

FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL'S REPORT

MUR 7865

DATE COMPLAINT FILED: Dec. 17, 2020

DATE OF NOTIFICATION: Dec. 22, 2020

LAST RESPONSE RECEIVED: Feb. 26, 2021

DATE ACTIVATED: July 16, 2021

[REDACTED]

EXPIRATION OF SOL: June 6-Oct. 26, 2025

ELECTION CYCLE: 2020

COMPLAINANTS:

Campaign Legal Center

Margaret Christ

RESPONDENTS:

Ditch Fund and Jennifer May in her official
capacity as treasurer

Honor Bound PAC and Chris Patton in his official
capacity as treasurer f/k/a Amy McGrath for
Senate, Inc.¹

Targeted Platform Media, LLC

Buying Time, LLC

MUR 7866

DATE COMPLAINT FILED: Dec. 17, 2020

DATE OF NOTIFICATION: Dec. 22, 2020

LAST RESPONSE RECEIVED: Feb. 19, 2021

DATE ACTIVATED: July 16, 2021

[REDACTED]

EXPIRATION OF SOL: Oct. 19-Nov. 8, 2025

ELECTION CYCLE: 2020

COMPLAINANTS:

Campaign Legal Center

Margaret Christ

RESPONDENTS:

March On PAC and Evvie Harmon in her official
capacity as treasurer

Mike Espy for Senate Campaign Committee and

Kaiser Brown in his official capacity as treasurer

Targeted Platform Media, LLC

Buying Time, LLC

¹ On March 29, 2021, Amy McGrath for Senate, Inc., changed its name to Honor Bound PAC and, on the same day, reorganized as a non-connected committee. See Honor Bound PAC, Statement of Organization (Mar. 29, 2021), <https://docquery.fec.gov/pdf/601/202103299442614601/202103299442614601.pdf>. In this Report, we will refer to this committee as the McGrath Committee.

RELEVANT STATUTES 52 U.S.C. § 30104(b)
AND REGULATIONS: 52 U.S.C. § 30116(a)
52 U.S.C. § 30116(f)
52 U.S.C. § 30118(a)
11 C.F.R. § 109.20
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: [REDACTED]

I. INTRODUCTION

The Complaints in these matters allege that two candidate committees and two non-connected committees, respectively, coordinated television advertisements through common vendors, Buying Time (“BT”) and Targeted Platform Media (“TPM”). The Complaints, filed by the same Complainant on the same day using a similar template, base the allegations primarily on the fact that Catherine Herrick, the president and founder of both BT and TPM, signed National Association of Broadcasters political advertising disclosure forms (“NAB Forms”) filed with the Federal Communications Commission (“FCC”) for all of the subject communications sponsored by the candidate committees and the non-connected committees, suggesting she acted as a coordinating agent.

Specifically, in MUR 7865, the Complaint alleges that Herrick’s involvement in certain advertising resulted in Amy McGrath for Senate and Chris Patton in his official capacity as treasurer (the “McGrath Committee”) coordinating with Ditch Fund and Jennifer May in her official capacity as treasurer (“Ditch Fund”). Similarly, in MUR 7866, Mike Espy for Senate Campaign Committee and Kaiser Brown in his official capacity as treasurer (the “Espy Committee”) allegedly coordinated with March On PAC and Evvie Harmon in her official capacity as treasurer (“March On”) also through Herrick and her companies, BT and TPM. Both

Complaints allege that the coordinated communications resulted in excessive, prohibited, and unreported in-kind contributions to the candidate committees.

As described below, although in other instances the existence of the same signatory on NAB Forms was considered evidence of coordination, in this matter, the Responses, including sworn declarations, and other underlying facts sufficiently rebut the coordination allegations. Therefore, we recommend that the Commission dismiss the allegations that Ditch Fund, the McGrath Committee, March On, the Espy Committee, BT, or TPM violated the Federal Election Campaign Act of 1971, as amended (the “Act”).²

II. FACTUAL BACKGROUND

Ditch Fund is a hybrid political committee with a non-contribution account, also known as a “Carey Committee.”³ In 2020, Amy McGrath was the Democratic U.S. Senate candidate in Kentucky, and the McGrath Committee was her principal campaign committee.⁴ Ditch Fund contracted with TPM, a media placement vendor, and paid for and disseminated independent expenditures supporting McGrath and opposing the incumbent Republican senator, Mitch McConnell.⁵ Ditch Fund reported almost \$11.5 million on independent expenditures in that race during the 2020 cycle.⁶ TPM founder Herrick signed NAB forms filed with the FCC in

² The Espy Committee did not respond to the Complaint, nor to CELA’s efforts to inquire about a response.

³ See Ditch Fund, Amended Statement of Organization (May 2, 2021), <https://docquery.fec.gov/pdf/129/202105029446141129/202105029446141129.pdf>; Ditch Fund Resp. at 1 (July 22, 2021); see *Carey v. Federal Election Commission*, 791 F. Supp. 2d 121 (D.D.C. 2011).

⁴ See Amy McGrath, Statement of Candidacy (July 18, 2019), [https://docquery.fec.gov/pdf/239/201907189151452239.pdf](https://docquery.fec.gov/pdf/239/201907189151452239/201907189151452239.pdf); Amy McGrath for Senate, Inc., Statement of Organization (July 9, 2019), <https://docquery.fec.gov/pdf/315/201907099150524315/201907099150524315.pdf>.

⁵ Ditch Fund Resp. at 1-2.

⁶ See *Ditch Fund: Spending 2019-2020*, FEC.GOV, <https://www.fec.gov/data/committee/C00688739/?tab=spending&cycle=2020> (last visited Aug. 20, 2024).

1 connection with those advertisements.⁷ The MUR 7865 Complaint attached copies of those
 2 forms.⁸

3 The McGrath Committee also paid for and disseminated advertising and contracted with
 4 BT, a media placement firm, in connection with its television advertisements, which totaled more
 5 than \$35 million.⁹ FCC records indicate that BT placed ads for the Committee on broadcast
 6 television stations across Kentucky.¹⁰ The Complaint includes attachments showing that Herrick
 7 signed NAB disclosure forms regarding these ads as well.¹¹

8 In addition to Herrick's role, the MUR 7865 Complaint asserts that the ads' timing and
 9 placement suggests a coordinated effort. It points to six instances on four broadcast television
 10 stations where the McGrath Committee and Ditch Fund ads ran on the same station at around the
 11 same time.¹² The Complaint alleges that BT and TPM, through Herrick, bought these "ad
 12 flights" for the McGrath Committee and Ditch Fund, respectively, evidencing a strategy to
 13 disseminate the ads in a complementary fashion.¹³ The Complaint alleges that because BT and

⁷ MUR 7865 Compl. at 4-5 (Dec. 17, 2020).

⁸ See MUR 7865 Compl., Exs. B, I, J, M, N, P.

⁹ Revised McGrath Committee Resp. at 1-2 (Feb. 26, 2021); see *FEC Disbursements: Filtered Results*, FEC.GOV https://www.fec.gov/data/disbursements/?data_type=processed&committee_id=C00711549&recipient_name=buying+time&two_year_transaction_period=2020 (last visited Aug. 20, 2024) (reflecting all disbursements by the McGrath Committee to Buying Time during the 2020 election cycle).

¹⁰ MUR 7865 Compl. at 4; *id.*, Exs. A, C, D, K, L, O. The FCC requires that a broadcast, cable, or satellite licensee place information about political advertising "immediately" in its "political file," which is available in the FCC's online public database. 47 C.F.R. § 73.1943. The political file must contain requests to purchase broadcast time made by candidates or communicates a message relating "to any political matter of national importance." 47 U.S.C. § 315(e)(1). The file must include: (1) whether the request is accepted or rejected; (2) the rate charged; (3) the date and time the communication is to air; (4) the name of the candidate and the office and election referenced, or the issue referenced, if applicable; and (5) in the case of a request made by the candidate, the name of the candidate, candidate's authorized committee, and treasurer; or in the case of any other request, the name of the person purchasing the time, the name, address, and phone number of a contact person for such person. *Id.* § 315(e)(2). NAB Form PB-18, "Political Broadcast Agreement Form," can satisfy the disclosure requirements.

¹¹ See MUR 7865 Compl., Exs. A, E, F, K, L, O.

¹² See MUR 7865 Compl. at 5-7.

¹³ *Id.* at 14.

TPM are “effectively indistinguishable,” Ditch Fund’s ads constitute excessive or prohibited in-kind contributions to the McGrath Committee in the form of coordinated communications through the use of a common vendor.¹⁴

The MUR 7866 Complaint makes similar allegations in connection with the 2020 Senate race in Mississippi. Like Ditch Fund, Respondent March On is registered with the Commission as a hybrid political committee with a non-contribution account, also known as a “Carey Committee.”¹⁵ In 2020, Espy was a federal candidate for the U.S. Senate in Mississippi, and the Espy Committee was his authorized committee.¹⁶ March On reported \$74,166.68 in independent expenditures supporting his candidacy.¹⁷

Like Ditch Fund, March On hired TPM to place its independent expenditure television advertisements, while the Espy Committee, like the McGrath Committee, hired BT to place its television ads.¹⁸ Herrick signed the NAB disclosure forms for all of the ads funded by March On and the Espy Committee.¹⁹ Thus, the MUR 7866 Complaint alleges Herrick’s role in signing all of the disclosure forms demonstrates coordination.²⁰ Further, the Complaint states that in three instances in October and November 2020, ads disseminated by March On and the Espy

¹⁴ *Id.* at 12-15.

¹⁵ March On PAC, Amended Statement of Organization (Apr. 20, 2023), <https://docquery.fec.gov/pdf/520/202304209581180520/202304209581180520.pdf>; *see supra* note 3.

¹⁶ *See* Michael Espy, Statement of Candidacy (Nov. 30, 2018), <https://docquery.fec.gov/pdf/690/201811309133886690/201811309133886690.pdf>; Espy Committee, Statement of Organization (Mar. 14, 2019), <https://docquery.fec.gov/pdf/285/201903149145708285/201903149145708285.pdf>.

¹⁷ *See* FEC Independent Expenditures: Filtered Results, FEC.GOV, https://www.fec.gov/data/independent-expenditures/?committee_id=C00748228&iWs_notice=true&data_type=processed&q_spender=C00748228&q_spender=C90020421&is_notice=true&candidate_id=S8MS00287&support_oppose_indicator=S&min_date=01%2F01%2F2019&max_date=12%2F31%2F2020 (last visited Aug. 20, 2024) (reflecting all independent expenditures by March On supporting Espy during the 2020 election cycle).

¹⁸ MUR 7866 Compl. at 2, 4-5 (Dec. 17, 2020).

¹⁹ *Id.* at 4-5.

²⁰ *Id.* at 11-15.

Committee complemented each other, and ran on the same television stations during the same time periods, and that in two of those instances, March On paid more while the Committee paid less, or vice versa.²¹ Based on these circumstances, the Complaint alleges that March On violated the Act by making unreported excessive and prohibited in-kind contributions to the Espy Committee in the form of coordinated communications.²²

The candidate committees and the hybrid committees responded to the Complaints by describing the organization and activities of Respondents BT and TPM and submitted declarations from Herrick and employee Kathryn Welsh.²³ In addition, Ditch Fund and March On provided declarations from the creators of the advertising at issue.²⁴

In her declaration, Herrick states that she established BT in 1999 to provide “media planning and buying services to political campaigns, political committees, and non-profit organizations.”²⁵ In 2014, she created TPM as a subsidiary of BT “to delineate between work done for candidates and work done for other independent clients.”²⁶ Herrick states that she is the sole owner, president, and chief executive officer of both BT and TPM.²⁷ Herrick describes how

²¹ *Id.* at 13-14.

²² *Id.* at 15.

²³ The McGrath Committee and Ditch Fund submitted original and Revised/Supplemental Responses, noting that the Revised/Supplemental Responses included a more recent declaration from Herrick, who filed her own Response and an identical declaration on behalf of BT and TPM.

²⁴ Ditch Fund Resp. at 14-15; March On Resp. at 13 (Feb. 9, 2021).

²⁵ MURs 7865, 7866 Buying Time/Targeted Platform Media Resp. (Feb. 23, 2021) (“BT/TPM Resp.”), Ex. A, Declaration of Catherine Herrick ¶ 2 (“Herrick Decl.”).

²⁶ *Id.* at 2, Herrick Decl. ¶ 3.

²⁷ *Id.*, Herrick Decl. ¶¶ 1, 6.

1 “BT and TPM have separate office space for their strategic staff and do not have overlapping
2 employees that work on strategic services.”²⁸

3 Herrick states that BT and TPM operate under a firewall policy, attached to the BT/TMP
4 Response, and that it specifically provides for the separation of document access, storage, and
5 internal lists.²⁹ She states that during the 2020 election cycle, in both the Kentucky and
6 Mississippi Senate races, she was restricted to working with candidate committees, and that
7 neither she nor to her knowledge any other BT employee “provided any non-public strategic
8 information, or otherwise provided any strategic advice regarding the plans, projects, or needs of
9 any candidate committee to Ditch Fund or March On during the 2020 cycle.”³⁰

10 Herrick also states that the media forms relied on by the Complainant are standard forms
11 required for political advertising purchases; that as president of BT and TPM, her signature is
12 generally stamped onto the forms; that she does not review every form; and that her stamped
13 signature does not prove that she had specific knowledge of any specific purchase of time.³¹

14 TPM employee Kathryn Welsh states in her declaration that during the 2020 election
15 cycle, she provided strategic and media placement advice to “Ditch Mitch” and March On and
16 that she was the only person at BT or TPM to provide such services to them.³² Welsh states that
17 under the internal firewall policy in effect during 2020, she “was not privy to, nor did [she] use,
18 any non-public information about the plans, projects, activities or needs of any candidate or

²⁸ *Id.*, Herrick Decl. ¶ 4.

²⁹ *Id.*, Herrick Decl. ¶ 5, Ex. B.

³⁰ *Id.*, Herrick Decl. ¶ 8.

³¹ *Id.*, Herrick Decl. ¶ 7.

³² BT/TPM Resp., Ex. C, Declaration of Kathryn Welsh ¶ 2 (“Welsh Decl.”). Ditch Fund is also known as the Ditch Mitch Fund.

candidate's committee in Mississippi or Kentucky.”³³ She further states that she had no access to any BT files or documents with such information, and she “did not engage in any substantive discussions with any BT employee that provided strategic services to any candidate for United States Senate in Kentucky or Mississippi regarding those candidate's plans, projects, activities, or needs.”³⁴

Phillip de Vellis, a partner at Beacon Media, the media and advertising firm hired by Ditch Fund, declares that he only communicated with Welsh at TPM regarding ad buys and the Kentucky Senate race.³⁵ De Vellis states that Herrick informed him about the firewall policy between TPM and BT and that in accordance with it, neither he nor his colleagues at Beacon Media discussed the Kentucky Senate race or Ditch Fund's ad purchases with Herrick.³⁶ He further states that the only discussion he had with Herrick about Welsh's work for Ditch Fund concerned the commission percentage TPM would charge Ditch Fund for its work.³⁷

March On's ad creation vendor, Sivan Jacobovitz of Van Ness Creative Strategies (“Van Ness”), states that when he contacted Herrick at BT on behalf of March On, she told him that BT could not provide services to it in Mississippi because BT “had implemented a firewall in the Mississippi Senate race.”³⁸ He further states that TPM then contacted Van Ness, which “served as March On's point of contact with [TPM].”³⁹ Jacobovitz states that all services provided to

³³ *Id.*, Welsh Decl. ¶ 5.

³⁴ *Id.*

³⁵ Ditch Fund Resp. at 14, Declaration of Phillip de Vellis ¶¶ 1, 4 (“de Vellis Decl.”).

³⁶ *Id.*, de Vellis Decl. ¶¶ 5-6.

³⁷ *Id.*, de Vellis Decl. ¶ 6.

³⁸ March On Resp. at 13, Declaration of Sivan Jacobovitz ¶ 5 (“Jacobovitz Decl.”). The Herrick, Welsh, de Vellis, and Jacobovitz Declarations are all sworn under penalty of perjury.

³⁹ *Id.*

Van Ness and Ditch Fund were provided by Welsh at TPM, and that neither Herrick nor Welsh “divulge[d] any non-public strategic information regarding the plans, projects or needs of *any* candidate to [Van Ness].”⁴⁰

BT and TPM’s firewall policy states that employees representing a candidate may not communicate with those representing an outside spending organization with respect to the same candidate or election.⁴¹ It further provides that client-specific information should be segregated from shared libraries or files,⁴² and that printed materials and email lists must be securely maintained.⁴³

III. LEGAL ANALYSIS

The Act defines the terms “contribution” and “expenditure” to include “anything of value” made by any person for the purpose of influencing an election.⁴⁴ The term “anything of value” includes in-kind contributions.⁴⁵ In-kind contributions result when goods or services are provided without charge or at less than the usual and normal charge,⁴⁶ and when a person makes an expenditure in cooperation, consultation or in concert with, or at the request or suggestion of a candidate or the candidate’s authorized committee or their agents.⁴⁷ The Act requires committee

⁴⁰ *Id.* ¶¶ 6, 8 (emphasis in original).

⁴¹ BT/TPM Resp., Ex. B at 2 (Firewall Policy).

⁴² *Id.* at 3.

⁴³ *Id.*

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

⁴⁵ 11 C.F.R. § 100.52(d).

⁴⁶ *Id.*

⁴⁷ 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.20.

1 treasurers to file reports of receipts and disbursements in accordance with the provisions of
2 52 U.S.C. § 30104.⁴⁸

3 Under Commission regulations, expenditures for “coordinated communications” are
4 addressed under a three-prong test at 11 C.F.R. § 109.21. Under this three-prong test for
5 coordinated communications, a communication is coordinated and treated as an in-kind
6 contribution when it is paid for by someone other than a candidate, a candidate’s authorized
7 committee, a political party committee, or the authorized agents of either (the “payment prong”);
8 satisfies one of five content standards (the “content prong”); and satisfies one of five conduct
9 standards (the “conduct prong”).⁴⁹ A communication must satisfy all three prongs to be a
10 “coordinated communication” under Commission regulations.

11 The “conduct prong” is satisfied by: (1) communications made at the “request or
12 suggestion” of the relevant candidate or committee; (2) communications made with the “material
13 involvement” of the relevant candidate or committee; (3) communications made after a
14 “substantial discussion” with the relevant candidate or committee; (4) specific actions of a
15 “common vendor;” (5) specific actions of a “former employee or independent contractor;” and
16 (6) specific actions relating to the dissemination of campaign material.⁵⁰

⁴⁸ 52 U.S.C. § 30104(a), (b).

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

⁵⁰ *Id.* § 109.21(d).

The “common vendor” standard of the conduct prong has three elements: (i) the person paying for the communication, or an agent of such person, uses a “commercial vendor”⁵¹ to create, produce, or distribute the communication; (ii) the vendor previously provided certain enumerated services to the candidate identified in the communication during the previous 120 days; and (iii) the commercial vendor uses or conveys to the person paying for the communication:

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

(B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a political party committee, and that information is material to the creation, production, or distribution of the communication.⁵²

Commission regulations state that a candidate or authorized committee “does not receive or accept an in-kind contribution” resulting from coordination through a common vendor unless the communication was made at the request or suggestion of, with the material involvement of, or after substantial discussions with, the candidate or authorized committee.⁵³ Further, the

⁵¹ A commercial vendor includes “any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services.” *Id.* § 116.1(c). A “commercial vendor” also includes “any owner, officer, or employee of the commercial vendor.” *Id.* § 109.21(d).

⁵² *Id.* § 109.21(d)(4)(iii); *see id.* § 116.1(c).

⁵³ *Id.* § 109.21(b)(2); *see id.* § 109.21(d)(1)-(3).

Commission has crafted a safe-harbor provision for commercial vendors that have established and implemented a written firewall policy that meets certain requirements.⁵⁴

A firewall policy satisfies the “safe harbor” if it: (1) is “designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate who is clearly identified in the communication, or the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a political party committee”; and (2) is “described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy.”⁵⁵ The safe harbor, however, “does not apply if specific information indicates that, despite the firewall, information about the candidate’s . . . campaign plans, projects, activities, or needs that is material to the creation, production, or distribution of the communication was used or conveyed to the person paying for the communication.”⁵⁶

The Commission considered a “common vendor” fact pattern in three reports — MURs 7427, 7497, 7524, and 7553 (National Rifle Association of America Political Victory Fund, *et al.*), MURs 7558, 7560, and 7621 (National Rifle Association of America Political Victory Fund, *et al.*), and MURs 7654 and 7660 (America First Action, Inc., *et al.*) (collectively, the “NRA MURs”) — involving allegations that employees of a media-placement vendor may have served as coordination agents because, like here, they signed NAB Forms on behalf of both

⁵⁴ *Id.* § 109.21(h).

⁵⁵ *Id.* § 109.21(h)(1)-(2).

⁵⁶ *Id.* § 109.21(h).

1 candidate committees and independent groups supporting those candidates.⁵⁷ The complaints in
 2 the NRA MURs alleged that the signatures on the NAB Forms showed that non-public
 3 information was shared, leading to the making of excessive and prohibited in-kind contributions
 4 via a common vendor.⁵⁸ The First General Counsel's Reports in the NRA MURs recommended
 5 that the Commission find reason to believe respondents coordinated communications, in part
 6 based on the NAB Forms, a defective firewall, and a pattern of complementary spending.⁵⁹

7 In their Responses to the Complaints in the present matters, Respondents acknowledge
 8 that parts 1 and 2 of the common vendor definition in the Commission's coordination regulations
 9 are met here: BT and TPM are owned by the same person,⁶⁰ BT and TPM performed work in
 10 connection with the same candidate race at the same time, and third parties (Ditch Fund and
 11 March On) paid for advertisements in connection with that race.⁶¹ Respondents argue, however,
 12 that the only facts cited to support the Complaint's allegations of coordinated conduct, Herrick's
 13 signature on the NAB disclosure forms and a few similar ad-time purchases, do not establish
 14 coordination.⁶² Moreover, they argue that BT and TPM's firewall policy satisfies the

⁵⁷ See First Gen. Counsel's Rpt. ("FGCR") at 14-29, MURs 7427, 7497, 7524, 7553 (Nat'l Rifle Ass'n of Am. Political Victory Fund, *et al.*) (specifically, the complaints in MURs 7524 and 7553 made such allegations); FGCR at 11-23, MURs 7558, 7560, 7621 (Nat'l Rifle Ass'n of Am. Political Victory Fund, *et al.*); FGCR at 9-18, MURs 7654, 7660 (Am. First Action, *et al.*) (specifically, the complaint in MUR 7654 made such an allegation).

⁵⁸ See FGCR at 14-29, MURs 7427, 7497, 7524, 7553; FGCR at 11-23, MURs 7558, 7560, 7621; FGCR at 9-18, MURs 7654, 7660.

⁵⁹ See FGCR at 14-29, MURs 7427, 7497, 7524, 7553; FGCR at 11-23, MURs 7558, 7560, 7621; FGCR at 9-18, MURs 7654, 7660. The Commission split 3-2 on the Office of General Counsel's reason-to-believe recommendations in the NRA MURs. Certification ("Cert.") (Apr. 12, 2021), MURs 7427, 7497, 7524, 7553; Cert. (Apr. 12, 2021), MURs 7558, 7560, 7621; Cert. (Apr. 12, 2021), MURs 7654, 7660; *see also* Statement of Reasons ("SOR"), Comm'r Weintraub, MURs 7427, 7497, 7524, 7553, 7558, 7560, 7621, 7654, 7660; SOR, Comm'rs Dickerson & Trainor, MURs 7427, 7497, 7524, 7553, 7558, 7560, 7621, 7654, 7660.

⁶⁰ See 11 C.F.R. § 109.21(d)(4)(ii).

⁶¹ See March On Resp. at 4; Ditch Fund Resp. at 5.

⁶² See BT/TPM Resp. at 4; Ditch Fund Resp. at 8; March On Resp. at 7.

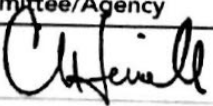

Commission's requirements and in fact prevented material information from passing between BT and TPM, as set forth in the declarations.⁶³

As explained below, although the common signatures on the NAB forms and similar advertising markets used by respondents could, in some circumstances, be indicative of coordination, in the present matters, the available information indicates that BT and TPM appear to have effectively implemented their firewall policy and avoided the sharing of nonpublic information.

A. Herrick's Stamped Signature and the Spending Patterns

The Complaints append copies of the NAB political advertisement disclosure forms BT and TPM filed, signed by Herrick, to disclose the allegedly coordinated ad buys.⁶⁴ However, all of those forms clearly show that Herrick's signature and date or lack thereof are exactly the same, as seen in these examples:

Fig. 1: BT/McGrath Committee NAB Form, WLKY⁶⁵

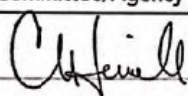
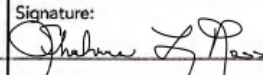
Candidate/Committee/Agency	Station Representative
Signature: 	Signature: 
Name: Cathie Herrick	Name: Jamie Young
Date of Request to Purchase Ad Time:	Date of Station Agreement to Sell Time: 9/14/20

⁶³ See BT/TPM Resp. at 3-5; Ditch Fund Resp. at 5-7; March On Resp. at 4-6.

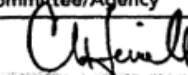

⁶⁴ See MUR 7865 Compl. at 36, 68, 71, 92, 106, and 151 (BT NAB disclosure forms); *id.* at 47, 85, 90, 127, 134, 159 (TPM NAB disclosure forms); MUR 7866 Compl. at 28, 166, 251 (BT NAB disclosure forms); *id.* at 104, 192, 281 (TPM NAB disclosure forms).

⁶⁵ MUR 7865 Compl. at 36.

1 *Fig. 2: BT/McGrath Committee NAB Form, WDRB⁶⁶*

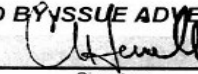
Candidate/Committee/Agency	Station Representative
Signature: 	Signature: 
Name: Cathie Herrick	Name: Shahara Ross
Date of Request to Purchase Ad Time:	Date of Station Agreement to Sell Time: 6.01.2020

2 *Fig. 3: BT/McGrath Committee NAB Form, WLWT⁶⁷*

Candidate/Committee/Agency	Station Representative
Signature: 	Signature: 
Name: Cathie Herrick	Name: Kelly J. Dorr
Date of Request to Purchase Ad Time:	Date of Station Agreement to Sell Time: 10-14-20

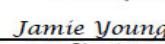
3 *Fig. 4: TPM/Ditch Fund NAB Form, WLKY⁶⁸*

TO BE SIGNED BY ISSUE ADVERTISER (SPONSOR)

5/26/2020  (202)965-5060
 Date Signature Contact Phone Number

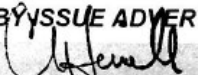
TO BE SIGNED BY STATION REPRESENTATIVE

☐ Accepted ☐ Accepted in Part ☐ Rejected

 Jamie Young Client Specialist
 Signature Printed Name Title

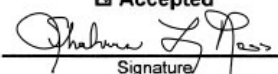
4 *Fig. 5: TPM/Ditch Fund NAB Form, WDRB⁶⁹*

TO BE SIGNED BY ISSUE ADVERTISER (SPONSOR)

5/26/2020  (202)965-5060
 Date Signature Contact Phone Number

TO BE SIGNED BY STATION REPRESENTATIVE

☒ Accepted ☐ Accepted in Part ☐ Rejected

 Shahara Ross National Sales Manager
 Signature Printed Name Title

⁶⁶ *Id.* at 68.

⁶⁷ *Id.* at 106.

⁶⁸ *Id.* at 47.

⁶⁹ *Id.* at 90.

1 *Fig. 6: TPM/Ditch Fund NAB Form, WLWT*⁷⁰

TO BE SIGNED BY ISSUE ADVERTISER (SPONSOR)

5/26/2020 Cathie Herrick (202)965-5060
 Date Signature Contact Phone Number

TO BE SIGNED BY STATION REPRESENTATIVE

☒ Accepted ☐ Accepted in Part ☐ Rejected

[Signature] Tatly D. Down NSM
 Signature Printed Name Title

2 *Fig. 7: BT/Espy Committee NAB Form, NCC Media (MS Zone)*⁷¹

Candidate/Committee/Agency	Station Representative
Signature: <u>Cathie Herrick</u>	Signature: <u>Demarius L. Burnside</u>
Name: Cathie Herrick	Name: Demarius L. Burnside
Date of Request to Purchase Ad Time:	Date of Station Agreement to Sell-Time:

3 *Fig. 8: TPM/March On NAB Form, NCC (MS Zone)*⁷²

TO BE SIGNED BY ISSUE ADVERTISER (SPONSOR)

10/16/2020 Cathie Herrick (202)965-5060
 Date Signature Contact Phone Number

TO BE SIGNED BY STATION REPRESENTATIVE

☒ Accepted ☐ Accepted in Part ☐ Rejected

Demarius L. Burnside Demarius L. Burnside Political Sales Planner
 Signature Printed Name Title

4 Herrick's signatures on the NAB forms appear to be either stamped or duplicated on
 5 every example cited in the Complaints, confirming Herrick's statement in her declaration that her
 6 signature is stamped and should not necessarily be understood to mean she participated in the

⁷⁰ *Id.* at 127.

⁷¹ MUR 7866 Compl. at 28. The MUR 7866 Complaint only included examples from NCC Media, which appears to provide services in connection with a wide variety of cable stations, including ESPN and Lifetime.

⁷² *Id.* at 104.

1 production or distribution decisions related to the ads. In addition, the forms that TPM filed on
2 behalf of Ditch Fund are all dated on May 16, 2020, months before most of the allegedly
3 coordinated ads were disseminated. These facts support the Respondents' argument that Herrick
4 did not personally review every ad buy made by BT and TPM as her signature and date stamp
5 were not contemporaneously made with many of the allegedly coordinated advertisements.

6 The Complaints base their allegations on the fact that the forms were signed by the same
7 person (Herrick), thus implying that she knew about the times, dates, stations, and demographics
8 influencing ad buys. That all the forms appear to include Herrick's *stamped* signature
9 undermines this implication. By contrast, in the NRA matters where the Office of General
10 Counsel recommended that the Commission find reason to believe a violation occurred, the
11 signatures were completed by several different individuals, appear to have been individually
12 signed, and were signed on dates coinciding with the expenditures at issue.⁷³ The custom nature
13 of the filings in the NRA MURs suggested that the signers may have had personal knowledge of
14 plans and strategies, and this fact supported OGC's reason-to-believe recommendation.⁷⁴
15 Moreover, unlike the affidavits filed in the earlier MURs, here Herrick's declaration clearly
16 states that she did not personally review or sign each form.⁷⁵

17 Moreover, while the Complaints argue that "complementary" spending by the
18 independent groups with the candidate committees "advance[s] a unified, coordinated election

⁷³ See, e.g., FGCR at 16-18, MURs 7427, 7497, 7524, 7553 (Nat'l Rifle Ass'n of Am. Political Victory Fund, *et al.*).

⁷⁴ See *id.*

⁷⁵ BT/TPM Resp., Herrick Decl. ¶ 7 ("As a general matter, this signature is stamped onto the form by my assistant. I do not review each form that is provided to a station and such signature does not provide any proof that I had specific knowledge of any specific purchase of time made by BT or TPM on behalf of their clients.").

strategy,”⁷⁶ the Complaints do not explain how similar purchases of ad space and time by BT and TPM on a handful of occasions establish that coordinated conduct occurred. It appears that the ads at issue were disseminated close to the election, and were perhaps targeted to a particular demographic, but these facts do not necessarily lead to the conclusion that the third-party vendor received non-public, material information about the candidate’s plans, projects, activities, or needs.

B. Firewall Policy

BT and TPM’s firewall policy appears to be written to provide for effective separation between the entities, and based on Herrick’s statements, appears to have been implemented. It requires segregation of electronic documents with password protection and the use of separate email lists.⁷⁷ Clients are notified of the firewall policy and the need for confidentiality.⁷⁸ The firewall policy does not allow communication between the candidate-side workers and the independent committee-side workers concerning their clients, and it does not exempt anyone from the policy.⁷⁹ Thus, it appears to satisfy the Commission’s requirement to be written to prevent the flow of information between the two sides of the firm.⁸⁰

Moreover, Herrick and Welsh state in their declarations that they abided by the policy in connection with the 2020 Kentucky and Mississippi Senate races.⁸¹ As described in detail

⁷⁶ MUR 7865 Compl. at 1; MUR 7866 Compl. at 1.

⁷⁷ BT/TPM Resp., Ex. B.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See, e.g.*, Factual & Legal Analysis at 10-11, MUR 6120 (Republican Campaign Comm. of N.M.) (finding firewall policy that prevented contact between common vendor employees at issue, along with affidavits stating that there was no coordination, satisfied Commission’s requirements).

⁸¹ BT/TPM Resp., Herrick Decl. ¶¶ 5, 8, Welsh Decl. ¶¶ 4-5.

1 above, the declarations and firewall policy specifically detail the measures taken to ensure that
 2 information would not be even inadvertently shared between Herrick and Welsh, including that
 3 BT and TPM have separate office space for their strategic staff and do not have overlapping
 4 employees who work on strategic services.⁸² Welsh, for instance, as media director, states that
 5 she was the only person to provide any strategic or media placement advice in the 2020 cycle to
 6 Ditch Fund or March On and was strictly limited to working only with non-candidate committees
 7 in the Mississippi and Kentucky Senate races in 2020.⁸³

8 In addition, the declaration from Jacobovitz of Van Ness, which created ads for March
 9 On in the Mississippi Senate race, offers an illustration of the firewall's application. He states
 10 that he initially contacted Herrick at BT regarding an ad for Espy, and she told him that she
 11 could not provide services because of a firewall and that he should contact TPM.⁸⁴ He then
 12 worked with Welsh at TPM, and states that neither Herrick nor Welsh divulged any non-public
 13 strategic information regarding the plans, project or needs of any candidate in the 2020 cycle.⁸⁵
 14 Similarly, de Vellis, a partner at Beacon Media, states that he was Ditch Fund's media
 15 consultant, and as the primary contact with TPM, he only discussed the substance of Ditch
 16 Fund's ad buys or the 2020 U.S. Senate race in Kentucky with Welsh.⁸⁶

17 Although there is no information in the record indicating that the firewall was distributed
 18 to all employees and evidenced by signed copies, the relevant employees here state in
 19 declarations that they complied with the policy and did not share information, indicating that the

⁸² BT/TPM Resp., Ex. B, Herrick Decl. ¶¶ 3-5, Welsh Decl. ¶¶ 4-5.

⁸³ *Id.*, Welsh Decl. ¶¶ 4-5.

⁸⁴ March On Resp., Jacobovitz Decl. ¶¶ 1, 5.

⁸⁵ *Id.*, Jacobovitz Decl. ¶¶ 6-8.

⁸⁶ Ditch Fund Resp., de Vellis Decl. ¶ 1, 3-4.

1 policy likely was distributed to all relevant employees.⁸⁷ In sum, the firewall as written complies
 2 with Commission regulations, the relevant Respondents affirm that it was followed, and no
 3 contrary information has been alleged or has been found showing that information was shared or
 4 that that firewall was otherwise not observed.⁸⁸

5 Therefore, we recommend that the Commission dismiss the allegations that Ditch Fund
 6 and March On made, and the McGrath Committee and the Espy Committee accepted, excessive
 7 or prohibited contributions in the form of coordinated communications. In addition, based on the
 8 recommendation above, we also recommend that the Commission dismiss the allegations that
 9 Buying Time, LLC, and Targeted Platform Media, LLC, violated the Act.

10 **IV. RECOMMENDATIONS**

- 11 1. In MUR 7865, dismiss the allegation that Ditch Fund and Jennifer May in her
 12 official capacity as treasurer violated 52 U.S.C. §§ 30104(b), 30116(a), and
 13 30118(a) by making and failing to report excessive or prohibited contributions in
 14 the form of coordinated communications;
- 15 2. In MUR 7865, dismiss the allegation that Honor Bound PAC and Chris Patton in
 16 his official capacity as treasurer f/k/a Amy McGrath for Senate, Inc., violated
 17 52 U.S.C. §§ 30104(b) and 30116(f) by accepting and failing to report excessive
 18 or prohibited contributions in the form of coordinated communications;
- 19 3. In MUR 7866, dismiss the allegation that March On PAC and Evvie Harmon in
 20 her official capacity as treasurer violated 52 U.S.C. §§ 30104(b), 30116(a), and
 21 30118(a) by making and failing to report excessive or prohibited contributions in
 22 the form of coordinated communications;

⁸⁷ The Commission has stated that a “person paying for a communication seeking to use the firewall safe harbor should be prepared to provide reliable information (*e.g.*, affidavits) about an organization’s firewall, and how and when the firewall was distributed and implemented.” Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006).

⁸⁸ In contrast, in at least one instance with the firewalls at issue in the NRA MURs, the person signing the forms was exempt from the firewall. Further, although the respondents in the NRA MURs also submitted declarations denying coordination, this Office took the position that those declarations did “not sufficiently refute the allegations” because of the available information suggesting a deficient firewall and overlap with the NAB forms. Here we credit the various declarations since they are consistent with each other and with the other documents available in this matter.

4. In MUR 7866, dismiss the allegation that Mike Espy for Senate Campaign Committee and Kaiser Brown in his official capacity as treasurer violated U.S.C. §§ 30104(b) and 30116(f) by accepting and failing to report excessive or prohibited in-kind contributions in the form of coordinated communications;
5. In MURs 7865 and 7866, dismiss the allegations that Targeted Platform Media, LLC, and Buying Time, LLC, violated the Act;
6. Approve the attached Factual and Legal Analysis;
7. Approve the appropriate letters; and
8. Close the files effective 30 days from the date the certification of this vote is signed (or on the next business day after the 30th day, if the 30th day falls on a weekend or holiday).

Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Associate General Counsel for Enforcement

8/22/2024

Date

Adrienne C. Baranowicz

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