FEDERAL ELECTION COMMISSION

FIRST GENERAL COUNSEL'S REPORT

	MUR 8123	
	DATE OF COMPLAINT:	Mar. 22, 2023
	DATES OF NOTIFICATIONS:	Mar. 29, 2023
		Apr. 3, 2023
		Apr. 5, 2023
	LAST RESPONSE RECEIVED:	June 9, 2023
	DATE ACTIVATED:	Mar. 5, 2024
	[redacted]	
	EXPIRATION OF SOL:	Oct. 19, 2025 – Dec. 3, 2025
	ELECTION CYCLE:	2020
COMPLAINANT:	Donald J. Trump	
RESPONDENTS:	Harris for President f/k/a Biden for President and Keana Spencer in her official capacity as treasurer (MUR 8123)	
	James Clapper	
	Michael Hayden	
	Leon Panetta	
	John Brennan	
	Thomas Finger	
	Rick Ledgett	
	John McLaughlin	
	Michael Morell	
	Mike Vickers	
	Doug Wise	
	Nick Rasmussen	
	Russ Travers	
	Andy Liepman	
	John Moseman	
	Larry Pfeiffer	
	Jeremy Bash	
	Rodney Snyder	
	Glenn Gerstell	
	David B. Buckley	
	Nada Bakos	
	Patty Brandmaier	
	James B. Bruce	
	David Cariens	
	Janice Cariens	
	Paul Kolbe	
	Peter Corsell	
	Brett Davis	

Roger Zane George
Steven L. Hall
Kent Harrington
Don Hepburn
Timothy D. Kilbourn
Ron Marks
Jonna Hiestand Mendez
Emile Nakhleh
Gerald A. O'Shea
David Priess
Pam Purcilly
Marc Polymeropoulos
Chris Savos
Nick Shapiro
John Sipher
Stephen Slick
Cynthia Strand
Greg Tarbell
David Terry
Greg Treverton
John Tullius
David A. Vanell
Winston Wiley
Kristin Wood

MUR 8182

DATE OF COMPLAINT:	Oct. 23, 2023
DATE OF NOTIFICATION:	Oct. 30, 2023
LAST RESPONSE RECEIVED:	Dec. 14, 2023
DATE ACTIVATED:	Mar. 5, 2024
[redacted]	
EXPIRATION OF SOL:	Dec. 3, 2025
ELECTION CYCLE:	2020

COMPLAINANTS: America First Legal Foundation
Julia Haller

RESPONDENTS: Harris for President f/k/a Biden for President and Keana Spencer in her official capacity as treasurer (MUR 8182)
Biden Action Fund and Joseph Smolskis in his official capacity as treasurer (terminated) (MUR 8182)
DNC Services Corp./Democratic National Committee and Virginia McGregor in her official capacity as treasurer (MUR 8182)
Harris Victory Fund f/k/a Biden Victory Fund and Monica Guardiola in her official capacity as treasurer

(MUR 8182)

RELEVANT STATUTES AND REGULATIONS:
52 U.S.C. § 30101(8), (9)
52 U.S.C. § 30104(b)
52 U.S.C. § 30116(a)
52 U.S.C. § 30119(a)
11 C.F.R. § 100.26
11 C.F.R. § 100.52(a), (d)
11 C.F.R. § 100.73
11 C.F.R. § 100.74
11 C.F.R. § 100.111(a), (d), (e)
11 C.F.R. § 109.20(a), (b)
11 C.F.R. § 109.21(a), (c), (d)
11 C.F.R. § 115.2(a)
11 C.F.R. § 100.132

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

These two overlapping Complaints focus on an October 2020 public letter (the "Letter") signed by 51 former United States intelligence officials, which was published by *POLITICO*, making the case that a series of emails purportedly sent by Hunter Biden, the son of then-presidential candidate Joseph R. Biden, might have been part of a Russian disinformation campaign. The Complaints allege that the Letter constituted an unreported, coordinated, in-kind contribution to Biden for President ("BFP"). The MUR 8182 Complaint also alleges — without providing any specific basis for its assertion — that the Letter constituted an unreported, coordinated, in-kind contribution to various committees involved in joint fundraising with BFP, including Biden Victory Fund ("BVF"), the Biden Action Fund ("BAF"), and the DNC Services Corp./Democratic National Committee ("DNC").[1] Further, the MUR 8123 Complaint alleges

[1] The committees formerly known as "Biden for President" and "Biden Victory Fund" have been renamed "Harris for President" and "Harris Victory Fund," respectively. *See* Harris for President, Amended Statement of

that the 51 former intelligence officials were federal contractors at the time the Letter was published, that the Letter thus constituted a prohibited government contractor contribution, and that BFP's solicitation and acceptance of the Letter violated the ban on soliciting and accepting government contractor contributions.

Respondents deny the allegations. The various individual signatories to the Letter (the "individual signatory Respondents") who submitted Responses state that they made no disbursements in connection with the Letter, and they argue that their actions constitute uncompensated volunteer activity that is exempt from being considered a contribution under the Act. The individual signatory Respondents also argue that, even if the Letter could be deemed a contribution, they were not prohibited from making such a contribution because they are not federal contractors. BFP, DNC, BVF, and BAF (the "political committee Respondents") argue that the Letter was exempt volunteer activity which did not constitute a contribution or expenditure; they also argue that the Letter was not a coordinated communication. Because the Letter was not a contribution, they argue, BFP was not obligated to report it. Finally, DNC, BVF, and BAF also assert that the MUR 8182 Complaint makes no specific allegations as to why the Letter could be deemed a contribution to any of them, and, as such, the allegations should be dismissed as to them without further analysis.

We recommend that the Commission dismiss the allegation that BFP, DNC, BVF, and BAF failed to report a coordinated in-kind contribution in violation of 52 U.S.C. § 30104(b)(2)(A) and (b)(3)(A) because the activity appears to constitute exempt volunteer

Organization (July 21, 2024), https://docquery.fec.gov/pdf/297/202407219665705297/202407219665705297.pdf; Harris Victory Fund, Amended Statement of Organization (July 21, 2024), https://docquery.fec.gov/pdf/305/202407219665705305/202407219665705305.pdf. Because the activity discussed herein occurred while both committees used their prior names, the narrative of this analysis refers to Biden for President and Biden Victory Fund.

activity and because it did not constitute a coordinated communication. We also recommend that the Commission dismiss the MUR 8123 allegations that the 51 individual signatory Respondents made and that BFP solicited or accepted a prohibited federal-contractor contribution in violation of 52 U.S.C. § 30119(a) because these individuals do not qualify as government contractors under the Act.

II. FACTUAL BACKGROUND

Joseph R. Biden, Jr., was a candidate for President of the United States during the 2020 election cycle.[2] At that time, BFP was his principal campaign committee.[3] BVF and BAF, as joint fundraising enterprises partially benefitting BFP and the DNC, were authorized to accept contributions to and make expenditures for Biden during the 2020 election cycle.[4] Finally, the DNC is, and was at that time, a national committee of the Democratic Party.[5]

During the latter part of the 2020 presidential campaign, news stories emerged regarding various emails purportedly sent by Hunter Biden, Joseph Biden's son, while he served as a board member of a Ukrainian energy company during his father's term as Vice President of the United

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[2] Joseph R. Biden, Jr., Amended Statement of Candidacy (Aug. 11, 2020), https://docquery.fec.gov/pdf/584/202008149261305584/202008149261305584.pdf. Biden was elected as the 46th President of the United States on November 3, 2020. FEC, FEDERAL ELECTIONS 2020: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 5 (Oct. 2022), https://www.fec.gov/resources/cms-content/documents/federalelections2020.pdf; *Joe Biden: The President*, WHITE HOUSE, https://www.whitehouse.gov/administration/president-biden/ (last visited July 24, 2024).

[3] Biden for President, Amended Statement of Organization (Aug. 11, 2020), https://docquery.fec.gov/pdf/378/202008219266863378/202008219266863378.pdf.

[4] Biden Victory Fund, Amended Statement of Organization (Aug. 31, 2020), https://docquery.fec.gov/pdf/685/202009019267073685/202009019267073685.pdf; Biden Action Fund, Amended Statement of Organization (Aug. 16, 2020), https://docquery.fec.gov/pdf/353/202008219266863353/202008219266863353.pdf. Biden Action Fund terminated on December 11, 2020. *See* Biden Action Find, Termination Report 2020 (Dec. 11, 2020), https://docquery.fec.gov/pdf/799/202012119374346799/202012119374346799.pdf.

[5] DNC Services Corp / Democratic National Committee ("DNC"), Amended Statement of Organization (Sept. 22, 2020), https://docquery.fec.gov/pdf/029/202009299284981029/202009299284981029.pdf. The DNC continues to be the Democratic Party's National Committee. *See* DNC, Amended Statement of Organization (Apr. 25, 2023), https://docquery.fec.gov/pdf/359/202304259581294359/202304259581294359.pdf.

States. On or about October 17, 2020, Antony Blinken, who was a campaign advisor to BFP, contacted former Acting Central Intelligence Agency Director Michael Morrell to discuss these news stories about Hunter Biden.[6] According to Morell, his conversation with Blinken led him to initiate drafting the Letter advancing the notion that the purported Hunter Biden emails and related news stories might be part of a disinformation campaign orchestrated by Russian intelligence agencies.[7] According to his later testimony, Morell also had discussions with Blinken and BFP regarding disseminating the Letter to the media.[8]

The Letter was signed by 51 individuals who previously worked in the U.S. intelligence community. Roles and levels of authority among the signatories include former Directors of Central Intelligence, former Directors of the National Security Agency, former Deputy Directors at the Defense Intelligence Agency, and various other intelligence officers.[9] Nine former intelligence officers who wished to remain anonymous also signed the Letter.[10] Morell allegedly directed Nick Shapiro, a former top aide at the CIA, to seek out publications, such as *POLITICO*, in which to place the Letter.[11]

On October 19, 2020, weeks before the 2020 election, *POLITICO* published the Letter, which, among other things, expressed the thesis that "the recent disclosure of emails allegedly

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6 Compl., Ex. 1 at 2 (Oct. 23, 2023), MUR 8182; *see also* Letter from Jim Jordan, Chairman, H. Comm. on the Judiciary & Michael R. Turner, Chairman, H. Permanent Select Comm. on Intel., to the Hon. Antony Blinken, Sec'y, U.S. Dep't of State (Apr. 20, 2023).

7 Compl., Ex. 1 at 2-3, Ex. 5 at 2, MUR 8182.

8 Compl., Ex. 1 at 7, 36-52, Ex. 5 at 3-4, MUR 8182. In an email to Shapiro, Morell expressed that BFP requested the Letter be sent to a particular reporter at the Washington Post, who did not publish it. Compl., Ex. 1 at 3, MUR 8182 (citing an email from Michael Morell to Nick Shapiro (Oct. 19, 2020)). Shapiro distributed the Letter to multiple news outlets, ultimately making an arrangement with *POLITICO*. *Id.*

9 For a complete list of all signatories and their former official roles, *see* Compl. at 1-6, MUR 8123.

10 *Id.* at 6.

11 Compl., Ex. 1 at 36-44, Ex. 5 at 3, MUR 8182.

belonging to Joe Biden's son [Hunter Biden] 'has all the classic earmarks of a Russian information operation.'"[12] The Letter qualified its assessment by stating that, although the signatories had no evidence of Russian involvement in the emails and news stories, they were "deeply suspicious" that they were part of a Russian operation to "undermine the candidacy of former Vice President Biden and thereby help the candidacy of President Trump."[13] The body of the *POLITICO* article publishing the Letter reported that, at the time of publication, the FBI was investigating the authenticity of the news stories in question regarding Hunter Biden.[14]

The Complaints argue that the Letter constituted an in-kind contribution and that BFP failed to report the Letter as a contribution. Further, the MUR 8182 Complaint alleges that the Letter also constituted an unreported contribution to DNC, BVF, and BAF. The MUR 8123 Complaint alleges that the individual signatory Respondents were federal contractors prohibited from making any political contributions, and that BFP was likewise prohibited from soliciting or accepting a contribution from the individual signatory Respondents due to their statuses as federal contractors.[15] Specifically, the MUR 8123 Complaint argues that, because the individual signatory Respondents, as former intelligence officials, carry a lifelong duty to safeguard classified information, this obligation renders each of them federal contractors for purposes of the Act.[16]

All Respondents who responded generally deny the allegations. In his Response, Morell

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[12] Natasha Bertrand, *Hunter Biden Story Is Russian Disinfo, Dozens of Former Intel Officials Say*, POLITICO (Oct. 19, 2020), https://www.politico.com/news/2020/10/19/hunter-biden-story-russian-disinfo-430276.

[13] *Id.* (asserting that "with Trump down in the polls, there is incentive for Moscow to pull out the stops to do anything possible to help Trump win and/or to weaken Biden should he win").

[14] *Id.*

[15] *See generally* Compl. (Mar. 22, 2023), MUR 8123.

[16] Compl. at 7, 17, MUR 8123.

acknowledges that he spearheaded drafting the Letter, but argues that he did so as a volunteer and received no compensation.[17] He asserts that the Letter did not constitute a contribution and, even if it did, he would still not have been prohibited from making it because he was not a federal contractor at the time.[18] The other individual signatory Respondents who submitted Responses argue that they had no interaction with any government official or BFP regarding the Letter and that they were not federal contractors.[19] Furthermore, they contend that the Letter constituted uncompensated volunteer activity and was therefore not a contribution.[20] The remaining individual signatory Respondents who submitted Responses offer similar arguments, generally denying their statuses as federal contractors and that the Letter constituted a contribution to BFP.[21]

BFP argues that the Complaints fail to establish that the Letter's publication was coordinated with BFP or that the Letter constituted a contribution or expenditure under the Act; it also argues that the MUR 8123 Complaint fails to establish that the individual signatory Respondents were federal contractors at the time of the Letter's publication.[22] Specifically, BFP emphasizes that the Complaint fails to allege either that a payment was made in connection with the Letter or that any of the "content standards" as outlined below are met.[23] Finally, DNC,

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17 Morell Resp. at 1 (May 23, 2023), MUR 8123.

18 *Id.* at 2.

19 Clapper, Brennan, & Rasmussen Resp. at 2 (May 17, 2023), MUR 8123.

20 *Id.* at 3.

21 *See, e.g.*, Harrington Resp. at 1-2 (Apr. 17, 2023), MUR 8123; Gerstell Resp. (Apr. 18, 2023), MUR 8123; Tullius Resp. at 1 (Apr. 20, 2023), MUR 8123.

22 *See generally* BFP Resp. (May 16, 2023), MUR 8123; Resp. (Dec. 14, 2023), MUR 8182. DNC, BVF, and BAF joined BFP in the Response to MUR 8182, and argued that the Complaint should be dismissed as to them because it alleges no violation against DNC, BVF, or BAF. Resp. at 1, MUR 8182.

23 Resp. at 4, MUR 8182.

BVF, and BAF argue that the MUR 8182 Complaint alleges no violation against them and, as such, the Complaint should be dismissed without further analysis as to these Respondents.[24]

III. LEGAL ANALYSIS

A. The Commission Should Dismiss the Allegation That the Letter Constitutes an Unreported Contribution to or an Expenditure on Behalf of BFP, DNC, BVF, or BAF

1. The Letter Is Exempt from the Definitions of "Contribution" and "Expenditure" as an Uncompensated Volunteer Activity by the Individual Signatory Respondents

The Act defines the term "contribution" to include "any gift, subscription, loan, advance, or deposit of money or *anything of value* made by any person for the purpose of influencing any election for Federal office."[25] The phrase "anything of value" is broadly encompassing and includes "*all* in-kind contributions" and "the provision of *any* goods or services" at no charge or at a reduced charge.[26] The regulation also provides a non-exhaustive list of examples that satisfy various campaign needs and represent a wide variety of things having electoral "value," such as: places to operate ("facilities"), methods of conveying a message ("advertising services"), and raw voter data ("mailing lists"), as well as physical and human resources ("supplies" and "personnel," respectively).[27]

The phrase "anything of value" contemplates a broad, case-by-case application, and the Commission has found that many tangible and intangible things fall within the scope of the definition.[28] In prior matters, when evaluating whether something is a thing "of value" under the

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[24] *Id.* at 1.

[25] 52 U.S.C. § 30101(8)(A)(i) (emphasis added); *see also* 11 C.F.R. § 100.52(a).

[26] 11 C.F.R. § 100.52(d)(1) (emphases added).

[27] *Id.* ("Examples of such goods or services *include, but are not limited to*: Securities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists." (emphasis added)).

[28] *See* Advisory Opinion ("AO") 2000-30 (pac.com) (concerning stock); AO 1980-125 (Cogswell for Senate

Act, the Commission has considered the following questions: whether the thing may confer a benefit on the recipient campaign;[29] whether political campaigns have previously used their own resources to procure the thing in question;[30] whether the provision of the thing would "relieve" the campaign of an "expense it would otherwise incur";[31] whether the provider of the thing or any third party "utilized its resources" to produce, organize, or collect the thing provided;[32] and whether the thing "may not have been publicly available" for the campaign's use absent the

Comm. 1980) (concerning silver coins); AO 1982-08 (Barter PAC) (regarding barter credit units); Factual & Legal Analysis ("F&LA") at 3, 7-8, MUR 6725 (Ron Paul 2012) (finding reason to believe committee failed to disclose value of gold coin as in-kind contribution of commodity to be liquidated); F&LA at 10-11, MUR 6040 (Rangel for Congress, *et al.*) (finding reason to believe that rent-controlled apartment occupied by political committees under terms and conditions that differed from other tenants was excessive in-kind contribution); First Gen. Counsel's Rpt. ("First GCR") at 10 & Certification ("Cert.") ¶ 2 (Oct. 19, 2004), MUR 5409 (Grover Norquist, *et al.*) (finding reason to believe that master contact list of activists was something of value under Act even though it lacked commercial or market value and despite difficulty in quantifying its precise worth); F&LA at 29-30, MUR 6718 (John Ensign, *et al.*) (finding reason to believe severance payment made by candidate's parents to committee's former treasurer for the loss of her job following extramarital affair was in-kind contribution); GC Br. at 7-8, MUR 5225 (New York Senate 2000) (detailing approximately $395,000 of in-kind contributions related to benefit concert production costs).

[29] *See , e.g.*, AO 1990-12 at 2 (Strub for Congress) (finding that the provision of poll results by a campaign volunteer who paid for the poll would result in an in-kind contribution); AO 2007-22 at 6 (Jim Hurysz for Congress Campaign Comm.) (finding that the provision of printed foreign election materials, including "flyers, advertisements, door hangers, tri-folds, signs, and other printed material," would result in an in-kind contribution); First GCR at 10 & Cert. ¶ 2 (Oct. 19, 2004), MUR 5409 (Grover Norquist, *et al.*) (finding that contact lists provided to a campaign without charge were "of value" because they "may at least point [the campaign] in the direction of persons who might help [its] election efforts").

[30] *See, e.g.*, AO 1990-12 at 2 (discussing Commission regulations addressing the making and acceptance of contributions in the form of poll results) (citing 11 C.F.R. § 106.4); *see also* First GCR at 14, MUR 6651 (Murray Energy Corp., *et al.*) (noting that campaigns often pay advance staff to generate crowds for campaign events).

[31] *See* AO 2007-22 at 6 (noting 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"); AO 1990-12 at 2.

[32] *See, e.g.*, F&LA at 8, MUR 7271 (Chalupa, *et al.*) (finding, on the pre-investigatory record, that there was reason to believe that a foreign embassy made a contribution when it "utilized its resources and expended funds for opposition research" that it provided to campaign at no charge). In MUR 7271, following an investigation, this Office recommended that the Commission decline to pursue these allegations but recommended that the Commission find probable cause to believe that a violation occurred on other grounds. Second Gen. Counsel's Rpt. at 32, MUR 7271; GC Br., MUR 7271. The Commission ultimately voted to find no probable cause to believe that a violation occurred. Cert. ¶ 1 (Apr. 21, 2021), MUR 7271. *See also* First GCR at 10 & Cert. ¶ 2 (Oct. 19, 2004), MUR 5409 (Grover Norquist, *et al.*) (recommending finding reason to believe that a nonprofit corporation made prohibited in-kind contributions by providing a campaign with its private lists of conservative organizations and individuals, which the corporation "utilized its resources to obtain and compile").

provider's actions.[33] Importantly, uncompensated activity by volunteers is exempt from the definition of a "contribution."[34] The Commission has interpreted this exemption to include the making of public statements.[35] Additionally, an individual's uncompensated personal services related to internet activities (defined to include "sending or forwarding electronic messages" and "any other form of communication distributed over the Internet") for the purpose of influencing a federal election are not contributions.[36]

Similarly, the term "expenditure" includes "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office."[37] Under the Commission's regulations, expenditures that are "coordinated" with a candidate, but are not made for a coordinated communication or party-coordinated communication, constitute in-kind contributions to that candidate.[38] In this context, "[c]oordinated means made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, [or] a candidate's authorized committee."[39]

Unless otherwise exempt, the "provision of any goods or services without charge or at a charge that is less than the usual and normal charge for the goods or services is an

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[33] *Compare* First GCR at 9 & Cert. ¶ 2 (Oct. 19, 2004), MUR 5409 (Grover Norquist, *et al.*) (observing that attendee lists provided to a campaign "may not have been publicly available"), *with* F&LA at 4-5, MUR 6938 (Rand Paul for President) (finding it unclear that author's private discussion of a forthcoming book has value for a candidate, particularly when the book information had also been publicly discussed).

[34] 11 C.F.R. § 100.74.

[35] F&LA at 9-11, MUR 7863 (Astrid Silva, *et al.*).

[36] 11 C.F.R. § 100.94.

[37] 52 U.S.C. § 30101(9)(A)(i); *see also* 11 C.F.R. § 100.111(a).

[38] 11 C.F.R. § 109.20(b); *see also* 11 C.F.R. § 100.52(d)(1) (providing that "in-kind contributions" may be a contribution under the Act); *id.* § 100.111(e)(1) (providing that "in-kind contributions" may be an expenditure under the Act).

[39] 11 C.F.R. § 109.20(a).

expenditure."[40] A non-exhaustive list of examples includes "[s]ecurities, facilities, equipment, supplies, personnel, advertising services, membership lists, and mailing lists."[41] Furthermore, where goods or services are rendered at below market price, the difference between the market price and the price charged constitutes the expenditure.[42]

Having the "purpose of influencing a federal election" is a necessary element in defining whether a payment is a "contribution" or "expenditure" under the Act and Commission regulations.[43] In analyzing whether a payment made by a third party is a "contribution" or "expenditure," the Commission has concluded that "the question under the Act is whether" the donation, payment, or service was "provided for the purpose of influencing a federal election [and] not whether [it] provided a benefit to [a federal candidate's] campaign."[44] The electoral purpose of a payment may be clear on its face, as in payments to solicit contributions or for communications that expressly advocate for the election or defeat of a specific candidate, or inferred from the surrounding circumstances.[45]

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[40] 11 C.F.R. § 100.111(e)(1). In MUR 7271, at the reason-to-believe stage, the Commission found that seeking and obtaining a foreign embassy's research into a political campaign at no cost was a thing of value. F&LA, at 7, MUR 7271 (Chalupa, *et al.*); *see* Second Gen. Counsel's Rpt., MUR 7271 (recommending dismissal of this allegation based on additional information obtained through an investigation). The Commission reasoned specifically that the foreign embassy's time and resources expended on the research constituted a "thing of value" subject to the Act's foreign national prohibition. F&LA at 7, MUR 7271 (citing F&LA at 13-20, MUR 6414 (Carnahan) (explaining that a committee's receipt of opposition research services without paying the usual or normal charge may result in an in-kind contribution)).

[41] 11 C.F.R. § 100.111(e)(1).

[42] *Id.* § 100.111(e)(1)-(2).

[43] *See* 52 U.S.C. § 30101(8)(A)(i), (9)(A)(i).

[44] F&LA at 6, MUR 7024 (Van Hollen for Senate). In a past set of matters, this Office recommended a finding of reason to believe that then-President Trump's seeking a public statement from the Ukrainian government concerning an investigation into Hunter Biden, and the investigation itself, constituted a thing "of value." First GCR at 51, MURs 7645, 7663, 7705 (Donald J. Trump, *et al.*). The Commission did not have the requisite four votes to approve OGC's recommendation in those matters.

[45] *See, e.g.*, AO 2000-08 at 1, 3 (Harvey) (concluding private individual's $10,000 "gift" to federal candidate would be a contribution because "the proposed gift would not be made but for the recipient's status as a Federal candidate"); AO1990-05 at 4 (Mueller) (explaining that solicitations and express advocacy communications are for the purpose of influencing an election and concluding, after examining circumstances of the proposed activity, that

For the purpose of this analysis, we assume *arguendo* that the Letter may be viewed as a thing "of value."[46] Written by 51 former U.S. intelligence officials, the Letter discredited a major news story that could have harmed Biden's 2020 presidential election effort right before the election.[47] Biden referenced the Letter in a subsequent Presidential debate.[48] Most tellingly, Blinken's contacting Morell to suggest he publicly opine on such a matter indicates the Letter had some inherent value for purposes of the Act and was for the purposes of influencing the 2020 election.[49]

But even assuming that the Letter constitutes a thing of value undertaken for the purpose of influencing a federal election, the drafting and dissemination of the Letter appear to fit cleanly into the exemption for uncompensated volunteer activity.[50] Had any of the individual signatory Respondents received payment from a third party to draft or disseminate the Letter, these payments may have rendered these services in-kind contributions to BFP.[51] But the record lacks any indication that the individual signatory Respondents were compensated for their services in

federal candidate's company newsletter featuring discussion of campaign resulted in contributions); AO 1988-22 at 5 (San Joaquin Valley Republican Assocs.) (concluding third party newspaper publishing comments regarding federal candidates, coordinated with those candidates or their agents, thereby made contributions because "the financing of a communication to the general public, not within the 'press exemption,' that discusses or mentions a candidate in an election-related context and is undertaken in coordination with the candidate or his campaign is 'for the purpose of influencing a federal election'); F&LA at 17-20, MURs 4568, 4633, 4634 (Triad Mgmt. Servs., Inc.) (finding reason to believe corporation and related nonprofit organizations made contributions by providing federal candidates with "uncompensated fundraising and campaign management assistance" and "advertising assistance[,]" including spending "several million dollars" on coordinated advertisements).

[46] 52 U.S.C. § 30101(9)(A)(i); *see also* 11 C.F.R. § 100.111(a).

[47] *See supra* note 12 and accompanying text.

[48] NBC News, *Final 2020 Presidential Debate Between Donald Trump, Joe Biden* at 1:11:57-1:12:20, YOUTUBE (Oct. 22, 2020), https://www.youtube.com/watch?v=UCA1A5GqCdQ.

[49] Compl., Ex. 1 at 2-3, Ex. 5 at 2, MUR 8182.

[50] 11 C.F.R. § 100.74.

[51] *See* F&LA at 6-7, MUR 7147 (Stephen K. Bannon) (stating that "[a] volunteer must receive compensation for work performed on behalf of [a] candidate" in order for that compensation to be considered an in-kind contribution to the candidate).

connection with the Letter, and the Commission has found that the volunteer services exemption applies to public statements, including written statements.[52] The apparently uncompensated nature of these services also renders them exempt from the definition of a contribution under the internet activities exemption.[53] Commission regulations exempt from the definition of a contribution an individual's uncompensated personal services related to any "internet activities," including "[s]ending or forwarding electronic messages" and "any other form of communication distributed over the Internet."[54] Copies of emails attached to the MUR 8182 Complaint appear to show that the Letter was distributed by email to three news outlets, including *POLITICO*, the eventual publisher of the Letter.[55] Thus, both the uncompensated service of drafting the Letter — a "communication distributed over the Internet" — and the dissemination of the Letter by email were exempt from the definition of a contribution.[56] Consequently, under either the volunteer services exemption or the internet activities exemption, the individual signatory Respondents' services with respect to the Letter were not contributions.

Based on the foregoing, the Letter was exempt from the definition of "contribution" under 52 U.S.C. § 30101(8) and "expenditure" under 52 U.S.C. § 30101(9) as an uncompensated volunteer activity. Accordingly, we recommend that the Commission dismiss the allegation that

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52 F&LA at 9-11, MUR 7863 (Astrid Silva, *et al.*) (applying the volunteer services exemption to the drafting of an op-ed, among other things).

53 11 C.F.R. § 100.94.

54 *Id.*

55 Compl., Ex. 1 at 39-42, MUR 8182.

56 Likewise, certain expenses incurred in connection with these uncompensated services would have been exempt from the definition of a contribution. *See Campaign Legal Ctr. v. FEC*, No. 22-5336 (D.C. Cir. 2024) (stating that "[a] member of the public who pays for WiFi at an internet café to write and post a blog entry in coordination with a campaign need not disclose as a campaign contribution the money he spent for the WiFi") (citing Internet Communications, 71 Fed. Reg. 18,589, 18,605 (Apr. 12, 2006)).

the political committee Respondents failed to report an in-kind contribution in violation of 52 U.S.C. § 30104(b)(2)(A) and (b)(3)(A).

2. The Letter Is Not a Coordinated Communication Because There Was No Payment Made by an Outside Party

Under Commission regulations, a communication is "coordinated," and therefore constitutes an in-kind contribution, when the communication meets a three-part test: (1) payment, in whole or in part, for the communication by a person other than the candidate, authorized committee, or political party committee; (2) satisfaction of one of five "content" standards; and (3) satisfaction of one of six "conduct" standards.[57]

Here, neither Complaint alleges any payment being made in connection with the Letter, let alone by an individual other than the candidate, authorized committee, political party committee, or an agent thereof.[58] Critically, as discussed above, the available information fails to indicate any such payment. Consequently, the Letter does not meet the first prong of the test for coordination and is therefore not a coordinated communication.[59] In the absence of any payment, there is no need to analyze whether the Letter, which did reference Joseph Biden's presidential candidacy within 30 days of the general election, and was prepared in consultation with BFP, meets either the content or conduct prongs of the coordination test. Accordingly, we recommend that the Commission dismiss the allegation that the political committee Respondents failed to report an in-kind contribution in violation of 52 U.S.C. § 30104(b)(2)(A) and (b)(3)(A).

[57] 11 C.F.R. § 109.21(a)(1)-(3).

[58] *See generally* Compl., MUR 8123; Compl., MUR 8182.

[59] 11 C.F.R. § 109.21.

B. The Commission Should Dismiss MUR 8123's Allegations as to Government Contractor Contributions Because the Individual Signatory Respondents Did Not Meet the Definition of "Federal Contractors" Under the Act

The Act and the Commission's regulations prohibit contributions to political committees by any person who enters into a contract with the United States or its departments or agencies for "furnishing any material, supplies, or equipment," if payment on such contract "is to be made in whole or in part from funds appropriated by Congress."[60] The prohibition covers contributions to any political party, political committee, federal candidate, or "any person for any political purpose or use."[61] The Act also bars any person from knowingly soliciting a contribution from a federal contractor during the prohibited period.[62]

The MUR 8123 Complaint asserts that the individual signatory Respondents, who are all former employees of the federal government agencies involved in intelligence activities, can be considered federal contractors because they are "bound by a lifelong contractual obligation with the Federal Government to maintain the secrecy of classified information."[63] The Complaint further states that those contracts required the individual signatory Respondents to seek pre-publication review from their respective agencies prior to publishing any material referencing their previous employment as intelligence professionals.[64]

These assertions, however, fail to establish that the individual signatory Respondents were federal contractors within the meaning of the Act. Even taking the Complaint's assertions

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[60] 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.2(a). Such contributions are barred for the period between (1) the earlier of commencement of negotiations or when requests for proposal are sent out, and (2) the later of the completion of performance on or termination of negotiations for the contract. 11 C.F.R. § 115.1(b).

[61] 11 C.F.R. § 115.2(a).

[62] 52 U.S.C. § 30119(a)(2); 11 C.F.R. § 115.2(c).

[63] Compl. at 7, 17, MUR 8123.

[64] *Id.* at 15.

about the individual signatory Respondents' ongoing contractual obligations as accurate, such an obligation does not constitute exchanging material, supplies, or equipment for Congressionally appropriated funds.[65] Additionally, the Commission has found that an individual's federal employment categorically does not create federal contractor status under the Act.[66] It is contradictory to think that an individual who was not a federal contractor while they were a federal employee would then be converted to a federal contractor at the conclusion of their employment as a result of contractual obligations resulting exclusively from the prior federal employment — again, assuming that the Complaint has accurately characterized these obligations as contractual.

In sum, the available information does not indicate that any individual signatory Respondent met the definition of a federal contractor under the Act. Therefore, even if the drafting and dissemination of the Letter constituted a contribution, the individual signatory Respondents were not barred from making political contributions under this provision, nor was BFP prohibited from soliciting or receiving the same from the individual signatory Respondents. Accordingly, we recommend that the Commission dismiss the allegation that the individual signatory Respondents made, and Biden for President either solicited or accepted, a prohibited federal-contractor contribution in violation of 52 U.S.C. § 30119(a).

IV. RECOMMENDATIONS

A. MUR 8123

1. Dismiss the allegation that Harris for President f/k/a Biden for President and Keana Spencer in her official capacity as treasurer failed to report an

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65 52 U.S.C. § 30119(a)(1); 11 C.F.R. § 115.2(a).

66 AO 1987-33 (Lawyers for Better Gov't).

in-kind contribution in violation of 52 U.S.C. § 30104(b)(2)(A) and (b)(3)(A);

2. Dismiss the allegation that the individual signatory Respondents made a prohibited federal-contractor contribution in violation of 52 U.S.C. § 30119(a);

3. Dismiss the allegation that Harris for President f/k/a Biden for President and Keana Spencer in her official capacity as treasurer solicited or accepted a prohibited federal-contractor contribution in violation of 52 U.S.C. § 30119(a);

4. Approve the attached Factual and Legal Analyses;

5. Approve the appropriate letters; and

6. Close the file effective 30 days from the date of certification of this vote (or on the next business day after the 30th day, if the 30th day falls on a weekend or holiday).

B. MUR 8182

7. Dismiss the allegation that Harris for President f/k/a Biden for President and Keana Spencer in her official capacity as treasurer, DNC Services Corp./Democratic National Committee and Virginia McGregor in her official capacity as treasurer, Harris Victory Fund f/k/a Biden Victory Fund and Monica Guardiola in her official capacity as treasurer, and Biden Action Fund and Joseph Smolskis in his official capacity as treasurer failed to report an in-kind contribution in violation of 52 U.S.C. § 30104(b)(2)(A) and (b)(3)(A);

8. Approve the attached Factual and Legal Analyses;

9. Approve the appropriate letters; and

10. Close the file effective 30 days from the date of certification of this vote (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

July 29, 2024
Date

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