

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR 7790

DATE COMPLAINT FILED:	09/08/2020
DATE OF NOTIFICATION:	09/15/2020
LAST RESPONSE RECEIVED:	09/29/2020
DATE ACTIVATED:	11/12/2020
EXPIRATION OF SOL:	08/17/2025 (earliest)
ELECTION CYCLE:	2020

COMPLAINANT: Lavora Barnes, Chair
Michigan Democratic Party

RESPONDENTS: John James
John James for Senate and Timothy Caughlin in his
official capacity as treasurer

RELEVANT STATUTES AND REGULATIONS:	52 U.S.C. § 30125(e)(1)
	11 C.F.R. § 300.2(m)
	11 C.F.R. § 300.2(n)
	11 C.F.R. § 300.61

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

34 The Complaint in this matter alleges that John James, the Republican candidate for U.S.
35 Senate from Michigan, along with his principal campaign committee, John James for Senate and
36 Timothy Caughlin in his official capacity as treasurer (the “Committee”) (collectively, the
37 “Respondents”), violated the soft money ban of the Federal Election Campaign Act of 1971, as
38 amended (the “Act”) by releasing an internal campaign memorandum to *Politico*. According to

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1 the Complaint, the memorandum solicited and directed spending by 501(c) non-profit
2 corporations on television advertising, in violation of 52 U.S.C. § 30125(e)(1).

3 The Response denies the allegation and makes the following arguments: (1) the
4 memorandum did not “solicit” or “direct” as defined in Commission’s regulations; (2) even if the
5 memorandum met the definitions of “solicit” or “direct,” it did not solicit or direct anything of
6 value from prohibited sources; and (3) there is no evidence showing that the James campaign
7 leaked the memorandum or that it was leaked to attract any organization to support James’s
8 candidacy.

9 Because the record does not indicate that James or the Committee solicited or directed
10 soft money, we recommend that the Commission dismiss the allegations that James or the
11 Committee violated 52 U.S.C. § 30125(e)(1).

12 **II. FACTUAL BACKGROUND**

13 **A. Activities of the James Campaign**

15 John James (“James”) was the Republican candidate for U.S. Senate from Michigan in
16 2020.¹ His principal campaign committee was John James for Senate, Inc.² His opponent was
17 U.S. Senator Gary Peters.³

18 On August 11, 2020, *Politico* reported that “no major independent groups supporting the
19 Republican Party” had bought airtime to disseminate advertisements in support of James for the

¹ John James, Amended Statement of Candidacy, FEC Form 2 (Sept. 11, 2020).

² John James for Senate, Inc., Statement of Organization, FEC Form 1 (May 4, 2020).

³ MUR 7790, Complaint at 2; MUR 7790, James Response at 1.

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1 remainder of the 2020 election cycle.⁴ According to the *Politico* article, as of August 2020,
 2 although James “nearly matched Peters dollar-for-dollar this cycle, at the moment he has no
 3 outside help.”⁵ On the Democratic side, the article reported that “outside groups have spent at
 4 higher levels to boost Peters, and a Democratic nonprofit has seven figures booked this month.”⁶
 5 The article cited Curt Anderson, a “senior strategist” with the James campaign, who claimed that
 6 the polls were a result of the disparity in spending by outside groups: “[a]nyone serious about
 7 keeping Republican control of the Senate should invest in John James.”⁷ The article also quoted
 8 Steven Law, president of the Internal Revenue Code section 501(c)(4) corporation One Nation
 9 and the independent expenditure-only committee Senate Leadership Fund, as saying SLF was
 10 “keeping a close eye on Michigan” because the race between James and Peters “could close.”⁸

11 The next day, a poll issued by CNBC/Change Research showed 45% of voters supporting
 12 James, with 48% supporting Peters, and 5% not sure.⁹ The same day, the James campaign issued
 13 a press release publicizing the results.¹⁰

⁴ Compl. at 2 (citing James Arkin, *Republicans retrench in fight for the Senate*, POLITICO (Aug. 11, 2020), <https://www.politico.com/news/2020/08/11/republicans-senate-fight-393332> (“Arkin Article”)).

⁵ Arkin Article.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Change Research & NBC, “State of Play” Poll Battleground Likely Voters August 7-9, 2020 (Aug. 12, 2020), https://9b1b5e59-cb8d-4d7b-8493-111f8aa90329.usrfiles.com/ugd/9b1b5e_41d9f1b0245c4c138aa26d496625d005.pdf.

¹⁰ See Press Release, John James for Senate, Inc., New Poll: John James Within Striking Distance of Gary Peters (Aug. 12, 2020), <https://web.archive.org/web/20200816234303/https://johnjamesforsenate.com/new-close-poll/> (displaying James campaign press release which has since been removed).

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1 Almost one week later, *Politico* published a James campaign memorandum addressed to
 2 the campaign's Finance and Steering Committees.¹¹ The memorandum focused on James's
 3 recent fundraising numbers and cash on hand and touted the CNBC/Change Research poll and an
 4 internal Tarrance poll conducted for the James campaign showing the race between James and
 5 Peters to be close.¹² The memorandum noted that an organization called "Duty and Honor" was
 6 spending \$1.6 million against James "with no corresponding conservative ally on the air against
 7 Gary Peters."¹³ The final paragraph of the memorandum stated:

8 **John James is in a strong position to win this race.** James has
 9 strong poll numbers, outstanding messaging, fantastic fundraising,
 10 solid cash on hand, and is a tremendous candidate. **With the proper**
 11 **resources, John James is poised to become the next U.S. Senator**
 12 **from Michigan.**¹⁴

13
 14 The morning of August 18, 2020, *Politico* reported on the memorandum, stating that

15 "John James' Senate campaign sent allies a new memorandum touting internal polling . . . and
 16 calling for outside air support."¹⁵

¹¹ Compl. at 2 n.8 (linking to John James for Senate, Memo Re: CONFIDENTIAL Two polls show MI Senate Race Tighten to Just Outside Margin of Error (Aug. 17, 2020), <https://www.politico.com/f/?id=00000173-fdf9-d721-a57f-fff38060000>) ("James Campaign Mem."); Resp. at 1 ("On August 17, 2020, the James campaign sent an internal memorandum, titled 'CONFIDENTIAL: Two polls show MI Senate Race Tighten to Just Outside Margin of Error' to the John James for Senate Steering and Finance Committees . . . This memo was subsequently leaked to and published by *Politico*.").

¹² James Campaign Mem.

¹³ *Id.*

¹⁴ *Id.* (emphasis in original)

¹⁵ See Zach Montello, *Recapping the first night of the Democratic convention (and what's coming tonight)*, POLITICO (Aug. 18, 2020), attached as Ex. A of Compl.

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1 Later that same day, *Roll Call* reported that the group One Nation reserved \$4.5 million
 2 in television, cable, and radio time to “promote conservative policies in Michigan.”¹⁶ The
 3 article reported that the ads would begin airing on August 19, 2020 — during the week “when
 4 Peters’ profile will be on the rise both at the Democratic National Convention and in a Friday
 5 hearing of the Homeland Security and Governmental Affairs Committee.”¹⁷

6 **B. The Complaint and Response**

7 The Complaint alleges that the James campaign memorandum solicited and directed

9 “dark corporate money in support of Mr. James’ campaign,” in violation of 52 U.S.C.

10 § 30125(e)(1).¹⁸ The Complaint argues that the memorandum sent by the James campaign:

11 (1) states that the James campaign wants a ‘corresponding conservative ally’ to go on the air

12 attacking Peters,”¹⁹ (2) uses the words “proper resources” to mean spending for the attacks

13 should come from 501(c)(4) non-profit corporations;²⁰ and (3) must have been intentionally

14 leaked to the media by the campaign or agents of the campaign “to reach such independent

¹⁶ See Compl. at 3 (citing Kate Ackley, *GOP-aligned group to spend \$4.5 million in Michigan Senate race*, ROLL CALL (Aug. 18, 2020), <https://www.rollcall.com/2020/08/18/gop-aligned-group-to-spend-4-5-million-in-michigan-senate-race/> (quoting One Nation President Steven Law)).

¹⁷ Ackley, *supra* note 16; *see also* Press Release, One Nation, Inc., One Nation Launches Advocacy Effort Calling on Senator Peters to Put Michigan Jobs Ahead of Party Politics (Aug. 19, 2020), <https://www.onenationamerica.org/one-nation-launches-advocacy-effort-calling-on-senator-peters-to-put-michigan-jobs-ahead-of-party-politics/> (discussing advocacy effort and linking to ad titled “Praised”).

¹⁸ Compl. at 4.

¹⁹ *Id.* at 5 (quoting James Campaign Memo).

²⁰ *Id.* at 5 (“It is clear that these ‘proper resources’ must come from independent spenders such as section 501 (c)(4) non-profit corporations”).

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1 spenders" because there is "no logical reason" the campaign would have sent the memorandum

2 to the committees "other than to authorize those agents to make it public and solicit support."²¹

3 The Response states that the Complaint's allegation is inaccurate and rests on speculation

4 and "unjust inferences."²² Specifically, the Response denies that the memorandum improperly

5 solicited non-federal funds and argues that the phrase "[w]ith the proper resources, John James is

6 positioned to become the next U.S. Senator from Michigan" is "a factual statement that does not

7 ask, request, or recommend something of value."²³ The Response also contends that there was

8 no direction of non-federal funds as defined by Commission regulations because the Complaint

9 provided no information indicating that the memorandum was "geared towards any individual

10 who wanted to make a contribution to the James campaign" or specified any organization that

11 would accept a contribution.²⁴ The Response states that, even assuming *arguendo* that the

12 memorandum met the definition of solicitation and direction, it was not targeted to any outside

13 organization that could accept non-federal funds.²⁵ The Response acknowledges that the

14 memorandum was "leaked to and published by *Politico*," but argues that there is no evidence that

15 the James campaign did so, noting that the memorandum was marked "CONFIDENTIAL" and

16 sent internally to the campaign's "agents and current hard-dollar donors."²⁶

²¹ *Id.* at 6.

²² *Resp.* at 1.

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ *Id.* at 2-3.

²⁶ *Id.*

1 **III. LEGAL ANALYSIS**

2

3 **A. The Available Information does not Indicate that Respondents Solicited Non-**

4 **Federal Funds**

5

6 The Act prohibits federal candidates, federal officeholders, their agents, and entities

7 established, financed, maintained, or controlled by federal candidates or officeholders from

8 soliciting or directing funds outside “the limitations, prohibitions, and reporting requirements” of

9 the Act in connection with a federal election.²⁷ For the purposes of the soft money prohibition,

10 an “agent” of a federal candidate or officeholder is “any person who has actual authority, either

11 express or implied, to engage in any of the following activities on behalf of that candidate or

12 officeholder: “solicit[ing], receiv[ing], direct[ing], transfer[ing], or spend[ing] funds in

13 connection with any election.”²⁸

14

15 Commission regulations define “solicit” as “to ask, request, or recommend, explicitly or

16 implicitly, that another person make a contribution, donation, transfer of funds, or otherwise

17 provide anything of value.”²⁹ A solicitation is an oral or written communication that “contains a

18 clear message asking, requesting, or recommending that another person make a contribution . . .

19 or otherwise provide anything of value.”³⁰ Determining whether a communication contains a

 solicitation requires that the communication be “construed as reasonably understood in the

²⁷ See 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. § 300.61; Advisory Op. 2011-12 (Majority PAC and House Majority PAC) at 3-4.

²⁸ 11 C.F.R. § 300.2(b)(3).

²⁹ 11 C.F.R. § 300.2(m).

³⁰ *Id.*

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1 context in which it is made . . .”³¹ This test is objective and does not turn on the subjective
 2 interpretations of the speaker or the recipients.³²

3 Commission regulations provide a non-exhaustive list of specific types of
 4 communications that constitute solicitations: “(i) A communication that provides a method of
 5 making a contribution or donation, . . . (ii) A communication that provides instructions on how or
 6 where to send contributions or donations, . . . [and] (iii) A communication that identifies a Web
 7 address where the Web page displayed is specifically dedicated to facilitating the making of a
 8 contribution or donation[.]”³³ The regulations also provide specific examples of statements that
 9 constitute solicitations, which include, but are not limited to the following:

- 10 • “Please give \$100,000 to Group X.”
- 11 • “It is important for our State party to receive at least \$100,000 from each of you in
 12 this election.”
- 13 • “Group X has always helped me financially in my elections. Keep them in mind this
 14 fall.”³⁴

17 The memorandum does not resemble any of the types of communications set forth in the
 18 Commission’s regulation as examples of solicitations.³⁵ Nor is the statement “[w]ith the proper
 19 resources, John James is poised to become the next U.S. Senator from Michigan” akin to any of

³¹ *Id.*

³² See Factual and Legal Analysis at 9, MUR 7048 (Cruz for President) (citing Definitions of “Solicit” and “Direct,” 71 Fed. Reg. 13926, 13927 (Mar. 20, 2006) (“2006 E & J’)).

³³ 11 C.F.R. § 300.2(m)(1)(i)-(iii).

³⁴ *Id.* at 300.2(m)(2).

³⁵ See 11 C.F.R. § 300.2(m)(1)(i).

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1 the regulation's examples of statements constituting solicitations.³⁶ The statement also does not
2 resemble any of the examples in the regulation of statements that are *not* solicitations.³⁷

3 But the regulation's examples are illustrative, not exhaustive.³⁸ When considered in the
4 context in which it was made, the memorandum, which was sent to "agents and current hard-
5 dollar donors,"³⁹ makes an implicit request that those persons provide something of value, *i.e.*
6 "proper resources," to the Committee. The Response acknowledges additional resources would
7 be valuable to the James campaign.⁴⁰ The Response is ambiguous, however, whether "agents"
8 and "hard-dollar donors" refer to mutually exclusive or overlapping groups.

9 Based upon information the current record, the memorandum constitutes a solicitation
10 under the Commission's regulation. Respondents admit that the memorandum's recipients
11 included hard-dollar donors, individuals who already provided something of value directly to
12 Committee.⁴¹ The memorandum cites recent polls showing the Senate race to be close, focuses
13 on the James campaign's successful fundraising and cash on hand figures relative to his electoral
14 opponent, and portrays the Senate race as winnable "[w]ith the proper resources." According to
15 the Response, the memorandum uses polling numbers as "tools" to garner support.⁴² The

³⁶ 11 C.F.R. § 300.2(m)(2) (listing examples).

³⁷ 11 C.F.R. § 300.2(m)(3) (listing examples).

³⁸ See Factual and Legal Analysis at 9 n.34, MUR 7048 (Cruz for President) (citing 2006 E&J, 71 Fed. Reg. at 13927).

³⁹ Resp. at 2.

⁴⁰ *Id.* at 3 ("[g]etting increased resources would put the Campaign in a better place to win the race").

⁴¹ *Id.* at 2.

⁴² *Id.* at 3.

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1 Response further states that “there is no better group” to discuss *getting* increased resources with
 2 than the Committee’s Finance and Steering Committees.⁴³ In this context, the memorandum’s
 3 statement “with the proper resources, John James is poised to become the next U.S. Senator from
 4 Michigan” is a clear message requesting that members of the Finance and Steering Committees
 5 provide additional resources to the Committee.

6 Nevertheless, the available record does not indicate that the memorandum solicited
 7 something of value from a prohibited source, as the Complaint alleges. First, the Complaint
 8 provides no information to support its claim that the memorandum was sent to the Committee’s
 9 Finance and Steering committees for the specific purpose of having it leaked to *Politico*.
 10 Moreover, the memorandum’s subject line states that it is “Confidential,” which cuts against the
 11 Complaint’s assertion that the memorandum was distributed for the specific purpose of being
 12 leaked.⁴⁴

13 Second, the Complaint’s assertion that the memorandum “states that the James campaign
 14 wants a ‘corresponding conservative ally’ to go on the air” is inaccurate.⁴⁵ The memorandum
 15 does not explicitly say that. Nor does the memorandum explicitly ask, request, or recommend
 16 that 501(c)(4) corporations or any other prohibited source provide something of value to the
 17 James campaign.

⁴³ *Id.*

⁴⁴ See First Gen. Counsel’s Rpt. at 14, MUR 7535 (Leah for Senate, *et al.*) (recommending dismissal of soft money solicitation allegation where, among other reasons, candidate’s statements made during a podcast and local television statement did not appear to be directed at a donor)

⁴⁵ See Compl. at 5.

1 Third, the Complaint's assertion that “[i]t is clear that the ‘proper resources’ must come
 2 from independent spenders” is not supported by the available information. The Response
 3 submits that the memorandum has a different meaning, specifically, that the Committee would
 4 want to send polling data to its Finance and Steering Committees, not as part of an effort to
 5 entice soft money spending, but to provide the members of those committees “[g]ood polling
 6 numbers” in order to “garner[] support because they provide tangible evidence of a successful
 7 political campaign.”⁴⁶ As described above, this reading of the memorandum can reasonably be
 8 supported by the text of the memorandum, when read in context. Thus, while there is
 9 information in the record that could support the Complaint's interpretation of the memorandum,
 10 it is not *clear* that “proper resources” could only refer to spending by 501(c)(4) corporations.⁴⁷
 11 Accordingly, the memorandum does not appear to be a solicitation of prohibited sources.

12 Because the available record does not indicate that John James or the Committee solicited
 13 soft money in violation of 52 U.S.C. § 30125(e)(1), we recommend that the Commission dismiss
 14 the allegation.

15 **B. The Available Information does not Indicate that Respondents Directed Non-**
 16 **Federal Funds**

17 Commission regulations define “direct” as “to guide, directly or indirectly, a person who
 18 has expressed an intent to make a contribution, donation, transfer of funds, or otherwise provide

46 Resp. at 3.

47 By contrast, in MUR 7048, the Commission determined that message from a campaign's agent, who was emcee and co-host of an official fundraiser, was clear when he told attendees to “max out [to the campaign] and then get engaged in the Super PAC,” identifying a particular Super PAC with a table at the fundraiser that could accept corporate contributions. Factual & Legal Analysis at 9-10, MUR 7048 (Cruz for President); *see also* First Gen. Counsel's Rpt. at 10-12, MUR 7682 (Amy McGrath for Senate, Inc., *et al.*) (recommending Commission find reason to believe where campaign manager told reporter that formation of a specific Super PAC signaled a way for candidate's supporters to make “contributions” “beyond the legal limits.”)

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1 anything of value, by identifying a candidate, political committee or organization, for the receipt
2 of such funds, or things of value.”⁴⁸ The Commission has explained that “to direct”
3 “encompasses situations where a person has already expressed an intent to make a contribution
4 or donation, but lacks the identity of an appropriate candidate, political committee or
5 organization to which to make that contribution or donation. The act of direction consists of
6 providing the contributor with the identity of an appropriate recipient for the contribution or
7 donation.”⁴⁹

8 The record does not indicate that the memorandum directed soft money for the same
9 reasons that the information is insufficient to find a solicitation of soft money: the memorandum
10 was addressed internally to the Committee’s Finance and Steering Committees; the
11 memorandum does not explicitly guide any prohibited source expressing an intent to provide
12 something of value; and “proper resources” is not a clear reference to prohibited sources. The
13 memorandum does not identify any prohibited source or independent organization that had
14 expressed an intent to make a contribution to the Committee as set forth under section 300.2(n).
15 Although it was reported that One Nation made a \$4.5 million media buy shortly after Politico
16 published the memorandum, there is insufficient information to conclude that One Nation did so
17 in response to the memorandum.

18 Because the available record does not indicate that John James or the Committee directed
19 soft money in violation of 52 U.S.C. § 30125(e)(1), we recommend that the Commission dismiss
20 the allegation.

⁴⁸ 11 C.F.R. § 300.2(n).

⁴⁹ 2006 E&J, 71 Fed. Reg. at 13932.

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1 **IV. RECOMMENDATIONS**

2

3 1. Dismiss the allegations that John James and John James for Senate and Timothy
4 Caughlin in his official capacity as treasurer violated 52 U.S.C. § 30125(e)(1) by
5 soliciting or directing non-federal funds;

6

7 2. Approve the Factual and Legal Analysis;

8

9 3. Approve the appropriate letters; and

10

11 4. Close the File.

12

13 Lisa J. Stevenson
14 Acting General Counsel

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16 Charles Kitcher
17 Acting Associate General Counsel for Enforcement

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20 03.11.21

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22 DATE

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Stephen Gura

Deputy Associate General Counsel

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Jin Lee

Jin Lee

Acting Assistant General Counsel

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Christopher S. Curran

Christopher S. Curran

Attorney

Attachments:

1. Factual and Legal Analysis for John James, John James for Senate and Timothy Caughlin
in his official capacity as treasurer

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: John James
John James for Senate and
Timothy Caughlin in his
official capacity as treasurer **MUR:** 7790

I. INTRODUCTION

The Complaint in this matter alleges that John James, the Republican candidate for U.S. Senator from Michigan, along with his principal campaign committee, John James for Senate and Timothy Caughlin in his official capacity as treasurer (the “Committee”) (collectively, the “Bidders”), violated the soft money ban of the Federal Election Campaign Act of 1971, as amended (the “Act”) by releasing an internal campaign memorandum to *Politico*. According to the complaint, the memorandum solicited and directed spending by 501(c) non-profit corporations on television advertising, in violation of 52 U.S.C. § 30125(e)(1).

20 The Response denies the allegation and makes the following arguments: (1) the
21 memorandum did not “solicit” or “direct” as defined in Commission’s regulations; (2) even if the
22 memorandum met the definitions of “solicit” or “direct,” it did not solicit or direct anything of
23 value from prohibited sources; and (3) there is no evidence showing that the James campaign
24 leaked the memorandum or that it was leaked to attract any organization to support James’s
25 candidacy.

26 Because the record does not provide sufficient support to find reason to believe that
27 James or the Committee solicited or directed soft money, the Commission dismisses the
28 allegations that James or the Committee violated 52 U.S.C. § 30125(e)(1).

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Factual and Legal Analysis

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1 **II. FACTUAL BACKGROUND**
23 **A. Activities of the James Campaign**

4 John James (“James”) was the Republican candidate for U.S. Senate from Michigan in

5 2020.¹ His principal campaign committee was John James for Senate, Inc.² His opponent was6 U.S. Senator Gary Peters.³7 On August 11, 2020, *Politico* reported that “no major independent groups supporting the

8 Republican Party” had bought airtime to disseminate advertisements in support of James for the

9 remainder of the 2020 election cycle.⁴ According to the *Politico* article, as of August 2020,

10 although James “nearly matched Peters dollar-for-dollar this cycle, at the moment he has no

11 outside help.”⁵ On the Democratic side, the article reported that “outside groups have spent at12 higher levels to boost Peters, and a Democratic nonprofit has seven figures booked this month.”⁶

13 The article cited Curt Anderson, a “senior strategist” with the James campaign, who claimed that

14 the polls were a result of the disparity in spending by outside groups: “[a]nyone serious about

15 keeping Republican control of the Senate should invest in John James.”⁷ The article also quoted

16 Steven Law, president of the Internal Revenue Code section 501(c)(4) corporation One Nation

¹ John James, Amended Statement of Candidacy, FEC Form 2 (Sept. 11, 2020).

² John James for Senate, Inc., Statement of Organization, FEC Form 1 (May 4, 2020).

³ MUR 7790, Complaint at 2; MUR 7790, James Response at 1.

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1 and the independent expenditure-only committee Senate Leadership Fund, as saying SLF was
2 “keeping a close eye on Michigan” because the race between James and Peters “could close.”⁸

3 The next day, a poll issued by CNBC/Change Research showed 45% of voters supporting
4 James, with 48% supporting Peters, and 5% not sure.⁹ The same day, the James campaign issued
5 a press release publicizing the results.¹⁰

6 Almost one week later, *Politico* published a James campaign memorandum addressed to
7 the campaign’s Finance and Steering Committees.¹¹ The memorandum focused on James’s
8 recent fundraising numbers and cash on hand and touted the CNBC/Change Research poll and an
9 internal Tarrance poll conducted for the James campaign showing the race between James and
10 Peters to be close.¹² The memorandum noted that an organization called “Duty and Honor” was
11 spending \$1.6 million against James “with no corresponding conservative ally on the air against
12 Gary Peters.”¹³ The final paragraph of the memorandum stated:

13

8 *Id.*

9 Change Research & NBC, “State of Play” Poll Battleground Likely Voters August 7-9, 2020 (Aug. 12, 2020), https://9b1b5e59-cb8d-4d7b-8493-111f8aa90329.usrfiles.com/ugd/9b1b5e_41d9f1b0245c4c138aa26d496625d005.pdf.

10 See Press Release, John James for Senate, Inc., New Poll: John James Within Striking Distance of Gary Peters (Aug. 12, 2020), <https://web.archive.org/web/20200816234303/https://johnjamesforsenate.com/new-close-poll/> (displaying James campaign press release which has since been removed).

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12 James Campaign Mem.

13 *Id.*

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Factual and Legal Analysis

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 2 strong poll numbers, outstanding messaging, fantastic fundraising,
 3 solid cash on hand, and is a tremendous candidate. **With the proper**
 4 **resources, John James is poised to become the next U.S. Senator**
 5 **from Michigan.**¹⁴

6
 7 The morning of August 18, 2020, *Politico* reported on the memorandum, stating that

8 “John James’ Senate campaign sent allies a new memorandum touting internal polling . . . and
 9 calling for outside air support.”¹⁵

10 Later that same day, *Roll Call* reported that the group One Nation reserved \$4.5 million
 11 in television, cable, and radio time to ““promote conservative policies in Michigan.””¹⁶ The
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18 § 30125(e)(1).¹⁸ The Complaint argues that the memorandum sent by the James campaign:

¹⁴ *Id.* (emphasis in original).

¹⁵ See Zach Montello, *Recapping the first night of the Democratic convention (and what's coming tonight)*, POLITICO (Aug. 18, 2020), attached as Ex. A of Compl.

¹⁶ See Compl. at 3 (citing Kate Ackley, *GOP-aligned group to spend \$4.5 million in Michigan Senate race*, ROLL CALL (Aug. 18, 2020), <https://www.rollcall.com/2020/08/18/gop-aligned-group-to-spend-4-5-million-in-michigan-senate-race/> (quoting One Nation President Steven Law)).

¹⁷ Ackley, *supra* note 16; *see also* Press Release, One Nation, Inc., One Nation Launches Advocacy Effort Calling on Senator Peters to Put Michigan Jobs Ahead of Party Politics (Aug. 19, 2020), <https://www.onenationamerica.org/one-nation-launches-advocacy-effort-calling-on-senator-peters-to-put-michigan-jobs-ahead-of-party-politics/> (discussing advocacy effort and linking to ad titled “Praised”).

¹⁸ Compl. at 4.

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1 (1) states that the James campaign wants a ‘corresponding conservative ally’ to go on the air
 2 attacking Peters,”¹⁹ (2) uses the words “proper resources” to mean spending for the attacks
 3 should come from 501(c)(4) non-profit corporations;²⁰ and (3) must have been intentionally
 4 leaked to the media by the campaign or agents of the campaign “to reach such independent
 5 spenders” because there is “no logical reason” the campaign would have sent the memorandum
 6 to the committees “other than to authorize those agents to make it public and solicit support.”²¹

7 The Response states that the Complaint’s allegation is inaccurate and rests on speculation
 8 and “unjust inferences.”²² Specifically, the Response denies that the memorandum improperly
 9 solicited non-federal funds and argues that the phrase “[w]ith the proper resources, John James is
 10 positioned to become the next U.S. Senator from Michigan” is “a factual statement that does not
 11 ask, request, or recommend something of value.”²³ The Response also contends that there was
 12 no direction of non-federal funds as defined by Commission regulations because the Complaint
 13 provided no information indicating that the memorandum was “geared towards any individual
 14 who wanted to make a contribution to the James campaign” or specified any organization that
 15 would accept a contribution.²⁴ The Response states that, even assuming *arguendo* that the
 16 memorandum met the definition of solicitation and direction, it was not targeted to any outside

¹⁹ *Id.* at 5 (quoting James Campaign Memo).

²⁰ *Id.* at 5 (“It is clear that these ‘proper resources’ must come from independent spenders such as section 501 (c)(4) non-profit corporations”).

²¹ *Id.* at 6.

²² Resp. at 1.

²³ *Id.* at 2.

²⁴ *Id.*

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1 organization that could accept non-federal funds.²⁵ The Response acknowledges that the
2 memorandum was “leaked to and published by *Politico*,” but argues that there is no evidence that
3 the James campaign did so, noting that the memorandum was marked “CONFIDENTIAL” and
4 sent internally to the campaign’s “agents and current hard-dollar donors.”²⁶

5 **III. LEGAL ANALYSIS**

6 **A. The Available Information does not Provide Sufficient Support to Find**
7 **Reason to Believe that Respondents Solicited Non-Federal Funds**

10 The Act prohibits federal candidates, federal officeholders, their agents, and entities
11 established, financed, maintained, or controlled by federal candidates or officeholders from
12 soliciting or directing funds outside “the limitations, prohibitions, and reporting requirements” of
13 the Act in connection with a federal election.²⁷ For the purposes of the soft money prohibition,
14 an “agent” of a federal candidate or officeholder is “any person who has actual authority, either
15 express or implied, to engage in any of the following activities on behalf of that candidate or
16 officeholder: “solicit[ing], receiv[ing], direct[ing], transfer[ing], or spend[ing] funds in
17 connection with any election.”²⁸

18 Commission regulations define “solicit” as “to ask, request, or recommend, explicitly or
19 implicitly, that another person make a contribution, donation, transfer of funds, or otherwise
20 provide anything of value.”²⁹ A solicitation is an oral or written communication that “contains a

²⁵ *Id.* at 2-3.

²⁶ *Id.*

²⁷ See 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. § 300.61; Advisory Op. 2011-12 (Majority PAC and House Majority PAC) at 3-4.

²⁸ 11 C.F.R. § 300.2(b)(3).

²⁹ 11 C.F.R. § 300.2(m).

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1 clear message asking, requesting, or recommending that another person make a contribution . . .
 2 or otherwise provide anything of value.”³⁰ Determining whether a communication contains a
 3 solicitation requires that the communication be “construed as reasonably understood in the
 4 context in which it is made . . .”³¹ This test is objective and does not turn on the subjective
 5 interpretations of the speaker or the recipients.³²

6 Commission regulations provide a non-exhaustive list of specific types of
 7 communications that constitute solicitations: “(i) A communication that provides a method of
 8 making a contribution or donation, . . . (ii) A communication that provides instructions on how or
 9 where to send contributions or donations, . . . [and] (iii) A communication that identifies a Web
 10 address where the Web page displayed is specifically dedicated to facilitating the making of a
 11 contribution or donation[.]”³³ The regulations also provide specific examples of statements that
 12 constitute solicitations, which include, but are not limited to the following:

- 13 • “Please give \$100,000 to Group X.”
- 14
- 15 • “It is important for our State party to receive at least \$100,000 from each of you in
 this election.”
- 16
- 17 • “Group X has always helped me financially in my elections. Keep them in mind this
 fall.”³⁴
- 18
- 19

³⁰ *Id.*

³¹ *Id.*

³² See Factual and Legal Analysis at 9, MUR 7048 (Cruz for President) (citing Definitions of “Solicit” and “Direct,” 71 Fed. Reg. 13926, 13927 (Mar. 20, 2006) (“2006 E & J’)).

³³ 11 C.F.R. § 300.2(m)(1)(i)-(iii).

³⁴ *Id.* at 300.2(m)(2).

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1 The memorandum does not resemble any of the types of communications set forth in the
2 Commission's regulation as examples of solicitations.³⁵ Nor is the statement “[w]ith the proper
3 resources, John James is poised to become the next U.S. Senator from Michigan” akin to any of
4 the regulation's examples of statements constituting solicitations.³⁶ The statement also does not
5 resemble any of the examples in the regulation of statements that are *not* solicitations.³⁷

6 But the regulation's examples are illustrative, not exhaustive.³⁸ When considered in the
7 context in which it was made, the memorandum, which was sent to “agents and current hard-
8 dollar donors,”³⁹ makes an implicit request that those persons provide something of value, *i.e.*
9 “proper resources,” to the Committee. The Response acknowledges additional resources would
10 be valuable to the James campaign.⁴⁰ The Response is ambiguous, however, whether “agents”
11 and “hard-dollar donors” refer to mutually exclusive or overlapping groups.

12 Based upon information in the current record, the memorandum constitutes a solicitation
13 under the Commission's regulation. Respondents admit that the memorandum's recipients
14 included hard-dollar donors, individuals who already provided something of value directly to the
15 Committee.⁴¹ The memorandum cites recent polls showing the Senate race to be close, focuses
16 on the James campaign's successful fundraising and cash on hand figures relative to his electoral

³⁵ See 11 C.F.R. § 300.2(m)(1)(i).

³⁶ 11 C.F.R. § 300.2(m)(2) (listing examples).

³⁷ 11 C.F.R. § 300.2(m)(3) (listing examples).

³⁸ See Factual and Legal Analysis at 9 n.34, MUR 7048 (Cruz for President) (citing 2006 E&J, 71 Fed. Reg. at 13927).

³⁹ Resp. at 2.

⁴⁰ *Id.* at 3 (“[g]etting increased resources would put the Campaign in a better place to win the race”).

⁴¹ *Id.* at 2.

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1 opponent, and portrays the Senate race as winnable “[w]ith the proper resources.” According to
2 the Response, the memorandum uses polling numbers as “tools” to garner support.⁴² The
3 Response further states that “there is no better group” to discuss *getting* increased resources with
4 than the Committee’s Finance and Steering Committees.⁴³ In this context, the memorandum’s
5 statement “with the proper resources, John James is poised to become the next U.S. Senator from
6 Michigan” is a clear message requesting that members of the Finance and Steering Committees
7 provide additional resources to the Committee.

8 Nevertheless, the available record is insufficient to conclude that the memorandum
9 solicited something of value from a prohibited source, as the Complaint alleges. First, the
10 Complaint provides no information to support its claim that the memorandum was sent to the
11 Committee’s Finance and Steering Committees for the specific purpose of having it leaked to
12 *Politico*. Moreover, the memorandum’s subject line states that it is “Confidential,” which cuts
13 against the Complaint’s assertion that the memorandum was distributed for the specific purpose
14 of being leaked.

15 Second, the Complaint’s assertion that the memorandum “states that the James campaign
16 wants a ‘corresponding conservative ally’ to go on the air” is inaccurate.⁴⁴ The memorandum
17 does not explicitly say that. Nor does the memorandum explicitly ask, request, or recommend
18 that 501(c)(4) corporations or any other prohibited source provide something of value to the
19 James campaign.

⁴² *Id.* at 3.

⁴³ *Id.*

⁴⁴ See Compl. at 5 (emphasis added).

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1 Third, the Complaint's assertion that “[i]t is clear that the ‘proper resources’ must come
2 from independent spenders” is not supported by the available information. The Response
3 submits that the memorandum has a different meaning, specifically, that the Committee would
4 want to send polling data to its Finance and Steering Committees, not as part of an effort to
5 entice soft money spending, but to provide the members of those committees “[g]ood polling
6 numbers” in order to “garner[] support because they provide tangible evidence of a successful
7 political campaign.”⁴⁵ As described above, this reading of the memorandum can reasonably be
8 supported by the text of the memorandum, when read in context. Thus, while there is
9 information in the record that could support the Complaint’s interpretation of the memorandum,
10 it is not clear that “proper resources” could only refer to spending by 501(c)(4) corporations.⁴⁶
11 Accordingly, even if the Complaint is correct that the memorandum was leaked by an agent of
12 the Committee, the record does not provide sufficient support to find reason to believe that John
13 James or the Committee solicited soft money in violation of 52 U.S.C. § 30125(e)(1). Thus, the
14 Commission dismisses the allegation.

15 **B. The Available Information does not Indicate that Respondents Directed Non-**
16 **Federal Funds**

17 Commission regulations define “direct” as “to guide, directly or indirectly, a person who
18 has expressed an intent to make a contribution, donation, transfer of funds, or otherwise provide
19 anything of value, by identifying a candidate, political committee or organization, for the receipt

⁴⁵ Resp. at 3.

⁴⁶ By contrast, in MUR 7048, the Commission determined that message from a campaign’s agent, who was emcee and co-host of an official fundraiser, was clear when he told attendees to “max out [to the campaign] and then get engaged in the Super PAC,” identifying a particular Super PAC with a table at the fundraiser that could accept corporate contributions. Factual & Legal Analysis at 9-10, MUR 7048 (Cruz for President).

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1 of such funds, or things of value.”⁴⁷ The Commission has explained that “to direct”
2 “encompasses situations where a person has already expressed an intent to make a contribution
3 or donation, but lacks the identity of an appropriate candidate, political committee or
4 organization to which to make that contribution or donation. The act of direction consists of
5 providing the contributor with the identity of an appropriate recipient for the contribution or
6 donation.”⁴⁸

7 The record does not indicate that the memorandum directed soft money for the same
8 reasons that the information is insufficient to find a solicitation of soft money: the memorandum
9 was addressed internally to the Committee’s Finance and Steering Committees; the
10 memorandum does not explicitly guide any prohibited source expressing an intent to provide
11 something of value; and “proper resources” is not a clear reference to prohibited sources. The
12 memorandum does not identify any prohibited source or independent organization that had
13 expressed an intent to make a contribution to the Committee as set forth under section 300.2(n).
14 Although it was reported that One Nation made a \$4.5 million media buy shortly after *Politico*
15 published the memorandum, there is insufficient information to conclude that One Nation did so
16 in response to the memorandum.

17 Because the available record does not indicate that John James or the Committee directed
18 soft money in violation of 52 U.S.C. § 30125(e)(1), the Commission dismisses the allegation.

⁴⁷ 11 C.F.R. § 300.2(n).

⁴⁸ 2006 E&J, 71 Fed. Reg. at 13932.