

**FEDERAL ELECTION COMMISSION****FIRST GENERAL COUNSEL'S REPORT****MUR: 7838**

DATE COMPLAINT FILED: Oct. 26, 2020

DATE OF NOTIFICATIONS: Oct. 28, 2020

LAST RESPONSE RECEIVED: Nov. 12, 2020

DATE ACTIVATED: Dec. 3, 2020

EXPIRATION OF SOL: Oct. 22, 2025

ELECTION CYCLE: 2020

**COMPLAINANT:**

RaiseUP

**RESPONDENTS:**

Expensify, Inc.

David Barrett

**MUR: 7849**

DATE COMPLAINT FILED: Oct. 29, 2020

DATE OF NOTIFICATIONS: Nov. 4, 2020

LAST RESPONSE RECEIVED: Nov. 12, 2020

DATE ACTIVATED: Dec. 3, 2020

EXPIRATION OF SOL: Oct. 22, 2025

ELECTION CYCLE: 2020

**COMPLAINANT:**

Dan Marrs

**RESPONDENTS:**

Expensify, Inc.

David Barrett

**MUR: 7852**

DATE COMPLAINT FILED: Oct. 30, 2020

DATE OF NOTIFICATIONS: Nov. 5, 2020

LAST RESPONSE RECEIVED: Nov. 12, 2020

DATE ACTIVATED: Dec. 3, 2020

EXPIRATION OF SOL: Oct. 22, 2025

ELECTION CYCLE: 2020

**COMPLAINANT:**

Americans for Public Trust

**RESPONDENTS:**

Expensify, Inc.

David Barrett

**MUR: 7856**

DATE COMPLAINT FILED: Nov. 12, 2020

DATE OF NOTIFICATIONS: Nov. 17, 2020

1 LAST RESPONSE RECEIVED: Dec. 1, 2020  
 2 DATE ACTIVATED: Dec. 3, 2020  
 3  
 4 EXPIRATION OF SOL: Oct. 22, 2025  
 5 ELECTION CYCLE: 2020  
 6  
 7 **COMPLAINANT:** Susan B. Anthony List, Inc.  
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 9 **RESPONDENTS:** Expensify, Inc.  
 10 David Barrett  
 11  
 12 **RELEVANT STATUTES**  
 13 **AND REGULATIONS:** 52 U.S.C. § 30118(a)  
 14 52 U.S.C. § 30104(c)  
 15 52 U.S.C. § 30120(a)  
 16 52 U.S.C. § 30121  
 17 11 C.F.R. § 109.10(d)  
 18 11 C.F.R. § 110.11(a)(1)-(2)  
 19 11 C.F.R. § 114.10(b)(1)  
 20  
 21 **INTERNAL REPORTS CHECKED:** Disclosure reports  
 22  
 23 **FEDERAL AGENCIES CHECKED:** None

## 24 I. INTRODUCTION

25 The Complaints make overlapping allegations centered on an email that Expensify, Inc.  
 26 (“Expensify”) CEO David Barrett sent to Expensify customers on October 22, 2020, endorsing  
 27 Joe Biden in the 2020 presidential election. Specifically, the Complaint in MUR 7849 alleges  
 28 that the email constituted an in-kind contribution to Biden.<sup>1</sup> The Complaints in MURs 7838,  
 29 7852, and 7856 allege that the email constituted an independent expenditure that Expensify  
 30 failed to report and that Expensify failed to include a required disclaimer on the email.<sup>2</sup> Lastly,

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<sup>1</sup> MUR 7849 Compl. at 1, 3 (Oct. 29, 2020).

<sup>2</sup> MUR 7838 Compl. at 3-4, 6-8 (Oct. 26, 2020); MUR 7852 Compl. at 1-2 (Oct. 30, 2020); MUR 7856 Compl. at 1-2 (Nov. 12, 2020).

1 the MUR 7856 Complaint also alleges that the email may have violated the foreign national  
2 prohibition by encouraging non-citizen recipients to participate in U.S. election activities.<sup>3</sup>

3 Respondents acknowledge that Barrett sent the email on behalf of Expensify and the  
4 email expressly advocated for Biden, but otherwise deny the allegations. They argue that the  
5 email was not a contribution or expenditure and, therefore, Expensify was not required to file  
6 any disclosures with the Commission. Moreover, they assert there was no coordination between  
7 either of the Respondents and Biden or his campaign committee. Finally, they argue that the  
8 email did not solicit a foreign national contribution or otherwise encourage foreign nationals to  
9 do anything prohibited by the Act or Commission regulations.<sup>4</sup>

10 As discussed below, we recommend that the Commission: (1) find no reason to believe  
11 that Respondents violated 52 U.S.C. § 30118(a) by making a prohibited in-kind corporate  
12 contribution; (2) dismiss, as a matter of prosecutorial discretion, the allegation that Expensify  
13 violated 52 U.S.C. § 30104(c) and 11 C.F.R. §§ 109.10(d), 114.10(b)(1) by failing to report an  
14 independent expenditure; (3) find no reason to believe that Barrett violated 52 U.S.C. § 30104(c)  
15 and 11 C.F.R. §§ 109.10(d), 114.10(b)(1) by failing to report an independent expenditure;  
16 (4) find no reason to believe that Respondents violated 52 U.S.C. § 30120(a) and 11 C.F.R.  
17 § 110.11(a)(1)-(2) by failing to include a disclaimer; and (5) find no reason to believe that  
18 Respondents violated 52 U.S.C. § 30121 by soliciting foreign national contributions.

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<sup>3</sup> MUR 7856 Compl. at 1.

<sup>4</sup> MURs 7838, 7849, 7852 Resp. at 2-4 (Nov. 12, 2020); MUR 7856 Resp. at 2-5 (Dec. 1, 2020).

1 **II. FACTUAL BACKGROUND**

2 Expensify is a corporation that provides receipt and expense management services and  
 3 software to individuals and businesses.<sup>5</sup> Barrett is Expensify's founder and CEO.<sup>6</sup> On October  
 4 22, 2020, Barrett sent an email to an estimated 10 million Expensify customers from his official  
 5 email account with the subject "Protect democracy, vote for Biden."<sup>7</sup> Barrett signed the email  
 6 "david [sic], Founder and CEO of Expensify" and the email notes at the bottom that it was  
 7 "[s]ent by: Expensify, Inc."<sup>8</sup> In relevant part, the Barrett Email makes the following statements:

Page	Statement
1	"If you are a US citizen, anything less than a vote for Biden is a vote against democracy."
1	"You know what to do: show up on November 3rd and vote for Biden."
2	"... all evidence suggests that another 4 (or as Trump has hinted -- 8, or more?) years of Trump leadership will damage our democracy to such an extent, I'm obligated on behalf of shareholders to take any action I can to avoid it. I am confident our democracy (and Expensify) can survive a Biden presidency. I can't say the same about Trump."
2	"Biden wants democracy, Trump does not. A vote for Trump is to endorse voter suppression, it really is very basic."
2	"Biden wins by promoting democracy; Trump wins by suppressing it. A vote for Biden is a vote for democracy."
2	"... the only way to ensure a peaceful transition of power is to ensure this election is an overwhelming, undeniable landslide in favor of Biden."
3	"Are you annoyed that you received this as a non-US citizen? If you're lucky enough to live in a democracy, then I'd encourage you to protect it and be

<sup>5</sup> MUR 7838 Compl. at 1; MUR 7852 Compl. at 1; MUR 7856 Compl. at 1; Delaware Department of State Division of Corporations Entity Search, <https://icis.corp.delaware.gov/ecorp/entitysearch/NameSearch.aspx> (search for "Expensify") (last visited Jan. 11, 2021).

<sup>6</sup> MUR 7838 Compl. at 1; MUR 7852 Compl. at 1.

<sup>7</sup> MUR 7838 Compl. at 1-2, Ex. 1; MUR 7849, Ex. 1; MUR 7852 Compl. at 1. A complete copy of the email is provided as Exhibit 1 to the MUR 7838 Complaint [hereafter Barrett Email].

<sup>8</sup> Barrett Email at 3.

	willing to do uncomfortable things -- like emailing millions of customers -- to defend it.”
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1           As mentioned above, the Complaints allege that the email was either a prohibited in-kind  
 2 contribution to Biden in violation of 52 U.S.C. § 30118(a) or an independent expenditure by  
 3 Expensify in excess of \$1,000 that Expensify failed to report in violation of 52 U.S.C. § 30104(c)  
 4 and 11 C.F.R. §§ 109.10(d), 114.10(b)(1). The Complaints argue that the value of the alleged  
 5 expenditure is tied to the value of Expensify’s customer email database, as well as the time and  
 6 overhead costs associated with drafting the email.<sup>9</sup> The Complaints further allege that  
 7 Respondents violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a)(1)-(2) by failing to  
 8 include a disclaimer on the email.<sup>10</sup> Lastly, the Complaint in MUR 7856 alleges that  
 9 Respondents violated 52 U.S.C. § 30121 by soliciting foreign national contributions.<sup>11</sup>

10           Respondents acknowledge that Barrett sent the email on behalf of Expensify for the  
 11 purpose of endorsing Biden and that it contained express advocacy, but deny violating the Act or  
 12 Commission regulations.<sup>12</sup> They argue that the email was not a contribution or expenditure of

<sup>9</sup> MUR 7849 Compl. at 2-3 (asserting that the email database is worth \$10-100 million based on open source information about commercial mailing list valuation); MUR 7856 Compl. at 1-2 (asserting that the email has “a substantial fair market value, including time and overhead costs associated with the development of the message and the very large expense of properly obtaining recipient email addresses for the purpose of distributing the message”).

<sup>10</sup> MUR 7838 Compl. at 8-9 (asserting that the Barrett Email did not state that it was not authorized by a candidate or candidate committee and that the text in the email noting that it was sent by Expensify neither appeared in a printed box nor in a color that contrasted with the background); MUR 7852 Compl. at 2 (characterizing the Barrett Email as an independent expenditure and asserting that it did not contain a disclaimer “making clear that this communication was neither paid for nor authorized by the Biden campaign”); MUR 7856 Compl. at 2 (arguing that “[t]he unauthorized public communication at issue also lacks a clear disclaimer on the email itself that would permit recipients to know for certain: whether the express advocacy communication for the Biden campaign was paid for by Expensify or some other individual/entity; and likewise whether the communication was authorized or coordinated by the Biden campaign or its agents”).

<sup>11</sup> MUR 7856 Compl. at 1 (arguing that “to the extent that Mr. Barrett knowingly encouraged foreign nationals to participate in the 2020 general election, he may have violated FECA’s ban on facilitating foreign national political activity concerning federal elections”).

<sup>12</sup> MURs 7838, 7849, 7852 Resp. at 4 (acknowledging that the Barrett Email “unquestionably endorsed a candidate . . . and communicated that endorsement beyond Expensify’s restricted class” but arguing that the Barrett Email “was not a contribution or expenditure, and it did not trigger a reporting requirement”).

1 any sort that Expensify was required to report because “the announcement was not coordinated  
2 with President elect Biden, his authorized committee, or their agents, and Expensify did not  
3 make disbursements for a press release or press conference to announce the endorsement.”<sup>13</sup> In  
4 addition, they argue that a disclaimer was not required because Expensify is not a political  
5 committee and the email was neither a public communication nor an electioneering  
6 communication as those terms are defined in the Commission regulations.<sup>14</sup> Moreover,  
7 Respondents assert that Barrett and Expensify did not coordinate with either Biden or anyone  
8 representing his campaign.<sup>15</sup> Lastly, Respondents deny soliciting any contributions or other  
9 actions by foreign nationals that would violate the Act or Commission regulations.<sup>16</sup>

### 10 **III. LEGAL ANALYSIS**

#### 11 **A. The Commission Should Find No Reason to Believe That Expensify and** 12 **Barrett Made a Prohibited In-Kind Corporate Contribution**

13 The Act and Commission regulations prohibit corporations from making contributions to  
14 a candidate or authorized committee and prohibit any officer or any director of any corporation  
15 from consenting to such a contribution.<sup>17</sup> Additionally, corporations and labor organizations  
16 (including officers, directors or other representatives acting as agents of corporations and labor  
17 organizations) are prohibited from facilitating the making of contributions to candidates or

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<sup>13</sup> MURs 7838, 7849, 7852 Resp. at 3-4; MUR 7856 Resp. at 3-5.

<sup>14</sup> MURs 7838, 7849, 7852 Resp. at 1-3; MUR 7856 Resp. at 2-3.

<sup>15</sup> MURs 7838, 7849, 7852 Resp. at 4 (stating that “the announcement was not coordinated with President elect Biden, his authorized committee, or their agents”); MUR 7856 Resp. at 4 (same).

<sup>16</sup> MUR 7856 Resp. at 2.

<sup>17</sup> 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b); *see id.*, Note to Paragraph (b) (explaining that corporations and labor organizations may make contributions to nonconnected political committees that make only independent expenditures, or to separate accounts maintained by nonconnected political committees for making only independent expenditures).

1 political committees.<sup>18</sup> However, “[a] corporation . . . may endorse a candidate, and may  
2 communicate the endorsement to . . . the general public” and any disbursements for such  
3 announcements “are not contributions or expenditures, provided that” they are “not coordinated  
4 with a candidate, a candidate’s authorized committee, or their agents” and that “[d]isbursements  
5 for any press release or press conference to announce the endorsement are de minimis.”<sup>19</sup>

6 The Act defines a contribution as “any gift, subscription, loan, advance, or deposit of  
7 money or anything of value made by any person for the purpose of influencing any election for  
8 Federal office.”<sup>20</sup> The term “anything of value” includes all in-kind contributions, including the  
9 “the provision of any goods or services without charge or at a charge that is less than the usual  
10 and normal charge.”<sup>21</sup> Coordinated communications are considered in-kind contributions.<sup>22</sup>

11 Commission regulations provide a three-part test for determining when a communication  
12 is a “coordinated communication.”<sup>23</sup> The communication must: (1) be paid for by a third party;  
13 (2) satisfy one of the five enumerated “content” standards; and (3) satisfy one of the five  
14 enumerated “conduct” standards.<sup>24</sup> All three prongs are required to be satisfied for a  
15 communication to be considered a coordinated communication.<sup>25</sup> Based on the available  
16 information, the Barrett Email does not appear to satisfy this test.

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<sup>18</sup> 11 C.F.R. § 114.2(f)(1).

<sup>19</sup> *Id.* § 114.4(c)(6)(i)-(ii).

<sup>20</sup> 52 U.S.C. § 30101(8)(A).

<sup>21</sup> 11 C.F.R. § 100.52(d)(1).

<sup>22</sup> *Id.* §§ 109.20, 109.21.

<sup>23</sup> *Id.* § 109.21(a).

<sup>24</sup> *Id.* (referencing content and conduct standards at 11 C.F.R. § 109.21(c) and (d), respectively)).

<sup>25</sup> *Id.*

1                   1.       Payment Prong

2                   The payment prong is satisfied where a communication “[i]s paid for, in whole or in part,  
3 by a person other than [the] candidate, authorized committee, or political party committee.”<sup>26</sup> In  
4 discussing implementation of the 2006 regulations on internet communications, the Commission  
5 stated that “there is virtually no cost associated with sending e-mail communications, even  
6 thousands of e-mails to thousands of recipients, and there is nothing in the record that suggests a  
7 payment is normally required to do so.”<sup>27</sup> There is no information indicating that Expensify  
8 made any payments associated with drafting or sending the email. Rather, the information  
9 indicates that Barrett wrote the email himself and sent the email using Expensify’s own mailing  
10 list — a list it maintains in the normal course of business for contacting customers. Thus, the  
11 associated cost that could potentially satisfy this prong appears to be limited to Expensify’s  
12 payments to Barrett for his time spent to draft and send the email. However, to the extent that  
13 this may have satisfied the payment prong, because the Barrett Email clearly does not satisfy the  
14 content and conduct prongs, as explained below, it therefore was not a coordinated  
15 communication.

16                   2.       Content Prong

17                   The content prong contains four standards, all of which require that the communication,  
18 at a minimum, be either an “electioneering communication” or a “public communication.”<sup>28</sup> The

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<sup>26</sup> *Id.* § 109.21(a)(1).

<sup>27</sup> Internet Communications, 71 Fed. Reg. 18589, 18594-18595 (Apr. 12, 2006) (“Internet Communications E&J”).

<sup>28</sup> The content prong is satisfied if the communication at issue meets at least one of the following content standards: (1) a communication that is *an electioneering communication* under 11 C.F.R. § 100.29; (2) *a public communication* that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate’s authorized committee; (3) *a public communication* that expressly advocates the election or defeat of a clearly identified candidate for federal office; (4) *a public communication* that, in relevant part, refers to a clearly identified Presidential candidate, and is publicly distributed or disseminated in a jurisdiction 120 days or fewer before the candidate’s primary election or nominating caucus in that jurisdiction; or (5) *a public*

1 Barrett Email is neither, however, since “electronic mail” and “communications over the  
2 Internet, except for communications placed for a fee on another person’s Web site” are  
3 specifically exempted from the definitions of electioneering communication and public  
4 communication, respectively.<sup>29</sup>

### 5 3. Conduct Prong

6 The conduct prong is satisfied by one of five types of interactions between the payor and  
7 the candidate or campaign regarding the communication: a request or suggestion, material  
8 involvement, substantial discussion, use of a common vendor, or involvement of a former  
9 employee or independent contractor.<sup>30</sup> The Complaints do not allege, and we are not aware of,  
10 any information suggesting such interactions between Expensify and either Biden or his  
11 campaign committee that might satisfy any of the conduct standards. Furthermore, Respondents  
12 specifically deny any such coordination occurred.<sup>31</sup> Therefore, it does not appear the Barrett  
13 Email satisfied the conduct prong.

14 Because the Barrett Email does not appear to satisfy all of the three prongs, there is no  
15 basis to conclude that it was a coordinated communication.

16 Finally, the Complaint in MUR 7849 alleges that the Barrett Email constitutes an in-kind  
17 contribution to Biden “because [Complainant’s] personal information has value” and Expensify

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*communication* that is the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c)(1)-(5) (emphasis added).

<sup>29</sup> *Id.* § 100.29(c)(1) (stating that the definition of electioneering communication “does not include ... communications over the Internet, including electronic mail ...”); *Id.* § 100.26 (stating that the definition of public communication “shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site”).

<sup>30</sup> *See id.* § 109.21(d)(1)-(5); *see also id.* 109.21(e) (stating that an agreement or formal collaboration “is not required for a communication to be a coordinated communication”).

<sup>31</sup> *Supra* note 15.

1 used Complainant's and other customers' personal information to send out the email.<sup>32</sup> To the  
2 extent that the Complaint is alleging that Expensify made an in-kind contribution to the Biden  
3 campaign by lending its valuable email list to the Biden campaign (and therefore defraying the  
4 campaign the cost of renting or purchasing an email list),<sup>33</sup> as stated above, there are no facts  
5 suggesting any such interaction between Respondents and the Biden campaign.

6 Therefore, because there is no basis to conclude that the Barrett Email was a coordinated  
7 communication or that Expensify otherwise made or Barrett consented to making, an in-kind  
8 contribution to Biden through the use of Expensify's email list, we recommend that the  
9 Commission find no reason to believe that Expensify or Barrett violated 52 U.S.C. § 30118(a) by  
10 making a prohibited corporate contribution to Biden or his campaign committee.

11 **B. The Commission Should Dismiss the Allegation that Expensify Made an**  
12 **Independent Expenditure, and Find No Reason to Believe that Barrett Made**  
13 **an Independent Expenditure**

14 The Complaints allege that the Barrett Email constituted an independent expenditure that  
15 Expensify was required to, but did not report.<sup>34</sup> Respondents argue that the email was not an  
16 expenditure of any sort, and therefore was not an independent expenditure that triggered the  
17 reporting requirements.<sup>35</sup>

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<sup>32</sup> MUR 7849 Compl. at 2; *see* 11 C.F.R. § 100.52(d)(1) (defining "provision of any goods or services without charge or at a charge that is less than the usual and normal charge" as an in-kind contribution).

<sup>33</sup> In determining whether there is an in-kind contribution, the Commission has considered whether the provision of an item would "relieve" the campaign of an expense it "would otherwise incur" to obtain a similar benefit. Advisory Op. 2017-06 (Stein and Gottlieb) at 5; *accord* Advisory Op. 2015-07 (Hillary for America) at 2; *see* Advisory Op. 2007-22 (Hurysz) at 6 (explaining that the provision of election materials to a campaign results in a contribution because it "would relieve [the] campaign of the expense that it would otherwise incur to obtain such materials"); *see also* Advisory Op. 1992-33 (DNC/RNC) at 3 ("As a general rule, an in-kind donation for Federal elections is treated as if funds equal to the value of the donation were received by the committee and then the committee expended those funds to purchase the goods or services.").

<sup>34</sup> *Supra* note 2.

<sup>35</sup> MURs 7838, 7849, 7852 Resp. at 3.

1           The Act defines “expenditure” as “any purchase, payment, distribution, loan, advance,  
2 deposit, or gift of money or anything of value, made by any person for the purpose of influencing  
3 any election for Federal office.”<sup>36</sup> An “independent expenditure” is an expenditure for a  
4 communication that expressly advocates the election or defeat of a clearly identified federal  
5 candidate, and is not made in concert or cooperation with or at the request or suggestion of such  
6 candidate, the candidate’s authorized political committee, or their agents.<sup>37</sup> Every person (other  
7 than a political committee) who makes independent expenditures aggregating in excess of \$250  
8 during a calendar year must report such independent expenditures in accordance with  
9 Commission regulations.<sup>38</sup> Additionally, every person who makes independent expenditures  
10 aggregating \$1,000 or more with respect to a given election after the 20th day, but more than 24  
11 hours before 12:01 a.m. of the day of an election, must file a 24-hour report.<sup>39</sup>

12           As discussed above, there is no information in any of the Complaints suggesting that  
13 Expensify incurred any direct costs associated with preparing or sending the email and, as noted  
14 above, the Commission has stated that, generally speaking, “there is virtually no cost associated  
15 with sending e-mail communications, even thousands of e-mails to thousands of recipients.”<sup>40</sup>  
16 To the extent that there may have been incidental costs — such as Expensify’s payments to  
17 Barrett for his time spent to draft and send the email — it appears that those costs were minimal  
18 and in any event would require an investigation to quantify whether the amount exceeded the  
19 \$250 reporting threshold or \$1,000 24-hour report threshold. Under these circumstances, we do

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<sup>36</sup> 52 U.S.C. § 30101(9)(A).

<sup>37</sup> *Id.* § 30101(17); *see also* 11 C.F.R. § 100.22(a), (b) (definition of “expressly advocating”).

<sup>38</sup> 52 U.S.C. § 30104(c); 11 C.F.R. § 114.10(a), (b)(1)-(2).

<sup>39</sup> 11 C.F.R. § 109.10(d).

<sup>40</sup> *See* Internet Communications E&J at 18594-95 (recognizing that “there is virtually no cost associated with sending e-mail communications, even thousands of e-mails to thousands of recipients.”).

1 not believe that such additional fact-finding would be an efficient use of the Commission's  
2 limited resources.

3 Accordingly, we recommend that the Commission dismiss, as a matter of prosecutorial  
4 discretion, the allegation that Expensify, Inc. violated 52 U.S.C. § 30104(c) and 11 C.F.R.  
5 §§ 109.10(d), 114.10(b)(1) by failing to report an independent expenditure.<sup>41</sup> Because these  
6 reporting obligations only extend to the corporation and not to corporate officers in their  
7 individual capacity, we recommend that the Commission find no reason to believe that Barrett  
8 violated 52 U.S.C. § 30104(c) and 11 C.F.R. §§ 109.10(d), 114.10(b)(1).<sup>42</sup>

9 **C. The Commission Should Find No Reason to Believe That Expensify and**  
10 **Barrett Failed to Include a Required a Disclaimer**

11 The Complaints allege that Expensify was required to, but did not, include a disclaimer  
12 on the Barrett Email.<sup>43</sup> Respondents argue that a disclaimer was not required because Expensify  
13 is not a political committee and the email was not a public communication.

14 A disclaimer identifying who paid for a communication and, where applicable, whether a  
15 communication was authorized by a candidate, is required on, among other communications, all  
16 "public communications" made by any person that expressly advocate the election or defeat of a

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<sup>41</sup> See *Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>42</sup> Unlike 52 U.S.C. § 30118(a), which specifically applies in part to "any officer or any director of any corporation," these reporting provisions do not, on their face, impose any reporting obligations on corporate officers personally. The relevant reporting obligations only extend to the "corporation" or "person" who made the expenditure. See 52 U.S.C. § 30104(c) (requiring "[e]very person other than a political committee who makes independent expenditures in an aggregate amount or value in excess of \$250 during a calendar year" to file the appropriate disclosure reports) (internal parenthesis omitted); 11 C.F.R. § 109.10(d) (applying a reporting requirement to "[e]very person making, after the 20th day, but more than 24 hours before 12:01 a.m. of the day of an election, independent expenditures aggregating \$1,000 or more with respect to a given election); 11 C.F.R. § 114.10(b)(1)-(2) (requiring "[c]orporations and labor organizations" that make independent expenditures or electioneering communications to file reports).

<sup>43</sup> *Supra* note 2.

1 clearly identified candidate and all electioneering communications.<sup>44</sup> As discussed above, the  
2 Barrett Email is neither a public communication nor an electioneering communication, and was  
3 therefore not required to include a disclaimer.<sup>45</sup> Accordingly, we recommend that the  
4 Commission find no reason to believe that Expensify, Inc. and Barrett violated 52 U.S.C.  
5 § 30120(a) and 11 C.F.R. § 110.11(a)(1)-(2) by failing to include a disclaimer on the Barrett  
6 Email.<sup>46</sup>

7 **D. The Commission Should Find No Reason to Believe that Expensify and**  
8 **Barrett Solicited Prohibited Foreign National Contributions**

9 The Complaint in MUR 7856 alleges that Respondents “may have violated 52 U.S.C.  
10 § 30121 by using corporate resources to encourage non-citizens to participate in election  
11 activities.”<sup>47</sup> Respondents deny the allegation, arguing that the email did not solicit any of the  
12 prohibited activity enumerated in the Act or Commission regulations.<sup>48</sup>

13 The Act and Commission regulations prohibit any foreign national from “directly or  
14 indirectly” making “a contribution or donation of money or other thing of value,” including “an  
15 express or implied promise to make a contribution or donation,” or making “an expenditure,  
16 independent expenditure, or disbursement for an electioneering communication,” in connection

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<sup>44</sup> 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11(a)(2), (4). Disclaimers are also required on emails of more than 500 substantially similar communications sent by political committees and on public communications that solicit any contribution; neither of which apply here. 11 C.F.R. § 110.11(a)(1), (3).

<sup>45</sup> *Supra* note 29 and accompanying text (explaining that emails are specifically exempted from the definition of both “electioneering communication” and “public communication”).

<sup>46</sup> We note that even if the facts supported the allegations that Expensify should have included a disclaimer on the Barrett email, a no reason to believe finding with respect to Barrett would still be appropriate because, as with the reporting requirements discussed above, neither the Act nor Commission regulations impose any individual obligation on corporate officers, but rather only to the “person” which makes a public communication or electioneering communication. *See* 11 C.F.R. § 110.11(a)(2)-(4) (requiring a disclaimer on certain public communications and all electioneering communication made “by any person”).

<sup>47</sup> MUR 7856 Compl. at 1.

<sup>48</sup> MUR 7856 Resp. at 2.

1 with a federal, state, or local election.<sup>49</sup> The Act and Commission regulations also prohibit any  
2 person from knowingly soliciting, accepting, or receiving a contribution or donation from a  
3 foreign national.<sup>50</sup> Under Commission regulations, “to solicit” means “to ask, request, or  
4 recommend, explicitly or implicitly, that another person make a contribution, donation, transfer  
5 of funds, or otherwise provide anything of value.”<sup>51</sup>

6 As an initial matter, there is no dispute that foreign nationals were likely among the  
7 recipients of the Barrett Email. Indeed, text of the email states: “Are you annoyed that you  
8 received this as a non-US citizen? If you’re lucky enough to live in a democracy, then I’d  
9 encourage you to protect it and be willing to do uncomfortable things -- like emailing millions of  
10 customers -- to defend it.”<sup>52</sup> Nonetheless, the email does not specifically solicit contributions,  
11 and the only call to action — to vote for Biden — is explicitly directed to U.S. citizens.<sup>53</sup> The  
12 portion directed to foreign nationals appears to be encouraging those recipients to participate in  
13 their own countries’ democratic process, not those of the United States. Accordingly, we  
14 recommend that the Commission find no reason to believe that Expensify, Inc. and Barrett  
15 violated 52 U.S.C. § 30121 by soliciting foreign national contributions.

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<sup>49</sup> 52 U.S.C. § 30121(a)(1); 11 C.F.R. § 110.20(b), (c), (e), (f).

<sup>50</sup> 52 U.S.C. § 30121(a)(2); 11 C.F.R. § 110.20(g); *see also* 11 C.F.R. § 110.20(a)(4) (definition of knowingly).

<sup>51</sup> 11 C.F.R. § 110.20(a)(6) (incorporating the definition at 11 C.F.R. § 300.2(m)).

<sup>52</sup> Barrett Email at 3.

<sup>53</sup> *Id.* at 1 (“*If you are a US citizen, anything less than a vote for Biden is a vote against democracy*”) (emphasis added).

1 **IV. RECOMMENDATIONS**

- 2 1. Find no reason to believe that Expensify, Inc. and David Barrett violated  
3 52 U.S.C. § 30118(a) by making a prohibited in-kind corporate contribution;
- 4 2. Dismiss the allegation that Expensify, Inc. violated 52 U.S.C. § 30104(c) and  
5 11 C.F.R. §§ 109.10(d), 114.10(b)(1) by failing to report an independent  
6 expenditure;
- 7 3. Find no reason to believe that David Barrett violated 52 U.S.C. § 30104(c) and  
8 11 C.F.R. §§ 109.10(d), 114.10(b)(1) by failing to report an independent  
9 expenditure;
- 10 4. Find no reason to believe that Expensify, Inc. and David Barrett violated  
11 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a)(1)-(2) by failing to include a  
12 disclaimer on their communication;
- 13 5. Find no reason to believe that Expensify, Inc. and David Barrett violated  
14 52 U.S.C. § 30121 by soliciting foreign national contributions;
- 15 6. Approve the attached Factual and Legal Analysis;
- 16 7. Approve the appropriate letters; and

1           8.     Close the file.

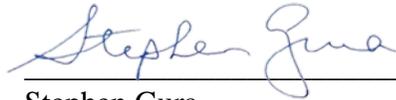
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