

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR 7753

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|-------------------------|------------|
| DATE COMPLAINT FILED: | 03/16/2020 |
| DATE OF NOTIFICATION: | 06/24/2020 |
| LAST RESPONSE RECEIVED: | 08/11/2020 |
| DATE ACTIVATED: | 09/29/2020 |
| EXPIRATION OF SOL: | 04/25/2023 |
| | (earliest) |
| | 05/22/2023 |
| | (latest) |
| ELECTION CYCLE: | 2018 |

COMPLAINANT:

Americans for Public Trust

RESPONDENTS:

Everytown for Gun Safety Action Fund, Inc.
 Everytown for Gun Safety Victory Fund and
 Tara Paone in her official capacity
 U.S. Rep. Lucy McBath
 Friends of Lucy McBath Inc. and
 Kendra-Sue Derby in her official capacity
 as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30101(17)
 52 U.S.C. § 30104(b)
 52 U.S.C. § 30116(a)(7)(B)
 52 U.S.C. § 30118(a)
 11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:**I. INTRODUCTION**

The Commission received a complaint alleging that Representative Lucy McBath, her principal campaign committee Friends of Lucy McBath Inc. and Kendra-Sue Derby in her official capacity as treasurer (the “Committee”), Everytown for Gun Safety Action Fund, Inc. (the “Action Fund”), and Everytown for Gun Safety Victory Fund and Tara Paone in her official

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1 capacity as treasurer (the “Victory Fund”) (collectively, the “Respondents”) violated the Federal
2 Election Campaign Act of 1971, as amended (the “Act”), by making coordinated
3 communications that constituted prohibited in-kind contributions. According to the Complaint,
4 McBath was simultaneously both a candidate and an employee of the Action Fund in March
5 2018. After McBath took leave from the organization in April 2018, the Action Fund endorsed
6 her and the Action Fund, and Victory Fund proceeded to spend more than three million dollars
7 supporting her campaign. Although the Action Fund and Victory Fund reported their spending
8 as independent expenditures, the Complaint alleges that those expenditures were, in fact,
9 coordinated with McBath based on her ties to the Action Fund. Respondents deny the allegations
10 and claim that McBath worked for a different organization.

11 As further described below, the available information supports a reasonable inference that
12 the Action Fund’s spending on behalf of McBath’s campaign during the 2018 primary election in
13 Georgia constituted coordinated communications. First, the Action Fund appears to have
14 employed McBath, while she was a federal candidate, 23 days before it began paying for public
15 communications supporting her candidacy. Second, the Action Fund’s expenditures accounted
16 for the overwhelming majority of advertising supporting McBath during the 2018 Georgia
17 Democratic primary election — while the Committee itself spent a little over \$10,000. Third,
18 Respondents fail to adequately explain conflicting information in the record regarding McBath’s
19 employment or adequately describe or provide the Action Fund’s firewall policy.

20 Under these circumstances, we recommend that the Commission find reason to believe
21 that the Action Fund violated section 30118(a) of the Act by making prohibited in-kind
22 contributions in the form of coordinated communications and that McBath and the Committee

violated section 30118(a) of the Act by receiving such in-kind contributions. In addition, we recommend that the Commission find reason to believe that the Committee failed to accurately report those contributions in violation of section 30104(b). Because we intend to investigate McBath's relationship to the Action Fund and her alleged involvement with the Action Fund's communications, we recommend that the Commission authorize compulsory process. With respect to the Victory Fund, we recommend that the Commission take no action at this time. If during the course of the investigation we uncover any relevant information regarding the Victory Fund, we will make the appropriate recommendation.

II. FACTUAL BACKGROUND

A. Lucy McBath's 2018 Campaign

Lucy McBath filed her Statement of Candidacy on March 5, 2018.¹ Her principal campaign committee, Friends of Lucy McBath, incorporated in Georgia on March 3, 2018 and filed its Statement of Organization on March 5, 2018.² Following Georgia's May 22, 2018 primary election and July 24, 2018 run-off election, Lucy McBath became the Democratic nominee to represent Georgia's Sixth Congressional District in the 2018 general election.

¹ Statement of Candidacy, Lucia Kay McBath (Mar. 5, 2018), <https://docquery.fec.gov/pdf/631/201803059095645631/201803059095645631.pdf>. McBath was a candidate for Georgia state House of Representatives to represent district 37. *See* Campaign Reports and Registration Information, Georgia Government Transparency and Campaign Finance Commission, https://media.ethics.ga.gov/Search/Campaign/Campaign_ByName.aspx (search "Lucy McBath").

² Certificate of Incorporation, Friends of Lucy McBath Inc. (Mar. 3, 2018), <https://ecorp.sos.ga.gov/BusinessSearch/BusinessInformation?businessId=2476252&businessType=Domestic%20Nonprofit%20Corporation&fromSearch=True> (select "filing history"); Statement of Organization, Friends of Lucy McBath Inc. (Mar. 3, 2018), <https://docquery.fec.gov/pdf/696/201803059095645696/201803059095645696.pdf>.

For the 2018 election cycle, the Committee reported accepting \$2,316,740.59 in individual contributions and spending \$2,457,120.66 in operating expenditures.³ For the 2018 primary election in Georgia, the Committee reported accepting \$81,948.38 in individual contributions and spending \$104,910.73 in operating expenditures.⁴ As reflected below, for the 2018 primary election, the Committee appears to have spent \$10,874.66 on non-consulting advertising costs (\$7,500 on media production plus \$3,374.66 on social media advertising), which was approximately 10 percent of its overall budget.⁵

**Primary Spending by Friends of McBath
 March 6, 2018-May 22, 2018**

| Disbursement Description | Disbursement Amount |
|---------------------------------------|----------------------------|
| ACCOUNTING/COMPLIANCE | \$ 750.00 |
| BANK FEES | \$ 78.00 |
| CONSULTING/POLITICAL STRATEGY | \$ 10,736.00 |
| CONSULTING/PRINTING-OFFICE SUPPLIES | \$ 2,113.00 |
| DIGITAL MEDIA CONSULTING | \$ 27,455.08 |
| EVENT SITE RENTAL | \$ 684.05 |
| FUNDRAISING SERVICES | \$ 2,480.00 |
| LEGAL FEES | \$ 1,500.00 |
| LODGING | \$ 892.83 |
| MEDIA PRODUCTION | \$ 7,500.00 |
| MERCHANT BANK PROCESSING FEE | \$ 4,058.52 |
| OFFICE SUPPLIES | \$ 3,157.11 |
| OFFSET TO CANDIDATE LOAN: FILING FEES | \$ 5,220.00 |
| PHOTOGRAPHY | \$ 1,500.00 |
| POSTAGE | \$ 1,475.00 |
| REIMBURSEMENT-SEE DETAILS | \$ 18,044.65 |

³ Friends of Lucy McBath, 2017-2018 Financial Summary, <https://www.fec.gov/data/committee/C00672295/?cycle=2018&tab=summary#total-raised>.

⁴ Friends of Lucy McBath, 2017-2018 Individual Contribution Transactions, <https://www.fec.gov/data/committee/C00672295/?cycle=2018&tab=raising#individual-contribution-transactions> (select "Filter this data"); Friends of Lucy McBath, 2017-2018 Spending, <https://www.fec.gov/data/committee/C00672295/?cycle=2018&tab=spending> (select "Filter this data").

⁵ Friends of Lucy McBath, 2017-2018 Spending, <https://www.fec.gov/data/committee/C00672295/?cycle=2018&tab=spending> (select "Filter this data").

| Disbursement Description | Disbursement Amount |
|--------------------------|----------------------|
| RESEARCH | \$ 1,000.00 |
| SOCIAL MEDIA ADVERTISING | \$ 3,374.66 |
| SOFTWARE | \$ 4,600.00 |
| STAFF TIME | \$ 300.45 |
| TRAVEL | \$ 1,831.00 |
| TRAVEL EXPENSES | \$ 1,460.38 |
| VOTER FILE | \$ 4,700.00 |
| Total | \$ 104,910.73 |

For the 2018 run-off and general elections combined, the Committee appears to have spent approximately \$1.5 million on advertising (excluding consulting costs).⁶

B. Spending in Support of McBath by the Everytown for Gun Safety Organizations

The Action Fund incorporated in Delaware in April 9, 2007 and is currently recognized as tax-exempt under section 501(c)(4) of the Internal Revenue Code.⁷ Its self-described mission is “promoting gun safety legislation and initiatives and reducing gun violence through the education of policymakers, the public, and the media and organizing communities in support of gun safety.”⁸ The Action Fund reported spending approximately \$1.5 million on independent expenditures in 2018, with approximately \$1.2 million (80%) spent supporting Lucy McBath.⁹ Between April 25, 2018 and July 23, 2018, the Action Fund focused exclusively on promoting McBath’s candidacy — reporting \$847,401 in independent expenditures in support of McBath

⁶ *Id.*

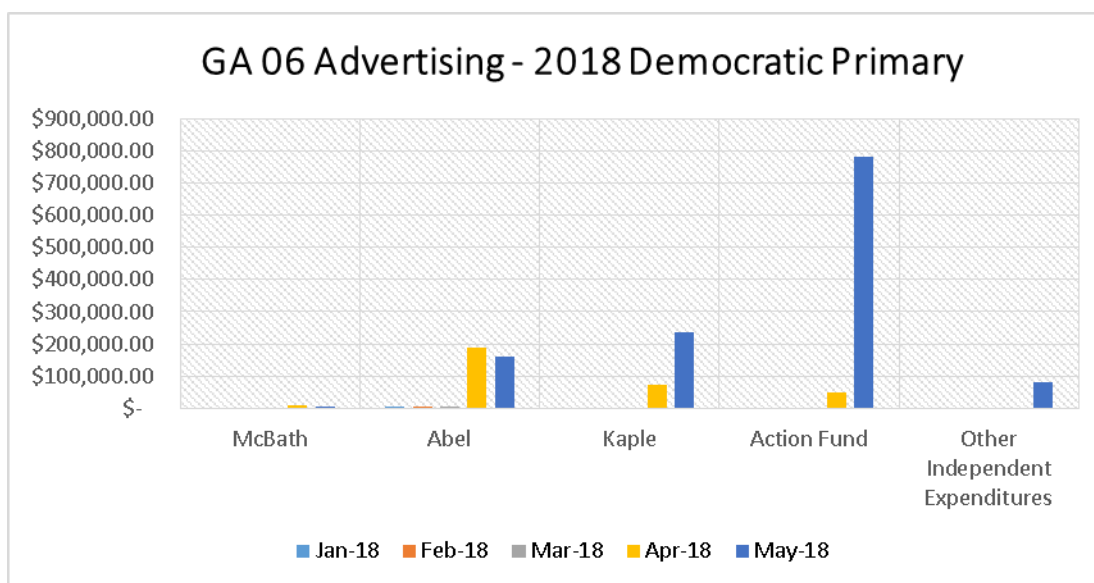
⁷ Delaware Dep’t of State: Corporation Division, Entity Search (search for “Everytown for Gun Safety Action Fund”), <https://icis.corp.delaware.gov/ecorp/entitysearch/NameSearch.aspx>; IRS Exempt Organizations Master File (search in New York for “Everytown for Gun Safety Action Fund”).

⁸ Everytown for Gun Safety Action Fund, 2018 Return of Organization Exempt From Tax (“2018 Action Fund Tax Return”), https://apps.irs.gov/pub/epostcard/cor/208802884_201812_9900_2020061217189577.pdf.

⁹ 2017-2018 Independent Expenditures, Everytown for Gun Safety Action Fund, <https://www.fec.gov/data/committee/C90015025/?tab=spending>.

between April 25, 2018 and May 22, 2018 for the primary election and an additional \$408,225 in independent expenditures supporting her candidacy between June 22, 2018 and July 23, 2018 for the run-off election.¹⁰

The graph below depicts candidate spending on advertising and independent expenditures reported for the 2018 Democratic primary for Georgia's Sixth Congressional District.



The Victory Fund incorporated in Delaware on September 21, 2016 and registered with the Commission as an independent expenditure-only committee on October 2, 2018.¹¹ While the Action Fund appears to have ceased spending directly on advertisements supporting McBath's campaign, it appears to have provided \$3,712,786 million to the Victory Fund, which then spent \$2,953,239 on independent expenditures in support of McBath for the general election on November 6, 2018. The \$3,712,786 in contributions that the Victory Fund received from the Action Fund represented approximately 95.7% of the Victory Fund's reported contributions for

¹⁰ *Id.* (select "Filter this data").

¹¹ Statement of Organization, Everytown for Gun Safety Victory Fund (Oct. 2, 2018), <https://docquery.fec.gov/pdf/571/201810029124275571/201810029124275571.pdf>.

all of 2018.¹² In addition to spending funds in support of McBath, the Victory Fund reported making independent expenditures worth \$108,068 against McBath's general election opponent, Karen Christine Handel, between October 22, 2018 and October 26, 2018.¹³ The Victory Fund's independent expenditures supporting McBath and opposing Handel represent approximately 83% of its total 2018 independent expenditures. The Victory Fund also reported \$49,724 in disbursements to the Action Fund in 2018 for an email list, various legal and accounting services, travel, and research.¹⁴

C. Information Provided by the Complaint and Responses

According to the Complaint, McBath was an employee of the Action Fund and continued to remain employed with the Action Fund even after she became a candidate.¹⁵ In support, the Complaint cites a March 11, 2018 television interview in which McBath is described as a "national spokeswoman for Everytown for Gun Safety" and "also running for Georgia's 6th Congressional District."¹⁶ This interview was posted on McBath's YouTube channel on March 13, 2018 and further posted to McBath's campaign website on an unknown date.¹⁷ In addition,

¹² 2017-2018 Individual Contributions, Everytown for Gun Safety Victory Fund, <https://www.fec.gov/data/committee/C00688655/?cycle=2018&tab=raising#individual-contribution-transactions> (select "Filter this data").

¹³ 2017-2018 Independent Expenditures, Everytown for Gun Safety Victory Fund, <https://www.fec.gov/data/committee/C00688655/?cycle=2018&tab=spending#independent-expenditures> (select "Filter this data").

¹⁴ 2017-2018 Disbursements, Everytown for Gun Safety Victory Fund, <https://www.fec.gov/data/committee/C00688655/?cycle=2018&tab=spending#disbursement-transactions> (select "Filter this data").

¹⁵ Compl. at 3.

¹⁶ *Id.* at 2 (citing CNN New Day Sunday, Interview with Lucy McBath (Mar. 11, 2018)).

¹⁷ See <https://lucyforcongress.com/news-updates/lucy-mcbath-appears-on-cnns-new-day/>; Lucy McBath, YouTube (Mar. 13, 2018), https://www.youtube.com/watch?v=bTqEsnVi194&feature=emb_title.

1 the Complaint relies upon McBath's Amended 2018 Financial Disclosure Report, which stated
 2 that McBath earned \$100,000 in salary from the Action Fund in 2017 and \$25,000 from the
 3 Action Fund in 2018.¹⁸ The Financial Disclosure Report also stated that McBath took a leave of
 4 absence in 2018 as part of an agreement with the Action Fund and would return only after
 5 November 15, 2018.¹⁹

6 The Complaint asserts that the Action Fund's independent expenditures in support of
 7 McBath are in fact coordinated communications. The Complaint argues that the Action Fund's
 8 communications met both the payment and content standards of the Commission's regulations
 9 defining coordinated communications because the Action Fund paid for independent
 10 expenditures supporting McBath's candidacy.²⁰ The Complaint also claims that the conduct
 11 standard of the regulations is satisfied in two independent ways. First, the Complaint alleges that
 12 the timing of McBath's employment with the Action Fund, coupled with the Action Fund's
 13 advertising supporting her — constituting the Action Fund's largest independent expenditure
 14 effort in 2018 — makes it “highly implausible that Representative McBath did not engage in
 15 substantial discussion regarding her election.”²¹ Second, the Complaint argues that the former

¹⁸ Compl. at 2 (citing Lucia McBath, Amendment to 2018 Financial Disclosure Report, U.S. Clerk of the House of Representatives (May 16, 2019), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2018/10028034.pdf).

¹⁹ *Id.* These disclosures are the same as those included in McBath's initial Financial Disclosure Report filed in May 2018 and the most recent Amended 2018 Financial Disclosure Report filed August 2019. *See* Lucia McBath, Amendment to 2018 Financial Disclosure Report, U.S. Clerk of the House of Representatives (August 26, 2019), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2018/10029259.pdf; Lucia McBath, 2018 Financial Disclosure Report, U.S. Clerk of the House of Representatives (May 21, 2018), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2018/10023518.pdf.

²⁰ Compl. at 3.

²¹ *Id.* at 4.

employee conduct standard is satisfied because the Action Fund employed McBath within 120 days of making independent expenditures supporting her.

The Everytown Response and the McBath Response deny the allegations and claim the Complaint is both speculative and fails to identify a specific communication alleged to be coordinated with McBath.²² The Responses do not address McBath's disclosures in her 2018 Financial Disclosure Report but instead argue that McBath was employed by Everytown for Gun Safety Support Fund, Inc.,²³ a separate Delaware corporation recognized as tax-exempt under section 501(c)(3) of the Internal Revenue Code.²⁴ The Everytown Response includes a sworn statement from Tara Paone, Chief Financial Officer of the Action Fund and Support Fund, and Treasurer of the Victory Fund. Paone states that: (1) the Support Fund employed McBath until she went on unpaid leave on April 2, 2018;²⁵ (2) the Action Fund and Victory Fund did not engage in any of the types of conduct set forth in 11 C.F.R. § 109.21(d)(1)-(5);²⁶ and (3) the Action Fund and Victory Fund had a written firewall and anti-coordination policy that met the requirements of the Commission's safe harbor at 11 C.F.R. § 109.21(h) and that McBath was

²² See Everytown Response at 1; McBath Response at 1.

²³ McBath Resp. at 2 ("The complaint falsely asserts that Rep. McBath was employed by the organizations that made independent expenditures on behalf of her candidacy. As stated above, she was not."); *id.* (McBath "served as the Support Fund's spokeswoman for the educational programs regarding gun safety issues"); Everytown Resp. at 2 (McBath's job duties at the Support Fund "included engaging faith leaders and speaking to faith congregations about the importance of common sense gun laws; serving as a national spokesperson on the issue of gun violence; and building and maintain relationships with survivors of gun violence.").

²⁴ Delaware Dep't of State: Corporation Division, Entity Search (search for "Everytown for Gun Safety Support Fund"), <https://icis.corp.delaware.gov/ecorp/entitysearch/NameSearch.aspx>; IRS Exempt Organizations Master File (search in New York for "Everytown for Gun Safety Support Fund").

²⁵ Everytown Resp., Attach. 1 ¶ 2.

²⁶ *Id.* ¶¶ 4-8.

provided with a copy of the policy “in light of her candidacy.”²⁷ The Everytown Response does not include a copy of the firewall policy.

III. LEGAL ANALYSIS

A. Legal Standard

The Act prohibits corporations from making contributions to federal candidates or their committees and corporate officers and directors from consenting to such contributions.²⁸ It also prohibits federal candidates or their committees from knowingly accepting corporate contributions.²⁹

The Act treats expenditures made “in cooperation, consultation, or concert, with or at the request or suggestion of, a candidate, his [or her] authorized political committees, or their agents” as in-kind contributions to that candidate and must be reported as expenditures made by the candidate’s authorized committee.³⁰ Commission regulations set forth a three-prong test for when a communication is “coordinated” with a candidate, an authorized committee, a political party committee, or agent thereof, and treated as an in-kind contribution: (1) the communication is paid for, partly or entirely, by a person other than the candidate, authorized committee, political party committee, or agent thereof; (2) the communication satisfies at least one of the “content standards” at 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of

²⁷ *Id.* ¶ 3.

²⁸ 52 U.S.C. § 30118(a).

²⁹ *Id.*

³⁰ 52 U.S.C. § 30116(a)(7)(B). Authorized committees are required to report the identification of each person who contributes an aggregate amount of \$200 or more per election cycle, along with the date and amount of the contribution, including in-kind contributions. 52 U.S.C. § 30104(b)(3); 11 C.F.R. § 100.52(d)(1) (term “anything of value” in the Act’s definition of contribution includes all in-kind contributions; 11 C.F.R. §§ 109.20, 109.21

the “conduct standards” at 11 C.F.R. § 109.21(d).³¹ All three prongs must be satisfied for a communication to be considered coordinated under the regulations. Agreement or formal collaboration is not required for a communication to be a coordinated communication.³²

In contrast to a coordinated expenditure, an independent expenditure is an expenditure by a person “expressly advocating the election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents.”³³

B. The Commission Should Find That There is Reason to Believe that Action Fund Expenditures Supporting McBath Constituted Coordinated Communications

1. The Payment and Content Prongs

There does not appear to be a dispute as to whether the Action Fund satisfied the payment and content prongs. The Action Fund acknowledges that it paid for all of the communications at issue, meeting the payment prong, and reported those communications as independent expenditures,³⁴ which meets the third standard of the content prong: “[a] public communication,

(coordinated expenditures and coordinated communications treated as in-kind contributions and must also be reported as an expenditures).

³¹ The six types of conduct that satisfy the conduct prong are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) use of a common vendor; (5) use of a former employee or independent contractor; and (6) republication of campaign material. 11 C.F.R. § 109.21(d)(1)-(6).

³² Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (2002) (“The [Commission’s] regulations shall not require agreement or formal collaboration to establish coordination.”); 11 C.F.R. § 109.21(e) (“Agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication . . . is not required for a communication to be a coordinated communication.”).

³³ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

³⁴ *See* Everytown Resp. at 2. The Action Fund’s independent expenditure reports disclosed hundreds of thousands of dollars spent for direct mail services, telephone services, television advertisements, and internet

as defined in 11 C.F.R. 100.26,³⁵ that expressly advocates, as defined in 11 C.F.R. 100.22, the election or defeat of a clearly identified candidate for Federal office.”³⁶ The Action Fund also issued multiple press releases in 2018 touting its spending in support of McBath’s candidacy.³⁷

2. The Conduct Prong

The Complaint argues that the conduct prong is satisfied because: (1) the Action Fund employed McBath within 120 days of making independent expenditures in support of her candidacy; and (2) the employer-employee relationship between the Action Fund and McBath, coupled with the timing of the Action Fund’s advertising, makes it “highly implausible” that Representative McBath did not engage in substantial discussion regarding her election.³⁸

advertising supporting McBath during the 2018 Georgia primary election and runoff. An example of the Action Fund’s \$540,000 television ad buy (disclosed on a 24-hour report filed May 13, 2018) was posted to YouTube on May 14, 2018. See Simone Pathé, *Who’s Going to Challenge Karen Handel Without Jon Ossoff*, ROLL CALL (May 21, 2018), <https://www.rollcall.com/2018/05/21/whos-going-to-challenge-karen-handel-without-jon-ossoff/> (reporting on the ad buy and linking to Everytown for Gun Safety, *Everytown for Lucy McBath*, YOUTUBE (May 14, 2018), <https://www.youtube.com/watch?v=OGpjQlyIVbg&feature=youtu.be>). The ad contains express advocacy as defined by 11 C.F.R. § 100.22(a) (“Vote Lucy McBath for Congress”).

³⁵ A “public communication” is “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. . . . [but] shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site.” 11 C.F.R. §100.26.

³⁶ 11 C.F.R. § 109.21(c)(3).

³⁷ Compl. at 3 (citing Press Release, Everytown for Gun Safety Action Fund, Everytown for Gun Safety Action Fund Applauds Lucy McBath for Winning Democratic Primary Runoff Election in Georgia’s Sixth Congressional District (July 24, 2018), <https://everytown.org/press/everytown-for-gun-safety-action-fund-applauds-lucy-mcbath-for-winning-democratic-primary-runoff-election-in-georgias-sixth-congressional-district/>); Press Release, Everytown for Gun Safety Action Fund, Everytown for Gun Safety Action Fund Applauds Lucy McBath for Advancing to Democratic Primary Runoff (May 23, 2018), <https://everytown.org/press/everytown-for-gun-safety-action-fund-applauds-lucy-mcbath-for-advancing-to-democratic-primary-runoff/> (Everytown for Gun Safety Action Fund “endorsed McBath and launched digital, mailer and television advertising in support of her campaign”).

³⁸ Compl. at 4.

i. Former Employee Standard

11 C.F.R. § 109.21(d)(5) provides that a communication satisfies the conduct standard if:

(a) “[t]he communication is paid for by a person, or by the employer of a person, *who was an employee or an independent contractor of the candidate* clearly identified in the communication” or the candidate’s opponent, or a political party committee, during the previous 120 days;³⁹ and
 (b) the employee or independent contractor uses or conveys to the payor information about the candidate’s or party’s plans, projects, activities, or needs, or information used by the employee in providing services to the candidate or party, and the information is material to the creation, production, or distribution of the communication.⁴⁰

Here, the Complaint does not allege that a former employee of the candidate, McBath, shared non-public information about the candidate’s plans, projects, activities or needs with the third party payor, the Action Fund, but alleges that the candidate herself shared such information.⁴¹ Given that the plain text of the regulation clearly applies to “an employee or independent contractor of the candidate,” it does not appear that the facts as alleged by the Complaint satisfy the conduct standard at section 109.21(d)(5).⁴²

³⁹ 11 C.F.R. § 109.21(d)(5)(i) (emphasis added).

⁴⁰ *Id.* § 109.21(d)(5)(ii); *see also* Advisory Opinion 2016-21 at 4-5 (Great America PAC) (determining that former employees of candidate’s campaign would satisfy the conduct prong of section 109.21(d)(5) if they shared material information from prior employment with requestor who was a non-connected hybrid political committee and planning to conduct a phone bank).

⁴¹ Compl. at 4.

⁴² *See* First Gen. Counsel’s Rpt. at 8, MUR 5506 (Emily’s List, *et al.*) (former employee standard not applicable “because it only covers conduct by a campaign committee’s former employee”); Certification, MUR 5506 (Aug. 12, 2005) (approving recommendations in First General Counsel’s Report);

ii. *Substantial Discussion and Material Involvement Standards*

The “substantial discussion” standard is met when a communication is created, produced or distributed after one or more “substantial discussion[s]” between the person paying for the communication and the candidate.⁴³ A discussion is “substantial” within the meaning of the regulation if information about the candidate’s plans, projects, activities or needs is conveyed to the person paying for the communication, and that information is material to the creation, production or distribution of the communication.⁴⁴

The “material involvement” conduct standard is met when a candidate is materially involved in decisions regarding: (i) the content of the communication; (ii) the intended audience for the communication; (iii) the means or mode of the communication; (iv) the specific media outlet used for the communication; (v) the timing or frequency of the communication; or (vi) the size or prominence of a printed communication, or duration of a communication by means of broadcast, cable or satellite.⁴⁵ A candidate is considered “materially involved” after sharing information (either directly or indirectly) about his or her plans, projects, activities, or needs with the person making the communication.⁴⁶ The Commission explained that the candidate “need not be present or included during [the] formal decisionmaking process but need only participate to the extent that he or she assists the ultimate decisionmaker.”⁴⁷ Further, the involvement of the

⁴³ 11 C.F.R. § 109.21(d)(3).

⁴⁴ *Id.*

⁴⁵ 11 C.F.R. § 109.21(d)(2). “[M]aterial” has its ordinary legal meaning, which is “important; more or less necessary; having influence or effect; going to the merits.” Coordinated and Independent Expenditures, 68 Fed. at 433.

⁴⁶ Coordinated and Independent Expenditures, 68 Fed. Reg. at 433-34.

⁴⁷ *Id.* at 434.

candidate does not need to be traced directly to one specific communication.⁴⁸ The “material involvement” standard can overlap with the “substantial discussion” standard⁴⁹ but also encompasses forms of “real world” coordination that the other conduct standards do not.⁵⁰

In directing the Commission to promulgate regulations on coordinated communications, Congress explicitly required the Commission to address payments by persons who had previously served as employees of candidates, indicating that such prior working relationships could often result in coordination.⁵¹ In implementing Congress’ instruction, the Commission’s former-employee conduct standard captures former employees using nonpublic “material information” about “campaign plans, projects, activities, or needs,” or sharing such information with the person funding the communication for 120 days following their employment with the

⁴⁸ *Id.* (“Rather, a candidate’s or political party committee’s involvement is material to a decision regarding a particular communication if that communication is one of a number of communications and the candidate or political party committee was materially involved in decisions regarding the strategy for those communications.”).

⁴⁹ *Id.* at 433 (“Many activities that satisfy the ‘substantial discussion’ conduct standard will also satisfy the ‘material involvement’ standard”).

⁵⁰ *Id.*; *see, e.g.*, Factual and Legal Analysis at 5, MUR 5440 (The Media Fund, *et al.*) (“The potential use of inside information by a person who has leadership positions in both a spending organization and a recipient committee is a type of ‘real world’ coordination not directly addressed by any of the other content standards.”); *see also* Factual and Legal Analysis at 6, MUR 5815 (Madrid for Congress, *et al.*) (reason to believe there was material involvement where state attorney general’s office sent mailer and candidate was the office’s top official); Factual and Legal Analysis at 8-9, MUR 5511/5525 (Swift Boat Vets and POWs for Truth) (reason to believe there was material involvement where individual had “dual positions” with Bush campaign and organization airing TV ads against Bush’s opponent).

⁵¹ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §214(c), 116 Stat. 81, 95 (2002) (“the [new] regulations shall address payments for communications directed or made by persons who previously served as an employee of a candidate or a political party”); 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) (“[I]f an individual involved in key strategic decisionmaking for a candidate’s political advertising resigned from the candidate’s campaign committee, immediately thereafter joined an outside organization, and then used inside strategic information from the campaign to develop the organization’s imminent soft money-funded advertising in support of the candidate, a finding of coordination might very well be appropriate.”). Although BCRA directed the Commission to address former employees in its coordination regulations, the Commission long considered previous employment relationships with candidates as evidence of coordination. *See, e.g.*, Gen. Counsel’s Rpt. at 2-4, MUR 443 (Florida Friends of Reagan, *et al.*) (expenditures by the group Florida Friends of Reagan in April 1976 not independent because its Chairman had been Florida Chairman of Citizens for Reagan until March 1976); Certification, MUR 443 (Florida Friends of Reagan, *et al.*) (Oct. 27, 1977) (finding reason to believe).

1 candidate.⁵² Although that standard does not govern in this matter because section 109.21(d)(5)
 2 does not address instances where the candidate herself is the current or former employee, an
 3 expenditure by a person directly employing the candidate herself within the 120 day time frame
 4 would logically indicate coordination as well, given that the funder's connection to the candidate
 5 is direct and occurred in close proximity to its paid communications. Because McBath appears
 6 to have worked for the Action Fund while simultaneously running for Federal office and the
 7 Action Fund's expenditures supporting McBath began just 23 days after her leave of absence,
 8 there is a reasonable basis to question whether McBath shared material information about her
 9 campaign's plans, projects, and activities with the Action Fund.⁵³

10 While the employer-employee relationship alone does not establish coordination, that
 11 fact, coupled with the timing and amount of the Action Fund's advertising in support of McBath
 12 during the 2018 Georgia primary election and minimal advertising by McBath's own campaign,
 13 further supports the inference that the Action Fund had inside information regarding McBath's
 14 paid media needs. As described above and depicted in the earlier chart of relative spending,

⁵² In establishing a 120-day temporal limit for the former employee conduct standard, the Commission concluded that material information shared by a candidate's former employee about the candidate's campaign strategy, plans, needs, and activities is not valuable beyond 120 days. *See Coordinated Communications*, 75 Fed. Reg. 55947, 55957-59 (Sept. 15, 2010).

⁵³ In contrast to the facts of this matter, in MUR 5970, the Commission found no reason to believe that a non-profit organization made an excessive in-kind contribution to a candidate where the organization "'excommunicated'" the candidate from the organization's Board of Directors as soon as she filed a statement of candidacy. *See Factual and Legal Analysis* at 3-4, MUR 5970 (League of Conservation Voters, *et al.*). In MURs 6789/6852, the Office of General Counsel recommended that the Commission find reason to believe that an independent expenditure-only political committee, Special Operations for America, (the "Super PAC") made in-kind contributions to Ryan Zinke, a federal candidate, when the Super PAC made expenditures in support of Zinke three weeks after he resigned as the Super PAC's chairman. First Gen. Counsel's Rpt. at 6-8, MURs 6789/6852 (Zinke for Congress, *et al.*) (Zinke filed his statement of candidacy after his resignation). The Commission split 2-2. Certification, MURs 6789/6852 (Zinke for Congress, *et al.*). In their statement of reasons for the matter, the declining-to-proceed Commissioners stated that they did not approve the recommendations, in part, because "[t]here [was] no evidence in the record of interaction or communication, much less coordination, between Zinke and the Super PAC after Zinke became a candidate." Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 4, MURs 6789/6852 (Zinke for Congress, *et al.*).

1 McBath's authorized committee spent a little over \$10,000 on total advertising costs (excluding
 2 consulting costs) for Georgia's primary election in May 2018 whereas the Action Fund spent
 3 \$847,501 supporting her for that election.

4 The Responses do not sufficiently rebut the allegations. The Complaint relies on
 5 McBath's 2018 Financial Disclosure Report, signed by McBath herself, reporting that she was a
 6 salaried employee of the Action Fund in 2017 and the first quarter of 2018,⁵⁴ yet the Responses
 7 do not address this information. Instead, the Responses assert that McBath worked for the
 8 Support Fund but leave unanswered the allegation that McBath worked for the Action Fund.
 9 While the Response of McBath and the Committee does not provide any supporting
 10 documentation, the Response of the Action Fund relies upon the affidavit of Paone, the CFO of
 11 the Action Fund and Support Fund and the treasurer of the Victory Fund.⁵⁵

12 Consistent with the district court's reasoning in *La Botz v. FEC*,⁵⁶ however, the
 13 Responses do not appear to support a dismissal in this matter. There, the district court concluded
 14 that the Commission's unanimous no reason to believe determination was not supported by
 15 substantial evidence because the Commission relied on a single affidavit that was not based on
 16 first-hand knowledge and was submitted only after the commencement of the enforcement

⁵⁴ Compl. at 2 (citing Lucia McBath, Amendment to 2018 Financial Disclosure Report, U.S. Clerk of the House of Representatives (May 16, 2019), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2018/10028034.pdf).

⁵⁵ The Paone Affidavit is titled as such but it is not notarized, making it more like a declaration than an affidavit. It is signed and affirmed under penalty of perjury.

⁵⁶ 889 F. Supp. 2d 51 (D.D.C. 2012) (denying Commission's motion to dismiss and remanding matter to Commission for proceedings consistent with the court's opinion). On remand, the Commission determined that further investigation of the complaint's allegations would not be an efficient use of agency resources and dismissed the matter as a matter of prosecutorial discretion. *See La Botz v. FEC*, 61 F. Supp. 3d 21, 25 (D.D.C. 2014). The complainant then filed suit again, and the court granted the Commission's motion to dismiss because the case had become moot and the Commission's exercise of its prosecutorial discretion was not contrary to law. *Id.*

proceeding, reflecting *post-hoc rationalizations* and the absence of contemporaneous evidence.⁵⁷

The district court found that the Commission did not account for conflicting contemporaneous evidence provided by the complainant and instead accepted the respondent's conclusory explanations.⁵⁸

Here, the Respondents' failure to address the Financial Disclosure Report — an important source of contemporaneous factual support for the Complaint's allegations, which supports the proposition that McBath was employed by the Action Fund — raises questions as to the credibility of Respondents' representation that she was employed by the Support Fund.

Moreover, the Paone Affidavit states in conclusory fashion that McBath was not materially involved in decisions regarding the Action Fund or the Victory Fund's public communications and that the Action Fund and Victory Fund did not engage in substantial discussions with McBath about the creation, production, or distribution of any public communication.⁵⁹ It is also unclear from the Affidavit whether Paone's representations are based on first hand-knowledge. It does not state that she has personal knowledge of the matters to which she purports to testify, and it does not indicate whether she, as CFO of the Action Fund, was responsible for the creation and

⁵⁷ 889 F. Supp. 2d at 61-62 (emphasis in original).

⁵⁸ *Id.* at 62-63 ("because the affidavit is not clearly supported by personal knowledge and is, in fact, contradicted by contemporaneous written evidence, the court concludes that the FEC's conclusion is not supported by 'substantial evidence.'"); *see also* Factual & Legal Analysis at 10-11,

⁵⁹ Everytown Resp., Attach. 1 ¶ 5 ("Neither Representative McBath nor her authorized committee or their agents was materially involved in any decision regarding the Action Fund or Victory Fund's public communications, including any communication's content, intended audience, means or mode of communication, specific media outlet, timing or frequency, size, prominence, or duration of a communication."); *id.* ¶ 6 ("Neither the Action Fund nor the Victory Fund participated in one or more substantial discussions with Representative McBath, her authorized committee or their agents about the creation, production, or distribution of any public communication.").

1 distribution of the Action Fund's political advertising and therefore in a position to know
 2 whether there was material involvement by McBath.

3 Likewise, the Paone Affidavit's assertion that the Action Fund maintained a firewall and
 4 anti-coordination policy meeting the requirements of the safe harbor provision at 109.21(h)
 5 leaves it unclear whether Paone had first-hand knowledge of the firewall policy and does not
 6 provide specific, reliable information as to how and when the firewall policy was implemented.⁶⁰
 7 The Affidavit states: "[i]n accordance with the firewall policy, Representative McBath and her
 8 agents were firewalled"⁶¹ Such statements are conclusory and do not describe how the policy
 9 prevented material information about McBath's plans, projects, activities or needs from being
 10 shared.⁶² The Affidavit does not identify the specific date the policy was provided to McBath
 11 and Action Fund employees. Nor does the Affidavit describe the manner in which the policy was
 12 distributed. Even taking as true Respondents' assertion that McBath worked for the Support
 13 Fund, the Affidavit does not indicate whether the policy was provided to Support Fund
 14 employees working with McBath who may also have been working for the Action Fund as a

⁶⁰ See Coordinated Communications, 71 Fed. Reg. 33190, 33207 (June 8, 2006) ("In an enforcement context, the Commission will weigh the credibility and specificity of any allegation of coordination against the credibility and specificity of the facts presented in the response showing that the elements of the safe harbor are satisfied. 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 policy was distributed and implemented").

⁶¹ Everytown Resp., Attach. 1 ¶ 3.

⁶² *Shays v. FEC*, 528 F.3d 914, 927-30 (D.C. Cir. 2008) (quoting the Commission's brief in upholding the firewall provision: "[a]n organization cannot come within the firewall safe harbor simply by alleging that it has an internal firewall"); see also Coordinated Communications, 71 Fed. Reg. at 33206 ("The commenters described how specific employees are placed on separate teams (or 'silos') within the organization, so that information does not pass between the employees who work on independent expenditures and the employees who work with candidates and their agents.").

1 result of an employee sharing agreement between the organizations.⁶³ Thus, in light of the other
 2 information, the Affidavit does not adequately explain how the Action Fund's firewall met the
 3 conditions of the Commission's safe harbor.

4 In sum, while the available information does not establish that the Action Fund's
 5 communications in support of McBath were in fact coordinated expenditures, the current record
 6 supports a reasonable inference that McBath had substantial discussions about the Action Fund's
 7 communications or was materially involved in decisions regarding the Action Fund's
 8 communications during the 2018 primary elections in Georgia.⁶⁴ Accordingly, we recommend
 9 that the Commission find reason to believe that the Action Fund made, and McBath and the
 10 Committee accepted, prohibited in-kind contributions as a result of coordinated communications
 11 in violation of 52 U.S.C. § 30118(a). Further, we recommend that the Commission find reason
 12 to believe that the Committee violated 52 U.S.C. § 30104(b) by failing to report prohibited in-
 13 kind contributions from the Action Fund in the form of coordinated communications.

14 **C. Because There is Insufficient Information as to the Victory Fund's Liability**
 15 **at This Time, We Recommend that the Commission Take No Action at this**
 16 **Time as to Victory Fund**
 17

18 The current record does not provide a reasonable basis to infer that the Victory Fund's
 19 expenditures in support of McBath were coordinated. Because the Victory Fund did not begin

⁶³ Everytown for Gun Safety Action Fund, 2018 Form 990 at Schedule O, https://apps.irs.gov/pub/epostcard/cor/208802884_201812_9900_2020061217189577.pdf (cost sharing agreement between the Action Fund and Support Fund "includes the sharing of employees whose skills and knowledge will assist both organizations.").

⁶⁴ At the preliminary stage of administrative enforcement, the available information does not need to conclusively establish that the Action Fund's expenditures were not independent. *See* Statement of Policy Regarding Commission Act in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007) ("Commission 'reason to believe' findings have caused confusion in the past because they have been viewed as definitive determinations that a respondent violated the Act. In fact, 'reason to believe' findings indicate only that the Commission found sufficient legal justification to open an investigation to determine whether a violation of the Act has occurred.").

1 making communications supporting McBath until October 2018 (during the general election),
2 approximately six months after McBath took her leave of absence from the Everytown for Gun
3 Safety family of organizations, it is unclear whether any information conveyed by McBath prior
4 to her leave of absence would have been material to the Victory Fund's communications.⁶⁵ For
5 this reason, we do not recommend finding reason to believe as to the Victory Fund. However,
6 because additional information may come to light as a result of an investigation into McBath and
7 the Action Fund, we recommend that the Commission take no action at this time on the
8 coordination allegation against the Victory Fund.

9 **IV. INVESTIGATION**

10
11 We propose an investigation that would determine conclusively whether McBath was
12 employed by the Action Fund and develop the factual record to determine whether material
13 information the Action Fund used in making its expenditures came from McBath herself or a
14 different source, and assess whether the Committee received or accepted in-kind contributions in
15 the form of coordinated communications. Although we plan to use informal investigative
16 methods, we recommend that the Commission authorize the use of compulsory process in case
17 Respondents are not cooperative.

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⁶⁵ See *Coordinated Communications*, 71 Fed. Reg. at 33203-04 (“[M]uch of the information gained working for candidates during primary races becomes largely irrelevant for general elections.”).

V. RECOMMENDATIONS

1. Find reason to believe that Everytown for Gun Safety Action Fund, Inc. violated 52 U.S.C. § 30118(a) by making in-kind contributions to Lucy McBath in the form of coordinated communications;
2. Find reason to believe that Friends of Lucy McBath and Kendra-Sue Derby in her official capacity as treasurer violated 52 U.S.C. §§ 30104(b) and 30118(a) by accepting or receiving unreported in-kind contributions from Everytown for Gun Safety Action Fund, Inc. in the form of coordinated communications;
3. Find reason to believe that Lucy McBath violated 52 U.S.C. § 30118(a) by accepting or receiving in-kind contributions from Everytown for Gun Safety Action Fund, Inc. in the form of coordinated communications;
4. Take no action at this time as to Everytown for Gun Safety Victory Fund, Inc. and Tara Paone in her official capacity as treasurer;
5. Approve the Factual and Legal Analyses; and
6. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

1/28/21
DATE

Charles Kitcher
Charles Kitcher
Acting Associate General Counsel for Enforcement

Jin Lee
Jin Lee
Acting Assistant General Counsel

Christopher S. Curran
Christopher S. Curran
Attorney

MUR 7753 (Everytown for Gun Safety Action Fund, *et al.*)

First General Counsel's Report

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1 Attachments:

- 2 1. Factual and Legal Analysis for Everytown for Gun Safety Action Fund, Inc.;
- 3 2. Factual and Legal Analysis for Lucy McBath, Friends of Lucy McBath and Kendra-
- 4 Sue Derby in her official capacity as treasurer

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Everytown for Gun Safety Action Fund, Inc. **MUR:** 7753

I. INTRODUCTION

The Complaint in this matter alleges that Everytown for Gun Safety Action Fund, Inc. (the “Action Fund”), and Everytown for Gun Safety Victory Fund and Tara Paone in her official capacity as treasurer (the “Victory Fund”) (collectively, the “Respondent(s)”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by making coordinated communications that constituted prohibited in-kind contributions. According to the Complaint, McBath was simultaneously both a candidate and an employee of the Action Fund in March 2018. After McBath took leave from the organization in April 2018, the Action Fund endorsed her and the Action Fund, and Victory Fund proceeded to spend more than three million dollars supporting her campaign. Although the Action Fund and Victory Fund reported their spending as independent expenditures, the Complaint alleges that those expenditures were, in fact, coordinated with McBath based on her ties to the Action Fund. Respondents deny the allegations and claim that McBath worked for a different organization.

As further described below, the available information supports a reasonable inference that the Action Fund’s spending on behalf of McBath’s campaign during the 2018 primary election in Georgia constituted coordinated communications. First, the Action Fund appears to have employed McBath, while she was a federal candidate, 23 days before it began paying for public communications supporting her candidacy. Second, the Action Fund’s expenditures accounted for the overwhelming majority of advertising supporting McBath during the 2018 Georgia

Democratic primary election — while McBath’s principal campaign committee Friends of Lucy McBath Inc. (the “Committee”) spent a little over \$10,000. Third, Respondents fail to adequately explain conflicting information in the record regarding McBath’s employment or adequately describe or provide the Action Fund’s firewall policy.

Under these circumstances, the Commission finds reason to believe that the Action Fund violated section 30118(a) of the Act by making prohibited in-kind contributions in the form of coordinated communications.

I. FACTUAL BACKGROUND

A. Lucy McBath’s 2018 Campaign

Lucy McBath filed her Statement of Candidacy on March 5, 2018.¹ Her principal campaign committee, Friends of Lucy McBath, incorporated in Georgia on March 3, 2018 and filed its Statement of Organization on March 5, 2018.² Following Georgia’s May 22, 2018 primary election and July 24, 2018 run-off election, Lucy McBath became the Democratic nominee to represent Georgia’s Sixth Congressional District in the 2018 general election.

For the 2018 election cycle, the Committee reported accepting \$2,316,740.59 in individual contributions and spending \$2,457,120.66 in operating expenditures.³ For the 2018

¹ Statement of Candidacy, Lucia Kay McBath (Mar. 5, 2018), <https://docquery.fec.gov/pdf/631/201803059095645631/201803059095645631.pdf>. McBath was a candidate for Georgia state House of Representatives to represent district 37. *See* Campaign Reports and Registration Information, Georgia Government Transparency and Campaign Finance Commission, https://media.ethics.ga.gov/Search/Campaign/Campaign_ByName.aspx (search “Lucy McBath”).

² Certificate of Incorporation, Friends of Lucy McBath Inc. (Mar. 3, 2018), <https://ecorp.sos.ga.gov/BusinessSearch/BusinessInformation?businessId=2476252&businessType=Domestic%20Nonprofit%20Corporation&fromSearch=True> (select “filing history”); Statement of Organization, Friends of Lucy McBath Inc. (Mar. 3, 2018), <https://docquery.fec.gov/pdf/696/201803059095645696/201803059095645696.pdf>.

³ Friends of Lucy McBath, 2017-2018 Financial Summary, <https://www.fec.gov/data/committee/C00672295/?cycle=2018&tab=summary#total-raised>.

primary election in Georgia, the Committee reported accepting \$81,948.38 in individual contributions and spending \$104,910.73 in operating expenditures.⁴ As reflected below, for the 2018 primary election, the Committee appears to have spent \$10,874.66 on non-consulting advertising costs (\$7,500 on media production plus \$3,374.66 on social media advertising), which was approximately 10 percent of its overall budget.⁵

**Primary Spending by Friends of McBath
March 6, 2018-May 22, 2018**

| Disbursement Description | Disbursement Amount |
|---------------------------------------|----------------------------|
| ACCOUNTING/COMPLIANCE | \$ 750.00 |
| BANK FEES | \$ 78.00 |
| CONSULTING/POLITICAL STRATEGY | \$ 10,736.00 |
| CONSULTING/PRINTING-OFFICE SUPPLIES | \$ 2,113.00 |
| DIGITAL MEDIA CONSULTING | \$ 27,455.08 |
| EVENT SITE RENTAL | \$ 684.05 |
| FUNDRAISING SERVICES | \$ 2,480.00 |
| LEGAL FEES | \$ 1,500.00 |
| LODGING | \$ 892.83 |
| MEDIA PRODUCTION | \$ 7,500.00 |
| MERCHANT BANK PROCESSING FEE | \$ 4,058.52 |
| OFFICE SUPPLIES | \$ 3,157.11 |
| OFFSET TO CANDIDATE LOAN: FILING FEES | \$ 5,220.00 |
| PHOTOGRAPHY | \$ 1,500.00 |
| POSTAGE | \$ 1,475.00 |
| REIMBURSEMENT-SEE DETAILS | \$ 18,044.65 |
| RESEARCH | \$ 1,000.00 |
| SOCIAL MEDIA ADVERTISING | \$ 3,374.66 |
| SOFTWARE | \$ 4,600.00 |
| STAFF TIME | \$ 300.45 |
| TRAVEL | \$ 1,831.00 |
| TRAVEL EXPENSES | \$ 1,460.38 |

⁴ Friends of Lucy McBath, 2017-2018 Individual Contribution Transactions, <https://www.fec.gov/data/committee/C00672295/?cycle=2018&tab=raising#individual-contribution-transactions> (select "Filter this data"); Friends of Lucy McBath, 2017-2018 Spending, <https://www.fec.gov/data/committee/C00672295/?cycle=2018&tab=spending> (select "Filter this data").

⁵ Friends of Lucy McBath, 2017-2018 Spending, <https://www.fec.gov/data/committee/C00672295/?cycle=2018&tab=spending> (select "Filter this data").

| Disbursement Description | Disbursement Amount |
|--------------------------|----------------------|
| VOTER FILE | \$ 4,700.00 |
| Total | \$ 104,910.73 |

For the 2018 run-off and general elections combined, the Committee appears to have spent approximately \$1.5 million on advertising (excluding consulting costs).⁶

B. Spending in Support of McBath by the Everytown for Gun Safety Organizations

The Action Fund incorporated in Delaware in April 9, 2007 and is currently recognized as tax-exempt under section 501(c)(4) of the Internal Revenue Code.⁷ Its self-described mission is “promoting gun safety legislation and initiatives and reducing gun violence through the education of policymakers, the public, and the media and organizing communities in support of gun safety.”⁸ The Action Fund reported spending approximately \$1.5 million on independent expenditures in 2018, with approximately \$1.2 million (80%) spent supporting Lucy McBath.⁹ Between April 25, 2018 and July 23, 2018, the Action Fund focused exclusively on promoting McBath’s candidacy — reporting \$847,401 in independent expenditures in support of McBath between April 25, 2018 and May 22, 2018 for the primary election and an additional \$408,225 in

⁶ *Id.*

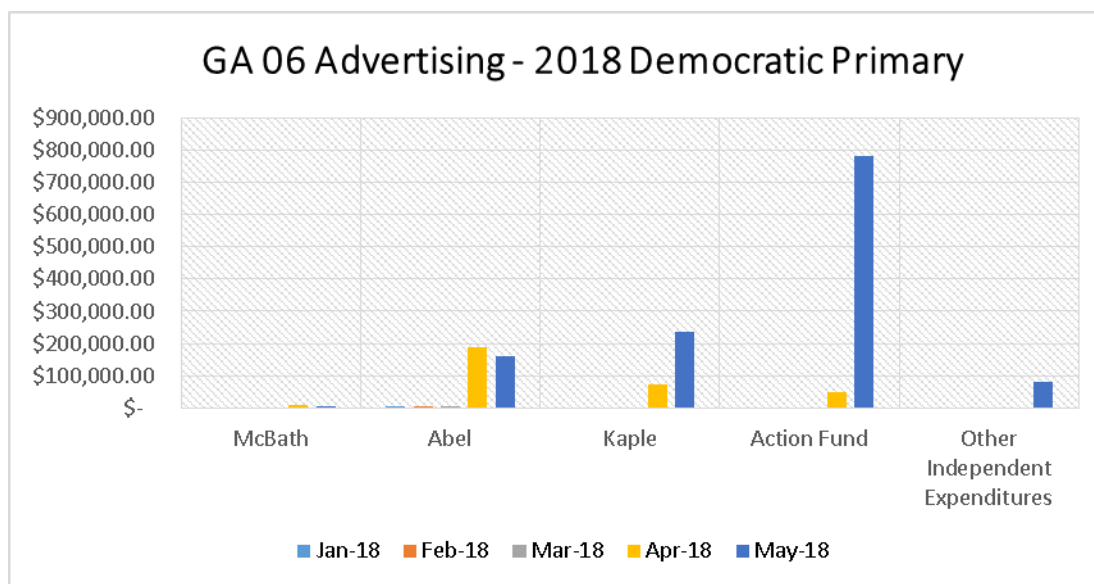
⁷ Delaware Dep’t of State: Corporation Division, Entity Search (search for “Everytown for Gun Safety Action Fund”), <https://icis.corp.delaware.gov/ecorp/entitysearch/NameSearch.aspx>; IRS Exempt Organizations Master File (search in New York for “Everytown for Gun Safety Action Fund”).

⁸ Everytown for Gun Safety Action Fund, 2018 Return of Organization Exempt From Tax (“2018 Action Fund Tax Return”), https://apps.irs.gov/pub/epostcard/cor/208802884_201812_9900_2020061217189577.pdf.

⁹ 2017-2018 Independent Expenditures, Everytown for Gun Safety Action Fund, <https://www.fec.gov/data/committee/C90015025/?tab=spending>.

independent expenditures supporting her candidacy between June 22, 2018 and July 23, 2018 for the run-off election.¹⁰

The graph below depicts candidate spending on advertising and independent expenditures reported for the 2018 Democratic primary for Georgia's Sixth Congressional District.



The Victory Fund incorporated in Delaware on September 21, 2016 and registered with the Commission as an independent expenditure-only committee on October 2, 2018.¹¹ While the Action Fund appears to have ceased spending directly on advertisements supporting McBath's campaign, it appears to have provided \$3,712,786 million to the Victory Fund, which then spent \$2,953,239 on independent expenditures in support of McBath for the general election on November 6, 2018. The \$3,712,786 in contributions that the Victory Fund received from the Action Fund represented approximately 95.7% of the Victory Fund's reported contributions for

¹⁰ *Id.* (select "Filter this data").

¹¹ Statement of Organization, Everytown for Gun Safety Victory Fund (Oct. 2, 2018), <https://docquery.fec.gov/pdf/571/201810029124275571/201810029124275571.pdf>.

all of 2018.¹² In addition to spending funds in support of McBath, the Victory Fund reported making independent expenditures worth \$108,068 against McBath's general election opponent, Karen Christine Handel, between October 22, 2018 and October 26, 2018.¹³ The Victory Fund's independent expenditures supporting McBath and opposing Handel represent approximately 83% of its total 2018 independent expenditures. The Victory Fund also reported \$49,724 in disbursements to the Action Fund in 2018 for an email list, various legal and accounting services, travel, and research.¹⁴

C. Information Provided by the Complaint and Response

According to the Complaint, McBath was an employee of the Action Fund and continued to remain employed with the Action Fund even after she became a candidate.¹⁵ In support, the Complaint cites a March 11, 2018 television interview in which McBath is described as a “national spokeswoman for Everytown for Gun Safety” and “also running for Georgia’s 6th Congressional District.”¹⁶ This interview was posted on McBath’s YouTube channel on March 13, 2018 and further posted to McBath’s campaign website on an unknown date.¹⁷ In addition,

¹² 2017-2018 Individual Contributions, Everytown for Gun Safety Victory Fund, <https://www.fec.gov/data/committee/C00688655/?cycle=2018&tab=raising#individual-contribution-transactions> (select “Filter this data”).

¹³ 2017-2018 Independent Expenditures, Everytown for Gun Safety Victory Fund, <https://www.fec.gov/data/committee/C00688655/?cycle=2018&tab=spending#independent-expenditures> (select “Filter this data”).

¹⁴ 2017-2018 Disbursements, Everytown for Gun Safety Victory Fund, <https://www.fec.gov/data/committee/C00688655/?cycle=2018&tab=spending#disbursement-transactions> (select “Filter this data”).

¹⁵ Compl. at 3.

¹⁶ *Id.* at 2 (citing CNN New Day Sunday, Interview with Lucy McBath (Mar. 11, 2018)).

¹⁷ See <https://lucyforcongress.com/news-updates/lucy-mcbath-appears-on-cnns-new-day/>; Lucy McBath, YouTube (Mar. 13, 2018), https://www.youtube.com/watch?v=bTqEsnVi194&feature=emb_title.

1 the Complaint relies upon McBath's Amended 2018 Financial Disclosure Report, which stated
 2 that McBath earned \$100,000 in salary from the Action Fund in 2017 and \$25,000 from the
 3 Action Fund in 2018.¹⁸ The Financial Disclosure Report also stated that McBath took a leave of
 4 absence in 2018 as part of an agreement with the Action Fund and would return only after
 5 November 15, 2018.¹⁹

6 The Complaint asserts that the Action Fund's independent expenditures in support of
 7 McBath are in fact coordinated communications. The Complaint argues that the Action Fund's
 8 communications met both the payment and content standards of the Commission's regulations
 9 defining coordinated communications because the Action Fund paid for independent
 10 expenditures supporting McBath's candidacy.²⁰ The Complaint also claims that the conduct
 11 standard of the regulations is satisfied in two independent ways. First, the Complaint alleges that
 12 the timing of McBath's employment with the Action Fund, coupled with the Action Fund's
 13 advertising supporting her — constituting the Action Fund's largest independent expenditure
 14 effort in 2018 — makes it "highly implausible that Representative McBath did not engage in
 15 substantial discussion regarding her election."²¹ Second, the Complaint argues that the former

¹⁸ Compl. at 2 (citing Lucia McBath, Amendment to 2018 Financial Disclosure Report, U.S. Clerk of the House of Representatives (May 16, 2019), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2018/10028034.pdf).

¹⁹ *Id.* These disclosures are the same as those included in McBath's initial Financial Disclosure Report filed in May 2018 and the most recent Amended 2018 Financial Disclosure Report filed August 2019. *See* Lucia McBath, Amendment to 2018 Financial Disclosure Report, U.S. Clerk of the House of Representatives (August 26, 2019), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2018/10029259.pdf; Lucia McBath, 2018 Financial Disclosure Report, U.S. Clerk of the House of Representatives (May 21, 2018), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2018/10023518.pdf.

²⁰ Compl. at 3.

²¹ *Id.* at 4.

employee conduct standard is satisfied because the Action Fund employed McBath within 120 days of making independent expenditures supporting her.

The Response denies the allegations and claims the Complaint is both speculative and fails to identify a specific communication alleged to be coordinated with McBath.²² The Response does not address McBath’s disclosures in her 2018 Financial Disclosure Report but instead argue that McBath was employed by Everytown for Gun Safety Support Fund, Inc.,²³ a separate Delaware corporation recognized as tax-exempt under section 501(c)(3) of the Internal Revenue Code.²⁴ The Response includes a sworn statement from Tara Paone, Chief Financial Officer of the Action Fund and Support Fund, and Treasurer of the Victory Fund. Paone states that: (1) the Support Fund employed McBath until she went on unpaid leave on April 2, 2018;²⁵ (2) the Action Fund and Victory Fund did not engage in any of the types of conduct set forth in 11 C.F.R. § 109.21(d)(1)-(5);²⁶ and (3) the Action Fund and Victory Fund had a written firewall and anti-coordination policy that met the requirements of the Commission’s safe harbor at 11 C.F.R. § 109.21(h) and that McBath was provided with a copy of the policy “in light of her candidacy.”²⁷ The Response does not include a copy of the firewall policy.

²² See Everytown Response at 1.

²³ *Id.* at 2 (“Representative McBath was previously employed by the Support Fund.”).

²⁴ Delaware Dep’t of State: Corporation Division, Entity Search (search for “Everytown for Gun Safety Support Fund”), <https://icis.corp.delaware.gov/ecorp/entitysearch/NameSearch.aspx>; IRS Exempt Organizations Master File (search in New York for “Everytown for Gun Safety Support Fund”).

²⁵ Everytown Resp., Attach. 1 ¶ 2.

²⁶ *Id.* ¶¶ 4-8.

²⁷ *Id.* ¶ 3.

II. LEGAL ANALYSIS

A. Legal Standard

The Act prohibits corporations from making contributions to federal candidates or their committees and corporate officers and directors from consenting to such contributions.²⁸ It also prohibits federal candidates or their committees from knowingly accepting corporate contributions.²⁹

The Act treats expenditures made “in cooperation, consultation, or concert, with or at the request or suggestion of, a candidate, his [or her] authorized political committees, or their agents” as in-kind contributions to that candidate and must be reported as expenditures made by the candidate’s authorized committee.³⁰ Commission regulations set forth a three-prong test for when a communication is “coordinated” with a candidate, an authorized committee, a political party committee, or agent thereof, and treated as an in-kind contribution: (1) the communication is paid for, partly or entirely, by a person other than the candidate, authorized committee, political party committee, or agent thereof; (2) the communication satisfies at least one of the “content standards” at 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the “conduct standards” at 11 C.F.R. § 109.21(d).³¹ All three prongs must be satisfied for a

²⁸ 52 U.S.C. § 30118(a).

²⁹ *Id.*

³⁰ 52 U.S.C. § 30116(a)(7)(B). Authorized committees are required to report the identification of each person who contributes an aggregate amount of \$200 or more per election cycle, along with the date and amount of the contribution, including in-kind contributions. 52 U.S.C. § 30104(b)(3); 11 C.F.R. § 100.52(d)(1) (term “anything of value” in the Act’s definition of contribution includes all in-kind contributions; 11 C.F.R. §§ 109.20, 109.21 (coordinated expenditures and coordinated communications treated as in-kind contributions and must also be reported as an expenditures)).

³¹ The six types of conduct that satisfy the conduct prong are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) use of a common vendor; (5) use of a former employee or independent contractor; and (6) republication of campaign material. 11 C.F.R. § 109.21(d)(1)-(6).

1 communication to be considered coordinated under the regulations. Agreement or formal
 2 collaboration is not required for a communication to be a coordinated communication.³²

3 In contrast to a coordinated expenditure, an independent expenditure is an expenditure by
 4 a person “expressly advocating the election or defeat of a clearly identified candidate . . . that is
 5 not made in concert or cooperation with or at the request or suggestion of such candidate, the
 6 candidate’s authorized political committee, or their agents, or a political party committee or its
 7 agents.”³³

8 **B. There is Reason to Believe that Action Fund Expenditures Supporting**
 9 **McBath Constituted Coordinated Communications**

10 1. The Payment and Content Prongs

11 There does not appear to be a dispute as to whether the Action Fund satisfied the payment
 12 and content prongs. The Action Fund acknowledges that it paid for all of the communications at
 13 issue, meeting the payment prong, and reported those communications as independent
 14 expenditures,³⁴ which meets the third standard of the content prong: “[a] public communication,

³² Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (2002) (“The [Commission’s] regulations shall not require agreement or formal collaboration to establish coordination.”); 11 C.F.R. § 109.21(e) (“Agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication . . . is not required for a communication to be a coordinated communication.”).

³³ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

³⁴ See *Everytown Resp.* at 2. The Action Fund’s independent expenditure reports disclosed hundreds of thousands of dollars spent for direct mail services, telephone services, television advertisements, and internet advertising supporting McBath during the 2018 Georgia primary election and runoff. An example of the Action Fund’s \$540,000 television ad buy (disclosed on a 24-hour report filed May 13, 2018) was posted to YouTube on May 14, 2018. See Simone Pathé, *Who’s Going to Challenge Karen Handel Without Jon Ossoff*, ROLL CALL (May 21, 2018), <https://www.rollcall.com/2018/05/21/whos-going-to-challenge-karen-handel-without-jon-ossoff/> (reporting on the ad buy and linking to Everytown for Gun Safety, *Everytown for Lucy McBath*, YOUTUBE (May 14, 2018), <https://www.youtube.com/watch?v=OGpjQIyIVbg&feature=youtu.be>). The ad contains express advocacy as defined by 11 C.F.R. § 100.22(a) (“Vote Lucy McBath for Congress”).

as defined in 11 C.F.R. 100.26,³⁵ that expressly advocates, as defined in 11 C.F.R. 100.22, the election or defeat of a clearly identified candidate for Federal office.”³⁶ The Action Fund also issued multiple press releases in 2018 touting its spending in support of McBath’s candidacy.³⁷

2. The Conduct Prong

The Complaint argues that the conduct prong is satisfied because: (1) the Action Fund employed McBath within 120 days of making independent expenditures in support of her candidacy; and (2) the employer-employee relationship between the Action Fund and McBath, coupled with the timing of the Action Fund’s advertising, makes it “highly implausible” that Representative McBath did not engage in substantial discussion regarding her election.³⁸

i. Former Employee Standard

11 C.F.R. § 109.21(d)(5) provides that a communication satisfies the conduct standard if: (a) “[t]he communication is paid for by a person, or by the employer of a person, *who was an employee or an independent contractor of the candidate* clearly identified in the communication” or the candidate’s opponent, or a political party committee, during the previous 120 days;³⁹ and

³⁵ A “public communication” is “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. . . . [but] shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site.” 11 C.F.R. §100.26.

³⁶ 11 C.F.R. § 109.21(c)(3).

³⁷ Compl. at 3 (citing Press Release, Everytown for Gun Safety Action Fund, Everytown for Gun Safety Action Fund Applauds Lucy McBath for Winning Democratic Primary Runoff Election in Georgia’s Sixth Congressional District (July 24, 2018), <https://everytown.org/press/everytown-for-gun-safety-action-fund-applauds-lucy-mcbath-for-winning-democratic-primary-runoff-election-in-georgias-sixth-congressional-district/>); Press Release, Everytown for Gun Safety Action Fund, Everytown for Gun Safety Action Fund Applauds Lucy McBath for Advancing to Democratic Primary Runoff (May 23, 2018), <https://everytown.org/press/everytown-for-gun-safety-action-fund-applauds-lucy-mcbath-for-advancing-to-democratic-primary-runoff/> (Everytown for Gun Safety Action Fund “endorsed McBath and launched digital, mailer and television advertising in support of her campaign”).

³⁸ Compl. at 4.

³⁹ 11 C.F.R. § 109.21(d)(5)(i) (emphasis added).

(b) the employee or independent contractor uses or conveys to the payor information about the candidate's or party's plans, projects, activities, or needs, or information used by the employee in providing services to the candidate or party, and the information is material to the creation, production, or distribution of the communication.⁴⁰

Here, the Complaint does not allege that a former employee of the candidate, McBath, shared non-public information about the candidate's plans, projects, activities or needs with the third party payor, the Action Fund, but alleges that the candidate herself shared such information.⁴¹ Given that the plain text of the regulation clearly applies to "an employee or independent contractor of the candidate," it does not appear that the facts as alleged by the Complaint satisfy the conduct standard at section 109.21(d)(5).⁴²

ii. Substantial Discussion and Material Involvement Standards

The "substantial discussion" standard is met when a communication is created, produced or distributed after one or more "substantial discussion[s]" between the person paying for the communication and the candidate.⁴³ A discussion is "substantial" within the meaning of the regulation if information about the candidate's plans, projects, activities or needs is conveyed to

⁴⁰ *Id.* § 109.21(d)(5)(ii); *see also* Advisory Opinion 2016-21 at 4-5 (Great America PAC) (determining that former employees of candidate's campaign would satisfy the conduct prong of section 109.21(d)(5) if they shared material information from prior employment with requestor who was a non-connected hybrid political committee and planning to conduct a phone bank).

⁴¹ Compl. at 4.

⁴² *See* First Gen. Counsel's Rpt. at 8, MUR 5506 (Emily's List, *et al.*) (former employee standard not applicable "because it only covers conduct by a campaign committee's former employee"); Certification, MUR 5506 (Aug. 12, 2005) (approving recommendations in First General Counsel's Report).

⁴³ 11 C.F.R. § 109.21(d)(3).

the person paying for the communication, and that information is material to the creation, production or distribution of the communication.⁴⁴

The “material involvement” conduct standard is met when a candidate is materially involved in decisions regarding: (i) the content of the communication; (ii) the intended audience for the communication; (iii) the means or mode of the communication; (iv) the specific media outlet used for the communication; (v) the timing or frequency of the communication; or (vi) the size or prominence of a printed communication, or duration of a communication by means of broadcast, cable or satellite.⁴⁵ A candidate is considered “materially involved” after sharing information (either directly or indirectly) about his or her plans, projects, activities, or needs with the person making the communication.⁴⁶ The Commission explained that the candidate “need not be present or included during [the] formal decisionmaking process but need only participate to the extent that he or she assists the ultimate decisionmaker.”⁴⁷ Further, the involvement of the candidate does not need to be traced directly to one specific communication.⁴⁸ The “material

⁴⁴ *Id.*

⁴⁵ 11 C.F.R. § 109.21(d)(2). “[M]aterial” has its ordinary legal meaning, which is “important; more or less necessary; having influence or effect; going to the merits.” Coordinated and Independent Expenditures, 68 Fed. at 433.

⁴⁶ Coordinated and Independent Expenditures, 68 Fed. Reg. at 433-34.

⁴⁷ *Id.* at 434.

⁴⁸ *Id.* (“Rather, a candidate’s or political party committee’s involvement is material to a decision regarding a particular communication if that communication is one of a number of communications and the candidate or political party committee was materially involved in decisions regarding the strategy for those communications.”).

involvement” standard can overlap with the “substantial discussion” standard⁴⁹ but also encompasses forms of “real world” coordination that the other conduct standards do not.⁵⁰

In directing the Commission to promulgate regulations on coordinated communications, Congress explicitly required the Commission to address payments by persons who had previously served as employees of candidates, indicating that such prior working relationships could often result in coordination.⁵¹ In implementing Congress’ instruction, the Commission’s former-employee conduct standard captures former employees using nonpublic “material information” about “campaign plans, projects, activities, or needs,” or sharing such information with the person funding the communication for 120 days following their employment with the candidate.⁵² Although that standard does not govern in this matter because section 109.21(d)(5)

⁴⁹ *Id.* at 433 (“Many activities that satisfy the ‘substantial discussion’ conduct standard will also satisfy the ‘material involvement’ standard”).

⁵⁰ *Id.*; *see, e.g.*, Factual and Legal Analysis at 5, MUR 5440 (The Media Fund, *et al.*) (“The potential use of inside information by a person who has leadership positions in both a spending organization and a recipient committee is a type of ‘real world’ coordination not directly addressed by any of the other content standards.”); *see also* Factual and Legal Analysis at 6, MUR 5815 (Madrid for Congress, *et al.*) (reason to believe there was material involvement where state attorney general’s office sent mailer and candidate was the office’s top official); Factual and Legal Analysis at 8-9, MUR 5511/5525 (Swift Boat Vets and POWs for Truth) (reason to believe there was material involvement where individual had “dual positions” with Bush campaign and organization airing TV ads against Bush’s opponent).

⁵¹ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §214(c), 116 Stat. 81, 95 (2002) (“the [new] regulations shall address payments for communications directed or made by persons who previously served as an employee of a candidate or a political party”); 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) (“[I]f an individual involved in key strategic decisionmaking for a candidate’s political advertising resigned from the candidate’s campaign committee, immediately thereafter joined an outside organization, and then used inside strategic information from the campaign to develop the organization’s imminent soft money-funded advertising in support of the candidate, a finding of coordination might very well be appropriate.”). Although BCRA directed the Commission to address former employees in its coordination regulations, the Commission long considered previous employment relationships with candidates as evidence of coordination. *See, e.g.*, Gen. Counsel’s Rpt. at 2-4, MUR 443 (Florida Friends of Reagan, *et al.*) (expenditures by the group Florida Friends of Reagan in April 1976 not independent because its Chairman had been Florida Chairman of Citizens for Reagan until March 1976); Certification, MUR 443 (Florida Friends of Reagan, *et al.*) (Oct. 27, 1977) (finding reason to believe).

⁵² In establishing a 120-day temporal limit for the former employee conduct standard, the Commission concluded that material information shared by a candidate’s former employee about the candidate’s campaign

1 does not address instances where the candidate herself is the current or former employee, an
 2 expenditure by a person directly employing the candidate herself within the 120 day time frame
 3 would logically indicate coordination as well, given that the funder's connection to the candidate
 4 is direct and occurred in close proximity to its paid communications. Because McBath appears
 5 to have worked for the Action Fund while simultaneously running for Federal office and the
 6 Action Fund's expenditures supporting McBath began just 23 days after her leave of absence,
 7 there is a reasonable basis to question whether McBath shared material information about her
 8 campaign's plans, projects, and activities with the Action Fund.⁵³

9 While the employer-employee relationship alone does not establish coordination, that
 10 fact, coupled with the timing and amount of the Action Fund's advertising in support of McBath
 11 during the 2018 Georgia primary election and minimal advertising by McBath's own campaign,
 12 further supports the inference that the Action Fund had inside information regarding McBath's
 13 paid media needs. As described above and depicted in the earlier chart of relative spending,
 14 McBath's authorized committee spent a little over \$10,000 on total advertising costs (excluding

strategy, plans, needs, and activities is not valuable beyond 120 days. *See* Coordinated Communications, 75 Fed. Reg. 55947, 55957-59 (Sept. 15, 2010).

⁵³ In contrast to the facts of this matter, in MUR 5970, the Commission found no reason to believe that a non-profit organization made an excessive in-kind contribution to a candidate where the organization "'excommunicated'" the candidate from the organization's Board of Directors as soon as she filed a statement of candidacy. *See* Factual and Legal Analysis at 3-4, MUR 5970 (League of Conservation Voters, *et al.*). In MURs 6789/6852, the Office of General Counsel recommended that the Commission find reason to believe that an independent expenditure-only political committee, Special Operations for America, (the "Super PAC") made in-kind contributions to Ryan Zinke, a federal candidate, when the Super PAC made expenditures in support of Zinke three weeks after he resigned as the Super PAC's chairman. First Gen. Counsel's Rpt. at 6-8, MURs 6789/6852 (Zinke for Congress, *et al.*) (Zinke filed his statement of candidacy after his resignation). The Commission split 2-2. Certification, MURs 6789/6852 (Zinke for Congress, *et al.*). In their statement of reasons for the matter, the declining-to-proceed Commissioners stated that they did not approve the recommendations, in part, because "[t]here [was] no evidence in the record of interaction or communication, much less coordination, between Zinke and the Super PAC after Zinke became a candidate." Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 4, MURs 6789/6852 (Zinke for Congress, *et al.*).

consulting costs) for Georgia's primary election in May 2018 whereas the Action Fund spent \$847,501 supporting her for that election.

The Response does not sufficiently rebut the allegations. The Complaint relies on McBath's 2018 Financial Disclosure Report, signed by McBath herself, reporting that she was a salaried employee of the Action Fund in 2017 and the first quarter of 2018,⁵⁴ yet the Response does not address this information. Instead, the Response asserts that McBath worked for the Support Fund but leaves unanswered the allegation that McBath worked for the Action Fund. For support, the Response relies upon the affidavit of Paone, the CFO of the Action Fund and Support Fund and the treasurer of the Victory Fund.⁵⁵

Consistent with the district court's reasoning in *La Botz v. FEC*,⁵⁶ however, the Response does not appear to support a dismissal in this matter. There, the district court concluded that the Commission's unanimous no reason to believe determination was not supported by substantial evidence because the Commission relied on a single affidavit that was not based on first-hand knowledge and was submitted only after the commencement of the enforcement proceeding, reflecting *post-hoc rationalizations* and the absence of contemporaneous evidence.⁵⁷ The district

⁵⁴ Compl. at 2 (citing Lucia McBath, Amendment to 2018 Financial Disclosure Report, U.S. Clerk of the House of Representatives (May 16, 2019), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2018/10028034.pdf).

⁵⁵ The Paone Affidavit is titled as such but it is not notarized, making it more like a declaration than an affidavit. It is signed and affirmed under penalty of perjury.

⁵⁶ 889 F. Supp. 2d 51 (D.D.C. 2012) (denying Commission's motion to dismiss and remanding matter to Commission for proceedings consistent with the court's opinion). On remand, the Commission determined that further investigation of the complaint's allegations would not be an efficient use of agency resources and dismissed the matter as a matter of prosecutorial discretion. *See La Botz v. FEC*, 61 F. Supp. 3d 21, 25 (D.D.C. 2014). The complainant then filed suit again, and the court granted the Commission's motion to dismiss because the case had become moot and the Commission's exercise of its prosecutorial discretion was not contrary to law. *Id.*

⁵⁷ 889 F. Supp. 2d at 61-62 (emphasis in original).

1 court found that the Commission did not account for conflicting contemporaneous evidence
 2 provided by the complainant and instead accepted the respondent's conclusory explanations.⁵⁸

3 Here, the Respondents' failure to address the Financial Disclosure Report — an
 4 important source of contemporaneous factual support for the Complaint's allegations, which
 5 supports the proposition that McBath was employed by the Action Fund — raises questions as to
 6 the credibility of the representation that she was employed by the Support Fund. Moreover, the
 7 Paone Affidavit states in conclusory fashion that McBath was not materially involved in
 8 decisions regarding the Action Fund or the Victory Fund's public communications and that the
 9 Action Fund and Victory Fund did not engage in substantial discussions with McBath about the
 10 creation, production, or distribution of any public communication.⁵⁹ It is also unclear from the
 11 Affidavit whether Paone's representations are based on first hand-knowledge. It does not state
 12 that she has personal knowledge of the matters to which she purports to testify, and it does not
 13 indicate whether she, as CFO of the Action Fund, was responsible for the creation and
 14 distribution of the Action Fund's political advertising and therefore in a position to know
 15 whether there was material involvement by McBath.

16 Likewise, the Paone Affidavit's assertion that the Action Fund maintained a firewall and
 17 anti-coordination policy meeting the requirements of the safe harbor provision at 109.21(h)

⁵⁸ *Id.* at 62-63 ("because the affidavit is not clearly supported by personal knowledge and is, in fact, contradicted by contemporaneous written evidence, the court concludes that the FEC's conclusion is not supported by 'substantial evidence.'").

⁵⁹ Everytown Resp., Attach. 1 ¶ 5 ("Neither Representative McBath nor her authorized committee or their agents was materially involved in any decision regarding the Action Fund or Victory Fund's public communications, including any communication's content, intended audience, means or mode of communication, specific media outlet, timing or frequency, size, prominence, or duration of a communication."); *id.* ¶ 6 ("Neither the Action Fund nor the Victory Fund participated in one or more substantial discussions with Representative McBath, her authorized committee or their agents about the creation, production, or distribution of any public communication.").

1 leaves it unclear whether Paone had first-hand knowledge of the firewall policy and does not
 2 provide specific, reliable information as to how and when the firewall policy was implemented.⁶⁰
 3 The Affidavit states: “[i]n accordance with the firewall policy, Representative McBath and her
 4 agents were firewalled⁶¹ Such statements are conclusory and do not describe how the
 5 policy prevented material information about McBath’s plans, projects, activities or needs from
 6 being shared.⁶² The Affidavit does not identify the specific date the policy was provided to
 7 McBath and Action Fund employees. Nor does the Affidavit describe the manner in which the
 8 policy was distributed. Even taking as true the Affidavit’s assertion that McBath worked for the
 9 Support Fund, the Affidavit does not indicate whether the policy was provided to Support Fund
 10 employees working with McBath who may also have been working for the Action Fund as a
 11 result of an employee sharing agreement between the organizations.⁶³ Thus, in light of the other
 12 information, the Affidavit does not adequately explain how the Action Fund’s firewall met the
 13 conditions of the Commission’s safe harbor.

⁶⁰ See Coordinated Communications, 71 Fed. Reg. 33190, 33207 (June 8, 2006) (“In an enforcement context, the Commission will weigh the credibility and specificity of any allegation of coordination against the credibility and specificity of the facts presented in the response showing that the elements of the safe harbor are satisfied. 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 policy was distributed and implemented”).

⁶¹ Everytown Resp., Attach. 1 ¶ 3.

⁶² *Shays v. FEC*, 528 F.3d 914, 927-30 (D.C. Cir. 2008) (quoting the Commission’s brief in upholding the firewall provision: “[a]n organization cannot come within the firewall safe harbor simply by alleging that it has an internal firewall”); see also Coordinated Communications, 71 Fed. Reg. at 33206 (“The commenters described how specific employees are placed on separate teams (or ‘silos’) within the organization, so that information does not pass between the employees who work on independent expenditures and the employees who work with candidates and their agents.”).

⁶³ Everytown for Gun Safety Action Fund, 2018 Form 990 at Schedule O, https://apps.irs.gov/pub/epostcard/cor/208802884_201812_990O_2020061217189577.pdf (cost sharing agreement between the Action Fund and Support Fund “includes the sharing of employees whose skills and knowledge will assist both organizations.”).

MUR 7753 (Everytown for Gun Safety Action Fund, *et al.*)

Factual and Legal Analysis

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1 Accordingly, the Commission finds reason to believe that the Action Fund made
2 prohibited in-kind contributions as a result of coordinated communications in violation of 52
3 U.S.C. § 30118(a).
4

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: Lucy McBath **MUR: 7753**
Friends of Lucy McBath
and Kendra-Sue Derby in her
official capacity as treasurer

I. INTRODUCTION

The Complaint in this matter alleges that Representative Lucy McBath and her principal campaign committee Friends of Lucy McBath Inc. and Kendra-Sue Derby in her official capacity as treasurer (the “Committee”) (collectively, the “Respondents”) violated the Federal Election Campaign Act of 1971, as amended (the “Act”), by accepting or receiving and failing to report in-kind contributions from Everytown for Gun Safety Action Fund, Inc. (the “Action Fund”) and Everytown for Gun Safety Victory Fund (the “Victory Fund”) in the form of coordinated communications. According to the Complaint, McBath was simultaneously both a candidate and an employee of the Action Fund in March 2018. After McBath took leave from the organization in April 2018, the Action Fund endorsed her and the Action Fund, and Victory Fund proceeded to spend more than three million dollars supporting her campaign. Although the Action Fund and Victory Fund reported their spending as independent expenditures, the Complaint alleges that those expenditures were, in fact, coordinated with McBath based on her ties to the Action Fund. Respondents deny the allegations and claim that McBath worked for a different organization.

As further described below, the available information supports a reasonable inference that the Action Fund’s spending on behalf of McBath’s campaign during the 2018 primary election in Georgia constituted coordinated communications. First, the Action Fund appears to have

1 employed McBath, while she was a federal candidate, 23 days before it began paying for public
 2 communications supporting her candidacy. Second, the Action Fund's expenditures accounted
 3 for the overwhelming majority of advertising supporting McBath during the 2018 Georgia
 4 Democratic primary election — while the Committee itself spent a little over \$10,000. Third,
 5 Respondents fail to adequately explain conflicting information in the record regarding McBath's
 6 employment.

7 Under these circumstances, the Commission finds reason to believe that McBath and the
 8 Committee violated section 30118(a) of the Act by accepting or receiving in-kind contributions.
 9 In addition, the Commission finds reason to believe that the Committee failed to accurately
 10 report those contributions in violation of section 30104(b).

11 **I. FACTUAL BACKGROUND**

12 **A. Lucy McBath's 2018 Campaign**

13 Lucy McBath filed her Statement of Candidacy on March 5, 2018.¹ Her principal
 14 campaign committee, Friends of Lucy McBath, incorporated in Georgia on March 3, 2018 and
 15 filed its Statement of Organization on March 5, 2018.² Following Georgia's May 22, 2018
 16 primary election and July 24, 2018 run-off election, Lucy McBath became the Democratic
 17 nominee to represent Georgia's Sixth Congressional District in the 2018 general election.

¹ Statement of Candidacy, Lucia Kay McBath (Mar. 5, 2018), <https://docquery.fec.gov/pdf/631/201803059095645631/201803059095645631.pdf>. McBath was a candidate for Georgia state House of Representatives to represent district 37. See Campaign Reports and Registration Information, Georgia Government Transparency and Campaign Finance Commission, https://media.ethics.ga.gov/Search/Campaign/Campaign_ByName.aspx (search "Lucy McBath").

² Certificate of Incorporation, Friends of Lucy McBath Inc. (Mar. 3, 2018), <https://ecorp.sos.ga.gov/BusinessSearch/BusinessInformation?businessId=2476252&businessType=Domestic%20Nonprofit%20Corporation&fromSearch=True> (select "filing history"); Statement of Organization, Friends of Lucy McBath Inc. (Mar. 3, 2018), <https://docquery.fec.gov/pdf/696/201803059095645696/201803059095645696.pdf>.

For the 2018 election cycle, the Committee reported accepting \$2,316,740.59 in individual contributions and spending \$2,457,120.66 in operating expenditures.³ For the 2018 primary election in Georgia, the Committee reported accepting \$81,948.38 in individual contributions and spending \$104,910.73 in operating expenditures.⁴ As reflected below, for the 2018 primary election, the Committee appears to have spent \$10,874.66 on non-consulting advertising costs (\$7,500 on media production plus \$3,374.66 on social media advertising), which was approximately 10 percent of its overall budget.⁵

**Primary Spending by Friends of McBath
March 6, 2018-May 22, 2018**

| Disbursement Description | Disbursement Amount |
|---------------------------------------|----------------------------|
| ACCOUNTING/COMPLIANCE | \$ 750.00 |
| BANK FEES | \$ 78.00 |
| CONSULTING/POLITICAL STRATEGY | \$ 10,736.00 |
| CONSULTING/PRINTING-OFFICE SUPPLIES | \$ 2,113.00 |
| DIGITAL MEDIA CONSULTING | \$ 27,455.08 |
| EVENT SITE RENTAL | \$ 684.05 |
| FUNDRAISING SERVICES | \$ 2,480.00 |
| LEGAL FEES | \$ 1,500.00 |
| LODGING | \$ 892.83 |
| MEDIA PRODUCTION | \$ 7,500.00 |
| MERCHANT BANK PROCESSING FEE | \$ 4,058.52 |
| OFFICE SUPPLIES | \$ 3,157.11 |
| OFFSET TO CANDIDATE LOAN: FILING FEES | \$ 5,220.00 |
| PHOTOGRAPHY | \$ 1,500.00 |
| POSTAGE | \$ 1,475.00 |
| REIMBURSEMENT-SEE DETAILS | \$ 18,044.65 |

³ Friends of Lucy McBath, 2017-2018 Financial Summary,
<https://www.fec.gov/data/committee/C00672295/?cycle=2018&tab=summary#total-raised>.

⁴ Friends of Lucy McBath, 2017-2018 Individual Contribution Transactions,
<https://www.fec.gov/data/committee/C00672295/?cycle=2018&tab=raising#individual-contribution-transactions>
(select “Filter this data”); Friends of Lucy McBath, 2017-2018 Spending,
<https://www.fec.gov/data/committee/C00672295/?cycle=2018&tab=spending> (select “Filter this data”).

⁵ Friends of Lucy McBath, 2017-2018 Spending,
<https://www.fec.gov/data/committee/C00672295/?cycle=2018&tab=spending> (select “Filter this data”).

| Disbursement Description | Disbursement Amount |
|--------------------------|----------------------|
| RESEARCH | \$ 1,000.00 |
| SOCIAL MEDIA ADVERTISING | \$ 3,374.66 |
| SOFTWARE | \$ 4,600.00 |
| STAFF TIME | \$ 300.45 |
| TRAVEL | \$ 1,831.00 |
| TRAVEL EXPENSES | \$ 1,460.38 |
| VOTER FILE | \$ 4,700.00 |
| Total | \$ 104,910.73 |

For the 2018 run-off and general elections combined, the Committee appears to have spent approximately \$1.5 million on advertising (excluding consulting costs).⁶

B. Spending in Support of McBath by the Everytown for Gun Safety Organizations

The Action Fund incorporated in Delaware in April 9, 2007 and is currently recognized as tax-exempt under section 501(c)(4) of the Internal Revenue Code.⁷ Its self-described mission is “promoting gun safety legislation and initiatives and reducing gun violence through the education of policymakers, the public, and the media and organizing communities in support of gun safety.”⁸ The Action Fund reported spending approximately \$1.5 million on independent expenditures in 2018, with approximately \$1.2 million (80%) spent supporting Lucy McBath.⁹ Between April 25, 2018 and July 23, 2018, the Action Fund focused exclusively on promoting McBath’s candidacy — reporting \$847,401 in independent expenditures in support of McBath

⁶ *Id.*

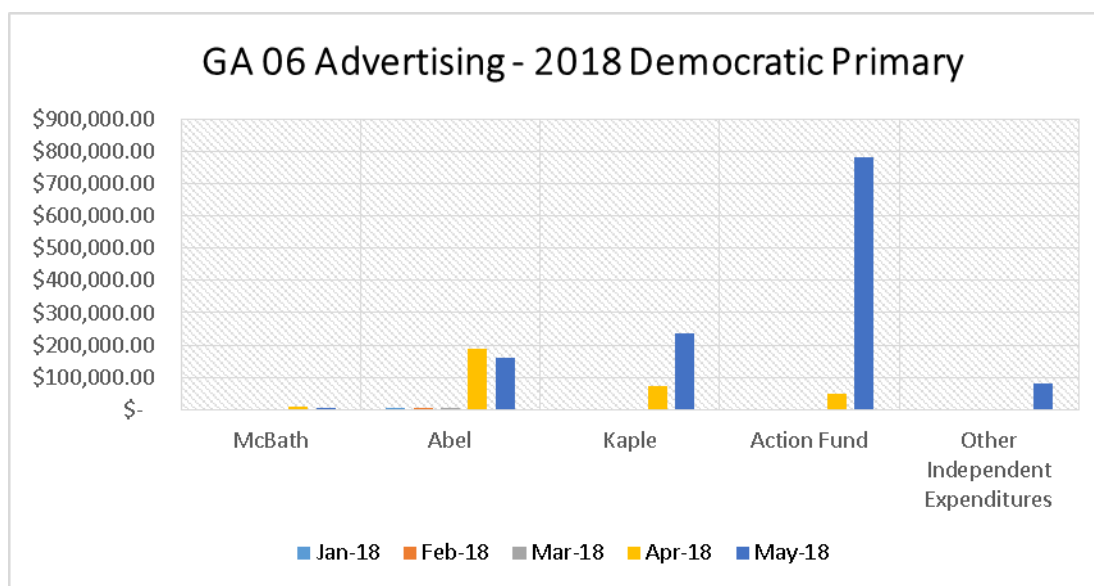
⁷ Delaware Dep’t of State: Corporation Division, Entity Search (search for “Everytown for Gun Safety Action Fund”), <https://icis.corp.delaware.gov/ecorp/entitysearch/NameSearch.aspx>; IRS Exempt Organizations Master File (search in New York for “Everytown for Gun Safety Action Fund”).

⁸ Everytown for Gun Safety Action Fund, 2018 Return of Organization Exempt From Tax (“2018 Action Fund Tax Return”), https://apps.irs.gov/pub/epostcard/cor/208802884_201812_9900_2020061217189577.pdf.

⁹ 2017-2018 Independent Expenditures, Everytown for Gun Safety Action Fund, <https://www.fec.gov/data/committee/C90015025/?tab=spending>.

between April 25, 2018 and May 22, 2018 for the primary election and an additional \$408,225 in independent expenditures supporting her candidacy between June 22, 2018 and July 23, 2018 for the run-off election.¹⁰

The graph below depicts candidate spending on advertising and independent expenditures reported for the 2018 Democratic primary for Georgia's Sixth Congressional District.



The Victory Fund incorporated in Delaware on September 21, 2016 and registered with the Commission as an independent expenditure-only committee on October 2, 2018.¹¹ While the Action Fund appears to have ceased spending directly on advertisements supporting McBath's campaign, it appears to have provided \$3,712,786 million to the Victory Fund, which then spent \$2,953,239 on independent expenditures in support of McBath for the general election on November 6, 2018. The \$3,712,786 in contributions that the Victory Fund received from the Action Fund represented approximately 95.7% of the Victory Fund's reported contributions for

¹⁰ *Id.* (select "Filter this data").

¹¹ Statement of Organization, Everytown for Gun Safety Victory Fund (Oct. 2, 2018), <https://docquery.fec.gov/pdf/571/201810029124275571/201810029124275571.pdf>.

all of 2018.¹² In addition to spending funds in support of McBath, the Victory Fund reported making independent expenditures worth \$108,068 against McBath's general election opponent, Karen Christine Handel, between October 22, 2018 and October 26, 2018.¹³ The Victory Fund's independent expenditures supporting McBath and opposing Handel represent approximately 83% of its total 2018 independent expenditures. The Victory Fund also reported \$49,724 in disbursements to the Action Fund in 2018 for an email list, various legal and accounting services, travel, and research.¹⁴

C. Information Provided by the Complaint and Response

According to the Complaint, McBath was an employee of the Action Fund and continued to remain employed with the Action Fund even after she became a candidate.¹⁵ In support, the Complaint cites a March 11, 2018 television interview in which McBath is described as a "national spokeswoman for Everytown for Gun Safety" and "also running for Georgia's 6th Congressional District."¹⁶ This interview was posted on McBath's YouTube channel on March 13, 2018 and further posted to McBath's campaign website on an unknown date.¹⁷ In addition,

¹² 2017-2018 Individual Contributions, Everytown for Gun Safety Victory Fund, <https://www.fec.gov/data/committee/C00688655/?cycle=2018&tab=raising#individual-contribution-transactions> (select "Filter this data").

¹³ 2017-2018 Independent Expenditures, Everytown for Gun Safety Victory Fund, <https://www.fec.gov/data/committee/C00688655/?cycle=2018&tab=spending#independent-expenditures> (select "Filter this data").

¹⁴ 2017-2018 Disbursements, Everytown for Gun Safety Victory Fund, <https://www.fec.gov/data/committee/C00688655/?cycle=2018&tab=spending#disbursement-transactions> (select "Filter this data").

¹⁵ Compl. at 3.

¹⁶ *Id.* at 2 (citing CNN New Day Sunday, Interview with Lucy McBath (Mar. 11, 2018)).

¹⁷ See <https://lucyforcongress.com/news-updates/lucy-mcbath-appears-on-cnns-new-day/>; Lucy McBath, YouTube (Mar. 13, 2018), https://www.youtube.com/watch?v=bTqEsnVi194&feature=emb_title.

1 the Complaint relies upon McBath's Amended 2018 Financial Disclosure Report, which stated
 2 that McBath earned \$100,000 in salary from the Action Fund in 2017 and \$25,000 from the
 3 Action Fund in 2018.¹⁸ The Financial Disclosure Report also stated that McBath took a leave of
 4 absence in 2018 as part of an agreement with the Action Fund and would return only after
 5 November 15, 2018.¹⁹

6 The Complaint asserts that the Action Fund's independent expenditures in support of
 7 McBath are in fact coordinated communications. The Complaint argues that the Action Fund's
 8 communications met both the payment and content standards of the Commission's regulations
 9 defining coordinated communications because the Action Fund paid for independent
 10 expenditures supporting McBath's candidacy.²⁰ The Complaint also claims that the conduct
 11 standard of the regulations is satisfied in two independent ways. First, the Complaint alleges that
 12 the timing of McBath's employment with the Action Fund, coupled with the Action Fund's
 13 advertising supporting her — constituting the Action Fund's largest independent expenditure
 14 effort in 2018 — makes it "highly implausible that Representative McBath did not engage in
 15 substantial discussion regarding her election."²¹ Second, the Complaint argues that the former

¹⁸ Compl. at 2 (citing Lucia McBath, Amendment to 2018 Financial Disclosure Report, U.S. Clerk of the House of Representatives (May 16, 2019), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2018/10028034.pdf).

¹⁹ *Id.* These disclosures are the same as those included in McBath's initial Financial Disclosure Report filed in May 2018 and the most recent Amended 2018 Financial Disclosure Report filed August 2019. *See* Lucia McBath, Amendment to 2018 Financial Disclosure Report, U.S. Clerk of the House of Representatives (August 26, 2019), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2018/10029259.pdf; Lucia McBath, 2018 Financial Disclosure Report, U.S. Clerk of the House of Representatives (May 21, 2018), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2018/10023518.pdf.

²⁰ Compl. at 3.

²¹ *Id.* at 4.

employee conduct standard is satisfied because the Action Fund employed McBath within 120 days of making independent expenditures supporting her.

The Response denies the allegations and claims the Complaint is both speculative and fails to identify a specific communication alleged to be coordinated with McBath.²² The Response does not address McBath’s disclosures in her 2018 Financial Disclosure Report but instead argues that McBath was employed by Everytown for Gun Safety Support Fund, Inc.,²³ a separate Delaware corporation recognized as tax-exempt under section 501(c)(3) of the Internal Revenue Code.²⁴

II. LEGAL ANALYSIS

A. Legal Standard

The Act prohibits corporations from making contributions to federal candidates or their committees and corporate officers and directors from consenting to such contributions.²⁵ It also prohibits federal candidates or their committees from knowingly accepting corporate contributions.²⁶

The Act treats expenditures made “in cooperation, consultation, or concert, with or at the request or suggestion of, a candidate, his [or her] authorized political committees, or their

²² See McBath Response at 1.

²³ *Id.* at 2 (“The complaint falsely asserts that Rep. McBath was employed by the organizations that made independent expenditures on behalf of her candidacy. As stated above, she was not.”); *id.* (McBath “served as the Support Fund’s spokeswoman for the educational programs regarding gun safety issues”).

²⁴ Delaware Dep’t of State: Corporation Division, Entity Search (search for “Everytown for Gun Safety Support Fund”), <https://icis.corp.delaware.gov/ecorp/entitysearch/NameSearch.aspx>; IRS Exempt Organizations Master File (search in New York for “Everytown for Gun Safety Support Fund”).

²⁵ 52 U.S.C. § 30118(a).

²⁶ *Id.*

agents” as in-kind contributions to that candidate and must be reported as expenditures made by the candidate’s authorized committee.²⁷ Commission regulations set forth a three-prong test for when a communication is “coordinated” with a candidate, an authorized committee, a political party committee, or agent thereof, and treated as an in-kind contribution: (1) the communication is paid for, partly or entirely, by a person other than the candidate, authorized committee, political party committee, or agent thereof; (2) the communication satisfies at least one of the “content standards” at 11 C.F.R. § 109.21(c); and (3) the communication satisfies at least one of the “conduct standards” at 11 C.F.R. § 109.21(d).²⁸ All three prongs must be satisfied for a communication to be considered coordinated under the regulations. Agreement or formal collaboration is not required for a communication to be a coordinated communication.²⁹

In contrast to a coordinated expenditure, an independent expenditure is an expenditure by a person “expressly advocating the election or defeat of a clearly identified candidate . . . that is not made in concert or cooperation with or at the request or suggestion of such candidate, the

²⁷ 52 U.S.C. § 30116(a)(7)(B). Authorized committees are required to report the identification of each person who contributes an aggregate amount of \$200 or more per election cycle, along with the date and amount of the contribution, including in-kind contributions. 52 U.S.C. § 30104(b)(3); 11 C.F.R. § 100.52(d)(1) (term “anything of value” in the Act’s definition of contribution includes all in-kind contributions; 11 C.F.R. §§ 109.20, 109.21 (coordinated expenditures and coordinated communications treated as in-kind contributions and must also be reported as an expenditures).

²⁸ The six types of conduct that satisfy the conduct prong are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) use of a common vendor; (5) use of a former employee or independent contractor; and (6) republication of campaign material. 11 C.F.R. § 109.21(d)(1)-(6).

²⁹ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 214(c), 116 Stat. 81, 95 (2002) (“The [Commission’s] regulations shall not require agreement or formal collaboration to establish coordination.”); 11 C.F.R. § 109.21(e) (“Agreement or formal collaboration between the person paying for the communication and the candidate clearly identified in the communication . . . is not required for a communication to be a coordinated communication.”).

candidate's authorized political committee, or their agents, or a political party committee or its agents."³⁰

B. There is Reason to Believe that Action Fund Expenditures Supporting McBath Constituted Coordinated Communications

1. The Payment and Content Prongs

There does not appear to be a dispute as to whether the Action Fund satisfied the payment and content prongs. The Action Fund reported communications advocating McBath's election as independent expenditures,³¹ which meets the third standard of the content prong: "[a] public communication, as defined in 11 C.F.R. 100.26,³² that expressly advocates, as defined in 11 C.F.R. 100.22, the election or defeat of a clearly identified candidate for Federal office."³³ The Action Fund also issued multiple press releases in 2018 touting its spending in support of McBath's candidacy.³⁴

³⁰ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

³¹ The Action Fund's independent expenditure reports disclosed hundreds of thousands of dollars spent for direct mail services, telephone services, television advertisements, and internet advertising supporting McBath during the 2018 Georgia primary election and runoff. An example of the Action Fund's \$540,000 television ad buy (disclosed on a 24-hour report filed May 13, 2018) was posted to YouTube on May 14, 2018. *See* Simone Pathé, *Who's Going to Challenge Karen Handel Without Jon Ossoff*, ROLL CALL (May 21, 2018), <https://www.rollcall.com/2018/05/21/whos-going-to-challenge-karen-handel-without-jon-ossoff/> (reporting on the ad buy and linking to Everytown for Gun Safety, *Everytown for Lucy McBath*, YOUTUBE (May 14, 2018), <https://www.youtube.com/watch?v=OGpIQIyIVbg&feature=youtu.be>). The ad contains express advocacy as defined by 11 C.F.R. § 100.22(a) ("Vote Lucy McBath for Congress").

³² A "public communication" is "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. . . . [but] shall not include communications over the Internet, except for communications placed for a fee on another person's Web site." 11 C.F.R. § 100.26.

³³ 11 C.F.R. § 109.21(c)(3).

³⁴ Compl. at 3 (citing Press Release, Everytown for Gun Safety Action Fund, Everytown for Gun Safety Action Fund Applauds Lucy McBath for Winning Democratic Primary Runoff Election in Georgia's Sixth Congressional District (July 24, 2018), <https://everytown.org/press/everytown-for-gun-safety-action-fund-applauds-lucy-mcath-for-winning-democratic-primary-runoff-election-in-georgias-sixth-congressional-district/>); Press Release, Everytown for Gun Safety Action Fund, Everytown for Gun Safety Action Fund Applauds Lucy McBath for Advancing to Democratic Primary Runoff (May 23, 2018), <https://everytown.org/press/everytown-for-gun->

2. The Conduct Prong

The Complaint argues that the conduct prong is satisfied because: (1) the Action Fund employed McBath within 120 days of making independent expenditures in support of her candidacy; and (2) the employer-employee relationship between the Action Fund and McBath, coupled with the timing of the Action Fund’s advertising, makes it “highly implausible” that Representative McBath did not engage in substantial discussion regarding her election.³⁵

i. Former Employee Standard

11 C.F.R. § 109.21(d)(5) provides that a communication satisfies the conduct standard if: (a) “[t]he communication is paid for by a person, or by the employer of a person, *who was an employee or an independent contractor of the candidate* clearly identified in the communication” or the candidate’s opponent, or a political party committee, during the previous 120 days;³⁶ and (b) the employee or independent contractor uses or conveys to the payor information about the candidate’s or party’s plans, projects, activities, or needs, or information used by the employee in providing services to the candidate or party, and the information is material to the creation, production, or distribution of the communication.³⁷

Here, the Complaint does not allege that a former employee of the candidate, McBath, shared non-public information about the candidate’s plans, projects, activities or needs with the

[safety-action-fund-applauds-lucy-mcbath-for-advancing-to-democratic-primary-runoff/](#) (Everytown for Gun Safety Action Fund “endorsed McBath and launched digital, mailer and television advertising in support of her campaign”).

³⁵ Compl. at 4.

³⁶ 11 C.F.R. § 109.21(d)(5)(i) (emphasis added).

³⁷ *Id.* § 109.21(d)(5)(ii); *see also* Advisory Opinion 2016-21 at 4-5 (Great America PAC) (determining that former employees of candidate’s campaign would satisfy the conduct prong of section 109.21(d)(5) if they shared material information from prior employment with requestor who was a non-connected hybrid political committee and planning to conduct a phone bank).

1 third party payor, the Action Fund, but alleges that the candidate herself shared such
 2 information.³⁸ Given that the plain text of the regulation clearly applies to “an employee or
 3 independent contractor of the candidate,” it does not appear that the facts as alleged by the
 4 Complaint satisfy the conduct standard at section 109.21(d)(5).³⁹

5 *ii. Substantial Discussion and Material Involvement Standards*

6 The “substantial discussion” standard is met when a communication is created, produced
 7 or distributed after one or more “substantial discussion[s]” between the person paying for the
 8 communication and the candidate.⁴⁰ A discussion is “substantial” within the meaning of the
 9 regulation if information about the candidate’s plans, projects, activities or needs is conveyed to
 10 the person paying for the communication, and that information is material to the creation,
 11 production or distribution of the communication.⁴¹

12 The “material involvement” conduct standard is met when a candidate is materially
 13 involved in decisions regarding: (i) the content of the communication; (ii) the intended audience
 14 for the communication; (iii) the means or mode of the communication; (iv) the specific media
 15 outlet used for the communication; (v) the timing or frequency of the communication; or (vi) the
 16 size or prominence of a printed communication, or duration of a communication by means of

³⁸ Compl. at 4.

³⁹ See First Gen. Counsel’s Rpt. at 8, MUR 5506 (Emily’s List, *et al.*) (former employee standard not applicable “because it only covers conduct by a campaign committee’s former employee”); Certification, MUR 5506 (Aug. 12, 2005) (approving recommendations in First General Counsel’s Report).

⁴⁰ 11 C.F.R. § 109.21(d)(3).

⁴¹ *Id.*

1 broadcast, cable or satellite.⁴² A candidate is considered “materially involved” after sharing
 2 information (either directly or indirectly) about his or her plans, projects, activities, or needs with
 3 the person making the communication.⁴³ The Commission explained that the candidate “need
 4 not be present or included during [the] formal decisionmaking process but need only participate
 5 to the extent that he or she assists the ultimate decisionmaker.”⁴⁴ Further, the involvement of the
 6 candidate does not need to be traced directly to one specific communication.⁴⁵ The “material
 7 involvement” standard can overlap with the “substantial discussion” standard⁴⁶ but also
 8 encompasses forms of “real world” coordination that the other conduct standards do not.⁴⁷

9 In directing the Commission to promulgate regulations on coordinated communications,
 10 Congress explicitly required the Commission to address payments by persons who had
 11 previously served as employees of candidates, indicating that such prior working relationships

⁴² 11 C.F.R. § 109.21(d)(2). “[M]aterial” has its ordinary legal meaning, which is “important; more or less necessary; having influence or effect; going to the merits.” Coordinated and Independent Expenditures, 68 Fed. at 433.

⁴³ Coordinated and Independent Expenditures, 68 Fed. Reg. at 433-34.

⁴⁴ *Id.* at 434.

⁴⁵ *Id.* (“Rather, a candidate’s or political party committee’s involvement is material to a decision regarding a particular communication if that communication is one of a number of communications and the candidate or political party committee was materially involved in decisions regarding the strategy for those communications.”).

⁴⁶ *Id.* at 433 (“Many activities that satisfy the ‘substantial discussion’ conduct standard will also satisfy the ‘material involvement’ standard”).

⁴⁷ *Id.*; *see, e.g.*, Factual and Legal Analysis at 5, MUR 5440 (The Media Fund, *et al.*) (“The potential use of inside information by a person who has leadership positions in both a spending organization and a recipient committee is a type of ‘real world’ coordination not directly addressed by any of the other content standards.”); *see also* Factual and Legal Analysis at 6, MUR 5815 (Madrid for Congress, *et al.*) (reason to believe there was material involvement where state attorney general’s office sent mailer and candidate was the office’s top official); Factual and Legal Analysis at 8-9, MUR 5511/5525 (Swift Boat Vets and POWs for Truth) (reason to believe there was material involvement where individual had “dual positions” with Bush campaign and organization airing TV ads against Bush’s opponent).

1 could often result in coordination.⁴⁸ In implementing Congress’ instruction, the Commission’s
 2 former-employee conduct standard captures former employees using nonpublic “material
 3 information” about “campaign plans, projects, activities, or needs,” or sharing such information
 4 with the person funding the communication for 120 days following their employment with the
 5 candidate.⁴⁹ Although that standard does not govern in this matter because section 109.21(d)(5)
 6 does not address instances where the candidate herself is the current or former employee, an
 7 expenditure by a person directly employing the candidate herself within the 120 day time frame
 8 would logically indicate coordination as well, given that the funder’s connection to the candidate
 9 is direct and occurred in close proximity to its paid communications. Because McBath appears
 10 to have worked for the Action Fund while simultaneously running for Federal office and the
 11 Action Fund’s expenditures supporting McBath began just 23 days after her leave of absence,
 12 there is a reasonable basis to question whether McBath shared material information about her
 13 campaign’s plans, projects, and activities with the Action Fund.⁵⁰

⁴⁸ Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, §214(c), 116 Stat. 81, 95 (2002) (“the [new] regulations shall address payments for communications directed or made by persons who previously served as an employee of a candidate or a political party”); 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. Feingold) (“[I]f an individual involved in key strategic decisionmaking for a candidate’s political advertising resigned from the candidate’s campaign committee, immediately thereafter joined an outside organization, and then used inside strategic information from the campaign to develop the organization’s imminent soft money-funded advertising in support of the candidate, a finding of coordination might very well be appropriate.”). Although BCRA directed the Commission to address former employees in its coordination regulations, the Commission long considered previous employment relationships with candidates as evidence of coordination. *See, e.g.*, Gen. Counsel’s Rpt. at 2-4, MUR 443 (Florida Friends of Reagan, *et al.*) (expenditures by the group Florida Friends of Reagan in April 1976 not independent because its Chairman had been Florida Chairman of Citizens for Reagan until March 1976); Certification, MUR 443 (Florida Friends of Reagan, *et al.*) (Oct. 27, 1977) (finding reason to believe).

⁴⁹ In establishing a 120-day temporal limit for the former employee conduct standard, the Commission concluded that material information shared by a candidate’s former employee about the candidate’s campaign strategy, plans, needs, and activities is not valuable beyond 120 days. *See* Coordinated Communications, 75 Fed. Reg. 55947, 55957-59 (Sept. 15, 2010).

⁵⁰ In contrast to the facts of this matter, in MUR 5970, the Commission found no reason to believe that a non-profit organization made an excessive in-kind contribution to a candidate where the organization “‘excommunicated’” the candidate from the organization’s Board of Directors as soon as she filed a statement of candidacy. *See* Factual and Legal Analysis at 3-4, MUR 5970 (League of Conservation Voters, *et al.*). In MURs

1 While the employer-employee relationship alone does not establish coordination, that
 2 fact, coupled with the timing and amount of the Action Fund's advertising in support of McBath
 3 during the 2018 Georgia primary election and minimal advertising by McBath's own campaign,
 4 further supports the inference that the Action Fund had inside information regarding McBath's
 5 paid media needs. As described above and depicted in the earlier chart of relative spending,
 6 McBath's authorized committee spent a little over \$10,000 on total advertising costs (excluding
 7 consulting costs) for Georgia's primary election in May 2018 whereas the Action Fund spent
 8 \$847,501 supporting her for that election.

9 The Response does not sufficiently rebut the allegations. The Complaint relies on
 10 McBath's 2018 Financial Disclosure Report, signed by McBath herself, reporting that she was a
 11 salaried employee of the Action Fund in 2017 and the first quarter of 2018,⁵¹ yet the Response
 12 does not address this information. Instead, the Response asserts that McBath worked for the
 13 Support Fund but leaves unanswered the allegation that McBath worked for the Action Fund.

14 Here, the Respondents' failure to address the Financial Disclosure Report — an
 15 important source of contemporaneous factual support for the Complaint's allegations, which

6789/6852, the Office of General Counsel recommended that the Commission find reason to believe that an independent expenditure-only political committee, Special Operations for America, (the "Super PAC") made in-kind contributions to Ryan Zinke, a federal candidate, when the Super PAC made expenditures in support of Zinke three weeks after he resigned as the Super PAC's chairman. First Gen. Counsel's Rpt. at 6-8, MURs 6789/6852 (Zinke for Congress, *et al.*) (Zinke filed his statement of candidacy after his resignation). The Commission split 2-2. Certification, MURs 6789/6852 (Zinke for Congress, *et al.*). In their statement of reasons for the matter, the declining-to-proceed Commissioners stated that they did not approve the recommendations, in part, because "[t]here [was] no evidence in the record of interaction or communication, much less coordination, between Zinke and the Super PAC after Zinke became a candidate." Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 4, MURs 6789/6852 (Zinke for Congress, *et al.*).

⁵¹ Compl. at 2 (citing Lucia McBath, Amendment to 2018 Financial Disclosure Report, U.S. Clerk of the House of Representatives (May 16, 2019), https://disclosures-clerk.house.gov/public_disc/financial-pdfs/2018/10028034.pdf).

1 supports the proposition that McBath was employed by the Action Fund — raises questions as to
2 the credibility of the representation that she was employed by the Support Fund.

3 Accordingly, the Commission finds reason to believe that McBath and the Committee
4 violated section 30118(a) of the Act by accepting or receiving in-kind contributions. In addition,
5 the Commission finds reason to believe that the Committee failed to accurately report those
6 contributions in violation of section 30104(b).