

1 **FEDERAL ELECTION COMMISSION**

2 **FIRST GENERAL COUNSEL'S REPORT**

3 **MUR 7670**

4 DATE COMPLAINT FILED: Dec. 13, 2019

5 DATE OF NOTIFICATION: Dec. 18, 2019

6 DATE OF LAST RESPONSE: Feb. 24, 2020

7 DATE ACTIVATED: Mar. 17, 2020

8 EXPIRATION OF SOL: Aug. 22-Oct. 15, 2024

9 ELECTION CYCLE: 2020

10
11 **COMPLAINANT:**

Kendra Arnold, Executive Director

12 Foundation for Accountability and Civic Trust

13 **RESPONDENTS:**

Hickenlooper for Colorado and Mark Turnage in his
14 official capacity as treasurer

15 Hickenlooper for Colorado (State Committee)

16 Hickenlooper 2020 and Blanca Uzeta O'Leary in
17 her official capacity as treasurer

18 Giddy Up PAC and Stephanie Donner in her official
19 capacity as treasurer

20 Putnam Partners, LLC

21 **RELEVANT STATUTES
22 AND REGULATIONS:**

52 U.S.C. § 30101(8)

23 52 U.S.C. § 30104(b)

24 52 U.S.C. § 30116(a), (f)

25 52 U.S.C. § 30118(a)

26 11 C.F.R. § 100.52(d)

27 11 C.F.R. § 110.1(b)(1), (g)

28 11 C.F.R. § 110.3(d)

29 11 C.F.R. § 110.9

30 11 C.F.R. § 114.2(b)

31 **INTERNAL REPORTS CHECKED:**

Disclosure Reports

32 **STATE AGENCIES CHECKED:**

Colorado Secretary of State, Campaign Finance Reports

33 **I. INTRODUCTION**

34 The Complaint alleges that John Hickenlooper's 2020 U.S. Senate committee,

35 Hickenlooper for Colorado and Mark Turnage in his official capacity as treasurer (the "Senate

36 Committee"), accepted a prohibited and unreported transfer of an asset from Hickenlooper's

1 2014 gubernatorial campaign, Hickenlooper for Colorado (the “State Committee”), in violation
2 of the Federal Election Campaign Act of 1971, as amended (the “Act”). Specifically, the
3 Complaint alleges that the Senate Committee used video footage in an advertisement that was
4 previously used in the State Committee’s advertisements. The Complaint further alleges that the
5 Senate Committee never reported any payments to, or contributions from, the State Committee
6 or Putnam Partners, LLC (“Putnam Partners”), the firm that produced the State Committee
7 advertisements, on its reports filed with the Commission.

8 Respondents acknowledge that a Senate Committee advertisement used video footage
9 from State Committee advertisements. The Senate Committee and Putnam Partners deny any
10 impermissible transfer, however, asserting that Putnam Partners owned the footage and that the
11 Senate Committee was permitted to use the footage without charge pursuant to the fair use
12 doctrine under federal copyright law. Hickenlooper argues that the State Committee has
13 terminated and cannot be named as a respondent. Hickenlooper 2020 and Giddy Up PAC
14 contend that the Complaint does not allege any violations as to them.

15 As set forth below, because the State Committee footage was publicly available and
16 comprises a minimal and incidental portion of the Senate Committee advertisement, we
17 recommend that the Commission exercise its prosecutorial discretion and dismiss the allegations
18 in this matter. Further, because the available information does not provide a basis for any
19 violations by Hickenlooper 2020 and Giddy Up PAC, we recommend the Commission find no
20 reason to believe that those entities violated the Act in connection with the allegations in this
21 matter.

1 II. FACTUAL BACKGROUND

2 John Hickenlooper is the former Governor of and a current U.S. Senator from Colorado.
3 The State Committee was Hickenlooper's state political committee for his 2014 gubernatorial
4 reelection campaign.¹ Before running for U.S. Senate in 2020, Hickenlooper was a candidate for
5 the 2020 Democratic presidential nomination from March 4 through August 15, 2019.²
6 Hickenlooper 2020 is the principal campaign committee for Hickenlooper's presidential primary
7 campaign.³ The Senate Committee is the principal campaign committee for Hickenlooper's
8 2020 U.S. Senate campaign.⁴ Giddy Up PAC is Hickenlooper's leadership PAC.⁵ Putnam
9 Partners is a limited liability company registered in Virginia.⁶

10 On August 22, 2019, Hickenlooper and the Senate Committee released a 90-second
11 advertisement, entitled "Not Done Fighting," announcing his U.S. Senate campaign.⁷ "Not Done
12 Fighting" incorporated six seconds of footage of Hickenlooper interacting with customers inside

¹ *Candidate and Candidate Committee Detail*, COLO. SEC'Y OF STATE, <https://tracer.sos.colorado.gov/PublicSite/SearchPages/CandidateDetail.aspx?OrgID=16956&Type=CO> (last visited Aug. 15, 2022); *see* Gov. John Hickenlooper Resp. at 1 (Feb. 14, 2020) [hereinafter Gov. Hickenlooper Resp.]. Hickenlooper represents that the State Committee terminated its political committee status in 2015 and dissolved as a Colorado non-profit corporation in 2018. Gov. Hickenlooper Resp. at 1 & n.1.

² Compl. at 4 & n.17 (Dec. 13, 2019).

³ Hickenlooper 2020, Amended Statement of Organization at 2 (Mar. 20, 2020), <https://docquery.fec.gov/pdf/824/202003209204651824/202003209204651824.pdf>.

⁴ Hickenlooper for Colo., Statement of Organization at 2 (Aug. 22, 2019), <https://docquery.fec.gov/pdf/747/201908229163097747/201908229163097747.pdf>.

⁵ Giddy Up PAC, Amended Statement of Organization at 2-3 (July 1, 2020), <https://docquery.fec.gov/pdf/968/202007019244230968/202007019244230968.pdf>.

⁶ *See* Commonwealth of Virginia, State Corporate Commission, Putnam Partners LLC Certificate of Organization (Dec. 10, 2010) (available in VBM); PUTNAMPARTNERS, <https://putnampartners.net> (last visited Aug. 15, 2022).

⁷ Compl. at 1-2; Hickenlooper for Colo. (Senate Comm.) Resp. at 2 (Feb. 24, 2020) [hereinafter Senate Comm. Resp.]. "Not Done Fighting" is available on Hickenlooper's YouTube Channel. John Hickenlooper, *Not Done Fighting: John Hickenlooper Is Running for U.S. Senate*, YOUTUBE (Aug. 22, 2019) [hereinafter Not Done Fighting Video], <https://www.youtube.com/watch?v=-63689Ahyuk> (available in VBM).

1 a restaurant he owned and interacting with employees in a factory (the “Video Footage”).⁸ The
2 Video Footage was created and produced by Putnam Partners for the State Committee during
3 Hickenlooper’s 2014 gubernatorial campaign: two seconds of footage originally appeared in a
4 television advertisement entitled “Restaurant” and four seconds of footage in one entitled “Hot
5 Seat.”⁹ The Senate Committee disclosed three payments totaling \$310,000 to a media vendor for
6 “digital media buy[s]” in August and September 2019, around the time of and possibly related to
7 the “Not Done Fighting” advertisement.¹⁰

8 The Complaint contends that the Video Footage was an asset of the State Committee and
9 that the Senate Committee’s use of it in “Not Done Fighting,” violated the Act and Commission
10 regulations.¹¹ Specifically, the Complaint alleges that the Senate Committee accepted a

⁸ Not Done Fighting Video; *see* Compl. at 1-2. The Video Footage appears at 0:45 to 0:51 in “Not Done Fighting.”

⁹ Senate Comm. Resp. at 1-2; Putnam Partners Resp. at 1-2 (Feb. 24, 2020); *see* Compl. at 1-2, Ex. A (screenshots of state campaign advertisements and “Not Done Fighting”). “Restaurant” and “Hot Seat” are available on Putnam Partners’s website. *See John Hickenlooper for Governor*, PUTNAMPARTNERS [hereinafter Putnam Partners Website], <https://www.putnampartners.net/case-study/john-hickenlooper-governor> (last visited Aug. 15, 2022) (available in VBM). The Complaint references a third advertisement, entitled “Under Water,” and attributes the screenshots to advertisements entitled “Restaurant” and “Recovery,” Compl., at 2, Ex. A, but it appears that the Video Footage at issue is in the “Restaurant” and “Hot Seat” advertisements featured on Putnam Partners’s website. *Compare* Not Done Fighting Video, *and* Compl., Ex. A, *with* Putnam Partners Website. This Office has been unable to locate the alleged “Recovery” or “Under Water” advertisements.

¹⁰ *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00716720&min_date=08%2F01%2F2019&max_date=09%2F30%2F2019 (last visited Aug. 15, 2022) (reflecting disbursements by the Senate Committee from August 1 through September 30, 2019); Hickenlooper for Colo., Amended 2019 October Quarterly Report at 921, 922, 926 (July 7, 2020), <https://docquery.fec.gov/pdf/476/202007079244343476/202007079244343476.pdf> (reflecting \$100,000, \$60,000, and \$150,000 disbursements to Do Big Things on August 28, August 29, and September 6, 2019, respectively). The State Committee’s disclosure reports reflect payments totaling \$158,008.21 to Putnam Partners during the 2014 election cycle, although it is unclear how much of that amount is associated with the Video Footage. *See TRACER Expenditure Search*, COLO. SEC’Y OF STATE, <https://tracer.sos.colorado.gov/PublicSite/SearchPages/ExpenditureSearch.aspx> (last visited Aug. 15, 2022) (search “Hickenlooper for Colorado” in the “Expending Committee Name” field and “Putnam Partners” in the “Payee Name” field). Of that amount, the State Committee paid \$63,310.50 through August 2014, \$68,125.78 in September 2014, and \$26,571.93 in October 2014. *Id.* It appears that the State Committee advertisements at started to air beginning in September 2014. *See* Eli Stokols, *Hickenlooper Features Wynkoop, Familiar Themes in Campaign’s First TV Ad*, KDVR (Sept. 9, 2014), <https://kdvr.com/news/politics/hickenlooper-features-wynkoop-familiar-themes-in-campaigns-first-tv-ad/>.

¹¹ Compl. at 1-4.

1 prohibited contribution in the transfer of an asset from the State Committee.¹² Additionally, the
2 Complaint states that neither the Senate Committee, Hickenlooper 2020, nor Giddy Up PAC
3 reported any disbursements to, or in-kind contributions from, the State Committee or Putnam
4 Partners for the cost of the Video Footage.¹³ Thus, the Complaint further alleges, the Senate
5 Committee violated the Act's reporting requirements by failing to accurately report the transfer
6 of the Video Footage or payments for the Video Footage in its disclosure reports.¹⁴

7 In Response to the Complaint, the Senate Committee acknowledges that it incorporated
8 two seconds from the State Committee's "Restaurant" advertisement and four seconds from the
9 "Hot Seat" advertisement into its 90-second "Not Done Fighting" campaign announcement
10 video, but denies that any violations resulted from that use of the Video Footage.¹⁵ The Senate
11 Committee asserts that there is "no record of the [State Committee] and Putnam Partners
12 executing a contract for this work," and because, under federal copyright law, Putnam Partners
13 owns the copyright to the footage as its creator, the Video Footage was not an asset of the State
14 Committee.¹⁶ The Senate Committee further states that it "used clips from Putnam Partners's
15 publicly available website and edited the images, altering the framing of the clips so that they

¹² *Id.* at 2-4.

¹³ *See id.*; *see also* *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00687582&committee_id=C00698258&committee_id=C00716720&recipient_name=hickenlooper+for+colorado&recipient_name=putnam+partners (last visited Aug. 15, 2022) (reflecting no disbursements from the Senate Committee, Hickenlooper 2020, or Giddy Up PAC to Putnam Partners or the State Committee and 11 disbursements from Giddy Up PAC to the Senate Committee); *FEC Receipts: Filtered Results*, FEC.GOV, https://www.fec.gov/data/receipts/?data_type=processed&committee_id=C00687582&committee_id=C00698258&committee_id=C00716720&contributor_name=hickenlooper+for+colorado&contributor_name=putnam+partners (last visited Aug. 15, 2022) (reflecting no receipts by the Senate Committee, Hickenlooper 2020, or Giddy Up PAC from Putnam Partners and four receipts by Hickenlooper 2020 from the Senate Committee).

¹⁴ Compl. at 3-5.

¹⁵ Senate Comm. Resp. at 1-2.

¹⁶ *Id.* at 1 & n.2; *see also* Putnam Partners Resp. at 1 ("The [State Committee] and Putnam Partners did not enter into a contract for this work.").

1 could serve as b-roll in the launch video.”¹⁷ Finally, the Senate Committee argues that use of
2 clips from the publicly available Video Footage without payment or a license is permitted under
3 the fair use doctrine in federal copyright law and that footage available for fair use does not have
4 value and thus cannot constitute a contribution under the Act.¹⁸

5 Putnam Partners acknowledges that the State Committee paid it as an independent
6 contractor to create the “Restaurant” and “Hot Seat” advertisements containing the Video
7 Footage and states that it retains the copyright and ownership thereof, but denies that it made any
8 contribution to the Senate Committee related to its use of the Video Footage in “Not Done
9 Fighting.”¹⁹ Putnam Partners argues that the Video Footage is not something of value both
10 under the fair use doctrine and because its standard business practice was to not assert its
11 copyright interest “when a person uses a small portion of an advertisement it has made available
12 on its website in another work.”²⁰ Finally, Putnam Partners contends that if value were assigned
13 to the Video Footage, the value of the potential contribution would nevertheless be *de minimis*
14 and warrant a dismissal.²¹

15 Hickenlooper, in a one-paragraph Response, states that the State Committee terminated
16 as a political committee with the Colorado Secretary of State in 2015 and dissolved as a
17 Colorado nonprofit corporation in 2018, and argues that the State Committee cannot be named as

¹⁷ Senate Comm. Resp. at 2; *see* Putnam Partners Website.

¹⁸ Senate Comm. Resp. at 2-3.

¹⁹ Putnam Partners Resp. at 1.

²⁰ *Id.* at 2-4. Putnam Partners further states that it “universally applies this policy, and treated the Senate [Committee] like any other person” in declining to exert its copyright interest in the Video Footage. *Id.* at 4.

²¹ *Id.* at 4; *see also* Senate Comm. Resp. at 4 (“[E]ven if the Commission were to assign value to the clips and find Respondent in violation of the Act, the alleged contribution would be *de minimis* and would warrant dismissal as a matter of prosecutorial discretion.”).

1 a respondent because it no longer exists as an entity.²² Finally, Hickenlooper 2020 and Giddy
2 Up PAC jointly respond that the Complaint does not allege any violations as to them and request
3 a dismissal of the allegations.²³

4 III. LEGAL ANALYSIS

5 A. Applicable Law

6 The Act provides that no person shall make contributions to any candidate or authorized
7 committee in excess of the Act's limits.²⁴ For the 2020 election cycle, the Act limits
8 contributions by persons to any candidate and his or her authorized political committees to
9 \$2,800 per election.²⁵ Corporations are prohibited from making a contribution to a candidate's
10 committee in connection with a federal election.²⁶ The Act's contribution limitations and
11 prohibitions apply to a limited liability company ("LLC") depending on that LLC's tax treatment

²² See Gov. Hickenlooper Resp. at 1 & n. 1; see also *Hickenlooper for Colorado TRACER Committee Information Page*, COLO. SEC'Y OF STATE, <https://tracer.sos.colorado.gov/PublicSite/SearchPages/CandidateDetail.aspx?OrgID=16956&Type=CO> (last visited Aug. 15, 2022) (displaying termination date as October 30, 2015); *Summary Page for Hickenlooper for Colorado*, COLO. SEC'Y OF STATE, <https://www.sos.state.co.us/biz/BusinessEntityDetail.do?quitButtonDestination=BusinessEntityResults&nameTyp=ENT&masterFileId=20101043586&entityId2=20101043586&fileId=20101043586&srchTyp=ENTITY> (last visited Aug. 15, 2022) (showing that the State Committee incorporated on January 21, 2010 and voluntarily dissolved on June 21, 2018). Additionally, the State Committee incorporates the Senate Committee's Response by reference. Gov. Hickenlooper Resp. at 1.

²³ Hickenlooper 2020 & Giddy Up PAC Resp. at 1 (Feb. 14, 2020). Additionally, Hickenlooper 2020 and Giddy Up PAC incorporate the Senate Committee's Response by reference. *Id.* at 1.

²⁴ 52 U.S.C. § 30116(a); 11 C.F.R. § 110.1(b)(1).

²⁵ 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1)(i); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019).

²⁶ See 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1).

1 election.²⁷ No candidate or committee shall knowingly accept excessive or prohibited
 2 contributions.²⁸

3 A “contribution” includes “any gift, subscription, loan, advance, or deposit of money or
 4 anything of value made by any person for the purpose of influencing any election for Federal
 5 office.”²⁹ “Anything of value” includes all in-kind contributions, such as the provision of goods
 6 or services without charge or at a charge less than the usual and normal charge.³⁰ The
 7 Commission’s regulations define “usual and normal charge” as “the price of those goods in the
 8 market from which they ordinarily would have been purchased at the time of the contribution.”³¹

9 The Commission’s regulations further provide, in material part, that “[t]ransfers of funds
 10 or assets from a candidate’s campaign or account for a nonfederal election to his or her principal
 11 campaign committee or other authorized committee for a federal election are prohibited.”³²

12 However, the transfer of a nonfederal committee’s assets to the campaign committee of a

²⁷ 11 C.F.R. § 110.1(g). An LLC that elects to be treated as a corporation by the Internal Revenue Service (“IRS”) is treated as a corporation for contribution purposes under the Act and is prohibited from making contributions to a candidate or candidate committee. 11 C.F.R. § 110.1(g)(3). In contrast, contributions by an LLC that elects to be treated as a partnership by the IRS are treated under the Act as partnership contributions rather than corporate contributions. *Id.* § 110.1(g)(2); *see also id.* § 110.1(e) (partnership contribution rules). Contributions by an LLC with a single natural person member that does not elect to be treated as a corporation by the IRS are attributed only to that single member. *Id.* § 110.1(g)(4).

²⁸ 52 U.S.C. §§ 30116(f), 30118(a); 11 C.F.R. §§ 110.9, 114.2(d).

²⁹ 52 U.S.C. § 30101(8)(A)(i); *accord* 11 C.F.R. § 100.52(a); *see also* 52 U.S.C. § 30118(b)(2) (adding that “contribution” includes “any direct or indirect payment, . . . gift of money, or any services, or anything of value”).

³⁰ 11 C.F.R. § 100.52(d)(1).

³¹ *Id.* § 100.52(d)(2).

³² 11 C.F.R. § 110.3(d). The Commission has explained that this prohibition on all transfers from a candidate’s state committee to the candidate’s federal committee is intended to prevent a federal committee’s indirect use of soft money. *See* Transfers of Funds from State to Federal Campaigns, 57 Fed. Reg. 36,344, 36,345 (Aug. 12, 1992) [hereinafter 1992 E&J] (explaining the revised regulation “would more effectively prevent the indirect use of impermissible funds in federal elections”); Transfer of Funds from State to Federal Campaigns, 58 Fed. Reg. 3474, 3475 (Jan. 8, 1993) [hereinafter 1993 E&J] (same); *see also* Factual & Legal Analysis (“F&LA”) at 3-4, MUR 7106 (Citizens for Maria Chappelle-Nadal, *et al.*) (describing 11 C.F.R. § 110.3(d) as “an extension of the Act’s soft money ban”).

1 candidate for federal office is permissible in instances in which the federal committee pays the
 2 fair market value or the “usual and normal charge” for the use of such assets.³³ The Commission
 3 has pursued matters where the federal candidate’s committee does not pay the state committee
 4 for goods and services used by the federal committee.³⁴ When the state committee does not own
 5 the asset, the federal committee must pay the usual and normal charge for use of the asset to the
 6 proper owner.³⁵

7 The Act also requires committee treasurers to file reports of receipts and disbursements.³⁶
 8 These reports must include, *inter alia*, the identification of each person who makes a contribution
 9 or contributions that have an aggregate amount or value in excess of \$200 during an election

³³ 1992 E&J, 57 Fed. Reg. at 36,345 (“[T]he rule should not be read to proscribe the sale of assets by the state campaign committee to the federal campaign committee, so long as those assets are sold at fair market value.”); 1993 E&J, 58 Fed. Reg. at 3475 (same); *see also* Advisory Opinion 1992-19 at 2 (Mike Kreidler for Congress) (approving request to permit the lease of state campaign committee’s computer equipment to candidate’s federal campaign committee).

³⁴ *See, e.g.*, Conciliation Agreement ¶¶ IV.10-11, V.1, MUR 5646 (Cohen for N.H.) (start-up expenses); Conciliation Agreement ¶¶ IV.4-5, V.1, MUR 6257 (John Callahan, *et al.*) (feasibility research); Conciliation Agreement ¶¶ IV.6-7, 12-13, V.2-4, MUR 6267 (Jonathan Paton for Congress, *et al.*) (polling and survey costs); Conciliation Agreement ¶¶ IV.7, V.1-3, MUR 7076 (Richard Tisei, *et al.*) (polling and fundraising analysis). In these matters, the contributions by state committees of federal candidates also constituted soft money violations of 52 U.S.C. § 30125(e)(1)(A). *See* Certification (“Cert.”) ¶ 6 (Feb. 3, 2005), MUR 5646 (Cohen for N.H., *et al.*); Amended Cert. ¶ 1 (Dec. 3, 2010), MUR 6257 (John Callahan, *et al.*); Cert. ¶¶ 1-2 (Oct. 6, 2010), MUR 6267 (Jonathan Paton for Congress, *et al.*); Conciliation Agreement ¶ V.1, MUR 7076 (Richard Tisei, *et al.*).

³⁵ *See* 11 C.F.R. § 100.52(d). *Compare* F&LA at 4-6, MUR 6784 (Lizbeth Benacquisto for Congress, *et al.*) (finding no reason to believe regarding a federal committee’s use of images used in state campaign advertisement where the federal committee provided copies of invoices documenting payments to the vendor which retained ownership of the images and there was no information indicating the payments were not below the usual and normal charges), F&LA at 10-11, MUR 6218 (Ball4NY, *et al.*) (finding no reason to believe regarding a federal committee’s use of photographs of state officeholder and federal candidate where committee treasurer averred the federal committee purchased the rights to the photographs from the state legislature and provided supporting documentation and there was no information to the contrary), *and* Statement of Reasons at 2, Comm’rs Walther, Petersen, Bauerly, Hunter, & Weintraub, MUR 5964 (Schock for Congress, *et al.*) [hereinafter Schock SOR] (exercising prosecutorial discretion to dismiss regarding federal committee’s use of footage of state officeholder and federal candidate where federal committee claimed it paid vendor for use rights and production of DVDs containing the footage), *with* F&LA at 2-4, 6-9, MUR 6792 (Sean Eldridge for Congress, *et al.*) (finding reason to believe that video footage committee received from corporation without payment).

³⁶ 52 U.S.C. § 30104(a); 11 C.F.R. § 104.3.

1 cycle, in the case of an authorized committee of a federal candidate, together with the date and
2 amount of any such contribution.³⁷

3 **B. The Commission Should Exercise Its Prosecutorial Discretion and Dismiss**
4 **the Allegation That the State Committee or Putnam Partners Made, and the**
5 **Senate Committee Accepted, an In-Kind Contribution in the Form of the**
6 **Video Footage**

7 The Complaint alleges that the Senate Committee accepted a prohibited and unreported
8 transfer of Video Footage from the State Committee.³⁸ The Senate Committee and Putnam
9 Partners state that the Video Footage created for the State Committee and later used by the
10 Senate Committee in “Not Done Fighting” is owned by Putnam Partners, and not the State
11 Committee, by operation of federal copyright law.³⁹ Putnam Partners acknowledges that the
12 State Committee paid for its services to produce the Video Footage and that it did not charge the
13 Senate Committee for its later use of the same Video Footage.⁴⁰ The Senate Committee states
14 that it used the Video Footage from Putnam Partners’s website in its “Not Done Fighting”
15 advertisement.⁴¹ The Senate Committee did not disclose any payments to the State Committee

³⁷ 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a)(4).

³⁸ Compl. at 4-5.

³⁹ Senate Comm. Resp. at 1-2; Putnam Partners Resp. at 1 (asserting that “[a]s the creator of the footage, Putnam Partners retained copyright and ownership of it under federal copyright law”). These Respondents do not provide documentation to support this claim but assert that no contract existed between the State Committee and Putnam Partners pertaining to the creation of the footage. Senate Comm. Resp. at 1-2 & n.2 (“There is no record of the Gubernatorial Campaign and Putnam Partners executing a contract for this work.”); Putnam Partners Resp. at 1 & n.2 (“The Gubernatorial Campaign and Putnam Partners did not enter into a contract for this work.”). The available information does not present any indication to the contrary.

⁴⁰ Putnam Partners Resp. at 1-4.

⁴¹ Senate Comm. Resp. at 1-2. The four seconds of footage in “Hot Seat” originally included on-screen text that does not appear in the Video Footage in “Not Done Fighting.” *Compare* Not Done Fighting Video, *with* Putnam Partners Website. All six seconds of the Video Footage appear to be closer frames or zoomed in versions of the footage originally in “Hot Seat” and “Restaurant.” *Compare* Not Done Fighting Video, *with* Putnam Partners Website. These minor differences appear consistent with the Senate Committee’s assertion that it “used clips from Putnam Partners’[s] publicly available website and edited the images, altering the framing of the clips so that they could serve as b-roll in the launch video.” Senate Comm. Resp. at 2.

1 or Putnam Partners or report the receipt of any contribution from the State Committee or Putnam
2 Partners during the 2020 election cycle.⁴²

3 The Senate Committee and Putnam Partners argue that neither entity made a contribution
4 under the Act because the Video Footage had no value under the fair use doctrine in federal
5 copyright law covering the use of small portions of publicly available work.⁴³ But nothing in the
6 Act or Commission regulations recognizes an exception to the definition of contribution based
7 on the fair use doctrine that would apply here, nor does there appear to be any relevant
8 Commission precedent creating such an exception. Indeed, in the context of the coordination
9 and republication rulemakings, the Commission specifically rejected requests to adopt public
10 domain and fair use exceptions, explaining that “virtually all campaign material that could be

⁴² See *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00716720&recipient_name=Hickenlooper+for+Colorado&recipient_name=Putnam (last visited Aug. 15, 2022) (reflecting no disbursements by the Senate Committee to Putnam Partners or the State Committee); *FEC Receipts: Filtered Results*, FEC.GOV, https://www.fec.gov/data/receipts/?data_type=processed&committee_id=C00716720&contributor_name=hickenlooper+for+colorado&contributor_name=putnam+partners (last visited Aug. 15, 2022) (reflecting no receipts by the Senate Committee from Putnam Partners or the State Committee).

⁴³ Senate Comm. Resp. at 2-3; Putnam Partners Resp. at 2-3. In further support of their arguments, Respondents cite Commission enforcement matters in which the Commission did not obtain four votes to find reason to believe respondents republished campaign materials. Senate Comm. Resp. at 3-4 & n.14; Putnam Partners Resp. at 3 & n.12; *see also* 52 U.S.C. § 30116(a)(7)(B)(iii) (defining republication as the “financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents”); *see also* 11 C.F.R. § 109.23(a). The republication provisions in the Act and Commission regulations apply to materials prepared by candidates for *federal office* and republished by third parties, while the Video Footage at issue here was originally prepared by a third party for Hickenlooper’s *state* campaign and used by his federal committee. *See* 52 U.S.C. § 30101(2) (defining the term “candidate” as “an individual who seeks nomination for election, or election, to Federal office”); *see also* F&LA at 6 & n.23, MUR 7080 (Paul Babeu for Congress, *et al.*) (concluding there was no republication of campaign materials under the Act where the federal committee used a candidate’s headshot from an associational webpage pre-dating the federal candidacy); F&LA at 7 n.23, MUR 6792 (Sean Eldridge for Congress, *et al.*) (rejecting respondents’ comparisons to republication matters where “the video footage at issue . . . was produced and distributed by a private entity and subsequently used by a campaign committee,” but nevertheless finding reason to believe where it appeared the committee had access to the raw video footage that was unlikely obtained from the public domain).

1 republished” may be considered in the public domain, and therefore such an exception could
2 “swallow the rule.”⁴⁴

3 Here, the available information does not indicate that the Senate Committee paid either
4 Putnam Partners or the State Committee for the Video Footage that it incorporated into its “Not
5 Done Fighting” advertisement. Nor did the Senate Committee report any in-kind contributions
6 from either Putnam Partners or the State Committee related to the Video Footage. If the
7 Commission were to pursue enforcement in this matter, an investigation would be necessary to
8 determine the ownership of the Video Footage, the appropriate valuation of the Video Footage,
9 and the extent of the Senate Committee’s communications with Putnam Partners regarding the
10 former’s use of the Video Footage. More readily discernible facts, such as Putnam Partners’s tax
11 election status and partnership agreement structure, could yield information that dilutes the
12 potential amount in violation.⁴⁵

13 However, the Video Footage used by the Senate Committee was — and remains —
14 publicly available on Putnam Partners’s website and formed a minimal and incidental part of the
15 Senate Committee’s advertisement (approximately six seconds out of a 90-second
16 advertisement). Although it would not be unreasonable to investigate, given the facts presented
17 in this matter, the investigation required, and the possibly low amount in violation, we

⁴⁴ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 442-43 (Jan. 3, 2003).

⁴⁵ If Putnam Partners elects to be treated as a partnership by the IRS, any contribution by Putnam Partners related to the Senate Committee’s use of the Video Footage without charge is attributed to the partnership and to each partner either (1) in direct proportion to her share of the partnership profits, or (2) by agreement of the partners. *See* 11 C.F.R. § 110.1(e), (g)(2); 52 U.S.C. § 30116(a). If Putnam Partners elects to be treated as a corporation by the IRS, it is subject to the Act’s prohibition on corporate contributions to candidate committees. *See* 11 C.F.R. § 110.1(g)(3); 52 U.S.C. § 30118(a). If the former, and after determining the appropriate valuation of the Video Footage, any contribution divided according to the partnership agreement could yield in-kind contributions attributable to a number of partners that do not themselves exceed the Act’s contribution limits.

1 recommend that the Commission exercise its prosecutorial discretion and decline to pursue these
2 allegations further.⁴⁶

3 Accordingly, we recommend that the Commission exercise its prosecutorial discretion
4 and dismiss the allegations that (1) the Senate Committee violated 52 U.S.C. §§ 30116(f) or
5 30118(a) by knowingly accepting an excessive or prohibited in-kind contribution; (2) the Senate
6 Committee violated 52 U.S.C. § 30104(b) by failing to disclose an in-kind contribution;
7 (3) Putnam Partners, LLC, violated 52 U.S.C. §§ 30116(a) or 30118(a) by making an excessive
8 or prohibited in-kind contribution; (4) the State Committee violated 11 C.F.R. § 110.3(d) by
9 making an impermissible transfer of an asset to a federal committee; and (5) the Senate
10 Committee violated 11 C.F.R. § 110.3(d) by receiving an impermissible transfer of a state
11 committee's asset.⁴⁷

12 **C. The Commission Should Find No Reason to Believe That Hickenlooper 2020**
13 **or Giddy Up PAC Violated the Act in This Matter**

14 The available information does not indicate that either Hickenlooper 2020 or Giddy Up
15 PAC used any footage produced for the State Committee or otherwise by Putnam Partners in any
16 of their advertisements. The record also does not support the Complaint's suggestion that either
17 Hickenlooper 2020 or Giddy Up PAC would have been expected to pay the State Committee for
18 the Video Footage. Accordingly, we recommend that the Commission find no reason to believe
19 that Hickenlooper 2020 or Giddy Up PAC violated the Act in connection with the allegations in
20 this matter.

⁴⁶ See F&LA at 3, MUR 6514 (Make Us Great Again) (exercising prosecutorial discretion to dismiss where "the footage at issue was a minimal part of the advertisement (less than ten seconds of the Committee's almost three-minute-long advertisement) and was used as an incidental part of the advertisement"); Schock SOR at 2-3 (exercising prosecutorial discretion to dismiss "given the relatively small amount potentially in violation" and after determining "that further use of the Commission's limited resources" was not warranted).

⁴⁷ See *Heckler vs. Chaney*, 470 U.S. 821 (1985).

1 **IV. RECOMMENDATIONS**

- 2 1. Dismiss the allegation that Hickenlooper for Colorado and Mark Turnage in his
3 official capacity as treasurer violated 52 U.S.C. §§ 30116(f) or 30118(a) by
4 knowingly accepting an excessive or prohibited in-kind contribution;
- 5 2. Dismiss the allegation that Hickenlooper for Colorado and Mark Turnage in his
6 official capacity as treasurer violated 52 U.S.C. § 30104(b) by failing to disclose
7 an in-kind contribution;
- 8 3. Dismiss the allegation that Putnam Partners, LLC, violated 52 U.S.C. §§ 30116(a)
9 or 30118(a) by making an excessive or prohibited in-kind contribution;
- 10 4. Dismiss the allegation that Hickenlooper for Colorado (State Committee) violated
11 11 C.F.R. § 110.3(d) by making an impermissible transfer of an asset to a federal
12 committee;
- 13 5. Dismiss the allegation that Hickenlooper for Colorado and Mark Turnage in his
14 official capacity as treasurer violated 11 C.F.R. § 110.3(d) by receiving an
15 impermissible transfer of a state committee's asset;
- 16 6. Find no reason to believe that Hickenlooper 2020 and Blanca Uzeta O'Leary in
17 her official capacity as treasurer and Giddy Up PAC and Stephanie Donner in her
18 official capacity as treasurer violated the Act in connection with the allegations in
19 this matter;
- 20 7. Approve the attached Factual and Legal Analysis;
- 21 8. Close the file; and

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 RESPONDENTS: Hickenlooper for Colorado and Mark Turnage MUR 7670
4 in his official capacity as treasurer
5 Hickenlooper for Colorado (State Committee)
6 Hickenlooper 2020 and Blanca Uzeta O’Leary
7 in her official capacity as treasurer
8 Giddy Up PAC and Stephanie Donner in her
9 official capacity as treasurer
10 Putnam Partners, LLC

11 **I. INTRODUCTION**

12 The Complaint alleges that John Hickenlooper’s 2020 U.S. Senate committee,
13 Hickenlooper for Colorado and Mark Turnage in his official capacity as treasurer (the “Senate
14 Committee”), accepted a prohibited and unreported transfer of an asset from Hickenlooper’s
15 2014 gubernatorial campaign, Hickenlooper for Colorado (the “State Committee”), in violation
16 of the Federal Election Campaign Act of 1971, as amended (the “Act”). Specifically, the
17 Complaint alleges that the Senate Committee used video footage in an advertisement that was
18 previously used in the State Committee’s advertisements. The Complaint further alleges that the
19 Senate Committee never reported any payments to, or contributions from, the State Committee
20 or Putnam Partners, LLC (“Putnam Partners”), the firm that produced the State Committee
21 advertisements, on its reports filed with the Commission.

22 Respondents acknowledge that a Senate Committee advertisement used video footage
23 from State Committee advertisements. The Senate Committee and Putnam Partners deny any
24 impermissible transfer, however, asserting that Putnam Partners owned the footage and that the
25 Senate Committee was permitted to use the footage without charge pursuant to the fair use
26 doctrine under federal copyright law. Hickenlooper argues that the State Committee has

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1 terminated and cannot be named as a respondent. Hickenlooper 2020 and Giddy Up PAC
2 contend that the Complaint does not allege any violations as to them.

3 As set forth below, because the State Committee footage was publicly available and
4 comprises a minimal and incidental portion of the Senate Committee advertisement, the
5 Commission exercises its prosecutorial discretion and dismisses the allegations in this matter.
6 Further, because the available information does not provide a basis for any violations by
7 Hickenlooper 2020 and Giddy Up PAC, the Commission finds no reason to believe that those
8 entities violated the Act in connection with the allegations in this matter.

9 **II. FACTUAL BACKGROUND**

10 John Hickenlooper is the former Governor of and a current U.S. Senator from Colorado.
11 The State Committee was Hickenlooper's state political committee for his 2014 gubernatorial
12 reelection campaign.¹ Before running for U.S. Senate in 2020, Hickenlooper was a candidate for
13 the 2020 Democratic presidential nomination from March 4 through August 15, 2019.²
14 Hickenlooper 2020 is the principal campaign committee for Hickenlooper's presidential primary
15 campaign.³ The Senate Committee is the principal campaign committee for Hickenlooper's

¹ *Candidate and Candidate Committee Detail*, COLO. SEC'Y OF STATE, <https://tracer.sos.colorado.gov/PublicSite/SearchPages/CandidateDetail.aspx?OrgID=16956&Type=CO> (last visited Aug. 15, 2022); *see* Gov. John Hickenlooper Resp. at 1 (Feb. 14, 2020) [hereinafter Gov. Hickenlooper Resp.]. Hickenlooper represents that the State Committee terminated its political committee status in 2015 and dissolved as a Colorado non-profit corporation in 2018. Gov. Hickenlooper Resp. at 1 & n.1.

² Compl. at 4 & n.17 (Dec. 13, 2019).

³ Hickenlooper 2020, Amended Statement of Organization at 2 (Mar. 20, 2020), <https://docquery.fec.gov/pdf/824/202003209204651824/202003209204651824.pdf>.

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1 2020 U.S. Senate campaign.⁴ Giddy Up PAC is Hickenlooper’s leadership PAC.⁵ Putnam
2 Partners is a limited liability company registered in Virginia.⁶
3 On August 22, 2019, Hickenlooper and the Senate Committee released a 90-second
4 advertisement, entitled “Not Done Fighting,” announcing his U.S. Senate campaign.⁷ “Not Done
5 Fighting” incorporated six seconds of footage of Hickenlooper interacting with customers inside
6 a restaurant he owned and interacting with employees in a factory (the “Video Footage”).⁸ The
7 Video Footage was created and produced by Putnam Partners for the State Committee during
8 Hickenlooper’s 2014 gubernatorial campaign: two seconds of footage originally appeared in a
9 television advertisement entitled “Restaurant” and four seconds of footage in one entitled “Hot
10 Seat.”⁹ The Senate Committee disclosed three payments totaling \$310,000 to a media vendor for

⁴ Hickenlooper for Colo., Statement of Organization at 2 (Aug. 22, 2019), <https://docquery.fec.gov/pdf/747/201908229163097747/201908229163097747.pdf>.

⁵ Giddy Up PAC, Amended Statement of Organization at 2-3 (July 1, 2020), <https://docquery.fec.gov/pdf/968/202007019244230968/202007019244230968.pdf>.

⁶ See Commonwealth of Virginia, State Corporate Commission, Putnam Partners LLC Certificate of Organization (Dec. 10, 2010); PUTNAMPARTNERS, <https://putnampartners.net> (last visited Aug. 15, 2022).

⁷ Compl. at 1-2; Hickenlooper for Colo. (Senate Comm.) Resp. at 2 (Feb. 24, 2020) [hereinafter Senate Comm. Resp.]. “Not Done Fighting” is available on Hickenlooper’s YouTube Channel. John Hickenlooper, *Not Done Fighting: John Hickenlooper Is Running for U.S. Senate*, YOUTUBE (Aug. 22, 2019) [hereinafter Not Done Fighting Video], <https://www.youtube.com/watch?v=-63689Ahyuk>.

⁸ Not Done Fighting Video; see Compl. at 1-2. The Video Footage appears at 0:45 to 0:51 in “Not Done Fighting.”

⁹ Senate Comm. Resp. at 1-2; Putnam Partners Resp. at 1-2 (Feb. 24, 2020); see Compl. at 1-2, Ex. A (screenshots of state campaign advertisements and “Not Done Fighting”). “Restaurant” and “Hot Seat” are available on Putnam Partners’s website. See *John Hickenlooper for Governor*, PUTNAMPARTNERS [hereinafter Putnam Partners Website], <https://www.putnampartners.net/case-study/john-hickenlooper-governor> (last visited Aug. 15, 2022). The Complaint references a third advertisement, entitled “Under Water,” and attributes the screenshots to advertisements entitled “Restaurant” and “Recovery,” Compl., at 2, Ex. A, but it appears that the Video Footage at issue is in the “Restaurant” and “Hot Seat” advertisements featured on Putnam Partners’s website. Compare Not Done Fighting Video, and Compl., Ex. A, with Putnam Partners Website. The Commission has been unable to locate the alleged “Recovery” or “Under Water” advertisements.

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1 “digital media buy[s]” in August and September 2019, around the time of and possibly related to
2 the “Not Done Fighting” advertisement.¹⁰

3 The Complaint contends that the Video Footage was an asset of the State Committee and
4 that the Senate Committee’s use of it in “Not Done Fighting,” violated the Act and Commission
5 regulations.¹¹ Specifically, the Complaint alleges that the Senate Committee accepted a
6 prohibited contribution in the transfer of an asset from the State Committee.¹² Additionally, the
7 Complaint states that neither the Senate Committee, Hickenlooper 2020, nor Giddy Up PAC
8 reported any disbursements to, or in-kind contributions from, the State Committee or Putnam
9 Partners for the cost of the Video Footage.¹³ Thus, the Complaint further alleges, the Senate

¹⁰ *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00716720&min_date=08%2F01%2F2019&max_date=09%2F30%2F2019 (last visited Aug. 15, 2022) (reflecting disbursements by the Senate Committee from August 1 through September 30, 2019); Hickenlooper for Colo., Amended 2019 October Quarterly Report at 921, 922, 926 (July 7, 2020), <https://docquery.fec.gov/pdf/476/202007079244343476/202007079244343476.pdf> (reflecting \$100,000, \$60,000, and \$150,000 disbursements to Do Big Things on August 28, August 29, and September 6, 2019, respectively). The State Committee’s disclosure reports reflect payments totaling \$158,008.21 to Putnam Partners during the 2014 election cycle, although it is unclear how much of that amount is associated with the Video Footage. See *TRACER Expenditure Search*, COLO. SEC’Y OF STATE, <https://tracer.sos.colorado.gov/PublicSite/SearchPages/ExpenditureSearch.aspx> (last visited Aug. 15, 2022) (search “Hickenlooper for Colorado” in the “Expending Committee Name” field and “Putnam Partners” in the “Payee Name” field). Of that amount, the State Committee paid \$63,310.50 through August 2014, \$68,125.78 in September 2014, and \$26,571.93 in October 2014. *Id.* It appears that the State Committee advertisements at started to air beginning in September 2014. See Eli Stokols, *Hickenlooper Features Wynkoop, Familiar Themes in Campaign’s First TV Ad*, KDVR (Sept. 9, 2014), <https://kdvr.com/news/politics/hickenlooper-features-wynkoop-familiar-themes-in-campaigns-first-tv-ad/>.

¹¹ Compl. at 1-4.

¹² *Id.* at 2-4.

¹³ See *id.*; see also *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00687582&committee_id=C00698258&committee_id=C00716720&recipient_name=hickenlooper+for+colorado&recipient_name=putnam+partners (last visited Aug. 15, 2022) (reflecting no disbursements from the Senate Committee, Hickenlooper 2020, or Giddy Up PAC to Putnam Partners or the State Committee and 11 disbursements from Giddy Up PAC to the Senate Committee); *FEC Receipts: Filtered Results*, FEC.GOV, https://www.fec.gov/data/receipts/?data_type=processed&committee_id=C00687582&committee_id=C00698258&committee_id=C00716720&contributor_name=hickenlooper+for+colorado&contributor_name=putnam+partners (last visited Aug. 15, 2022) (reflecting no receipts by the Senate Committee, Hickenlooper 2020, or Giddy Up PAC from Putnam Partners and four receipts by Hickenlooper 2020 from the Senate Committee).

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1 Committee violated the Act’s reporting requirements by failing to accurately report the transfer
2 of the Video Footage or payments for the Video Footage in its disclosure reports.¹⁴

3 In Response to the Complaint, the Senate Committee acknowledges that it incorporated
4 two seconds from the State Committee’s “Restaurant” advertisement and four seconds from the
5 “Hot Seat” advertisement into its 90-second “Not Done Fighting” campaign announcement
6 video, but denies that any violations resulted from that use of the Video Footage.¹⁵ The Senate
7 Committee asserts that there is “no record of the [State Committee] and Putnam Partners
8 executing a contract for this work,” and because, under federal copyright law, Putnam Partners
9 owns the copyright to the footage as its creator, the Video Footage was not an asset of the State
10 Committee.¹⁶ The Senate Committee further states that it “used clips from Putnam Partners’s
11 publicly available website and edited the images, altering the framing of the clips so that they
12 could serve as b-roll in the launch video.”¹⁷ Finally, the Senate Committee argues that use of
13 clips from the publicly available Video Footage without payment or a license is permitted under
14 the fair use doctrine in federal copyright law and that footage available for fair use does not have
15 value and thus cannot constitute a contribution under the Act.¹⁸

16 Putnam Partners acknowledges that the State Committee paid it as an independent
17 contractor to create the “Restaurant” and “Hot Seat” advertisements containing the Video
18 Footage and states that it retains the copyright and ownership thereof, but denies that it made any
19 contribution to the Senate Committee related to its use of the Video Footage in “Not Done

¹⁴ Compl. at 3-5.

¹⁵ Senate Comm. Resp. at 1-2.

¹⁶ *Id.* at 1 & n.2; *see also* Putnam Partners Resp. at 1 (“The [State Committee] and Putnam Partners did not enter into a contract for this work.”).

¹⁷ Senate Comm. Resp. at 2; *see* Putnam Partners Website.

¹⁸ Senate Comm. Resp. at 2-3.

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1 Fighting.”¹⁹ Putnam Partners argues that the Video Footage is not something of value both
2 under the fair use doctrine and because its standard business practice was to not assert its
3 copyright interest “when a person uses a small portion of an advertisement it has made available
4 on its website in another work.”²⁰ Finally, Putnam Partners contends that if value were assigned
5 to the Video Footage, the value of the potential contribution would nevertheless be *de minimis*
6 and warrant a dismissal.²¹

7 Hickenlooper, in a one-paragraph Response, states that the State Committee terminated
8 as a political committee with the Colorado Secretary of State in 2015 and dissolved as a
9 Colorado nonprofit corporation in 2018, and argues that the State Committee cannot be named as
10 a respondent because it no longer exists as an entity.²² Finally, Hickenlooper 2020 and Giddy
11 Up PAC jointly respond that the Complaint does not allege any violations as to them and request
12 a dismissal of the allegations.²³

¹⁹ Putnam Partners Resp. at 1.

²⁰ *Id.* at 2-4. Putnam Partners further states that it “universally applies this policy, and treated the Senate [Committee] like any other person” in declining to exert its copyright interest in the Video Footage. *Id.* at 4.

²¹ *Id.* at 4; *see also* Senate Comm. Resp. at 4 (“[E]ven if the Commission were to assign value to the clips and find Respondent in violation of the Act, the alleged contribution would be *de minimis* and would warrant dismissal as a matter of prosecutorial discretion.”).

²² *See* Gov. Hickenlooper Resp. at 1 & n. 1; *see also* *Hickenlooper for Colorado TRACER Committee Information Page*, COLO. SEC’Y OF STATE, <https://tracer.sos.colorado.gov/PublicSite/SearchPages/CandidateDetail.aspx?OrgID=16956&Type=CO> (last visited Aug. 15, 2022) (displaying termination date as October 30, 2015); *Summary Page for Hickenlooper for Colorado*, COLO. SEC’Y OF STATE, <https://www.sos.state.co.us/biz/BusinessEntityDetail.do?quitButtonDestination=BusinessEntityResults&nameTyp=ENT&masterFileId=20101043586&entityId=20101043586&fileId=20101043586&srchTyp=ENTITY> (last visited Aug. 15, 2022) (showing that the State Committee incorporated on January 21, 2010 and voluntarily dissolved on June 21, 2018). Additionally, the State Committee incorporates the Senate Committee’s Response by reference. Gov. Hickenlooper Resp. at 1.

²³ Hickenlooper 2020 & Giddy Up PAC Resp. at 1 (Feb. 14, 2020). Additionally, Hickenlooper 2020 and Giddy Up PAC incorporate the Senate Committee’s Response by reference. *Id.* at 1.

1 **III. LEGAL ANALYSIS**2 **A. Applicable Law**

3 The Act provides that no person shall make contributions to any candidate or authorized
4 committee in excess of the Act's limits.²⁴ For the 2020 election cycle, the Act limits
5 contributions by persons to any candidate and his or her authorized political committees to
6 \$2,800 per election.²⁵ Corporations are prohibited from making a contribution to a candidate's
7 committee in connection with a federal election.²⁶ The Act's contribution limitations and
8 prohibitions apply to a limited liability company ("LLC") depending on that LLC's tax treatment
9 election.²⁷ No candidate or committee shall knowingly accept excessive or prohibited
10 contributions.²⁸

11 A "contribution" includes "any gift, subscription, loan, advance, or deposit of money or
12 anything of value made by any person for the purpose of influencing any election for Federal
13 office."²⁹ "Anything of value" includes all in-kind contributions, such as the provision of goods
14 or services without charge or at a charge less than the usual and normal charge.³⁰ The

²⁴ 52 U.S.C. § 30116(a); 11 C.F.R. § 110.1(b)(1).

²⁵ 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1)(i); Price Index Adjustments for Contribution and Expenditure Limitations and Lobbyist Bundling Disclosure Threshold, 84 Fed. Reg. 2504, 2506 (Feb. 7, 2019).

²⁶ *See* 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1).

²⁷ 11 C.F.R. § 110.1(g). An LLC that elects to be treated as a corporation by the Internal Revenue Service ("IRS") is treated as a corporation for contribution purposes under the Act and is prohibited from making contributions to a candidate or candidate committee. 11 C.F.R. § 110.1(g)(3). In contrast, contributions by an LLC that elects to be treated as a partnership by the IRS are treated under the Act as partnership contributions rather than corporate contributions. *Id.* § 110.1(g)(2); *see also id.* § 110.1(e) (partnership contribution rules). Contributions by an LLC with a single natural person member that does not elect to be treated as a corporation by the IRS are attributed only to that single member. *Id.* § 110.1(g)(4).

²⁸ 52 U.S.C. §§ 30116(f), 30118(a); 11 C.F.R. §§ 110.9, 114.2(d).

²⁹ 52 U.S.C. § 30101(8)(A)(i); *accord* 11 C.F.R. § 100.52(a); *see also* 52 U.S.C. § 30118(b)(2) (adding that "contribution" includes "any direct or indirect payment, . . . gift of money, or any services, or anything of value").

³⁰ 11 C.F.R. § 100.52(d)(1).

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1 Commission’s regulations define “usual and normal charge” as “the price of those goods in the
2 market from which they ordinarily would have been purchased at the time of the contribution.”³¹
3 The Commission’s regulations further provide, in material part, that “[t]ransfers of funds
4 or assets from a candidate’s campaign or account for a nonfederal election to his or her principal
5 campaign committee or other authorized committee for a federal election are prohibited.”³²
6 However, the transfer of a nonfederal committee’s assets to the campaign committee of a
7 candidate for federal office is permissible in instances in which the federal committee pays the
8 fair market value or the “usual and normal charge” for the use of such assets.³³ The Commission
9 has pursued matters where the federal candidate’s committee does not pay the state committee
10 for goods and services used by the federal committee.³⁴ When the state committee does not own

³¹ *Id.* § 100.52(d)(2).

³² 11 C.F.R. § 110.3(d). The Commission has explained that this prohibition on all transfers from a candidate’s state committee to the candidate’s federal committee is intended to prevent a federal committee’s indirect use of soft money. *See* Transfers of Funds from State to Federal Campaigns, 57 Fed. Reg. 36,344, 36,345 (Aug. 12, 1992) [hereinafter 1992 E&J] (explaining the revised regulation “would more effectively prevent the indirect use of impermissible funds in federal elections”); Transfer of Funds from State to Federal Campaigns, 58 Fed. Reg. 3474, 3475 (Jan. 8, 1993) [hereinafter 1993 E&J] (same); *see also* Factual & Legal Analysis (“F&LA”) at 3-4, MUR 7106 (Citizens for Maria Chappelle-Nadal, *et al.*) (describing 11 C.F.R. § 110.3(d) as “an extension of the Act’s soft money ban”).

³³ 1992 E&J, 57 Fed. Reg. at 36,345 (“[T]he rule should not be read to proscribe the sale of assets by the state campaign committee to the federal campaign committee, so long as those assets are sold at fair market value.”); 1993 E&J, 58 Fed. Reg. at 3475 (same); *see also* Advisory Opinion 1992-19 at 2 (Mike Kreidler for Congress) (approving request to permit the lease of state campaign committee’s computer equipment to candidate’s federal campaign committee).

³⁴ *See, e.g.*, Conciliation Agreement ¶¶ IV.10-11, V.1, MUR 5646 (Cohen for N.H.) (start-up expenses); Conciliation Agreement ¶¶ IV.4-5, V.1, MUR 6257 (John Callahan, *et al.*) (feasibility research); Conciliation Agreement ¶¶ IV.6-7, 12-13, V.2-4, MUR 6267 (Jonathan Paton for Congress, *et al.*) (polling and survey costs); Conciliation Agreement ¶¶ IV.7, V.1-3, MUR 7076 (Richard Tisei, *et al.*) (polling and fundraising analysis). In these matters, the contributions by state committees of federal candidates also constituted soft money violations of 52 U.S.C. § 30125(e)(1)(A). *See* Certification (“Cert.”) ¶ 6 (Feb. 3, 2005), MUR 5646 (Cohen for N.H., *et al.*); Amended Cert. ¶ 1 (Dec. 3, 2010), MUR 6257 (John Callahan, *et al.*); Cert. ¶¶ 1-2 (Oct. 6, 2010), MUR 6267 (Jonathan Paton for Congress, *et al.*); Conciliation Agreement ¶ V.1, MUR 7076 (Richard Tisei, *et al.*).

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1 the asset, the federal committee must pay the usual and normal charge for use of the asset to the
2 proper owner.³⁵

3 The Act also requires committee treasurers to file reports of receipts and disbursements.³⁶
4 These reports must include, *inter alia*, the identification of each person who makes a contribution
5 or contributions that have an aggregate amount or value in excess of \$200 during an election
6 cycle, in the case of an authorized committee of a federal candidate, together with the date and
7 amount of any such contribution.³⁷

8 **B. The Commission Exercises Its Prosecutorial Discretion and Dismisses the**
9 **Allegation That the State Committee or Putnam Partners Made, and the**
10 **Senate Committee Accepted, an In-Kind Contribution in the Form of the**
11 **Video Footage**

12 The Complaint alleges that the Senate Committee accepted a prohibited and unreported
13 transfer of Video Footage from the State Committee.³⁸ The Senate Committee and Putnam
14 Partners state that the Video Footage created for the State Committee and later used by the
15 Senate Committee in “Not Done Fighting” is owned by Putnam Partners, and not the State

³⁵ See 11 C.F.R. § 100.52(d). Compare F&LA at 4-6, MUR 6784 (Lizbeth Benacquisto for Congress, *et al.*) (finding no reason to believe regarding a federal committee’s use of images used in state campaign advertisement where the federal committee provided copies of invoices documenting payments to the vendor which retained ownership of the images and there was no information indicating the payments were not below the usual and normal charges), F&LA at 10-11, MUR 6218 (Ball4NY, *et al.*) (finding no reason to believe regarding a federal committee’s use of photographs of state officeholder and federal candidate where committee treasurer averred the federal committee purchased the rights to the photographs from the state legislature and provided supporting documentation and there was no information to the contrary), and Statement of Reasons at 2, Comm’rs Walther, Petersen, Bauerly, Hunter, & Weintraub, MUR 5964 (Schock for Congress, *et al.*) [hereinafter Schock SOR] (exercising prosecutorial discretion to dismiss regarding federal committee’s use of footage of state officeholder and federal candidate where federal committee claimed it paid vendor for use rights and production of DVDs containing the footage), with F&LA at 2-4, 6-9, MUR 6792 (Sean Eldridge for Congress, *et al.*) (finding reason to believe that video footage committee received from corporation without payment).

³⁶ 52 U.S.C. § 30104(a); 11 C.F.R. § 104.3.

³⁷ 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a)(4).

³⁸ Compl. at 4-5.

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1 Committee, by operation of federal copyright law.³⁹ Putnam Partners acknowledges that the
2 State Committee paid for its services to produce the Video Footage and that it did not charge the
3 Senate Committee for its later use of the same Video Footage.⁴⁰ The Senate Committee states
4 that it used the Video Footage from Putnam Partners’s website in its “Not Done Fighting”
5 advertisement.⁴¹ The Senate Committee did not disclose any payments to the State Committee
6 or Putnam Partners or report the receipt of any contribution from the State Committee or Putnam
7 Partners during the 2020 election cycle.⁴²

8 The Senate Committee and Putnam Partners argue that neither entity made a contribution
9 under the Act because the Video Footage had no value under the fair use doctrine in federal

³⁹ Senate Comm. Resp. at 1-2; Putnam Partners Resp. at 1 (asserting that “[a]s the creator of the footage, Putnam Partners retained copyright and ownership of it under federal copyright law”). These Respondents do not provide documentation to support this claim but assert that no contract existed between the State Committee and Putnam Partners pertaining to the creation of the footage. Senate Comm. Resp. at 1-2 & n.2 (“There is no record of the Gubernatorial Campaign and Putnam Partners executing a contract for this work.”); Putnam Partners Resp. at 1 & n.2 (“The Gubernatorial Campaign and Putnam Partners did not enter into a contract for this work.”). The available information does not present any indication to the contrary.

⁴⁰ Putnam Partners Resp. at 1-4.

⁴¹ Senate Comm. Resp. at 1-2. The four seconds of footage in “Hot Seat” originally included on-screen text that does not appear in the Video Footage in in “Not Done Fighting.” *Compare* Not Done Fighting Video, *with* Putnam Partners Website. All six seconds of the Video Footage appear to be closer frames or zoomed in versions of the footage originally in “Hot Seat” and “Restaurant.” *Compare* Not Done Fighting Video, *with* Putnam Partners Website. These minor differences appear consistent with the Senate Committee’s assertion that it “used clips from Putnam Partners’[s] publicly available website and edited the images, altering the framing of the clips so that they could serve as b-roll in the launch video.” Senate Comm. Resp. at 2.

⁴² See *FEC Disbursements: Filtered Results*, FEC.GOV, https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00716720&recipient_name=Hickenlooper+for+Colorado&recipient_name=Putnam (last visited Aug. 15, 2022) (reflecting no disbursements by the Senate Committee to Putnam Partners or the State Committee); *FEC Receipts: Filtered Results*, FEC.GOV, https://www.fec.gov/data/receipts/?data_type=processed&committee_id=C00716720&contributor_name=hickenlooper+for+colorado&contributor_name=putnam+partners (last visited Aug. 15, 2022) (reflecting no receipts by the Senate Committee from Putnam Partners or the State Committee).

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1 copyright law covering the use of small portions of publicly available work.⁴³ But nothing in the
2 Act or Commission regulations recognizes an exception to the definition of contribution based
3 on the fair use doctrine that would apply here, nor does there appear to be any relevant
4 Commission precedent creating such an exception. Indeed, in the context of the coordination
5 and republication rulemakings, the Commission specifically rejected requests to adopt public
6 domain and fair use exceptions, explaining that “virtually all campaign material that could be
7 republished” may be considered in the public domain, and therefore such an exception could
8 “swallow the rule.”⁴⁴

9 Here, the available information does not indicate that the Senate Committee paid either
10 Putnam Partners or the State Committee for the Video Footage that it incorporated into its “Not
11 Done Fighting” advertisement. Nor did the Senate Committee report any in-kind contributions
12 from either Putnam Partners or the State Committee related to the Video Footage. If the
13 Commission were to pursue enforcement in this matter, an investigation would be necessary to
14 determine the ownership of the Video Footage, the appropriate valuation of the Video Footage,

⁴³ Senate Comm. Resp. at 2-3; Putnam Partners Resp. at 2-3. In further support of their arguments, Respondents cite Commission enforcement matters in which the Commission did not obtain four votes to find reason to believe respondents republished campaign materials. Senate Comm. Resp. at 3-4 & n.14; Putnam Partners Resp. at 3 & n.12; *see also* 52 U.S.C. § 30116(a)(7)(B)(iii) (defining republication as the “financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents”); *see also* 11 C.F.R. § 109.23(a). The republication provisions in the Act and Commission regulations apply to materials prepared by candidates for *federal office* and republished by third parties, while the Video Footage at issue here was originally prepared by a third party for Hickenlooper’s *state* campaign and used by his federal committee. *See* 52 U.S.C. § 30101(2) (defining the term “candidate” as “an individual who seeks nomination for election, or election, to Federal office”); *see also* F&LA at 6 & n.23, MUR 7080 (Paul Babeu for Congress, *et al.*) (concluding there was no republication of campaign materials under the Act where the federal committee used a candidate’s headshot from an associational webpage pre-dating the federal candidacy); F&LA at 7 n.23, MUR 6792 (Sean Eldridge for Congress, *et al.*) (rejecting respondents’ comparisons to republication matters where “the video footage at issue . . . was produced and distributed by a private entity and subsequently used by a campaign committee,” but nevertheless finding reason to believe where it appeared the committee had access to the raw video footage that was unlikely obtained from the public domain).

⁴⁴ Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 442-43 (Jan. 3, 2003).

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1 and the extent of the Senate Committee’s communications with Putnam Partners regarding the
2 former’s use of the Video Footage. More readily discernible facts, such as Putnam Partners’s tax
3 election status and partnership agreement structure, could yield information that dilutes the
4 potential amount in violation.⁴⁵

5 However, the Video Footage used by the Senate Committee was — and remains —
6 publicly available on Putnam Partners’s website and formed a minimal and incidental part of the
7 Senate Committee’s advertisement (approximately six seconds out of a 90-second
8 advertisement). Although it would not be unreasonable to investigate, given the facts presented
9 in this matter, the investigation required, and the possibly low amount in violation, the
10 Commission exercises its prosecutorial discretion and declines to pursue these allegations
11 further.⁴⁶

12 Accordingly, the Commission exercises its prosecutorial discretion and dismisses the
13 allegations that (1) the Senate Committee violated 52 U.S.C. §§ 30116(f) or 30118(a) by
14 knowingly accepting an excessive or prohibited in-kind contribution; (2) the Senate Committee
15 violated 52 U.S.C. § 30104(b) by failing to disclose an in-kind contribution; (3) Putnam Partners,
16 LLC, violated 52 U.S.C. §§ 30116(a) or 30118(a) by making an excessive or prohibited in-kind

⁴⁵ If Putnam Partners elects to be treated as a partnership by the IRS, any contribution by Putnam Partners related to the Senate Committee’s use of the Video Footage without charge is attributed to the partnership and to each partner either (1) in direct proportion to her share of the partnership profits, or (2) by agreement of the partners. *See* 11 C.F.R. § 110.1(e), (g)(2); 52 U.S.C. § 30116(a). If Putnam Partners elects to be treated as a corporation by the IRS, it is subject to the Act’s prohibition on corporate contributions to candidate committees. *See* 11 C.F.R. § 110.1(g)(3); 52 U.S.C. § 30118(a). If the former, and after determining the appropriate valuation of the Video Footage, any contribution divided according to the partnership agreement could yield in-kind contributions attributable to a number of partners that do not themselves exceed the Act’s contribution limits.

⁴⁶ *See* F&LA at 3, MUR 6514 (Make Us Great Again) (exercising prosecutorial discretion to dismiss where “the footage at issue was a minimal part of the advertisement (less than ten seconds of the Committee’s almost three-minute-long advertisement) and was used as an incidental part of the advertisement”); Schock SOR at 2-3 (exercising prosecutorial discretion to dismiss “given the relatively small amount potentially in violation” and after determining “that further use of the Commission’s limited resources” was not warranted).

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1 contribution; (4) the State Committee violated 11 C.F.R. § 110.3(d) by making an impermissible
2 transfer of an asset to a federal committee; and (5) the Senate Committee violated 11 C.F.R.
3 § 110.3(d) by receiving an impermissible transfer of a state committee's asset.⁴⁷

4 **C. The Commission Finds No Reason to Believe That Hickenlooper 2020 or**
5 **Giddy Up PAC Violated the Act in This Matter**

6 The available information does not indicate that either Hickenlooper 2020 or Giddy Up
7 PAC used any footage produced for the State Committee or otherwise by Putnam Partners in any
8 of their advertisements. The record also does not support the Complaint's suggestion that either
9 Hickenlooper 2020 or Giddy Up PAC would have been expected to pay the State Committee for
10 the Video Footage. Accordingly, the Commission finds no reason to believe that Hickenlooper
11 2020 or Giddy Up PAC violated the Act in connection with the allegations in this matter.

⁴⁷ See *Heckler vs. Chaney*, 470 U.S. 821 (1985).