimated Applegate and the DCCC have together aired over \$960,000 of TV ads in the past month — during which time Applegate filed an FEC report showing him with just \$167,000 in his campaign account, compared with Issa’s \$3 million-plus.

“Darrell Issa and the tea party Republicans tried to play politics with our lives,” a 9/11 first responder says in one of Applegate’s ads. Other spots paid for by Applegate and the DCCC reference Trump, including one charging that both Trump and Issa “gamed the system” to direct taxpayer money to themselves.

Democrats are making heavy use of hybrid ads now, but they have a bipartisan tradition. President George W. Bush’s 2004 campaign used them heavily in conjunction with the Republican National Committee, and the FEC deadlocked on whether to continue allowing the practice.

“The reason this happens is that the coordinated limits are now increasingly irrelevant in campaigns, because the campaigns are so expensive,” said a Republican legal expert. “There is

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so much money spent now that the parties want to stretch the coordinated limits so that they're somewhat relevant."

Scott Bland, "*Dems use loophole to pump millions into fight for the House*," Politico (Oct. 18, 2016), <http://www.politico.com/story/2016/10/democrats-house-campaign-money-229957>.

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