FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Correct the Record, *et al.*	)	MURs 6940, 7097, 7146, 7160, 7193

STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONER CAROLINE C. HUNTER

These matters raise questions of statutory and regulatory interpretation, fair notice, and First Amendment rights. They also raise questions about the use of stolen materials as the basis for an administrative enforcement action. Accordingly, we approached these matters deliberately and with caution. Mindful that every action the Commission takes implicates core constitutionally protected activity,[1] we chose to rely on precedent whenever possible rather than adopt aggressive or novel legal theories.

During the 2016 election cycle, Correct the Record, a "hybrid PAC"[2] that supported Hillary Clinton's presidential candidacy, announced that it could "coordinate with campaigns and Party Committees" in connection with its internet communications, because its communications would not be "paid media."[3] The complaints in these matters allege that, Correct the Record's claims notwithstanding, the millions of dollars spent by Correct the Record actually constituted excessive and prohibited in-kind contributions to Hillary for America, Hillary Clinton's principal campaign committee. In response, Hillary for America and Correct the Record argue that Correct the Record's internet communications were not in-kind contributions to Hillary for America because they were not "coordinated communications." The

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1 *See Van Hollen, Jr. v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016).

2 A "hybrid PAC," is a nonconnected political committee that maintains both a "contribution account" and a "non-contribution account." Hybrid PACs may accept into their contribution accounts only funds subject to the Act's amount limitations and source prohibitions; from their contribution accounts, hybrid PACs may make contributions to federal candidates and parties. Hybrid PACs, unlike a traditional nonconnected committees, also maintain non-contribution accounts, into which they may accept contributions in unlimited amounts from corporations, labor unions, and individuals to finance independent expenditures or other independent political spending. *See* Press Release, FEC Statement on *Carey v. FEC* (2011): Reporting Guidance for Political Committees that Maintain a Non-contribution Account (Oct. 5, 2011), https://www.fec.gov/updates/fec-statement-on-carey-fec/.

3 Correct the Record Press Release, "Correct the Record Launches as New Pro-Clinton SuperPAC" (May 12, 2015).

Commission's Office of General Counsel ("OGC") generally agreed with the thrust of the complaints. OGC recommended that the Commission find reason to believe that Correct the Record's coordination with Hillary for America resulted in violations of the Federal Election Campaign Act of 1971, as amended (the "Act").

While the scale of activities allegedly undertaken by Correct the Record may be larger than those considered by the Commission in prior enforcement matters, the Act and Commission regulations do not clearly prohibit them. Specifically, (1) Correct the Record's internet communications in support of Hillary for America do not appear to be in-kind contributions to Hillary for America even if coordinated with Hillary for America, and (2) speculative information and materials stolen by Russian intelligence operatives and published by WikiLeaks does not provide reason to believe that Correct the Record's expenditures for other activities were excessive or prohibited in-kind contributions to Hillary for America.[4] We therefore voted against finding reason to believe the Respondents violated the Act.

I. BACKGROUND

Five complaints were filed against Correct the Record and Hillary for America for their alleged coordination during the 2016 election cycle. The principal allegations in the complaints, the responses thereto, and the resulting recommendations to the Commission by the Commission's Office of General Counsel ("OGC"), are summarized below.

A. Complaints and Responses

1. *MUR 6940*

The complaint in MUR 6940 alleges that Correct the Record "has made, or is planning to make, illegal in-kind contributions" to Hillary for America, based on a Correct the Record press release issued before Correct the Record registered with the Commission as a political committee.[5] Correct the Record's press release stated, in part, that Correct the Record "will not be engaged in paid media and thus will be allowed to coordinate with campaigns and Party Committees."[6] Based also on the press release's description of Correct the Record as "a strategic

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[4] Some of the complaints in these matters rely on information that was illegally obtained by Russian intelligence officers through hacking operations that targeted computers and networks used by Hillary for America and thereafter published on WikiLeaks. *See* U.S. DEPARTMENT OF JUSTICE, OFFICE OF THE SPECIAL COUNSEL, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019). We believed that it would be inappropriate for the Commission to consider such information. Accordingly, we excluded from our deliberations the material stolen and disseminated by the Russian government. We were joined by one of our colleagues in voting against OGC's Factual and Legal Analyses incorporating stolen information. *See* MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*), Vote Cert. ¶ 2 (reflecting vote of 1-3 to approve OGC's proposed F&LA).

[5] Correct the Record's press release is dated May 12, 2015; the MUR 6940 Complaint was sworn and notarized on May 18, 2015; and Correct the Record's Statement of Organization is dated June 2, 2015.

[6] MUR 6940 (Correct the Record, *et al.*), Compl. at Ex. A.

research and rapid response team designed to defend Hillary Clinton," and "a political research and communications war room,"[7] the complaint alleges that expenses incurred by Correct the Record for "compensated internet activity" in coordination with Hillary for America and the provision of staff to Hillary for America are in-kind contributions to Hillary for America.[8]

Hillary for America and Correct the Record respond that the complaint in MUR 6940 is purely speculative and without factual basis because none of the alleged activity had occurred at the time of the complaint. They also asserted that Correct the Record's proposed communications and necessary costs of production would not be in-kind contributions to Hillary for America because they would not be "public communications."[9]

2. *MUR 7097*

The complaint in MUR 7097 alleges that Correct the Record and Hillary for America violated the Act by Correct the Record's use of paid employees to "work[] for the Clinton Campaign" as part of "a fake promotional apparatus" and "false promotion scheme" to "mislead[] the public" and "muscle out opposing opinions."[10] In their responses, Hillary for America and Correct the Record characterize the allegations as speculative and again assert that Correct the Record's online communications are not "coordinated communications" under Commission regulations because they are not "public communications."[11]

3. *MUR 7146*

The complaint in MUR 7146 also alleges that Correct the Record made, and Hillary for America received, excessive and prohibited in-kind contributions.[12] It asks the Commission to

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7 *Id.*

8 MUR 6940 (Correct the Record, *et al.*), Compl. at 7.

9 *See* MUR 6940 (Correct the Record, *et al.*), Hillary for America Resp. at 2; MUR 6940 (Correct the Record, *et al.*), Correct the Record Resp. at 1-4.

10 MUR 7097 (Correct the Record, *et al.*), Compl. at 2-3 (citing Walker Bragman, *This is the Hillary Clinton Scandal No One's Talking About*, PASTE MAGAZINE (June 21, 2016), https://www.pastemagazine.com/articles/2016/06/this-is-the-hillary-clinton-scandal-no-ones-talkin html); *see also* MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*), First General Counsel's Report at 6 (characterizing the complaint in MUR 7097 as alleging coordination between Correct the Record and Hillary for America and that Correct the Record benefited from "impermissible financial backing by foreign nationals") (hereinafter "FGCR").

11 *See* MUR 7097 (Correct the Record, *et al.*), Hillary for America Resp.; MUR 7097 (Correct the Record, *et al.*), Correct the Record Resp. The Complaint in MUR 7097 also appears to allege that Correct the Record and Priorities USA, another super PAC, violated 52 U.S.C. § 30121 by accepting funds from foreign nationals. We agreed with OGC's recommendation that the allegation was "vague and unsupported," FGCR at 26, and declined to move forward on it.

12 The complaint in MUR 7146 relies heavily on press reports. *See* MUR 7146 (Correct the Record, *et al.*), Compl. ¶¶ 9-67 (citing, *e.g.*, Matea Gold, *How a Super PAC Plans to Coordinate Directly with Hillary Clinton's Campaign*, WASH. POST (May 12, 2015) (discussing Correct the Record press release); Rebecca Ballhaus, *Pro-Clinton Group Sets Novel Strategy*, WALL ST. J. (May 12, 2015) ("The group will spend money on activities that can

treat certain Correct the Record disbursements — such as to staff and contractors to conduct research, develop messaging, track opposition candidates, and conduct interviews to defend Clinton — as regulated expenditures, "even if the finished product — such as a research memo, messaging guide, or video" — would not be "public communications" or "coordinated communications."[13] The complaint argues that "even if a small fraction of Correct the Record's expenditures went towards activities that fell under the 'communications over the internet exception' to the definition of public communication (and the definition of coordinated communications), the underlying expenditures for staff compensation and equipment are still 'expenditures' . . . and would constitute in-kind contributions under 11 C.F.R. § 109.20 if coordinated with a candidate."[14]

In their responses, Hillary for America and Correct the Record assert that nearly all of the activities described in the complaint were for "communications over the Internet" that were not "public communications" and, thus, would not be in-kind contributions to Hillary for America even if coordinated with Hillary for America.[15] They also assert that "research, production, and distribution costs related to" the internet communications that Correct the Record distributed via free online platforms similarly would not be in-kind contributions to Hillary for America.[16]

Further, Hillary for America and Correct the Record assert that (1) Hillary for America paid Correct the Record fair market value for certain services (tracking and research), and the complaint fails to provide information showing otherwise; (2) Correct the Record and Hillary for America did not collaborate on other services (Correct the Record's media training sessions for

legally be coordinated with a campaign, such as social media, the [Correct the Record] spokeswoman said"); Maggie Haberman, *Hillary Clinton-Aligned Group Gets Closer to Her Campaign*, NY TIMES (May 12, 2015) ("Correct the Record will be able to communicate with federal campaigns and party committees, as it is not involved with independent expenditures.")).

[13] MUR 7146 (Correct the Record, *et al.*), Compl. ¶ 94 (emphasis in original). *See, e.g.*, *id*. ¶¶ 90-91 ("The factual record demonstrates that the vast majority of Correct the Record's expenditures have been for activities like opposition research, message development, surrogate training, reporter pitches, media booking, video production, 'rapid response' press outreach, and other 'earned media.'").

[14] *Id.* ¶ 94.

[15] *See* MUR 7146 (Correct the Record, *et al.*), Hillary for America Resp. at 4; *see also* MUR 7146 (Correct the Record, *et al.*), Correct the Record Resp.

[16] *See* MUR 7146 (Correct the Record, *et al.*), Hillary for America Resp. at 5. Hillary for America also argues that the complaint (1) incorrectly assumes that only communications within the Commission's regulatory exemption for personal volunteer internet activities (11 C.F.R. § 100.94) are free from regulation, and (2) misinterprets the Commission's coordinated expenditure rule (11 C.F.R. § 109.20) as applying to the very communications that are excluded from regulation under the coordinated communication rule (11 C.F.R. § 109.21). MUR 7146, Hillary for America Resp. at 4; *id* at 6 n.39 (citing MUR 6037 (Democratic Party of Oregon); *see also* MUR 6037 (Democratic Party of Oregon), FGCR at 13 ("[11 C.F.R. § 109.20] only applies to those coordinated expenditures which are not made for communications").

Clinton supporters); and (3) Correct the Record's op-eds and contacts with reporters are exempt from regulation under the media exemption.[17]

4. *MURs 7160 and 7193*

The complaints in MURs 7160 and 7193 allege that Correct the Record made excessive and prohibited contributions to Hillary for America by coordinating its activities with Hillary for America. These complaints, however, rely entirely on information illegally obtained by Russian intelligence services and distributed via WikiLeaks in an effort to influence the 2016 elections.[18] Correct the Record's and Hillary for America's responses in MURs 7160 and 7193 caution against relying on information "obtained and distributed through a hostile foreign intelligence operation,"[19] because doing so could "promote foreign objectives" and "create an incentive for others to steal confidential information."[20]

B. First General Counsel's Report

OGC acknowledges that Correct the Record's expenditures for internet communications would not be in-kind contributions to Hillary for America even if coordinated with Hillary for America because the communications were not "public communications."[21] OGC distinguishes "payments for communication-specific purposes such as 'graphic services' and 'web hosting,'" however, from payments for the "underlying" material, and asserts that "much of Correct the Record's approximately $9 million in disbursements for activity during the 2016 election cycle cannot fairly be described as for 'communications,' public or otherwise."[22]

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[17] MUR 7146 (Correct the Record, *et al.*), Hillary for America Resp.; MUR 7146 (Correct the Record, *et al.*), Correct the Record Resp. (claiming protection under media exemption).

[18] FGCR at 12 n.34.

[19] MUR 7160 (Correct the Record, *et al.*), Hillary for America Resp. at 2; MUR 7160 (Correct the Record, *et al.*), Correct the Record Resp. at 3 ("[I]t would create perverse incentives for campaigns to benefit from foreign attacks on the integrity of American elections."); MUR 7193 (Correct the Record, *et al.*), Hillary for America Resp, at 3 (relying on "emails published by WikiLeaks would implicitly condone or legitimate a foreign attack on the integrity of American elections").

[20] *Id.*

[21] *See* 11 C.F.R. § 100.26 (excluding from definition of "public communication" "communications over the Internet, except for communications placed for a fee on another person's Web site").

[22] FGCR at 20; *id.* at 9-10 (stating that "the bulk of [Correct the Record's] reported disbursements are for purposes that are not communication-specific, including payroll, salary, travel, lodging, meals, rent, fundraising consulting, computers, digital software, domain services, email services, equipment, event tickets, hardware, insurance, office supplies, parking, and shipping . . . ."); *id.* at 21 (arguing that expenses reported for "trackers" and "travel" are not communication costs).

OGC also asserts that expenditures for "some of [Correct the Record's] specific programs" — including payments for (1) a "surrogacy program,"[23] (2) Correct the Record staffers to engage in private telephone communications with and distribute materials to journalists and media outlets,[24] and (3) overhead expenses associated with these activities (such as travel, food, lodging, etc.)[25] — are not properly analyzed under the Commission's coordinated communication regulation (11 C.F.R. § 109.21), and that everything Correct the Record did was coordinated with Hillary for America.[26] As support for the latter contention, OGC relies on Correct the Record's May 2015 press release, information not included in the complaints or responses, and information stolen and disseminated by Russian intelligence officers.

For example, OGC augments the record with excerpts from an interview that Correct the Record's founder and chairman David Brock gave months after the complaints here were filed.[27] In that interview, Brock describes Correct the Record as a "surrogate arm of the campaign" and "under [Hillary for America's] thumb."[28] We have previously explained our concerns with OGC's unilateral augmentation of the record to support allegations in enforcement actions, and

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23 *Id.* at 22-23.

24 *Id.* at 23.

25 *See id.* at 20.

26 In fact, OGC predicates its analysis on the view that "[Correct the Record] systematically coordinated with [Hillary for America]." FGCR at 16; *id.* at 20 ("[I]t appears all [Correct the Record] activity was" coordinated with Hillary for America.); *id.* at 22 ("[T]he available information indicates that [Correct the Record] worked closely with [Hillary for America] in all of its activities."); *id.* at 24 ("At its core, [Correct the Record] existed for only one purpose — to elect Clinton — and it accomplished its purpose via openly coordinating its efforts with [Hillary for America].").

27 FGCR at 11 (citing *Politico* "Off Message" podcast with reporter Glenn Thrush (Dec. 12, 2016), https://itunes.apple.com/us/podcast/politicos-off-message/id987591126?mt=2).

28 FGCR at 11-12, 16, 20. The FGCR contains only selected quotes from a much lengthier interview. Listening to the interview reveals that, in response to the question "Who is your counterpart [at Hillary for America] that you would pick up the phone and talk to?," Brock stated:

> So, Robbie [Mook, Hillary for America campaign manager]. Occasionally John [Podesta, Hillary for America campaign chairman]. . . . So, anyway, I got this idea, we've got to put Sanders' campaign on defense because we're just taking all this crap from them. So, I noticed that he hadn't released his medical records . . . . John tweeted that I should chill out and that we weren't running a fitness, physical fitness test for presidency or something like that. And so, the campaign was unhappy that I did that. I never knew if they were unhappy substantively or they were just unhappy because they didn't control it, um, because this was a very controlling culture . . . . so I took my lumps and then I obeyed. And so, the out-of-box thinking, that one might have had or the more aggressive things that one might have had, basically that ended.

FGCR at 11, 16-17 (citing December 12, 2016 *Politico* "Off Message" podcast with reporter Glenn Thrush); *see also id.* at 16 (citing Correct the Record's May 12, 2015 press release and Brock Politico interview to conclude "Correct the Record systematically coordinated with Hillary for America on its activities").

need not belabor that point here.[29] Suffice it to say that neither Correct the Record nor Hillary for America has been permitted in this matter to address the Brock interview on which OGC relies.[30] But even if we considered it appropriate to base our reason to believe determinations on information gleaned by OGC in selective Google searches (which we do not), Brock's statements about Correct the Record's coordination with Hillary for America merely reinforce what we already know from information in the record.[31]

Moreover, on its face Brock's statement contradicts OGC's assertions that Correct the Record fully coordinated its activities with Hillary for America.[32] In the interview, Brock states that Hillary for America "was unhappy because it didn't control" what Correct the Record had done. In other words, Correct the Record acted on its own initiative, not in response to a request by Hillary for America, without first notifying Hillary for America or seeking Hillary for America's input or approval and, in fact, contrary to what Hillary for America wanted it to do. Moreover, Podesta's after-the-fact request via Twitter was for Correct the Record to "chill out" — that is, not to take action, not to spend money. Absent an expenditure by a third party, there can be no "coordination" under the Act and Commission regulations.[33]

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[29] *See, e.g.*, MUR 6928 (Rick Santorum, *et al.*), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 12, n.79 (criticizing practice of augmenting record with information not in complaint or response because it "is unfair to respondents, and risks threatening the legitimacy of the Commission's conclusions"); MUR 6518 (Newt Gingrich, *et al.*), Statement of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 9 (recognizing that "recommending a reason to believe finding based on information outside the Complaint presents legal and practical problems for the Commission and respondents").

[30] *See* 52 U.S.C. § 30109(a)(1) ("Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission . . . that no action should be taken against such person on the basis of the complaint."); *see also* MUR 6056 (Protect Colorado Jobs, Inc.), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 11 ("[I]f we assume *arguendo* that certain limited reviews of publicly available materials are permissibly undertaken in 'the normal course of carrying out [the Commission's] supervisory responsibilities,' then any unearthed facts or allegations that OGC uses to support RTB recommendations should be provided to respondents so that they may have a full and fair opportunity to challenge them before the Commission votes on those recommendations.") (brackets in original). OGC's reliance on information obtained in *ad hoc* internet searches to inform its reason to believe recommendations lends itself to arbitrary decision-making. *See* MUR 6928 (Santorum, *et al.*), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at n.79 ("We have noticed that the recommendations in some MURs . . . have been based, at least in part, on information not in the complaint or response, while the record has not been augmented in other matters.") (citing examples).

[31] *See, e.g.*, MUR 6940 (Correct the Record, *et al.*), Compl. at Ex. A (Correct the Record Press Release dated May 12, 2015) (describing Correct the Record as "a political research and communications war room" and "a strategic research and rapid response team designed to defend Hillary Clinton" that "will work in support of Hillary Clinton's candidacy for President, aggressively responding to false attacks and misstatements of the Secretary's exemplary record" and "will be allowed to coordinate with campaigns and Party Committees").

[32] *See supra* n. 26.

[33] *See* 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. §§ 109.20, 109.21.

OGC also relies on information in two complaints that derives from material stolen by Russian military intelligence and disseminated through WikiLeaks in an apparent effort to subvert the 2016 U.S. presidential election. OGC advises that the Commission is not legally prohibited from considering stolen material in administrative proceedings, "so long as the agency was not involved in the underlying criminal act."[34] We are concerned, nonetheless, that reliance on information made available only as the result of a foreign intelligence operation to inform our decision here would be incompatible with our responsibility as Commissioners to help "preserve the basic conception of [an American] political community."[35] Further, such use might encourage similar violations of U.S. law in the future. The tools necessary to carry out cyberattacks and disinformation campaigns are widely held and commonly used. Rather than create an incentive for foreign nationals to interfere in U.S. elections by using the fruits of their illegal activity against its victims, we excluded from our analysis the stolen material released via WikiLeaks. We therefore relied on our prosecutorial discretion to decline proceeding on the complaints in MURs 7160 and 7193 complaints that would have required the Commission to rely upon the stolen materials.[36]

II. LEGAL ANALYSIS

To be an in-kind contribution to a candidate with whom it has been coordinated, an internet communication must be both a "public communication" and a "coordinated communication" under the Act and Commission regulations.

A. Public Communication

The Act defines a "public communication" as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility,

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[34] FGCR at 18 (citing *Nat'l Labor Relations Bd. v. S. Bay Daily Breeze*, 415 F.2d 360, 364 (9th Cir. 1969); *Knoll Associates, Inc. v. Fed. Trade Comm'n*, 397 F.2d 530, 533 (7th Cir. 1968)). Hillary for America, for its part, also suggests that ethics rules prohibit the use of the material hacked and disseminated by WikiLeaks. *See* MUR 7160 (Correct the Record, *et al.*), Hillary for America Resp. at 7.

[35] *Bluman v. FEC*, 800 F. Supp. 2d 281 (2011), *affirmed* 565 U.S. 1104 (2012).

[36] *See CREW v. FEC*, 892 F.3d 434 (D.C. Cir. 2018). As cyberattacks and disinformation campaigns become more sophisticated, material generated by such efforts will require more demanding assessments of credibility. Already, hackers have strategically released forgeries to create false and distorted factual records. *See* MUR 7160 (Correct the Record, *et al.*), Hillary for America Resp. at 3 (quoting Eric Zorn, *The inherent peril in trusting whatever WikiLeaks dumps on us*, CHICAGO TRIBUNE (Oct. 13, 2016)); *see also* Adam Nossiter, David E. Sanger, and Nicole Perlroth, *Hackers Came, but the French Were Prepared*, NY TIMES (May 9, 2017) (reporting that documents released online on eve of French Presidential election included "some authentic documents, some phony documents of the hackers' own manufacture, some stolen documents from various companies, and some false emails created by the campaign"). Selectively releasing authentic materials could also create a false impression. Thus, information obtained and distributed as part of a hostile foreign intelligence operation should be considered inherently unreliable in an enforcement matter, even if it purports to be a respondent's own documents.

mass mailing, or telephone bank to the general public, or any other form of general public political advertising."[37] It does not explicitly include any internet communications.

The Commission's regulations generally define "public communication" the same as the Act.[38] Unlike the Act, however, the regulatory definition of "public communication" explicitly addresses internet communications: It excludes all internet communications "except for communications placed for a fee on another person's Web site."[39] Consequently, an internet communication will not be regulated as a "public communication" unless the speaker posts it on a third party's online platform and pays a fee to do so.

The Commission deliberately excluded the vast majority of internet communications from regulation as "public communications" in a 2006 rulemaking that focused on internet communications. In that rulemaking, the Commission recognized the internet as a "unique and evolving mode of mass communication and political speech that is distinct from other media" and "warrants a restrained regulatory approach."[40] The Commission also excluded "uncompensated Internet activity" from the definitions of "contribution" and "expenditure,"[41] and created a "broad exemption" to enable individuals and groups to engage in online political discourse without fear of government regulation.[42] These provisions are collectively referred to as the "internet exemption."

B. Coordinated Communication

The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate."[43] The Commission implements this statutory provision through two different regulatory provisions: section 109.20, for "expenditures that are *not* made for communications but that are coordinated with a

37 52 U.S.C. § 30101(22).

38 *See* 11 C.F.R. § 100.26.

39 *Id.*

40 Internet Communications, 71 Fed. Reg. 18589, 18589 (April 12, 2006).

41 11 C.F.R. §§ 100.94, 100.155.

42 71 Fed. Reg. at 18603.

43 2 U.S.C. § 30116(a)(7)(B)(i).

candidate, authorized committee, or political party committee,"[44] and section 109.21, for "coordinated communications."[45]

Section 109.20 defines "coordinated" in terms nearly identical to those in the Act: "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee."[46] In pertinent part, the regulation provides that any expenditure so coordinated, "but that is *not* made for a coordinated communication under 11 C.F.R. 109.21," is an in-kind contribution to the candidate with whom it was coordinated.[47]

Section 109.21, by contrast, addresses coordination "in the context of communications."[48] It establishes a three-part test consisting of a payment prong, a content prong, and a conduct prong. Satisfaction of all three prongs "justifies the conclusion that payments for the coordinated communications are made for the purpose of influencing a Federal election, and therefore constitute in-kind contributions."[49]

Most relevant to these matters is the content prong. The content prong is satisfied by a "public communication" that republishes campaign materials, contains express advocacy or its functional equivalent, or refers to federal candidates or party committees at certain times before an election.[50] The Commission acknowledged when it promulgated the coordinated communication regulation that the content prong is made up of "bright-line tests," which "may serve to exclude some communications that are made with the subjective intent of influencing a Federal election, thereby potentially narrowing the reach of [the Act's coordination provision]."[51] The Commission stated that the content prong nonetheless served as a "clear and

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[44] Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 425 (Jan. 3, 2003) (emphasis added); *see also* 11 C.F.R. § 109.20(b).

[45] 11 C.F.R. § 109.21.

[46] 11 C.F.R. § 109.20(a).

[47] 11 C.F.R. § 109.20(b) (emphasis added).

[48] Coordinated and Independent Expenditures, 68 Fed. Reg. at 425.

[49] *Id.* at 426.

[50] 11 C.F.R. § 109.21(c)(2)–(5) (citing the definition of "public communication" at 11 C.F.R. §100.26). The content prong may also be met by an electioneering communication. However, because the definition of "electioneering communication" encompasses only broadcast, cable, or satellite communications, it does not apply to internet communications. *See* 11 C.F.R. § 100.29(a), (b)(1).

[51] 68 Fed. Reg. at 426, 428; *see also* 52 U.S.C. § 30101(8)(a) (defining contribution as "any gift . . . made by any person for the purpose of influencing any election for Federal office").

useful" mechanism to "ensure that the coordination regulations do not inadvertently encompass communications that are not made for the purpose of influencing a federal election."[52]

The Commission's general exclusion of internet communications from treatment as coordinated communications (and thus as in-kind contributions) is deliberate. In the 2006 Internet Communications rulemaking, discussed above, the Commission expressly acknowledged the effect of the revised definition of "public communication" on the definition of "coordinated communication."[53] For example, the Commission stated that, as a result of the rulemaking, a person's "republication of a candidate's campaign materials on his or her own website, blog, or e-mail cannot constitute a 'coordinated communication.'"[54] And after the 2006 rulemaking, the Commission has consistently interpreted the content prong of the coordinated communication test to exclude internet communications not placed for a fee on a third party's website.[55]

C. Application to the Facts Here

In evaluating the allegations in these matters, we considered the extent to which Correct the Record's activities were covered by the internet exemption; activities falling within the exemption's scope are not coordinated communications, and hence not in-kind contributions. Consistent with Commission precedent, we concluded that Correct the Record's expenses for its online communications, including creation and production costs, are not in-kind contributions to Hillary for America under the "coordinated communication" standard at 11 C.F.R. § 109.21.

As for Correct the Record's spending that appears unrelated to creating and disseminating online political communications, we examined the information in the complaints to determine whether it provided reason to believe that Correct the Record made coordinated expenditures under 11 C.F.R. § 109.20. We concluded that the information did not support finding reason to believe Correct the Record and Hillary for America violated the Act.

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52 *Id.*

53 *See id.* at 18589, n.2; *id.* at 18594 (explaining that the definition of "public communication" "should be read together with other existing regulations regarding coordinated and independent expenditures").

54 *Id.* at 18600.

55 *See* MURs 6722/6723 (House Majority PAC), F&LA at 3-4 (finding no reason to believe on coordination allegation as video produced by super PAC in which officeholders appeared was not "public communication"); MUR 6657 (Akin for Senate), F&LA at 4-6 (finding no reason to believe on coordination allegation as PAC's emails soliciting bundled contributions were not "public communications"); MUR 6477 (Turn Right USA), F&LA at 7-8 (finding no reason to believe on coordination allegation as super PAC's video uploaded to internet was not a "public communication"); MUR 6414 (Carnahan in Congress Committee), F&LA at 11 (finding no reason to believe on coordination allegation as website was not "public communication"); Advisory Opinion 2011-14 (Utah Bankers Association) (concluding that SSF's emails and statements on its website would not satisfy coordinated communications test because communications were not "public communications"); Advisory Opinion 2008-10 (VoterVoter.com) (concluding that videos uploaded to website by political committees for free would not be "public communications").

1. *Correct the Record's Expenses for Online Communications*

The complaints generally allege that Correct the Record made in-kind contributions to Hillary for America by "coordinating" with Hillary for America without engaging in "paid media."[56] According to the complaints and OGC, Correct the Record's expenses for, for example, computer equipment, office space, software, web hosting, video equipment, placing a poll online, and salaries for individuals to conduct internet activity (posting on social media and e-mailing journalists), should be regulated as separate expenditures under 11 C.F.R. § 109.20(b). The Respondents generally argue that Commission regulations "do not prohibit coordination on communications other than 'public communications.'"[57]

We agree with the Respondents. According to the plain text of 11 C.F.R. § 109.21, which governs the meaning of coordination "in the context of communications,"[58] an extensive underlying rulemaking record, and subsequent Commission advisory opinions and enforcement determinations, an internet communication is not regulated as "coordinated" unless it is placed for a fee on a third party's website.[59]

Moreover, the Commission has repeatedly interpreted the internet exemption to encompass expenses incurred by a speaker to produce an internet communication. Such input costs are treated as in-kind contributions only when the internet communication itself is an in-kind contribution.[60] In 2013, for example, a unanimous Commission found that "significant related expenses" that a PAC had "incurred . . . [to] finance[]" email solicitations were not in-kind contributions under section 109.21, because the emails themselves had not been "placed for

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[56] *See, e.g.*, MUR 7146 (Correct the Record, *et al.*), Compl. ¶¶ 19 (creating website), 20 (emailing), 22-23 (emailing), 26 (tweeting), 28-29 (emailing), 30 & 32 (creating Facebook page, Twitter account, and YouTube account to post videos), 35 (posting video to YouTube), 40-42 & 44 (posting content on social media platforms, including Twitter, Facebook, Reddit, and Instagram), 43 (posting video to YouTube), 46-49 (creating website), 55-56 (emailing), 64-65 & 67 (posting videos online), 66 (posting content to its website).

[57] MUR 7146 (Correct the Record, *et al.*), Correct the Record Resp. at 3.

[58] 68 Fed. Reg. at 425.

[59] *See supra* II.B.

[60] MUR 6657 (Akin for Senate), F&LA at 4-6 (finding no reason to believe on coordination allegation because PAC's emails soliciting bundled contributions were not "public communications"); MUR 6477 (Turn Right USA), F&LA at 3, 7-8 (finding no reason to believe on coordination because video uploaded to internet for free was not "public communication" although video cost super PAC approximately $5,800); MUR 6414 (Carnahan in Congress Committee), F&LA at 11 ("Although it appears that the Committee may have paid [a vendor], at least in part, to gather some of the information ultimately displayed on the website, on the facts presented here, such payments do not amount to the Committee having placed an Internet communication on another person's website for a fee."). The Commission has taken a similar approach with respect to reportable independent expenditures by individuals. *See* Advisory Opinion 2008-10 (VoterVoter.com) at 7 ("The costs incurred by an individual in creating an ad will be covered by the Internet exemption from the definition of 'expenditure' as long as the creator is not also purchasing TV airtime for the ad he or she created.").

a fee" on a third-party's website.[61] Accordingly, the PAC's payments for "services necessary to make an Internet communication"— including some $118,000 spent on email list rentals and contribution-processing fees — were not in-kind contributions, because the internet communications (emails) themselves were not in-kind contributions under the Commission's coordinated communication regulations.[62]

OGC singles out Correct the Record's poll for special attention. It asserts that Correct the Record's "payment for the underlying polling, made in coordination with [Hillary for America] as it appears all [Correct the Record] activity was, would be a coordinated expenditure under 11 C.F.R. § 109.20(b)," regardless of whether Correct the Record's online posting of the poll was a coordinated communication.[63] Under Commission precedent, however, the input expenses were "necessary to make" the internet communication, and the inputs would not be in-kind contributions because the resulting internet communication would not be in-kind contributions.[64]

The Commission's traditional approach to input costs operates as a bright-line rule and recognizes that a speaker will almost always incur expenses to produce an internet communication even if the speaker does not incur a cost to post the communication online. For example, an organization that has decided to endorse a particular candidate and wishes to post a simple notice of the endorsement on its own website will likely incur, at a minimum, costs in the form of staff time, computer usage, and electricity. More ambitious forms of notice could necessitate additional overhead and other expenses, such as for travel and the services of consultants, graphic designers, videographers, actors, and other specialists. The Act and Commission regulations already require any organization that is a political committee to disclose all such expenses.[65] Requiring speakers to further allocate overhead expenses across internet communications (or other activities) and then exempting only those component fees deemed essential for the internet communication's placement would eviscerate the internet exemption and the deliberate policy decisions behind it, and potentially chill political speech online. In any event, the Commission has never required speakers to do so.

In light of the policy determinations that the Commission made in the 2006 Internet Communications rulemaking and the Commission's subsequent affirmations of those principles in the enforcement and advisory opinion contexts, Respondents properly understood Correct the

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61 MUR 6657 (Akin for Senate), Vote Cert. (approving unanimously OGC's recommendations and F&LA edits circulated on behalf of Commissioner Weintraub); MUR 6657 (Akin for Senate), F&LA at 5.

62 MUR 6657 (Akin for Senate), F&LA at 2, 4-5.

63 FGCR at 20 (analyzing polling payments).

64 Moreover, similar to much of the activities analyzed, *infra* II.C., we do not see particularized facts in the relevant complaint, *see* MUR 7146 (Correct the Record), Compl. ¶ 31, to show that the polling was conducted "at the request or suggestion of" Hillary for America.

65 *See* 52 U.S.C. § 30104(b)(5)(A); 11 C.F.R. § 104.3(b)(4)(i).

Record's internet communications posted without charge on its own internet platforms, and associated expenses, as not providing in-kind contributions to Hillary for America.[66]

2. *Correct the Record's Expenses for Other Activities*

The complaints and OGC also address particular "programs or activities" that the record suggests do not relate directly to Correct the Record's internet communications. These activities include Correct the Record's surrogacy program, research and tracking, and contacts with reporters.

According to the complaints, expenses for these activities must be considered coordinated expenditures under section 109.20(b) and thus contributions to Hillary for America. Even assuming that the "coordinated communication" standard of section 109.21 does not apply, the complaints fail to provide the Commission with information showing that Correct the Record did not receive fair market compensation from Hillary for America for its work or that expenditures were made "in cooperation, consultation, or concert, with, or at the request or suggestion of" Hillary for America.[67] Indeed, the complaint with the most robust discussion of these activities seems to concede the speculative nature of its coordination allegations, asserting them in the conditional tense: "*If* any of these expenditures *were* coordinated with the Clinton campaign, they *would* constitute in-kind contributions to the campaign"[68]; "Compensation paid by [Correct the Record] to its staff or contractors to conduct [the activities] *would* constitute in-kind contributions to Hillary for America *if* the services *were* conducted at the request or suggestion of, or otherwise in coordination with, Clinton or her campaign staff."[69]

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66 *See* 52 U.S.C. § 30111(e) ("Notwithstanding any other provision of law, any person who relies upon any rule or regulation prescribed by the Commission in accordance with the provisions of this section and who acts in good faith in accordance with such rule or regulation shall not, as a result of such act, be subject to any sanction provided by this Act."). Indeed, courts have struck agencies' retroactive policy reversals as violations of due process. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012) ("The Commission's lack of notice to Fox and ABC that its interpretation had changed so the fleeting moments of indecency contained in their broadcasts were a violation of § 1464 as interpreted and enforced by the agency 'fail[ed] to provide a person of ordinary intelligence fair notice of what is prohibited.'") (quoting *U.S. v. Williams*, 553 U.S. 285 (2008)); *CBS Corp. v. FCC*, 663 F.3d 122, 152 (3d Cir. 2011) (vacating FCC's order finding CBS liable for a forfeiture penalty as a result of "arbitrarily and capriciously depart[ing] from its prior policy"); *see also United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1144 (10th Cir. 2010) ("[E]ven if Congress repealed the APA tomorrow, the Due Process Clauses of the Fifth and Fourteenth Amendments would still prohibit the imposition of penalties without fair notice. . . . And it pertains when an agency advances a novel interpretation of its own regulation in the course of a civil enforcement action.") (citations omitted).

67 *See* 11 C.F.R. §§ 109.20(b), 109.21.

68 MUR 7146 (Correct the Record), Compl. ¶ 95 (emphasis added).

69 *Id.* ¶ 99 (emphasis added).

With regard to Correct the Record's surrogacy training program, the lead complaint on this issue describes the program and its purpose,[70] but the only information that it provides in support of the coordination allegation — a single news article — actually suggests a lack of coordination. The article states that Clinton's campaign played "no role" in Correct the Record's training sessions and acknowledges that Hillary for America has its own surrogate operation.[71]

For its part, Correct the Record indicates that it did not coordinate its training sessions with Hillary for America. In its response, Correct the Record asserts that it provided training only as a free service to local volunteers and did not include any official Clinton campaign surrogates (as identified by Hillary for America) or Hillary for America staff, nor did it solicit or accept suggestions from Hillary for America as to who should receive training, "or otherwise permit [Hillary for America] to direct individuals to the sessions."[72]

With respect to research and tracking, Correct the Record's reports to the Commission disclose receipts of $275,615.43 from Hillary for American for "research,"[73] and an additional $6,346 from Hillary for America for "research services."[74] In their responses, Correct the Record and Hillary for America assert that these payments fully compensated Correct the Record for tracking and research services. Information in the record does not indicate otherwise.[75] Moreover, the Commission has previously advised that "research" and "research services" are adequate descriptions for reporting purposes.[76] Thus, without more, we did not agree with OGC's assertion that it is "unclear" that the payments were for the purposes asserted by Correct

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70 *Id.* ¶ 15.

71 *Id.* (*citing* Phillip Rucker, *How Clinton's Campaign Fakes Grassroots Love*, NY POST (July 8, 2015) ("[Correct the Record] – one of several super PACs run by Clinton ally David Brock – coordinates some of its activities with Clinton's campaign, but officials said the campaign played no role in the training sessions."). Similarly, that complaint does not allege particular facts to show that the "surrogate booking program," *see id.* ¶¶ 50-51, (if different from the surrogate training program) was coordinated with Hillary for America.

72 MUR 7146 (Correct the Record, *et al.*), Correct the Record Resp. at 5.

73 MUR 7146 (Correct the Record, *et al.*), Compl. ¶¶ 18, 33; MUR 7146 (Correct the Record, *et al.*), Hillary for America Resp. at 8-9; MUR 7146 (Correct the Record, *et al.*), Correct the Record Resp. at 5-6;Correct the Record, FEC Form 3X, Schedule A, line 17 at 8 (July 31, 2015).

74 Correct the Record, FEC Form 3X. Schedule A, line 17 at 17 (Dec. 31, 2015).

75 For example, the MUR 7146 complaint claims that trackers associated with Correct the Record were spotted in Iowa and New Hampshire, and that Correct the Record performed opposition research, but does not provide any information to show that Hillary for America received these services for less than fair market value. *See* MUR 7146 (Correct the Record, *et al.*), Compl. ¶¶ 16-18, 23. To the contrary, an article quoted in the relevant complaint provides contemporaneous support for the argument that Hillary for America would pay Correct the Record for "[a]ny nonpublic information." *Id.* ¶ 14 (internal citations omitted).

76 *See Purposes of Disbursements*, https://www.fec.gov/help-candidates-and-committees/purposes-disbursement (identifying acceptable descriptions of "purpose" for reporting purposes, including research and research services, as well as unacceptable descriptions of purpose).

the Record and Hillary for America.[77] As we have previously explained, we do not consider "official curiosity" sufficient to find reason to believe.[78]

OGC also concluded that Correct the Record's payments to its staff to "engage in private communications with reporters" (via telephone calls and printed materials) were in-kind contributions to Hillary for America.[79] To the extent that the cost of these communications, which do not appear to be "public communications," are not covered under section 109.21, the complaints do not present facts to show that particular efforts were even "coordinated" with Hillary for America.[80]

The arguments for the Commission to authorize an investigation of Correct the Record's non-internet activities appear to rely largely, if not exclusively, on Correct the Record's publicized plans to coordinate its internet communications with Hillary for America. "Coordination" is not a status, however, such that coordination in one activity can be imputed to other activities. Finding coordination requires more than considering the general relationship between entities — it requires a transaction-by-transaction assessment to determine whether specific conduct occurred with respect to particular expenditures. The information in the record indicates that Correct the Record limited its interactions with Hillary for America to the very communications that the Commission has previously decided not to regulate.[81] Thus, the complaints fail to meet their burden in providing reason to believe that Correct the Record made

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77 FGCR at 9.

78 *See, e.g.*, MURs 6789/6852 (Special Operations for America, *et al.*), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter at 4 ("We do not authorize Commission investigations based on mere speculation"), citing *FEC v. Machinists Non-partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981) ("[M]ere 'official curiosity' will not suffice as the basis for FEC investigations") (footnote omitted); *see also Machinists*, 655 F.2d at 387 (distinguishing Commission from administrative agencies "vested with broad duties to gather and compile information and to conduct periodic investigations concerning business practices . . . . the FEC has no such roving statutory functions"); MUR 4960 (Clinton for U.S. Exploratory Committee), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1 ("The Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented.").

79 FGCR at 23.

80 FGCR at 23-24; MUR 7146 (Correct the Record, *et al.*), Compl. ¶ 90 (asserting that Correct the Record's "expenditures to pay staff to produce and circulate memos to reporters," "circulating research memos to reporters," and "pitching the video interview to reporters," among other things, would be in-kind contributions "*if* made in 'cooperation, consultation, or concert, with, or at the request or suggestion of' Clinton and/or her campaign committee staff") (emphasis added).

81 The numerous articles in the complaints, for example, generally reiterate Correct the Record's assertion that internet communications only satisfy the coordinated communications test when they are placed for a fee on a third party platform. *See, e.g.*, MUR 6940 (Correct the Record, *et al.*), Compl. at Exs. B-D; MUR 7097 (Correct the Record, *et al.*), Compl. Attach.; MUR 7146 (Correct the Record, *et al.*), Compl. ¶¶ 9-11, 14, 24, 26-27, 36, 44, 54.

specific expenditures "in cooperation, consultation, or concert, with, or at the request or suggestion of" Hillary for America under 11 C.F.R. § 109.20.

III. CONCLUSION

To the extent that these matters raise extraordinary issues, it is in the scope and scale of the Respondents' alleged activities and in the complaints' attempted reliance on information illegally obtained and distributed as part of a foreign state-sponsored cyberattack. The legal issues themselves, however, lend themselves to consideration under the Commission's traditional coordination framework. Excluding the illegally obtained information, we thoroughly analyzed the information presented in the complaints in light of the Commission's precedent.[82] For the reasons provided above, we voted against OGC's recommendations.[83]

[82] Regrettably, these matters led one of our colleagues on the Commission to engage in gamesmanship by moving to dismiss all of the complaints pursuant to *Heckler v. Chaney* and then voting against her own motion. We chose not to indulge her gamesmanship and abstained from the vote, *see* MURs 6940, 7097, 7146, 7160, 7193 (Correct the Record, *et al.*), Amend. Cert. ¶ 3, preferring our statement to explain our votes.

[83] A word of caution: Our conclusion here should not be read as sanctioning close working relationships between Super PACs and the candidates that they support. To the contrary, such relationships might well trigger the Act's coordination provision or violate other provisions of the Act, such as the soft money prohibition at 52 U.S.C. § 30125(e). The complaints here alleged only violations of the Act's coordination provision, however, and the facts were not sufficient to establish reason to believe that the Respondents' activity violated either that or any other provision of the Act.

Matthew S. Petersen (SDB)
Matthew S. Petersen
Vice Chairman

8/21/19
Date

Caroline C. Hunter
Caroline C. Hunter
Commissioner

8/21/19
Date