

FEDERAL ELECTION COMMISSION**FIRST GENERAL COUNSEL'S REPORT****MUR 7654**

DATE COMPLAINT FILED: October 28, 2019

DATE OF NOTIFICATIONS: November 1, 2019

LAST RESPONSE RECEIVED: December 26, 2019

DATE ACTIVATED: February 20, 2020

EARLIEST SOL: September 28, 2023

LATEST SOL: October 31, 2023

ELECTION CYCLE: 2018

COMPLAINANTS:

Campaign Legal Center

End Citizens United

Margaret Christ

RESPONDENTS:America First Action, Inc. and Jon Proch in his
official capacity as treasurer

OnMessage, Inc.

Starboard Strategic, Inc.

Josh Hawley for Senate and Salvatore Purpura in
his official capacity as treasurerMatt Rosendale for Montana and Errol Galt in his
official capacity as treasurerPete Sessions for Congress and Steve Hargrove in
his official capacity as treasurerNational Media Research, Planning and Placement,
LLC**MUR 7660**

DATE COMPLAINT FILED: November 1, 2019

DATE OF NOTIFICATIONS: October 29, 2018

LAST RESPONSE RECEIVED: December 3, 2019

DATE ACTIVATED: February 20, 2020

EARLIEST SOL: February 27, 2019

LATEST SOL: November 3, 2019

ELECTION CYCLE: 2014

COMPLAINANT:

Amber Dahlin

RESPONDENTS:National Rifle Association of America Political
Victory Fund and Robert Owens, in his official
capacity as treasurer

1 National Rifle Association of America Institute for
2 Legislative Action and Robert Owens, in his
3 official capacity as treasurer
4 Cory Gardner for Senate and Lisa Lisker in her
5 official capacity as treasurer
6 Cory Gardner
7 OnMessage, Inc.
8 Starboard Strategic, Inc.
9

10 **I. INTRODUCTION**
11

12 The Complaints in these two matters involve separate allegations that America First
13 Action, Inc. and Jon Proch in his official capacity as treasurer (“AFA”), the National Rifle
14 Association of America Political Victory Fund and Robert Owens in his official capacity as
15 treasurer (the “NRA-PVF”), and the National Rifle Association Institute for Legislative Action
16 and Robert Owens in his official capacity of treasurer (the “NRA-ILA”) (collectively the “NRA
17 Respondents”) made excessive, prohibited, and unreported in-kind contributions to federal
18 candidates using a common vendor. The Complaint in MUR 7654 alleges that during the 2018
19 election cycle AFA made millions in excessive, prohibited, and unreported in-kind contributions
20 to Josh Hawley for Senate and Salvatore Purpura in his official capacity as treasurer (the
21 “Hawley Committee”), Matt Rosendale for Montana and Errol Galt in his official capacity as
22 treasurer (the “Rosendale Committee”), and Pete Sessions for Congress and Steve Hargrove in
23 his official capacity as treasurer (the “Sessions Committee.”)¹ The MUR 7660 Complaint,
24 consistent with the complaint submitted in MUR 7427, alleges that the NRA Respondents
25 coordinated communications with Cory Gardner’s principal campaign committee, Cory Gardner

¹ See Compl. at 2 (Oct. 25, 2019), MUR 7654.

1 for Senate and Lisa Lisker in her official capacity as treasurer (“Gardner Committee”) during the
2 2014 election cycle.²

3 For the reasons that follow, we recommend that the Commission: (1) find reason to
4 believe that AFA violated 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a) by making and failing
5 to report excessive and prohibited in-kind contributions in the form of coordinated
6 communications to the Hawley Committee, the Rosendale Committee, and the Sessions
7 Committee; (2) take no action at this time with respect to the Hawley Committee, Rosendale
8 Committee, and Sessions Committee; and (3) merge MUR 7660 into MUR 7427.

9 **II. MUR 7654 (COORDINATION ALLEGATIONS AGAINST AFA AND**
10 **POLITICAL CANDIDATE COMMITTEES)**

11 **A. Factual Background**
12

13 AFA is registered with the Commission as an independent expenditure-only political
14 committee (“IEOPC”). In registering as an IEOPC, AFA stated its intent “to raise funds in
15 unlimited amounts,” but pledged that it would “not use those funds to make contributions,
16 whether direct, in-kind, or via coordinated communications to federal candidates or
17 committees.”³

18 In the 2018 election cycle, Matt Rosendale was a candidate for U.S. Senate in Montana
19 and Josh Hawley was a candidate for U.S. Senate in Missouri.⁴ Pete Sessions was a candidate

² See Compl. (Nov. 16, 2019), MUR 7660. See also Compl. ¶¶ 2, 42-55, MUR 7427; Compl. ¶¶ 3, 51-55, 60-66, MUR 7497; Compl. ¶¶ 2, 63-66, MUR 7524.

³ Compl at 3, MUR 7654, citing AFA Amended Statement of Organization, FEC Form 1, at 1 (Nov. 14, 2017).

⁴ See Matt Rosendale, Amended Statement of Candidacy (Oct. 13, 2017); Josh Hawley, Amended Statement of Candidacy (May 9, 2018).

1 for the U.S. House in Texas's 32nd congressional district in 2018.⁵

2 National Media Research, Planning and Placement, LLC ("National Media") is a Virginia
3 company organized in 2006 that provides political consulting services and operates under the
4 names "Red Eagle Media Group" and "American Media & Advocacy Group ("AMAG")."⁶
5 Respondents have previously acknowledged that National Media, Red Eagle, and AMAG are the
6 same company.⁷

7 Founded in 2005, OnMessage is a political consulting firm that provides media
8 consulting services.⁸ During the 2018 election cycle, OnMessage provided media consulting
9 services to the Sessions, Hawley, and Rosendale Committees; in some instances, OnMessage
10 subcontracted the placement of ads through National Media.⁹

11 During the 2018 election cycle, AFA reported making more than \$2.6 million in
12 independent expenditures opposing Hawley's opponent, Claire McCaskill, in Missouri's U.S.
13 Senate race.¹⁰ Included in those expenditures were more than \$2.2 million in disbursements to
14 National Media, through its Red Eagle fictitious name, for "placed media."¹¹ In the Montana

⁵ See Pete Sessions, Amended Statement of Candidacy (Feb. 2, 2018).

⁶ See National Media, Commonwealth of Virginia State Corporation Commission, <https://sccefile.scc.virginia.gov/Business/S207052>; National Media, Certificate of Assumed or Fictitious Name "Red Eagle Media Group," Commonwealth of Virginia State Corporation Commission (Mar. 27, 2014); National Media, Certificate of Assumed or Fictitious Name "American Media & Advocacy Group," Commonwealth of Virginia State Corporation Commission (Dec. 12, 2018).

⁷ See, e.g., NRA Resp. at 5, MUR 7553 (Jan. 29, 2019) (on behalf of National Media); NRA Resp. at 4, MUR 7524 (Dec. 17, 2019) (on behalf of National Media, among others).

⁸ See OnMessage, Articles of Incorporation (Apr. 13, 2005).

⁹ Response of National Media and OnMessage ("NatMedia Resp.") at 4, MUR 7654 (Dec. 20, 2019).

¹⁰ See AFA, Disbursements for Independent Expenditures ("IEs") opposing McCaskill, 2017-2018 (regularly scheduled reports).

¹¹ See AFA, Disbursements to Red Eagle for IEs opposing McCaskill, 2017-2018 (regularly scheduled reports).

1 Senate race, AFA reported disbursements of more than \$1.6 million to Red Eagle Media for
2 “placed media” in connection with independent expenditures opposing Rosendale’s opponent,
3 Jon Tester.¹² And in the U.S. House race in Texas’s 32nd Congressional District, AFA reported
4 disbursements of nearly \$2.8 million paid to Red Eagle Media in connection with independent
5 expenditures opposing Sessions’s opponent, Colin Allred.¹³

6 Meanwhile, National Media, through its AMAG fictitious name, provided media services
7 to the Hawley, Rosendale, and Sessions Committees, including selecting and purchasing
8 advertising slots and audiences.¹⁴ Specifically, these committees reported paying OnMessage
9 for media buys in amounts totaling more than \$1,8 million (Sessions), \$6.5 million (Hawley) and
10 \$2.8 million (Rosendale), respectively.¹⁵ In turn, OnMessage subcontracted with AMAG to
11 place each candidate’s committee broadcast ads during the 2018 election cycle.¹⁶

12 **B. Legal Analysis**

13 1. Legal Standard

14 The Federal Election Campaign Act of 1971, as amended, defines the terms
15 “contribution” and “expenditure” to include “anything of value” made by any person for the
16 purpose of influencing an election.¹⁷ The term “anything of value” includes in-kind

¹² See AFA, Disbursements to Red Eagle for IEs opposing Tester, 2017-2018 (regularly scheduled reports).

¹³ See AFA, Disbursements to Red Eagle for IEs opposing Allred, 2017-2018 (regularly scheduled reports).

¹⁴ Compl. at 2, MUR 7654.

¹⁵ See Sessions Committee, TV Ad and Media Buy Disbursements to OnMessage, 2017-2018 (regularly scheduled reports); Hawley Committee, Media Disbursements to OnMessage, 2017-2018 (regularly scheduled reports); and Rosendale Committee, TV Ad and Media Buy Disbursements to OnMessage, 2017-2018. (regularly scheduled reports).

¹⁶ See Compl. at 7, 11, and 14, MUR 7654; NatMedia Resp. at 4, MUR 7654.

¹⁷ 52 U.S.C §§ 30101(8)(A)(i), 30101(9)(A)(i).

1 contributions.¹⁸ In-kind contributions result when goods or services are provided without charge
2 or at less than the usual and normal charge,¹⁹ and when a person makes an expenditure in
3 cooperation, consultation or in concert with, or at the request or suggestion of a candidate or the
4 candidate's authorized committee or their agents.²⁰

5 Under Commission regulations, expenditures for "coordinated communications" are
6 addressed under a three-prong test at 11 C.F.R. § 109.21 and other coordinated expenditures are
7 addressed under 11 C.F.R. § 109.20(b). The Commission has explained that section 109.20(b)
8 applies to "expenditures that are not made for communications but that are coordinated with a
9 candidate, authorized committee, or political party committee."²¹ Under the three-prong test for
10 coordinated communications, a communication is coordinated and treated as an in-kind
11 contribution when it is paid for by someone other than a candidate, a candidate's authorized
12 committee, a political party committee, or the authorized agents of either (the "payment prong");
13 satisfies one of five content standards (the "content prong"); and satisfies one of five conduct
14 standards (the "conduct prong").²² A communication must satisfy all three prongs to be a
15 "coordinated communication."

¹⁸ 11 C.F.R. § 100.52(d).

¹⁹ *Id.*

²⁰ 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.20. *See also Buckley v. Valeo*, 424 U.S. 1, 46-47 (1976).

²¹ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003); *see also* Advisory Opinion 2011-14 (Utah Bankers Association).

²² 11 C.F.R. § 109.21(a); *see also id.* § 109.21(b) (describing in-kind treatment and reporting of coordinated communications); *id.* § 109.21(c), (d) (describing content and conduct standards, respectively). A sixth conduct standard describes how the other conduct standards apply when a communication republishes campaign materials. *See id.* § 109.21(d)(6).

1 The “conduct prong” is satisfied by: (1) communications made at the “request or
2 suggestion” of the relevant candidate or committee; (2) communications made with the “material
3 involvement” of the relevant candidate or committee; (3) communications made after a
4 “substantial discussion” with the relevant candidate or committee; (4) specific actions of a
5 “common vendor;” (5) specific actions of a “former employee or independent contractor”; and
6 (6) specific actions relating to the dissemination of campaign material.²³

7 The MUR 7654 Complaint alleges coordination through a common vendor.²⁴

8 The “common vendor” standard of the conduct prong has three elements: (i) the person paying
9 for the communication, or an agent of such person, uses a “commercial vendor”²⁵ to create,
10 produce, or distribute the communication; (ii) the vendor previously provided certain enumerated
11 services to the candidate identified in the communication during the previous 120 days; and
12 (iii) the commercial vendor uses or conveys to the person paying for the communication:

13 (A) Information about the campaign plans, projects, activities, or needs of the
14 clearly identified candidate, the candidate’s opponent, or a political party
15 committee, and that information is material to the creation, production, or
16 distribution of the communication; or

17
18 (B) Information used previously by the commercial vendor in providing
19 services to the candidate who is clearly identified in the communication,
20 or the candidate’s authorized committee, the candidate’s opponent, the
21 opponent’s authorized committee, or a political party committee, and that
22 information is material to the creation, production, or distribution of the
23 communication.²⁶

²³ *Id.* § 109.21(d).

²⁴ Compl. at 25, MUR 7654.

²⁵ A commercial vendor includes “any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease, or provision of those goods or services.” 11 C.F.R. § 116.1(c). A “commercial vendor” also includes “any owner, officer, or employee of the commercial vendor.” *Id.* § 109.21(d).

²⁶ 11 C.F.R. § 109.21(d)(4); *see id.* § 116.1(c).

1 Commission regulations state that a candidate or authorized committee “does not receive
2 or accept an in-kind contribution” resulting from coordination through a common vendor unless
3 the communication was made at the request or suggestion of, with the material involvement of,
4 or after substantial discussions with, the candidate or authorized committee.²⁷ Further, the
5 Commission has crafted a safe harbor provision for commercial vendors that have established
6 and implemented a written firewall policy that meets certain requirements.²⁸

7 A firewall policy satisfies the “safe harbor” if it: (1) is “designed and implemented to
8 prohibit the flow of information between employees or consultants providing services for the
9 person paying for the communication and those employees or consultants currently or previously
10 providing services to the candidate” who is identified in the communication, or “the candidate’s
11 authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a
12 political party committee”; and (2) is “described in a written policy that is distributed to all
13 relevant employees, consultants, and clients affected by the policy.”²⁹ The safe harbor, however,
14 “does not apply if specific information indicates that, despite the firewall, information about the
15 candidate’s . . . campaign plans, projects, activities, or needs that is material to the creation,
16 production, or distribution of the communication was used or conveyed to the person paying for
17 the communication.”³⁰

²⁷ 11 C.F.R. § 109.21(b)(2); *see id.* § 109.21(d)(1)-(3).

²⁸ *Id.* § 109.21(h).

²⁹ *Id.* § 109.21(h)(1)-(2).

³⁰ *Id.* § 109.21(h).

1 2. The Commission Should Find Reason to Believe that AFA Made
2 Excessive and Prohibited In-Kind Contributions to the Hawley,
3 Rosendale, and Sessions Committees in the Form of Coordinated
4 Communications Through National Media

5 The Complaint in MUR 7654 alleges that AFA coordinated ads with the Hawley,
6 Rosendale, and Sessions Committees using National Media as a common vendor.³¹ None of the
7 Respondents dispute that the AFA's ads satisfy the payment and content prongs of the
8 coordinated communications test and the first two elements of the common vendor standard of
9 the conduct prong.³² In dispute is whether the third element of the common vendor standard has
10 been satisfied — *i.e.*, whether there was use or conveyance of material information.

11 The MUR 7654 Complaint alleges that the same National Media official placed ads for
12 both the AFA and the aforementioned candidate committees, disseminating ads with the same
13 intended audience, on the same TV station, and at the same time.³³ Attached as exhibits to the
14 Complaint are documents obtained from the Federal Communication Commission's ("FCC")
15 public database that contain information about ads National Media placed for AFA and the
16 aforementioned committees.³⁴

17 The available information indicates that National Media used or conveyed non-public
18 information to AFA about the Hawley, Rosendale, and Sessions Committees' "plans, projects,
19 activities or needs" that was material to the placement of the AFA's communications. The

³¹ See Compl. at 2, MUR 7654.

³² See generally AFA Resp., MUR 7654; Response of the Hawley Committee ("Hawley Committee Resp.") (Dec. 20, 2019), MUR 7654; Response of the Rosendale Committee ("Rosendale Resp.") (Dec. 4, 2019), MUR 7654; Response of the Sessions Committee ("Sessions Committee Resp.") (Dec. 26, 2019), MUR 7654; see also First General Counsel's Report at 26, 29, 34, MURs 7427, 7497, 7524, 7553.

³³ See Compl. at 1-2, 9, 11-12, MUR 7654.

³⁴ These FCC filings were also attached to the Complaint in MUR 7654. See Compl. Exs., MUR 7654.

1 submitted FCC filings show that the same National Media official was involved in the placement
2 of ads for AFA and the Hawley, Rosendale, and Sessions Committees, and included ads that
3 were placed on the same television station, within days of each other, running during the same
4 time period or in close proximity. Specifically, in at least eight instances,³⁵ Jon Ferrell, National
5 Media's Director of Accounting, signed agreements for the placement of ads on behalf of AFA
6 and either the Sessions, Hawley, or Rosendale Committees.³⁶ In one instance, Farrell signed
7 agreements on behalf of both the Rosendale Committee and AFA on October 8, 2018, with the
8 ads for both entities airing on television station KECI at the same time period.³⁷ The Rosendale
9 Committee ads aired from October 9, 2018, through October 16, 2018, at a cost of \$13,065.³⁸
10 Contemporaneously, the AFA ads attacking Rosendale's opponent aired on television station
11 KECI from October 5, 2018, through October 11, 2018, in amounts totaling \$37,260.³⁹ Over a
12 three day period — October 9, 2018 through October 11, 2018 — the AFA and Rosendale
13 Committee ads both appeared on eight television programs, which included "The NBC Today

³⁵ The Complaint refers to other instances in which National Media effectively placed ads for AFA and the Sessions Committee without the corresponding forms establishing that Ferrell signed on behalf on both entities. Compl at 7-16, MUR 7654. There, AFA either filed the "Agreement Form for Non-Candidate/Issue Advertisements" with Ferrell's signature but the "Agreement Form for Political Candidate Advertisements" for Sessions Committee ads that aired during the same time period or in close proximity to the AFA ads was not disclosed, or vice versa. *See* Compl. ¶¶ 19(a), (b), (g), and (h), MUR 7654. In two other instances, the Complaint refers to Sessions Committee and AFA ads that aired during overlapping periods, but does not include either agreement form. *See* Compl. ¶¶ 19(c) and (f), MUR 7654. The FCC's online public database likewise does not include the forms absent in the Complaint or attached exhibits.

³⁶ *See* Compl. ¶¶ 19, 22, and 25, MUR 7654.

³⁷ *See* Compl., Montana Ex. A, MUR 7654. The National Media/OnMessage Response states that AFA had order dates for the TV ads at issue on September 28, 2018, to run from October 5, 2018, through October 11, 2018. NatMedia Resp. at 9. The Rosendale Committee ordered the ads on October 5, 2018, to run from October 9, 2018, through October 15, 2018. *Id.*

³⁸ *See* Compl., Montana Ex. A at 10-12, MUR 7654.

³⁹ *See* Compl., Montana Ex. B at 11, 13, MUR 7654.

1 Show,” the local television evening news programs at 5, 6 and 10 p.m., respectively, “Ellen,”
2 “The Voice,” and “The Tonight Show with Jimmy Fallon.”⁴⁰

3 This same pattern of overlapping ads appeared with respect to Farrell’s signed
4 agreements on behalf of the Hawley Committee and AFA. On October 11, 2018, Ferrell signed
5 the “Agreement Form for Political Candidate Advertisements” on behalf of the Hawley
6 Committee, to air ads on television station KOLR from October 16, 2018, through October 22,
7 2018, in amounts totaling \$25,405.06.⁴¹ Six days later, on October 17, 2018, Ferrell signed the
8 corresponding “Agreement Form for Non-Candidate/Issue Advertisements” on behalf of Red
9 Eagle for AFA, to run ads on television station KOLR from October 17, 2018, through
10 October 23, 2018, in amounts totaling \$26,785.⁴² During the overlapping period of October 17,
11 2018 through October 22, 2018, National Media placed ads to air on the same programs, which
12 included KOLR.’s early morning news broadcasts at 5:00 a.m. and 5:30 a.m., respectively,
13 “NCIS,” “NCIS: New Orleans,” and “NCIS: Los Angeles.”⁴³ Additionally, National Media
14 placed Hawley Committee and AFA ads to run on programs airing in close proximity.
15 Specifically, on October 23, 2018, National Media placed an AFA sponsored ad to air during the
16 “NFL London Game” on television station KOLR, which had an airtime of 8:30 a.m. to 11:00
17 a.m.⁴⁴ Subsequently, National Media placed a Hawley Committee ad to air during the next NFL

⁴⁰ See Compl., Montana Exs. A and B, MUR 7654.

⁴¹ See Compl., Missouri Ex. L, MUR 7654.

⁴² Though not included in the Complaint, the FCC’s online public database discloses this form. See Licensing & Databases Public Inspection Files-Broadcast Stations TV, https://publicfiles.fcc.gov/tv-profile/kolr/search/america_first_action.

⁴³ See Compl., Missouri Exs. L and M, MUR 7654.

⁴⁴ See Compl., Missouri Ex. M, MUR 7654.

1 game (Cincinnati Bengals v. the Kansas City Chiefs) on the same television station, which was
2 slotted to air between 12:00 p.m. to 3 p.m.⁴⁵

3 In another example, on a contract originally dated September 27, 2018, and revised
4 October 9, 2018, AFA through Red Eagle contracted to place \$205,800 in AFA ads to run from
5 October 10 through October 16, 2018 on television station KDFW.⁴⁶ Ferrell signed the
6 corresponding “Agreement Form for Non-Candidate/Issue Advertisements” on behalf of Red
7 Eagle for AFA.⁴⁷ On the same television station, Ferrell signed the corresponding “Agreement
8 Form for Political Candidate Advertisements” as an “agent for Pete Sessions for Congress” to a
9 contract originally dated September 28, 2018, which was revised on October 2, 2018, and
10 uploaded to the FCC database on October 4, 2018. Under the terms of this contract, AMAG
11 placed \$77,850 in Sessions Committee ads for the period September 29, 2018, through
12 October 8, 2018. Also during this period, Ferrell signed an “Agreement Form for Political
13 Candidate Advertisements” as an “agent for Josh Hawley for Senate” dated August 16, 2018, for
14 ads totaling \$2,805 supporting Josh Hawley, which ran from October 9, 2018, to October 15,
15 2018, on the television station WSIL⁴⁸ Subsequently, Ferrell signed an October 3, 2018,
16 “Agreement Form for Non-Candidate/Issue Advertisements” on behalf of AFA to run ads
17 totaling \$25,675 supporting Hawley or attacking his opponent on television station WSIL during

⁴⁵ See Compl., Missouri Ex. L, MUR 7654.

⁴⁶ See Compl. Texas Ex. M, MUR 7654.

⁴⁷ Compl., Texas Exs. M and N, MUR 7654. The National Media/OnMessage Response asserts that the order date for these TV ads was September 18, 2018. NatMedia Resp at 7.

⁴⁸ See Compl., Missouri Ex. B, MUR 7654. The National Media/OnMessage Response identifies order dates for the Rosendale and AFA TV ads to be August 15, 2018, and September 21, 2018, respectively. NatMedia Resp. at 8.

1 the same time period.⁴⁹ The Hawley Committee and AFA ads thus aired on numerous television
2 programs on the same date during this time period, including local news broadcasts airing at 6:00
3 a.m., 6:00 p.m., 6:30 p.m., and 10:00 p.m., respectively, “Good Morning America” and “Jimmy
4 Kimmel Live!”⁵⁰

5 In a previous matter, the Commission found reason to believe that the third element of the
6 common vendor conduct prong was satisfied and investigated where a principal of a common
7 vendor, “while providing consulting services, arranging media buys, and producing television
8 ads” for the candidate committee, was also providing the same services to an organization that
9 supported the candidate.⁵¹ These dual roles, the Commission explained, placed the principal of
10 the common vendor “in a position to know non-public information regarding” the candidate’s
11 campaign and the organization’s plans for the election cycle and to use or convey that
12 information in advising and guiding both clients, including on issues related to the allocation of
13 resources.⁵²

14 Here, the available information similarly indicates that the same National Media official,
15 Ferrell, was involved in the placement of ads for both the AFA and the Hawley, Rosendale and
16 Sessions Committees, putting him in a position to know non-public information that may have
17 informed the placement of the AFA’s ads supporting the aforementioned candidates. And as
18 outlined above, the parallel placement and distribution of the ads by National Media provide

⁴⁹ Compl., Missouri Ex. D, MUR 7654.

⁵⁰ See Compl., Missouri Exs. C and E, MUR 7654.

⁵¹ See Factual & Legal Analysis at 3-4, 6-7, 10-11, MUR 5415 (Club for Growth).

⁵² *Id.* The Commission subsequently voted to take no further action, concluding that the investigation produced no evidence of common vendor coordination. See Commission Certification, MUR 5415 (Nov. 12, 2008) (Club for Growth); Third General Counsel’s Report at 15, MUR 5415 (Club for Growth).

1 additional support for the inference that non-public information about these committees' plans,
2 activities, and needs influenced National Media's placement of AFA's ads.

3 Respondents argue that the Commission's coordination standard is not met here.⁵³

4 National Media, for instance, claims that it adopted and implemented a firewall policy that
5 prohibited the same employees or consultants from performing "work relating to more than one
6 client on opposite sides of the firewall, for the same election or race."⁵⁴ And AFA attaches to its
7 Response a redacted independent contractor agreement with Red Eagle that includes a "Non-
8 Coordination" provision, which prohibits contacts between the vendor and AFA regarding the
9 plans, projects, activities or needs of a federal candidate, or similarly situated contacts between
10 the vendor and the candidate regarding AFA.⁵⁵ But under its plain terms, the National Media
11 policy does not apply to management or administrative employees such as Ferrell.⁵⁶ Further, the
12 firewall policy was not signed by any National Media employee, and there are no details
13 regarding when it was distributed and how it was implemented.⁵⁷ And while AFA's stated
14 policy includes provisions regarding coordinated contacts, Ferrell's activities on both sides of the
15 firewall during the same time period indicates that the policy was insufficient to ensure that the

⁵³ See generally NatMedia Resp., Ex. A., MUR 7654; AFA Resp., MUR 7654.

⁵⁴ NatMedia Resp., Ex. A., MUR 7654.

⁵⁵ AFA Resp.; Ex. A., MUR 7654.

⁵⁶ Specifically, the firewall policy excludes "employees or consultants who provide exclusively administrative assistance (e.g., reception, clerical, or IT support)" or "employees who perform management functions (e.g., financial, strategic, or corporate leadership) which affect all AMAG clients" from the firewall policy. NatMedia Resp., Ex. A., MUR 7654.

⁵⁷ *Id.* The Commission has stated that a "person paying for a communication seeking to use the firewall safe harbor should be prepared to provide reliable information (e.g., affidavits) about an organization's firewall, and how and when the firewall was distributed and implemented." Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006). As we noted in the First General Counsel's Report in MUR 7553, National Media has not provided this information. See First General Counsel's Report at 21, MUR 7427, 7497, 7524, 7553.

1 same employees could not simultaneously perform work for AFA and the candidates at issue in
2 this matter. Under these circumstances, it appears that the firewall policy failed to prevent
3 material information about the candidate's communication strategies from being used by
4 National Media officials, or passing to AFA, and thus that the firewall safe harbor does not
5 apply.⁵⁸

6 Respondents further contend that the fact that ad buy information is publicly available
7 and disclosed "immediately" through the FCC's public database renders common vendor
8 coordination legally impossible.⁵⁹ But the third element of the common vendor standard focuses
9 on whether the commercial vendor uses or conveys to the person paying for the communication
10 information that is material to its distribution, irrespective of when the communication airs.⁶⁰
11 Further, the argument that the ad buys were publicly available ignores the key fact that the *same*
12 company and personnel placed ads for both the payor and the candidate committee, belying the
13 contention that the relevant participants relied solely on information in the stations' public
14 inspection files to make placement decisions. Importantly, Respondents do not argue that they in
15 fact relied on publicly available information to make their ad placement decisions, or even that
16 they were contemporaneously aware of the information in the public inspection files.⁶¹

⁵⁸ See 11 C.F.R. § 109.21(h).

⁵⁹ See AFA Resp. at 2, MUR 7654; NatMedia Resp. at 3, MUR 7654. "To qualify for the safe harbor, the person paying for the communication bears the burden of showing that the information used in creating, producing, or distributing the communication was obtained from a publicly available source." 71 Fed. Reg. at 33,205.

⁶⁰ See 11 C.F.R. § 109.21(d)(4)(iii).

⁶¹ See generally NatMedia Resp. Respondents' failure to assert that their ad placement decisions were actually based on information in the stations' public files distinguishes this matter from MUR 5506 (EMILY's List). See First General Counsel's Report at 5-7, MUR 5506 (concluding that the response rebuts allegation of coordination because the committee "states that it made its decisions about placing and pulling ads on information that television stations are required to make public"), Commission Certification, MUR 5506 (Aug. 12, 2005).

1 Respondents also contend that Ferrell's signature on the NAB Form PB-18, *i.e.*, the
2 "agreement form," is merely administrative and that Ferrell does not "authorize" the ad buys
3 placed by National Media's media buyers.⁶² They insist the "agreement forms" that bear
4 Ferrell's signature (NAB Form PB-18) are not contracts, do not "authorize the airing" or
5 placement of ads, and "have nothing whatsoever to do with the selection of audiences and time
6 slots."⁶³ Respondents further contend that Ferrell performs an administrative position at
7 National Media and that his position is one that cannot facilitate coordination.⁶⁴ In his sworn
8 affidavit, Ferrell avers that he is not involved in the creation, production, or distribution of any
9 advertising and that his interaction with National Media's buyers generally consist of receiving
10 billing and invoicing instructions from those buyers.⁶⁵

11 These arguments are not persuasive. As the Commission explained in the context of the
12 former employee conduct standard, the "use or convey" standard "does not make any distinction
13 between categories or ranks of employees."⁶⁶ The Commission specifically declined to limit its
14 application to "a specified class of employees who are likely to 'possess material political
15 information.'"⁶⁷ Respondents' reliance on Ferrell's allegedly administrative responsibilities
16 lacks merit.⁶⁸

⁶² *See* NatMedia Resp. at 11, MUR 7654.

⁶³ *Id.*

⁶⁴ *See id.* at 10.

⁶⁵ *Id.*; Ferrell Affidavit, ¶¶ 3-7.

⁶⁶ *See* Advisory Opinion 2016-21 at 5 (Great America PAC); *see also* 11 C.FR. § 109.21(d)(5).

⁶⁷ *Id.* (quoting 68 Fed. Reg. at 437).

⁶⁸ *Id.* (The Commission specifically declined to limit its application to "a specified class of employees who are likely to 'possess material political information.'").

1 Further, according to the National Association of Broadcasters — the entity that created
2 the ad placement forms themselves — the “agreement forms” Ferrell signed were “*designed to*
3 *serve as actual contracts for the sale of political broadcast time* and to satisfy FCC record
4 retention requirements.”⁶⁹ By signing the forms, Ferrell represented in writing that the “payment
5 for the above described broadcast time had been furnished” and that he was “authorized to
6 announce the time as paid” by AFA Respondents and the Hawley, Rosendale, and Sessions
7 Committees.⁷⁰ And even if it could be assumed that such writings were not the “actual
8 contracts” they expressly announce themselves to be, it would not change the fact that Ferrell
9 was manifestly in a position to know when and where the ads were being placed and the cost of
10 the ad placements for both the Hawley, Rosendale, and Sessions Committees and AFA —
11 because he placed them.⁷¹ This information, together with the pattern of placement of the ads,
12 supports a reasonable inference that National Media used information about the Hawley,
13 Rosendale, and Sessions Committees to place the AFA’s ads supporting these campaigns. And

⁶⁹ See National Association of Broadcasters, Political Broadcast Agreement Forms, PB-18, available at <https://gab.org/wp-content/uploads/2016/06/pb18-form-final-c1.pdf>. Section 315 of the Communications Act requires broadcasters to retain a record containing the following information in connection with political advertisements: “specific schedules of advertising time by candidates and certain issue advertisers, as well as the final dispositions or ‘deals’ agreed to by the broadcaster and the advertiser in response to any requests.” See About Public Inspection Files, Federal Communications Commission, available at <https://publicfiles.fcc.gov/about-station-profiles/>. The NAB PB-18 form is designed to fulfill this requirement.

⁷⁰ See, e.g., Compl., Texas Ex. L, Missouri Ex. B, and Montana Ex. C, MUR 7654. In fact, Ferrell signed each agreement form as the “agent” of the Hawley, Rosendale, and Sessions Committees, respectively. *Id.*

⁷¹ The Commission has explained that “common leadership or overlapping administrative personnel does not defeat the use of a firewall policy,” unless there is specific information that it did not prevent the flow of material information. 71 Fed. Reg. at 33,207. As noted above, the facts indicate that Ferrell had access to material information about ad placements for AFA and the Hawley, Rosendale and Sessions Committees, and the pattern of these placements supports an inference that National Media may have used this information to maximize the effect of the ads it placed. This situation stands in contrast to MUR 5823, where the Commission concluded that the common vendor standard was not satisfied because the media buyer vendor provided clerical and administrative support and did not have adequate decision-making control or knowledge of the communications. See Factual & Legal Analysis at 10-11, MUR 5823 (Citizens Club for Growth). National Media does not argue, and the facts do not support, that as a company it was retained merely to provide administrative and clerical support for media buys, that it lacked decision-making authority, or that it lacked knowledge of the communications at issue.

1 Ferrell's affidavit disclaiming knowledge of the forms' contents is contravened by his
2 representations in them and his signatures on them.

3 Accordingly, based on the available information, we recommend that the Commission
4 find reason to believe that the AFA violated 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a)⁷² by
5 making and failing to report excessive and prohibited in-kind contributions to the Hawley,
6 Rosendale and Sessions Committees in the form of coordinated communications. With respect
7 to the Hawley, Rosendale, and Sessions Committees, the available information is insufficient to
8 conclude that these Committees engaged in any type of conduct indicating that they may have
9 knowingly received or accepted in-kind contributions resulting from coordinated
10 communications. However, because additional information may come to light as a result of an
11 investigation, we recommend that the Commission take no action at this time on any
12 coordination allegation against the Hawley, Rosendale, and Sessions Committees.⁷³

13 **III. MUR 7660 (COORDINATION ALLEGATIONS AGAINST THE NRA**
14 **RESPONDENTS, CORY GARDNER AND HIS CAMPAIGN COMMITTEE)**
15

16 The Complaint in MUR 7660 alleges that the NRA Respondents paid more than
17 \$3 million to Starboard⁷⁴ — a company formed in 2013 to provide consulting services for the
18 creation of independent expenditures — for spending designed to support Gardner and oppose

⁷² We include 52 U.S.C. § 30118(a) because AFA is permitted to accept corporate contributions, but it is not permitted to contribute those funds to candidates.

⁷³ 11 C.F.R. § 109.21(b)(2); *see* 11 C.F.R. § 109.21(d)(1)-(3).

⁷⁴ *See* NRA Resp. at 2, MUR 7427.

1 his opponents.⁷⁵ It cites to a listing of NRA-ILA Independent Expenditures to Starboard
2 Strategic, Inc. in support of Cory Gardner or opposing Mark Udall from 2013-2014.⁷⁶

3 The MUR 7660 Complaint focuses exclusively on activity that transpired during the 2014
4 election cycle, and the allegations in MUR 7660 are also alleged in open MUR 7427 which is
5 currently pending with the Commission.⁷⁷ In light of this overlapping activity, we recommend
6 that the Commission merge MUR 7660 into MUR 7427.

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⁷⁵ MUR 7660 Compl. at 1.

⁷⁶ *Id.*

⁷⁷ *See* Compl. ¶¶ 2, 42, 45, 47, 48, 50, 54, MUR 7427; Compl. ¶¶ 24, MUR 7497; Compl. ¶¶ 20, MUR 7524.

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13 **V. RECOMMENDATIONS**

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1. Merge MUR 7660 into MUR 7427;

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2. Find reason to believe that America First Action, Inc. and Jon Proch, in his official capacity as treasurer violated 52 U.S.C. §§ 30104(b), 30116(a) and 30118(a) by making and failing to report excessive and prohibited in-kind contributions to Josh Hawley for Senate and Salvatore Purpura in his official capacity as treasurer by coordinating communications through National Media;

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3. Find reason to believe that America First Action, Inc. and Jon Proch, in his official capacity as treasurer violated 52 U.S.C. §§ 30104(b), 30116(a) and 30118(a) by making and failing to report excessive and prohibited in-kind contributions to Matt Rosendale for Montana and Errol Galt in his official capacity as treasurer by coordinating communications through National Media;

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4. Find reason to believe that America First Action, Inc. and Jon Proch in his official capacity as treasurer violated 52 U.S.C. §§ 30104(b), 30116(a) and 30118(a) by making and failing to report excessive and prohibited in-kind contributions to Pete Sessions for Congress and Steve Hargrove in his official capacity as treasurer by coordinating communications through National Media;

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5. Take no action at this time as to Hawley for Senate and Salvatore Purpura in his official capacity as treasurer, Rosendale for Montana and Errol Galt in his official capacity as treasurer, and Pete Sessions for Congress and Steve Hargrove in his official capacity as treasurer;

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6. Approve the Factual and Legal Analysis;

- 1 7. Authorize the use of compulsory process, including the issuance of appropriate
2 interrogatories, document subpoenas, and deposition subpoenas, as necessary; and
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4 8. Approve the appropriate letter.
5

6 Lisa J. Stevenson
7 Acting General Counsel
8

9
10 August 7, 2020
11 Date

Charles Kitcher
 Charles Kitcher
 Acting Associate General Counsel for Enforcement

12
13
14 Lynn Y. Tran
15 Lynn Y. Tran
16 Assistant General Counsel
17

18 Roy Q. Lockett
19 Roy Q. Lockett
20 Attorney
21
22
23

24 Attachment:
25 Factual and Legal Analysis of America First Action, Inc.