

1 **FEDERAL ELECTION COMMISSION**

2
3 **FIRST GENERAL COUNSEL’S REPORT**

4
5 **MUR: 7139**

6 DATE COMPLAINT FILED: 09/21/2016

7 DATE OF NOTIFICATION: 09/28/2016

8 LAST RESPONSE RECEIVED: 11/14/2016

9 DATE ACTIVATED: 01/31/2017

10
11 ELECTION CYCLE: 2016

12 EXPIRATION OF SOL: 7/22/2020 – 04/01/2021

13
14 **COMPLAINANTS:**

John K. Delaney, Friends of John Delaney

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16 **RESPONDENTS:**

Maryland USA and Joel Ritter in his official
capacity as treasurer

Mark Epstein

Amie Hoeber

Amie Hoeber for Congress and Chris Marston in his
official capacity as treasurer

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23 **RELEVANT STATUTES
24 AND REGULATIONS:**

52 U.S.C. § 30116(a), (f)

52 U.S.C. § 30125(e)

11 C.F.R. § 100.26

11 C.F.R. § 109.20(a)

11 C.F.R. § 109.21(a), (c), (d)

11 C.F.R. § 109.23(a)

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31 **INTERNAL REPORTS CHECKED:**

Disclosure Reports

32
33 **AGENCIES CHECKED:**

None

34
35 **I. INTRODUCTION**

36 The Complaint alleges that Maryland USA, an independent-expenditure-only committee
37 (“IEOPC”), republished campaign materials from, and coordinated with, Amie Hoeber for
38 Congress, the principal campaign committee for Amie Hoeber’s 2016 congressional campaign
39 (the “Committee”), in violation of the Federal Election Campaign Act of 1971, as amended (the
40 “Act”). The Complaint alleges that coordination occurred because Mark Epstein (“Epstein”),
41 Amie Hoeber’s husband, both served as the Committee’s Assistant Treasurer and Custodian of

1 Records and contributed almost all of Maryland USA's funds, and because Maryland USA and
2 the Committee used two common vendors.

3 For the reasons stated below, we recommend that the Commission find reason to believe
4 that Maryland USA impermissibly republished the Committee's campaign materials and
5 coordinated its communications with the Committee. We further recommend that the
6 Commission authorize the use of compulsory process.

7 **II. FACTUAL BACKGROUND**

8 Maryland USA is an IEOPC that registered with the Commission on July 22, 2015, one
9 week before the Committee.¹ Amie Hoeber ("Hoeber") was the only candidate that Maryland
10 USA supported during the 2016 election cycle.² On October 26, 2015, one week after he left
11 Hoeber's campaign, Epstein made a \$300,000 contribution to Maryland USA, and it appears that
12 Maryland USA made its first public communications during November 2015, which cost
13 \$200,989.43.³ In 2016, Epstein contributed \$3,500,000 more to Maryland USA.⁴ In sum,
14 Epstein contributed \$3,800,000 of the \$3,808,709 Maryland USA raised.⁵ Maryland USA
15 ultimately spent \$3,193,922.32 on independent expenditures that either supported Hoeber or
16 opposed her general election opponent, John Delaney.⁶

¹ FEC Form 1, Statement of Organization, Maryland USA (July 22, 2015); *see* FEC Form 1, Statement of Organization, Amie Hoeber for Congress (July 29, 2015).

² *See* 2015 Year-End Report, Maryland USA (Jan. 28, 2016); Amended Pre-Primary Report, Maryland USA (Aug. 22, 2016); July Quarterly Report, Maryland USA (July 14, 2016); October Quarterly Report, Maryland USA (Oct. 13, 2016); Pre-General Report, Maryland USA (Oct. 27, 2016); Post-General Report, Maryland USA (Dec. 6, 2016); 2016 Year-End Report, Maryland USA (Jan. 26, 2017).

³ *See* Compl. at 2, 7; 2015 Year-End Report, Maryland USA.

⁴ *See* 2015 Year-End Report, Maryland USA; 2016 Year-End Report, Maryland USA.

⁵ *See supra* note 2.

⁶ *See* 2015 Year-End Report, Maryland USA; 2016 Year-End Report, Maryland USA.

1 The Complaint alleges Respondents violated the Act in three ways. First, it alleges that
2 Maryland USA republished the Committee's campaign materials.⁷ The Complaint states that on
3 October 15, 2015, the Committee released an online video announcing Hoeber's candidacy (the
4 "Announcement Video").⁸ The three-minute-and-nine-second Announcement Video features
5 Hoeber speaking into the camera while standing in front of a building.⁹ The Complaint alleges
6 that Maryland USA created three videos using footage from the Announcement Video:

- 7 • Declaration 30 HD 2 is a 30-second video that uses 18 seconds of content from the
8 Announcement Video;
- 9 • Declaration 15 HD is a 15-second video that uses 9 seconds of content from the
10 Announcement Video;
- 11 • Stronger America HD 30 1119 is a 30-second video that uses 9 seconds of content
12 from the Announcement Video.¹⁰

13 Maryland USA made three expenditures on November 21, 2015, that appear to be for the
14 production of these videos.¹¹ The expenditures are described as: "Mobile Advertising
15 (Production, 'Declaration' 30);" "Mobile Advertising (Production, 'Declaration' 15);" and
16 "Mobile Advertising (Production, 'Stronger America' 30)."¹² These three expenditures total
17 \$15,515.¹³ On November 20, 2015, the day before these three expenditures, Maryland USA
18 made another expenditure for "Mobile Advertising (Placement)," in the amount of
19

7 Compl. at 4-5.

8 *Id.* at 4.

9 *Id.*

10 *Id.* at 4-5.

11 *See* 2015 Year-End Report, Maryland USA at 12-14.

12 *Id.*

13 *Id.* A fourth expenditure, for "Mobile Advertising (Production, 'Stronger America' 15)," was also reported on November 21, 2015, for \$4,275, but does not appear to contain any content from Hoeber's Announcement Video.
Id.

1 \$181,199.43.¹⁴ These expenditures were the first independent expenditures by Maryland USA;
2 its next independent expenditure was on December 4, 2015.¹⁵

3 Next, the Complaint alleges that Epstein, while an agent of the Committee, must have
4 communicated with Maryland USA to learn that it was going to support Hoeber, and Epstein told
5 the IEOPC that he was going to fund its communications.¹⁶ The Complaint alleges that the
6 available information “strongly suggests” that Maryland USA’s public communications resulted
7 from substantial discussions between it, the Committee, and their agents, or that Hoeber, her
8 campaign, or her agents were materially involved in decisions leading to the communications.¹⁷
9 In support, the Complaint cites a November 30, 2015, article from *Bethesda Magazine*, which
10 states that “sources told Bethesda Beat in early September that the major source of funding for
11 Maryland USA is expected to be Hoeber’s husband, Mark Epstein. . . .”¹⁸

12 The Complaint’s final allegation is that the Committee and Maryland USA each used two
13 common vendors: Wilson Perkins Allen Opinion Research (“Wilson Perkins”) and i360 LLC
14 (“i360”).¹⁹ Specifically, Maryland USA spent a combined \$28,300 for polling services from
15 Wilson Perkins in November and December of 2015, and the Committee spent \$25,200 on

¹⁴ *Id.*

¹⁵ *Id.* Maryland USA disclosed a \$6,125.00 independent expenditure on December 4, 2015, for “Cable Advertising (Production Cost).” *Id.* Its next independent expenditure was \$147,840.00 on January 19, 2016, for “Cable Advertising (Placement Cost),” after Epstein’s second contribution to the IEOPC, \$400,000 on January 4, 2016. *See* 2015 Year-End Report, Maryland USA at 14; 2016 Pre-Primary Report, Maryland USA at 14.

¹⁶ Compl. at 5-7.

¹⁷ *Id.* at 6-7. The allegation regarding Epstein’s contributions does not rely on any specific communication, but instead relies on all of Maryland USA’s communications in support of Hoeber. We have considered all of these communications, not just the three videos that relate to the Announcement Video, which are the only communications that are specifically mentioned in the Complaint.

¹⁸ *Id.* at 4 (quoting Louis Peck, *Super PAC Spends \$200,000 to Boost Candidate in Crowded Dist. 6 GOP Contest*, BETHESDA BEAT (Nov. 30, 2015) [hereinafter Bethesda Beat Article], <http://www.bethesdamagazine.com/Bethesda-Beat/2015/Super-PAC-Spends-200000-to-Boost-Candidate-In-Crowded-Dist-6-GOP-Contest/>).

¹⁹ *Id.* at 5.

1 February 14, 2016, for public opinion research from Wilson Perkins.²⁰ The Committee also paid
2 i360 \$2,144.59 for voter telephone contacts in March 2016, and Maryland USA paid i360 \$2,500
3 for database services on April 1, 2016.²¹ The Complaint alleges that use of these common
4 vendors shows coordination between Maryland USA and the Committee.²²

5 The Committee, Hoeber, and Epstein filed a joint response denying any violations of the
6 Act (the “Joint Hoeber Response”).²³ The Joint Hoeber Response states that the three videos
7 republishing Hoeber’s campaign materials were “uploaded and disseminated for free solely on
8 the Internet,” thus, the videos are not considered contributions or expenditures under the
9 Commission regulations.²⁴ The Joint Hoeber Response further asserts that the Complaint’s
10 allegations are speculative, Epstein was not an agent of the Committee, he was not materially
11 involved in any decisions regarding Maryland USA’s spending or independent expenditures, and
12 he did not relay any information regarding the Committee’s plans, strategies, and needs to
13 Maryland USA.²⁵ The Joint Hoeber Response includes an affidavit from Epstein in support of
14 these assertions.²⁶ The Joint Hoeber Response also argues that Epstein had a constitutional right
15 to contribute to Maryland USA, and the fact a spouse may have been privy to non-public

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 7-8.

²³ Resp. of Amie Hoeber for Congress, Amie Hoeber, and Mark Epstein (Nov. 15, 2016) (“Joint Hoeber Resp.”).

²⁴ *Id.* at 8.

²⁵ *Id.* at 2.

²⁶ *Id.*, Aff. of Mark Epstein ¶¶ 5-7.

1 information about the candidate's plans, projects, activities, or needs is insufficient, by itself, to
2 prove coordination.²⁷

3 Maryland USA also submitted a response that denies any violations of the Act.²⁸
4 Maryland USA's response asserts that the three videos contain only brief snippets from the
5 Announcement Video, and therefore are exempted from the republication regulation.²⁹ Both
6 responses state that Wilson Perkins used a firewall to prevent the flow of information between
7 Maryland USA and the Committee.³⁰ Maryland USA's Response states that i360 also used a
8 firewall.³¹

9 **III. LEGAL ANALYSIS**

10 The Act prohibits any person from making, and any candidate or committee from
11 knowingly accepting, contributions in excess of the limits stated in 52 U.S.C. § 30116.³² In the
12 2016 cycle, an individual was permitted to contribute up to \$2,700 to a candidate per election.³³
13 In addition, IEOPCs are prohibited from making contributions to federal candidates,³⁴ and

²⁷ Joint Hoeber Resp. at 5-6.

²⁸ Maryland USA Resp. (Nov. 16, 2016).

²⁹ *Id.* at 4; *see* 11 C.F.R. § 109.23(b)(4).

³⁰ Maryland USA Resp. at 2; Joint Hoeber Resp. at 7.

³¹ Maryland USA Resp. at 2. Maryland USA states that it possesses each vendor's firewall policy and can make them available to the Commission. *Id.* The Joint Hoeber Response does not address whether i360 used a firewall because it argues that prior Commission precedent regarding i360 negates the coordination allegations regarding that vendor. *See* Joint Hoeber Resp. at 7 (citing MUR 6888 (Republican National Committee)).

³² 52 U.S.C. § 30116(a), (f).

³³ *Id.* § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1). Epstein contributed \$2,700 to Hoeber's primary election campaign; the Committee did not disclose the receipt of a contribution from Epstein for the general election. *See* 2015 October Quarterly Report at 12, Amie Hoeber for Congress (Oct. 15, 2015).

³⁴ *See* 52 U.S.C. § 30116(a) (prohibition on excessive contributions); *id.* § 30118(a) (prohibition on corporate contributions); Advisory Op. 2010-11 (Commonsense Ten).

1 candidates and their authorized committees are prohibited from accepting contributions not
2 subject to the limits and prohibitions of the Act.³⁵

3 **A. Republication of Campaign Materials**

4 The Act provides that the “financing by any person of the dissemination, distribution, or
5 republication, in whole or *in part*, of any broadcast or any written, graphic, or other form of
6 campaign materials prepared by the candidate, his campaign committees, or their authorized
7 agents shall be considered to be an expenditure.”³⁶ The republication of campaign materials
8 prepared by a candidate’s authorized committee is an in-kind contribution, because the person
9 financing the republication “has provided something of value to the candidate [or] authorized
10 committee.”³⁷ Thus, an IEOPC’s republication of a Committee’s campaign materials is
11 prohibited.³⁸ The Commission has stated that “Congress has addressed republication of
12 campaign materials through [52 U.S.C. § 30116(a)(7)(B)(iii)] in a context where the
13 candidate/author generally views republication of his or her campaign material, *even in part*, as a
14 benefit” and “can be reasonably construed only as for the purpose of influencing an election.”³⁹
15 The candidate who prepared the campaign material does not receive or accept an in-kind

³⁵ See 52 U.S.C. § 30125(e)(1).

³⁶ *Id.* § 30116(a)(7)(B)(iii) (emphasis added); see also 11 C.F.R. § 109.23(a). For republication, the Commission has concluded that “campaign materials” include any material belonging to or emanating from a campaign. See, e.g., MUR 5743 (Betty Sutton) (candidate photo obtained from campaign website); MUR 5672 (Save American Jobs) (video produced and used by candidate’s campaign subsequently hosted on association’s website).

³⁷ See Explanation and Justification, Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 442 (Jan. 3, 2003) [hereinafter 2003 Coordination E&J].

³⁸ See 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(a); Advisory Op. 2010-11 (Commonsense Ten); F&LA at 4-7, MUR 6535 (Restore Our Future) (finding reason to believe that an IEOPC violated the Act by republishing campaign materials to support Mitt Romney’s 2012 presidential campaign that were originally published by Romney’s 2008 campaign).

³⁹ 2003 Coordination E&J at 443 (emphasis added); see also Explanation and Justification, *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,191 (June 8, 2006).

1 contribution, and is not required to report an expenditure, unless the dissemination, distribution,
2 or republication of campaign materials is a coordinated communication.⁴⁰

3 The videos created by Maryland USA appear to impermissibly republish Hoeber's
4 Announcement Video. Declaration 30 HD 2 republishes 18 seconds in a 30-second video;
5 Declaration 15 HD republishes 9 seconds in a 15-second video; and Stronger America HD 30
6 republishes 9 seconds in a 30-second video.⁴¹

7 Maryland USA's campaign filings seemingly indicate that it spent \$15,515 on
8 November 21, 2015, to produce the three videos; these expenditures were described as being for
9 the production of "mobile advertising."⁴² Maryland USA's filings also indicate that it spent
10 \$181,199.43 for the placement of "mobile advertising" on November 20, 2015.⁴³ The IEOPC
11 paid to produce only one other video around this time – "Stronger America 15."⁴⁴ These
12 expenditures for the production/placement of "mobile advertising" were the first expenditures
13 made by Maryland USA, and it did not make another expenditure until December 4, 2015.⁴⁵
14 These facts create a reasonable inference that Maryland USA spent some of its \$181,199 ad buy
15 on the three videos that republish Hoeber's campaign materials. Contrary to the Respondents'
16 position, the internet exception in the Commission's regulations does not exempt Maryland

⁴⁰ 11 C.F.R. § 109.23(a).

⁴¹ Compl. at 4-5; Maryland USA Resp. at 4.

⁴² 2015 Year-End Report, Maryland USA at 12-14.

⁴³ *Id.*

⁴⁴ *Id.* This video was also described as being for "mobile advertising," but it does not appear to republish campaign materials.

⁴⁵ *Id.*

1 USA's payments from the expenditure definition because the exemption only applies to
2 communications placed on the internet at no or nominal cost.⁴⁶

3 These expenditures indicate that Maryland USA financed the republication of footage
4 from the Announcement Video and thus made an in-kind contribution to the Committee. We
5 therefore recommend that the Commission find reason to believe that Maryland USA violated
6 52 U.S.C. § 30116(a).⁴⁷

7 **B. Coordinated Communications**

8 Under the Act, "coordinated" means made in cooperation, consultation or concert with,
9 or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political
10 party committee.⁴⁸ For purposes of this definition, any reference to a candidate, a candidate's
11 authorized committee, or a political party committee includes an agent thereof.⁴⁹ Any
12 expenditure that is coordinated is an in-kind contribution to the candidate or committee with
13 which it is coordinated.⁵⁰ Under the Commission's regulations, an expenditure for a
14 communication is coordinated when the communication:

⁴⁶ See 11 C.F.R. §§ 100.26, 100.155; *see also* Joint Hoeber Resp. at 8.

⁴⁷ In light of our recommendation in Section III.B of this Report that the Commission find reason to believe that Hoeber and the Committee impermissibly coordinated with Maryland USA, and because that recommendation also applies to the three republished videos, we are not making a separate recommendation here that the Committee accepted in-kind contributions that resulted from the republished videos. *Cf., e.g.*, First Gen. Counsel's Rpt. ("FGCR") at 12, 19, MUR 6603 (Chandler for Congress, *et al.*) (making recommendations consistent with this approach); FGCR at 14, 21, MURs 6789/6852 (Zinke for Congress, *et al.*) (same).

⁴⁸ See 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20(a).

⁴⁹ See 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20(a).

⁵⁰ See 52 U.S.C. § 30116(a)(7)(B)(i)-(ii); *see also* 11 C.F.R. §§ 109.20, 109.21(b).

1 (1) Is paid for, in whole or in part, by a person other than that candidate, authorized
2 committee, or political party committee;

3
4 (2) Satisfies at least one of the content standards⁵¹ in paragraph (c) of [§ 109.21]; and

5
6 (3) Satisfies at least one of the conduct standards in paragraph (d) of [§ 109.21].⁵²

7 The conduct standard is satisfied when, among other things, a candidate or her authorized
8 committee is materially involved in decisions regarding a communication or a communication is
9 made after substantial discussion about the communication with a candidate or her authorized
10 committee.⁵³ A candidate is “materially involved” in decisions if she conveys approval or
11 disapproval of the third party payor’s plans.⁵⁴ It is not necessary that the involvement of the
12 candidate be traced directly to one specific communication.⁵⁵ Rather, a candidate’s involvement
13 is material to a decision regarding a particular communication if that communication is one of a
14 number of communications, and the candidate was materially involved in decisions regarding the

⁵¹ The content standard is satisfied if the communication at issue meets at least one of the following content standards: (1) a communication that is an electioneering communication under 11 C.F.R. § 100.29; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate’s authorized committee; (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for federal office; (4) a public communication, in relevant part, that refers to a clearly identified House or Senate candidate, and is publicly distributed or disseminated in the clearly identified candidate’s jurisdiction 90 days or fewer before the candidate’s primary election; or (5) a public communication that is the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c)(1)-(5).

⁵² *Id.* § 109.21(a). The six types of conduct that satisfy the conduct standard are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; (5) former employee; and (6) republication. *Id.* § 109.21(d)(1)-(6).

⁵³ 11 C.F.R. § 109.21(d)(2), (3). Material involvement occurs when a candidate, authorized committee, or political party committee is materially involved in decisions regarding: (i) the content of the communication; (ii) the intended audience for the communication; (iii) the means or mode of the communication; (iv) the specific media outlet used for the communication; (v) the timing or frequency of the communication; or (vi) the size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite. *Id.* § 109.21(d)(2).

⁵⁴ *See* 2003 Coordination E&J at 434.

⁵⁵ *See id.*

1 strategy for those communications.⁵⁶ A discussion is “substantial” if information about the
2 plans, projects, or needs of the candidate is conveyed to a person paying for the communication
3 and that information is material to the creation, production, or distribution of the
4 communication.⁵⁷ A determination of whether a communication was made with material
5 involvement or after substantial discussion with a candidate or campaign is necessarily a fact-
6 based determination.⁵⁸ Under the Commission’s regulations, any person who has actual
7 authority, either express or implied, to engage in activities on behalf of a Federal candidate that
8 would satisfy the conduct standard of § 109.21’s coordination test is considered an agent of that
9 candidate.⁵⁹

10 The available record demonstrates that Maryland USA paid for public communications
11 that expressly advocated in support of Hoeber’s candidacy; thus, the payment and content prongs
12 of the coordinated communication test are satisfied.⁶⁰ Regarding the conduct prong, the
13 available information supports a reasonable inference that Epstein, as an agent of the Hoeber

⁵⁶ *Id.* For example, if a candidate is materially involved in a decision about the content or timing of a 10-part advertising campaign, then each of the 10 communications is coordinated without the need for further inquiry into the decisions regarding each individual advertisement on its own. *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 433.

⁵⁹ See 11 C.F.R. 109.3(b) (defining “agent”); *see also* 2003 Coordination E&J at 423-24.

⁶⁰ See *supra* notes 2, 6. The Joint Hoeber Response states that the first two prongs of the coordination test are “not at issue.” See Joint Hoeber Resp. at 4. Maryland USA expressly denies that the conduct standard has been met, but makes no such denial as to the first two prongs of the coordination test. See Maryland USA Resp. at 2. It appears that the four videos discussed in Sections II and III.A of this Report are among the communications that satisfy the content standard: they expressly advocate the election of Hoeber, *see* 11 C.F.R. § 100.22(a), and Maryland USA’s \$181,199 expenditure apparently for the placement of these videos qualifies them as public communications, *see* 11 C.F.R. § 100.26 (communications placed for a fee on another person’s Web site). More broadly, Maryland USA disclosed almost \$3.2 million in independent expenditures in support of Hoeber, indicating express advocacy communications.

1 campaign, shared information between the Committee and Maryland USA that would satisfy the
2 material involvement or substantial discussion elements.

3 The facts indicate that Epstein was an agent of the Committee in some capacity. He was
4 the Committee's Assistant Treasurer and Custodian of Records from the Committee's inception,
5 he served nearly three months, and he resigned from the Committee four days after Hoeber
6 formally announced her candidacy via the Announcement Video on October 15, 2015.⁶¹ Epstein
7 admits that during that service he was privy to at least some of the campaign's plans, strategies,
8 and needs.⁶² These factors create a reasonable inference that Epstein may have been an agent of
9 the Committee authorized to engage in conduct that could satisfy § 109.21(d) during the three
10 months he served a formal position with the campaign.

11 Epstein avers that his role with the Committee was "solely administrative," and that "at
12 no point in time did [he] act as an agent of the Amie Hoeber for Congress committee regarding
13 the [Committee's] plans, projects or needs."⁶³ Notably, neither Hoeber nor any other
14 representative of the Committee provides an affidavit corroborating Epstein's claim that he was
15 not an agent of the Committee regarding the Committee's plans, projects, or needs and Epstein,
16 Hoeber, or any other representative have never denied that he acted as an agent of the Committee
17 in other respects.⁶⁴ These conclusory assertions, moreover, do not sufficiently rebut the facts
18 suggesting Epstein's involvement with the Hoeber Committee was significant, nor do they rebut
19 the possibility of implied actual authority derived from his role as the candidate's spouse.

⁶¹ Epstein served as Assistant Treasurer and Custodian of Records from July 29, 2015, until October 19, 2015. *See* FEC Form 1, Statement of Organization, Amie Hoeber for Congress (July 29, 2015); FEC Form 1, Amended Statement of Organization, Amie Hoeber for Congress (Oct. 19, 2015).

⁶² *See* Joint Hoeber Resp. at 2.

⁶³ *Id.*, Aff. of Mark Epstein ¶ 2; *see also* Joint Hoeber Resp. at 6 (describing the roles as serving an "administrative function").

⁶⁴ *See* 11 C.F.R. 109.3(b) (defining "agent"); *see also* 2003 Coordination E&J at 423-24.

1 The available information also suggests that Epstein may have been an agent of the
2 Committee after he left his formal positions with the campaign because he is Hoeber's husband.
3 As husband and wife, Hoeber and Epstein presumably had numerous opportunities to discuss
4 Hoeber's campaign while and after Epstein held positions with the campaign, information that
5 Epstein could have passed to Maryland USA.

6 It is reasonable to infer that, outside of any formal association with the campaign, the
7 husband of a political candidate may be more aware of his spouse's campaign's plans, strategies,
8 and needs than individuals with other familial relationships to the candidate. While the
9 Commission has previously considered family relationships and found that the existence of a
10 close family relationship, standing alone, does not satisfy the conduct standard, it has never
11 considered a spousal relationship specifically, and there are important reasons to weigh that
12 relationship differently than a parent-child or sibling relationship, especially when that spouse
13 held an official campaign position.⁶⁵ The unique nature of a spousal relationship creates more
14 opportunities for confidential communications and shared confidences. For this reason, spouses
15 enjoy privileged status within other aspects of the law, such as the spousal communications and
16 testimonial privileges.⁶⁶ In that light, it is reasonable to infer that Epstein and Hoeber discussed
17 Hoeber's campaign and Epstein was aware of the campaign's plans, strategies, and needs after he
18 left his formal positions with the Committee. Notably, in his affidavit, Epstein did not deny
19 communicating with his wife about the Committee or its plans, projects, activities, or needs.⁶⁷

⁶⁵ Compare with F&LA at 4-5, MUR 7067 (Murphy) (finding no reason to believe where the father of a federal candidate and a family owned business contributed \$450,000 and \$300,000, respectively, to an IEOPC that supported the candidate); F&LA at 5-9, MUR 6668 (Chen) (finding no reason to believe where the brother of a federal candidate provided \$765,000 of the \$1,115,000 received by an IEOPC that supported the candidate).

⁶⁶ See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2 FEDERAL EVIDENCE §§ 5:39-:40.

⁶⁷ See generally Joint Hoeber Resp., Aff. of Mark Epstein.

1 Furthermore, it is possible that Epstein, armed with information about the campaign's
2 plans, strategies, and needs, acted as an agent of the Committee by virtue of his relationship with
3 Hoeber even after he resigned his campaign positions. In other contexts, the law recognizes a
4 husband and wife's spousal relationship as a fact supporting the conclusion that one spouse acted
5 as an agent of the other spouse.⁶⁸ That conclusion is bolstered when the husband served his
6 wife's campaign in an official capacity during the months from its organization to announcement
7 of the candidacy, especially if he acted as an agent of the Committee in some regard during that
8 time.

9 Thus, Epstein's spousal relationship to Hoeber magnifies the likelihood that he had
10 access to confidential and material information regarding the campaign's strategies and acted as
11 an agent of the Committee both while Epstein served as Assistant Treasurer and Custodian of
12 Records and later when he was making contributions to Maryland USA as Hoeber's husband.

13 **1. Material Involvement and Substantial Discussion**

14 The record contains evidence and circumstances that, taken together, are sufficient to
15 raise a reasonable inference that Epstein was materially involved with, and/or had substantial
16 discussions with Maryland USA regarding its activity in support of Epstein's wife's candidacy.

17 First, the record contains information that Epstein was in communication with Maryland
18 USA regarding his planned contributions. A magazine reported that it had learned in September
19 2015 that Epstein was expected to be the "major source of funding" for Maryland USA.⁶⁹ That

⁶⁸ See, e.g., 5 WILLISTON ON CONTRACTS § 11:9 (4th ed. July 2019 Update) ("The courts have had repeated occasion to observe that while the marital relationship in and of itself does not give rise to an agency relationship, it is competent evidence to be considered with other circumstances to establish that one spouse was in fact acting as agent for the other."); *id.* ("The general view here... is that the agency of either spouse is a question of fact to be determined by the usual rules relating to principal and agent, except that... because of the marital relation, inferences may be more readily drawn supporting the existence of the agency.").

⁶⁹ Compl. at 4 (quoting Bethesda Beat Article).

1 expectation implies Epstein communicated with Maryland USA regarding its support for his
2 wife's campaign. Moreover, it suggests that they were communicating around September 2015
3 while he was still working for the Committee and was aware of the Committee's plan, strategies,
4 and needs through his official position as Assistant Treasurer and Custodian of Records.
5 Notably, none of the Respondents deny or even address this account, including Epstein.

6 Second, Epstein ultimately contributed \$3,800,000 to Maryland USA: essentially all the
7 money the IEOPC raised and more than the \$3,193,922.32 the IEOPC spent on independent
8 expenditures in support of Hoeber or in opposition of her opponent.⁷⁰ It seems implausible that
9 Epstein would have no material input regarding nearly \$3.2 million in ads his contributions
10 funded, particularly when he was essentially the IEOPC's sole contributor, he served a formal
11 role with the campaign the advertisements supported, had information regarding the campaign's
12 plans, strategies, and needs, and the candidate whose campaign the advertisements supported
13 was his wife.

14 Third, Epstein qualified his denial that he was involved in the content of Maryland
15 USA's communications: he avers that at no point was he "materially" involved in the content; he
16 does not deny *any* involvement.⁷¹ Epstein's blanket denial that his involvement was "material"
17 deprives the Commission of information and context necessary to assess the materiality of his
18 involvement.⁷² And, as explained above, the factual circumstances raise a reasonable inference
19 that he may have been involved in Maryland USA's strategies and communications in support of

⁷⁰ See *supra* notes 2, 6. This fact bolsters the credibility of the magazine reporting of communication between Epstein and Maryland USA: the reported expectation that Epstein would be the major funder of Maryland USA proved true.

⁷¹ Joint Hoeber Resp., Aff. of Mark Epstein ¶ 6.

⁷² Cf. 2003 Coordination E&J at 434.

1 his wife's candidacy, and an investigation would allow the Commission to assess the materiality
2 of his involvement.

3 Fourth, the chronology of Epstein's contributions to Maryland USA and other
4 circumstantial information further support the inference that the material involvement and
5 substantial involvement prongs are satisfied. As described above, the record suggests that
6 Epstein was in communication with Maryland USA around September 2015 regarding his
7 planned financing of the IEOPC's efforts in support of his wife's candidacy.⁷³ This
8 communication occurred in the middle of Epstein's three-month tenure with the Committee,
9 during which time he, the Committee, and Hoeber acknowledged that he was privy to at least
10 some of the Committee's "plans, strategies[,] and needs."⁷⁴

11 The Committee amended its Statement of Organization on October 19, 2015, to reflect
12 that Epstein was no longer serving roles for the Committee.⁷⁵ Less than one week later, Epstein
13 made his first contribution to Maryland USA on October 26, 2015. That first \$300,000
14 contribution was all the money Maryland USA had raised at that time, and the IEOPC used those
15 funds to create advertisements supporting Hoeber.

16 Furthermore, the day after Epstein made his first contribution to Maryland USA—just
17 days after he resigned his positions with the Committee—Maryland USA paid \$13,266.57 to a
18 law firm for legal fees. It seems likely that Maryland USA paid the firm, at least in part, for
19 work it had already performed, especially where Maryland USA's original Statement of

⁷³ See Bethesda Beat Article.

⁷⁴ Joint Hoeber Resp. at 2.

⁷⁵ FEC Form 1, Amended Statement of Organization, Amie Hoeber for Congress (Oct. 19, 2015); Joint Hoeber Resp. at 2.

1 Organization listed the law firm as a contact.⁷⁶ Since the IEOPC paid the firm solely with
2 money from Epstein and the record indicates the parties were in communication in or before
3 September regarding his plans to be the group's major source of funding, it stands to reason that
4 he was aware of and agreed to pay for that work as late as the time of their assumed
5 communications in September 2015.

6 While the record does not provide specific information to link Epstein and Maryland
7 USA's communications and involvement to one particular communication, that showing is not
8 necessary.⁷⁷ Instead, the entirety of the record evidence suggests that Epstein had information
9 regarding the Committee's plans, strategies, and needs, and was materially involved in and/or
10 had substantial discussions with Maryland USA regarding its communications strategy in
11 support of Epstein's wife's candidacy.⁷⁸

12 To rebut the allegations, Respondents rely on Epstein's affidavit, which states that he was
13 not materially involved with the content of Maryland USA's communications, did not have any
14 position or role with the IEOPC, and did not communicate with Maryland USA regarding the
15 Committee's "plans, projects, activities, or needs."⁷⁹ However, these conclusory assertions do
16 not sufficiently rebut the facts suggesting significant connections among Epstein, Hoeber,
17 Maryland USA, and the Committee, which merit further scrutiny.

18 In sum, the record contains information that (1) a candidate's spouse served formal roles
19 with her authorized campaign committee during its first few months; (2) during which time he

⁷⁶ See Maryland USA Statement of Organization at 1 (14:27 July 22, 2015). The IEOPC amended its Statement of Organization later the same day, excluding the law firm email address. See Maryland USA Amended Statement of Organization at 1 (17:01 July 22, 2015).

⁷⁷ See 2003 Coordination E&J at 434.

⁷⁸ See Joint Hoeber Resp. at 2.

⁷⁹ *Id.*, Aff. of Mark Epstein ¶¶ 6-7.

1 was privy to the campaign's plans, strategies, and needs; (3) during which time he reportedly
2 communicated with an IEOPC his plans to be the group's major source of funding; (4) the
3 spouse then made a \$300,000 contribution to the IEOPC within a week of resigning his formal
4 roles with his wife's authorized campaign committee; (5) the \$300,000 contribution was the
5 IEOPC's first contribution; (6) the \$300,000 contribution funded the IEOPC's first
6 communications in support of the candidate and payment of legal fees to a law firm for services
7 rendered during the group's organization period; (7) the spouse ultimately contributed all but
8 \$8,709 out of the total \$3,808,709 the IEOPC raised during the election cycle; (8) the candidate's
9 wife was the only candidate the IEOPC supported during the election cycle; and (9) there are
10 prudential reasons to doubt the only affidavit submitted by Respondents.

11 Taken alone, any of the above facts may be insufficient to satisfy the material
12 involvement or substantial discussion conduct standards to conclude that Respondents
13 impermissibly coordinated. However, taken together, these circumstances support making
14 further inquiries regarding the extent of coordination between Epstein, Hoeber, the Committee,
15 and Maryland USA.⁸⁰ Thus, we recommend that the Commission find reason to believe that
16 Mark Epstein and Maryland USA and Joel Ritter in his official capacity as treasurer violated
17 52 U.S.C. § 30116(a) by making excessive and prohibited in-kind contributions in the form of
18 coordinated communications, and Amie Hoeber and Amie Hoeber for Congress and Chris
19 Marston in his official capacity as treasurer violated 52 U.S.C. § 30116(f) by knowingly
20 accepting excessive and prohibited in-kind contributions in the form of coordinated
21 communications and failing to disclose these contributions.⁸¹

⁸⁰ These facts create a reasonable inference both that Epstein engaged in conduct that would satisfy both the "substantial discussion" and "material involvement" subparts of the conduct prong.

⁸¹ See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007).

1 **2. Common Vendors**

2 The “common vendor” conduct standard is satisfied if all of the following are true:
3 (i) the person paying for the communication employs a commercial vendor⁸² to “create, produce,
4 or distribute” the communication; (ii) the vendor has provided certain delineated services to the
5 recipient of the contribution during the 120 days preceding the communication; and (iii) the
6 vendor conveys non-public information about the campaign’s “plans, projects, activities, or
7 needs,” or services previously provided to the campaign by the vendor, and that information is
8 material to the creation, production, or distribution of the communication.⁸³

9 The available record indicates that Wilson Perkins provided polling services to both
10 Maryland USA and the Committee, while i360 provided data services to those groups.⁸⁴ There
11 is, however, no information that i360 created, produced, or distributed a communication on
12 behalf of Maryland USA or the Committee.⁸⁵ In contrast, if any poll conducted by Wilson
13 Perkins consisted of more than 500 telephone calls, then that poll would be considered a
14 telephone bank, a type of public communication.⁸⁶

15 Despite the possibility that Wilson Perkins made public communications, the record does
16 not raise a sufficient inference that either vendor conveyed non-public information about the
17 Committee to Maryland USA. Wilson Perkins completed its work for Maryland USA about two

⁸² “Commercial vendor” means any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services. 11 C.F.R. § 116.1(c).

⁸³ *Id.* § 109.21(d)(4)(i)-(iii).

⁸⁴ Compl. at 5.

⁸⁵ See F&LA at 14, MUR 6888 (Republican National Committee, *et al.*) (finding that i360 is not involved in “creating, producing, or distributing communications in any way.”).

⁸⁶ See 11 C.F.R. § 100.26 (defining public communication to include a telephone bank); *id.* § 100.28 (defining a telephone bank as more than 500 calls of an identical or substantially similar nature made within a 30-day period); see also F&LA at 4-5, MUR 5835 (DCCC) (finding that a poll involving more than 500 calls constituted a public communication).

1 months before starting work for the Committee, which seems inconsistent with the allegation that
2 it shared the Committee's information with Maryland USA.⁸⁷ The Respondents also assert that
3 both vendors used firewalls to prevent the dissemination of such information.⁸⁸ We therefore do
4 not believe that the available information indicates that the common vendor standard has been
5 satisfied.

6 **IV. PROPOSED INVESTIGATION**

7 We intend to determine the extent of Epstein's involvement with Maryland USA,
8 including communications between the two, and discover other communications that were shared
9 between the Committee and Maryland USA involving Epstein as well as others, regarding the
10 campaign, including communications regarding the Committee's plans, projects, and needs.
11 Although we plan to use informal investigative methods, we recommend that the Commission
12 authorize the use of compulsory process, in the event the parties do not cooperate in providing
13 this information.

14 **V. RECOMMENDATIONS**

- 15
16 1. Find reason to believe that that Maryland USA and Joel Ritter in his official capacity
17 as treasurer violated 52 U.S.C. § 30116(a) in connection with the republication of
18 Amie Hoeber for Congress campaign materials;
19
20 2. Find reason to believe that Amie Hoeber and Amie Hoeber for Congress and Chris
21 Marston in his official capacity as treasurer violated 52 U.S.C. § 30116(f) in
22 connection with coordinated communications with Maryland USA;
23
24 3. Find reason to believe that Mark Epstein and Maryland USA and Joel Ritter in his
25 official capacity as treasurer violated 52 U.S.C. § 30116(a) in connection with Mark
26 Epstein's coordination with Maryland USA;
27
28 4. Approve the attached Factual and Legal Analyses;
29

⁸⁷ See Compl. at 5.

⁸⁸ Maryland USA Resp. at 2; Joint Hoeber Resp. at 7. We note that Respondents did not provide copies of the actual signed firewall agreements.

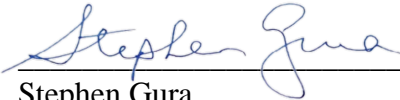
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- 5. Authorize the use of compulsory process, as necessary; and
- 6. Approve the appropriate letters.


Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Acting Associate General Counsel for Enforcement


September 24, 2019
Date



Stephen Gura
Deputy Associate General Counsel for Enforcement



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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Mark Epstein MUR 7139
Amie Hoeber
Amie Hoeber for Congress and Chris Marston in his
official capacity as treasurer

I. INTRODUCTION

The Complaint alleges that Maryland USA, an independent-expenditure-only committee (“IEOPC”) coordinated with Amie Hoeber for Congress, the principal campaign committee for Amie Hoeber’s 2016 congressional campaign (the “Committee”), in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”). The Complaint alleges that coordination occurred because Mark Epstein (“Epstein”), Amie Hoeber’s husband, both served as the Committee’s Assistant Treasurer and Custodian of Records and contributed almost all of Maryland USA’s funds, and because Maryland USA and the Committee used two common vendors. For the reasons stated below, the Commission finds reason to believe that Epstein, Amie Hoeber, and the Committee coordinated with Maryland USA regarding its communications in support of the Committee.

II. FACTUAL BACKGROUND

Maryland USA is an IEOPC that registered with the Commission on July 22, 2015, one week before the Committee.¹ Amie Hoeber (“Hoeber”) was the only candidate that Maryland USA supported during the 2016 election cycle.² On October 26, 2015, one week after he left Hoeber’s campaign, Epstein made a \$300,000 contribution to Maryland USA, and it appears that

¹ FEC Form 1, Statement of Organization, Maryland USA (July 22, 2015); *see* FEC Form 1, Statement of Organization, Amie Hoeber for Congress (July 29, 2015).

² *See* 2015 Year-End Report, Maryland USA (Jan. 28, 2016); Amended Pre-Primary Report, Maryland USA (Aug. 22, 2016); July Quarterly Report, Maryland USA (July 14, 2016); October Quarterly Report, Maryland USA (Oct. 13, 2016); Pre-General Report, Maryland USA (Oct. 27, 2016); Post-General Report, Maryland USA (Dec. 6, 2016); 2016 Year-End Report, Maryland USA (Jan. 26, 2017).

1 Maryland USA made its first public communications during November 2015, which cost
2 \$200,989.43.³ In 2016, Epstein contributed \$3,500,000 more to Maryland USA.⁴ In sum,
3 Epstein contributed \$3,800,000 of the \$3,808,709 Maryland USA raised.⁵ Maryland USA
4 ultimately spent \$3,193,922.32 on independent expenditures that either supported Hoeber or
5 opposed her general election opponent, John Delaney.⁶

6 The Complaint states that on October 15, 2015, the Committee released an online video
7 announcing Hoeber's candidacy (the "Announcement Video").⁷ The three-minute-and-nine-
8 second Announcement Video features Hoeber speaking into the camera while standing in front
9 of a building.⁸ The Complaint alleges that Maryland USA created three videos using footage
10 from the Announcement Video:

- 11 • Declaration 30 HD 2 is a 30-second video that uses 18 seconds of content from the
12 Announcement Video;
- 13 • Declaration 15 HD is a 15-second video that uses 9 seconds of content from the
14 Announcement Video;
- 15 • Stronger America HD 30 1119 is a 30-second video that uses 9 seconds of content
16 from the Announcement Video.⁹

³ See Compl. at 2, 7; 2015 Year-End Report, Maryland USA.

⁴ See 2015 Year-End Report, Maryland USA; 2016 Year-End Report, Maryland USA.

⁵ See *supra* note 2.

⁶ See 2015 Year-End Report, Maryland USA; 2016 Year-End Report, Maryland USA.

⁷ Compl. at 4.

⁸ *Id.*

⁹ *Id.* at 4-5.

1 Maryland USA made three expenditures on November 21, 2015, that appear to be for the
2 production of these videos.¹⁰ The expenditures are described as: “Mobile Advertising
3 (Production, ‘Declaration’ 30);” “Mobile Advertising (Production, ‘Declaration’ 15);” and
4 “Mobile Advertising (Production, ‘Stronger America’ 30).”¹¹ These three expenditures total
5 \$15,515.¹² On November 20, 2015, the day before these three expenditures, Maryland USA
6 made another expenditure for “Mobile Advertising (Placement),” in the amount of
7 \$181,199.43.¹³ These expenditures were the first independent expenditures by Maryland USA;
8 its next independent expenditure was on December 4, 2015.¹⁴

9 The Complaint alleges that Epstein, while an agent of the Committee, must have
10 communicated with Maryland USA to learn that it was going to support Hoeber, and Epstein told
11 the IEOPC that he was going to fund its communications.¹⁵ The Complaint alleges that the
12 available information “strongly suggests” that Maryland USA’s public communications resulted
13 from substantial discussions between it, the Committee, and their agents, or that Hoeber, her

¹⁰ See 2015 Year-End Report, Maryland USA at 12-14.

¹¹ *Id.*

¹² *Id.* A fourth expenditure, for “Mobile Advertising (Production, ‘Stronger America’ 15),” was also reported on November 21, 2015, for \$4,275, but does not appear to contain any content from Hoeber’s Announcement Video. *Id.*

¹³ *Id.*

¹⁴ *Id.* Maryland USA disclosed a \$6,125.00 independent expenditure on December 4, 2015, for “Cable Advertising (Production Cost).” *Id.* Its next independent expenditure was \$147,840.00 on January 19, 2016, for “Cable Advertising (Placement Cost),” after Epstein’s second contribution to the IEOPC, \$400,000 on January 4, 2016. See 2015 Year-End Report, Maryland USA at 14; 2016 Pre-Primary Report, Maryland USA at 14.

¹⁵ Compl. at 5-7.

1 campaign, or her agents were materially involved in decisions leading to the communications.¹⁶
2 In support, the Complaint cites a November 30, 2015, article from *Bethesda Magazine*, which
3 states that “sources told Bethesda Beat in early September that the major source of funding for
4 Maryland USA is expected to be Hoeber’s husband, Mark Epstein. . . .”¹⁷

5 The Complaint also alleges that the Committee and Maryland USA each used two
6 common vendors: Wilson Perkins Allen Opinion Research (“Wilson Perkins”) and i360 LLC
7 (“i360”).¹⁸ Specifically, Maryland USA spent a combined \$28,300 for polling services from
8 Wilson Perkins in November and December of 2015, and the Committee spent \$25,200 on
9 February 14, 2016, for public opinion research from Wilson Perkins.¹⁹ The Committee also paid
10 i360 \$2,144.59 for voter telephone contacts in March 2016, and Maryland USA paid i360 \$2,500
11 for database services on April 1, 2016.²⁰ The Complaint alleges that use of these common
12 vendors shows coordination between Maryland USA and the Committee.²¹

13 The Committee, Hoeber, and Epstein filed a joint response denying any violations of the
14 Act (the “Joint Hoeber Response”).²² The Joint Hoeber Response states that the three videos

¹⁶ *Id.* at 6-7. The allegation regarding Epstein’s contributions does not rely on any specific communication, but instead relies on all of Maryland USA’s communications in support of Hoeber. The Commission considered all of these communications, not just the three videos that relate to the Announcement Video, which are the only communications that are specifically mentioned in the Complaint.

¹⁷ *Id.* at 4 (quoting Louis Peck, *Super PAC Spends \$200,000 to Boost Candidate in Crowded Dist. 6 GOP Contest*, BETHESDA BEAT (Nov. 30, 2015) [hereinafter Bethesda Beat Article], <http://www.bethesdamagazine.com/Bethesda-Beat/2015/Super-PAC-Spends-200000-to-Boost-Candidate-In-Crowded-Dist-6-GOP-Contest/>).

¹⁸ *Id.* at 5.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 7-8.

²² Resp. of Amie Hoeber for Congress, Amie Hoeber, and Mark Epstein (Nov. 15, 2016) (“Joint Hoeber Resp.”).

1 republishing Hoeber’s campaign materials were “uploaded and disseminated for free solely on
2 the Internet,” thus, the videos are not considered contributions or expenditures under the
3 Commission regulations.²³ The Joint Hoeber Response further asserts that the Complaint’s
4 allegations are speculative, Epstein was not an agent of the Committee, he was not materially
5 involved in any decisions regarding Maryland USA’s spending or independent expenditures, and
6 he did not relay any information regarding the Committee’s plans, strategies, and needs to
7 Maryland USA.²⁴ The Joint Hoeber Response includes an affidavit from Epstein in support of
8 these assertions.²⁵ It also argues that Epstein had a constitutional right to contribute to Maryland
9 USA, and the fact a spouse may have been privy to non-public information about the candidate’s
10 plans, projects, activities, or needs is insufficient, by itself, to prove coordination.²⁶ Finally, the
11 Joint Hoeber Response states that Wilson Perkins used a firewall to prevent the flow of
12 information between Maryland USA and the Committee.²⁷

13 III. LEGAL ANALYSIS

14 The Act prohibits any person from making, and any candidate or committee from
15 knowingly accepting, contributions in excess of the limits stated in 52 U.S.C. § 30116.²⁸ In the

²³ *Id.* at 8.

²⁴ *Id.* at 2.

²⁵ *Id.*, Aff. of Mark Epstein ¶¶ 5-7.

²⁶ Joint Hoeber Resp. at 5-6.

²⁷ *Id.* at 7. The Joint Hoeber Response does not address whether i360 used a firewall because it argues that prior Commission precedent regarding i360 negates the coordination allegations regarding that vendor. *See id.* at 7 (citing MUR 6888 (Republican National Committee)). The Commission possesses information that i360 used a firewall.

²⁸ 52 U.S.C. § 30116(a), (f).

1 2016 cycle, an individual was permitted to contribute up to \$2,700 to a candidate per election.²⁹
2 In addition, IEOPCs are prohibited from making contributions to federal candidates,³⁰ and
3 candidates and their authorized committees are prohibited from accepting contributions not
4 subject to the limits and prohibitions of the Act.³¹

5 Under the Act, “coordinated” means made in cooperation, consultation or concert with,
6 or at the request or suggestion of, a candidate, a candidate’s authorized committee, or a political
7 party committee.³² For purposes of this definition, any reference to a candidate, a candidate’s
8 authorized committee, or a political party committee includes an agent thereof.³³ Any
9 expenditure that is coordinated is an in-kind contribution to the candidate or committee with
10 which it is coordinated.³⁴ Under the Commission’s regulations, an expenditure for a
11 communication is coordinated when the communication:

²⁹ *Id.* § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1). Epstein contributed \$2,700 to Hoeber’s primary election campaign; the Committee did not disclose the receipt of a contribution from Epstein for the general election. *See* 2015 October Quarterly Report at 12, Amie Hoeber for Congress (Oct. 15, 2015).

³⁰ *See* 52 U.S.C. § 30116(a) (prohibition on excessive contributions); *id.* § 30118(a) (prohibition on corporate contributions); Advisory Op. 2010-11 (Commonsense Ten).

³¹ *See* 52 U.S.C. § 30125(e)(1).

³² *See id.* § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20(a).

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

³⁴ *See* 52 U.S.C. § 30116(a)(7)(B)(i)-(ii); *see also* 11 C.F.R. §§ 109.20, 109.21(b).

1 (1) Is paid for, in whole or in part, by a person other than that candidate, authorized
2 committee, or political party committee;

3
4 (2) Satisfies at least one of the content standards³⁵ in paragraph (c) of [§ 109.21]; and

5
6 (3) Satisfies at least one of the conduct standards in paragraph (d) of [§ 109.21].³⁶

7 The conduct standard is satisfied when, among other things, a candidate or her authorized
8 committee is materially involved in decisions regarding a communication or a communication is
9 made after substantial discussion about the communication with a candidate or her authorized
10 committee.³⁷ A candidate is “materially involved” in decisions if she conveys approval or
11 disapproval of the third party payor’s plans.³⁸ It is not necessary that the involvement of the
12 candidate be traced directly to one specific communication.³⁹ Rather, a candidate’s involvement
13 is material to a decision regarding a particular communication if that communication is one of a
14 number of communications, and the candidate was materially involved in decisions regarding the

³⁵ The content standard is satisfied if the communication at issue meets at least one of the following content standards: (1) a communication that is an electioneering communication under 11 C.F.R. § 100.29; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate’s authorized committee; (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for federal office; (4) a public communication, in relevant part, that refers to a clearly identified House or Senate candidate, and is publicly distributed or disseminated in the clearly identified candidate’s jurisdiction 90 days or fewer before the candidate’s primary election; or (5) a public communication that is the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c)(1)-(5).

³⁶ *Id.* § 109.21(a). The six types of conduct that satisfy the conduct standard are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; (5) former employee; and (6) republication. *Id.* § 109.21(d)(1)-(6).

³⁷ *Id.* § 109.21(d)(2), (3). Material involvement occurs when a candidate, authorized committee, or political party committee is materially involved in decisions regarding: (i) the content of the communication; (ii) the intended audience for the communication; (iii) the means or mode of the communication; (iv) the specific media outlet used for the communication; (v) the timing or frequency of the communication; or (vi) the size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite. *Id.* § 109.21(d)(2).

³⁸ *See* Explanation and Justification, Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 434 (Jan. 3, 2003) [hereinafter 2003 Coordination E&J].

³⁹ *See id.*

1 strategy for those communications.⁴⁰ A discussion is “substantial” if information about the
2 plans, projects, or needs of the candidate is conveyed to a person paying for the communication
3 and that information is material to the creation, production, or distribution of the
4 communication.⁴¹ A determination of whether a communication was made with material
5 involvement or after substantial discussion with a candidate or campaign is necessarily a fact-
6 based determination.⁴² Under the Commission’s regulations, any person who has actual
7 authority, either express or implied, to engage in activities on behalf of a Federal candidate that
8 would satisfy the conduct standard of § 109.21’s coordination test is considered an agent of that
9 candidate.⁴³

10 The available record demonstrates that Maryland USA paid for public communications
11 that expressly advocated in support of Hoeber’s candidacy; thus, the payment and content prongs
12 of the coordinated communication test are satisfied.⁴⁴ Regarding the conduct prong, the
13 available information supports a reasonable inference that Epstein, as an agent of the Hoeber

⁴⁰ *Id.* For example, if a candidate is materially involved in a decision about the content or timing of a 10-part advertising campaign, then each of the 10 communications is coordinated without the need for further inquiry into the decisions regarding each individual advertisement on its own. *Id.*

⁴¹ *Id.*

⁴² *Id.* at 433.

⁴³ See 11 C.F.R. 109.3(b) (defining “agent”); see also 2003 Coordination E&J at 423-24.

⁴⁴ See *supra* notes 2, 6. The Joint Hoeber Response states that the first two prongs of the coordination test are “not at issue.” See Joint Hoeber Resp. at 4. It appears that the four videos discussed in Section II, *supra*, are among the communications that satisfy the content standard: they expressly advocate the election of Hoeber, see 11 C.F.R. § 100.22(a), and Maryland USA’s \$181,199 expenditure apparently for the placement of these videos qualifies them as public communications, see 11 C.F.R. § 100.26 (communications placed for a fee on another person’s Web site). More broadly, Maryland USA disclosed almost \$3.2 million in independent expenditures in support of Hoeber, indicating express advocacy communications.

1 campaign, shared information between the Committee and Maryland USA that would satisfy the
2 material involvement or substantial discussion elements.

3 The facts indicate that Epstein was an agent of the Committee in some capacity. He was
4 the Committee’s Assistant Treasurer and Custodian of Records from the Committee’s inception,
5 he served nearly three months, and he resigned from the Committee four days after Hoeber
6 formally announced her candidacy via the Announcement Video on October 15, 2015.⁴⁵ Epstein
7 admits that during that service he was privy to at least some of the campaign’s plans, strategies,
8 and needs.⁴⁶ These factors create a reasonable inference that Epstein may have been an agent of
9 the Committee authorized to engage in conduct that could satisfy § 109.21(d) during the three
10 months he served a formal position with the campaign.

11 Epstein avers that his role with the Committee was “solely administrative,” and that “at
12 no point in time did [he] act as an agent of the Amie Hoeber for Congress committee regarding
13 the [Committee’s] plans, projects or needs.”⁴⁷ Notably, neither Hoeber nor any other
14 representative of the Committee provides an affidavit corroborating Epstein’s claim that he was
15 not an agent of the Committee regarding the Committee’s plans, projects, or needs and Epstein,
16 Hoeber, or any other representative have never denied that he acted as an agent of the Committee
17 in other respects.⁴⁸ These conclusory assertions, moreover, do not sufficiently rebut the facts

⁴⁵ Epstein served as Assistant Treasurer and Custodian of Records from July 29, 2015, until October 19, 2015. *See* FEC Form 1, Statement of Organization, Amie Hoeber for Congress (July 29, 2015); FEC Form 1, Amended Statement of Organization, Amie Hoeber for Congress (Oct. 19, 2015).

⁴⁶ *See* Joint Hoeber Resp. at 2.

⁴⁷ *Id.*, Aff. of Mark Epstein ¶ 2; *see also* Joint Hoeber Resp. at 6 (describing the roles as serving an “administrative function”).

⁴⁸ *See* 11 C.F.R. 109.3(b) (defining “agent”); *see also* 2003 Coordination E&J at 423-24.

1 suggesting Epstein’s involvement with the Hoeber Committee was significant, nor do they rebut
2 the possibility of implied actual authority derived from his role as the candidate’s spouse.

3 The available information also suggests that Epstein may have been an agent of the
4 Committee after he left his formal positions with the campaign because he is Hoeber’s husband.
5 As husband and wife, Hoeber and Epstein presumably had numerous opportunities to discuss
6 Hoeber’s campaign while and after Epstein held positions with the campaign, information that
7 Epstein could have passed to Maryland USA.

8 It is reasonable to infer that, outside of any formal association with the campaign, the
9 husband of a political candidate may be more aware of his spouse’s campaign’s plans, strategies,
10 and needs than individuals with other familial relationships to the candidate. While the
11 Commission has previously considered family relationships and found that the existence of a
12 close family relationship, standing alone, does not satisfy the conduct standard, it has never
13 considered a spousal relationship specifically, and there are important reasons to weigh that
14 relationship differently than a parent-child or sibling relationship, especially when that spouse
15 held an official campaign position.⁴⁹ The unique nature of a spousal relationship creates more
16 opportunities for confidential communications and shared confidences. For this reason, spouses
17 enjoy privileged status within other aspects of the law, such as the spousal communications and
18 testimonial privileges.⁵⁰ In that light, it is reasonable to infer that Epstein and Hoeber discussed
19 Hoeber’s campaign and Epstein was aware of the campaign’s plans, strategies, and needs after he

⁴⁹ Compare with F&LA at 4-5, MUR 7067 (Murphy) (finding no reason to believe where the father of a federal candidate and a family owned business contributed \$450,000 and \$300,000, respectively, to an IEOPC that supported the candidate); F&LA at 5-9, MUR 6668 (Chen) (finding no reason to believe where the brother of a federal candidate provided \$765,000 of the \$1,115,000 received by an IEOPC that supported the candidate).

⁵⁰ See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2 FEDERAL EVIDENCE §§ 5:39-:40.

1 left his formal positions with the Committee. Notably, in his affidavit, Epstein did not deny
2 communicating with his wife about the Committee or its plans, projects, activities, or needs.⁵¹

3 Furthermore, it is possible that Epstein, armed with information about the campaign’s
4 plans, strategies, and needs, acted as an agent of the Committee by virtue of his relationship with
5 Hoeber even after he resigned his campaign positions. In other contexts, the law recognizes a
6 husband and wife’s spousal relationship as a fact supporting the conclusion that one spouse acted
7 as an agent of the other spouse.⁵² That conclusion is bolstered when the husband served his
8 wife’s campaign in an official capacity during the months from its organization to announcement
9 of the candidacy, especially if he acted as an agent of the Committee in some regard during that
10 time.

11 Thus, Epstein’s spousal relationship to Hoeber magnifies the likelihood that he had
12 access to confidential and material information regarding the campaign’s strategies and acted as
13 an agent of the Committee both while Epstein served as Assistant Treasurer and Custodian of
14 Records and later when he was making contributions to Maryland USA as Hoeber’s husband.

15 **A. Material Involvement and Substantial Discussion**

16 The record contains evidence and circumstances that, taken together, are sufficient to
17 raise a reasonable inference that Epstein was materially involved with, and/or had substantial
18 discussions with Maryland USA regarding its activity in support of Epstein’s wife’s candidacy.

⁵¹ See generally Joint Hoeber Resp., Aff. of Mark Epstein.

⁵² See, e.g., 5 WILLISTON ON CONTRACTS § 11:9 (4th ed. July 2019 Update) (“The courts have had repeated occasion to observe that while the marital relationship in and of itself does not give rise to an agency relationship, it is competent evidence to be considered with other circumstances to establish that one spouse was in fact acting as agent for the other.”); *id.* (“The general view here... is that the agency of either spouse is a question of fact to be determined by the usual rules relating to principal and agent, except that... because of the marital relation, inferences may be more readily drawn supporting the existence of the agency.”).

1 First, the record contains information that Epstein was in communication with Maryland
2 USA regarding his planned contributions. A magazine reported that it had learned in September
3 2015 that Epstein was expected to be the “major source of funding” for Maryland USA.⁵³ That
4 expectation implies Epstein communicated with Maryland USA regarding its support for his
5 wife’s campaign. Moreover, it suggests that they were communicating around September 2015
6 while he was still working for the Committee and was aware of the Committee’s plan, strategies,
7 and needs through his official position as Assistant Treasurer and Custodian of Records.
8 Notably, Respondents do not deny or even address this account.

9 Second, Epstein ultimately contributed \$3,800,000 to Maryland USA: essentially all the
10 money the IEOPC raised and more than the \$3,193,922.32 the IEOPC spent on independent
11 expenditures in support of Hoeber or in opposition of her opponent.⁵⁴ It seems implausible that
12 Epstein would have no material input regarding nearly \$3.2 million in ads his contributions
13 funded, particularly when he was essentially the IEOPC’s sole contributor, he served a formal
14 role with the campaign the advertisements supported, had information regarding the campaign’s
15 plans, strategies, and needs, and the candidate whose campaign the advertisements supported
16 was his wife.

17 Third, Epstein qualified his denial that he was involved in the content of Maryland
18 USA’s communications: he avers that at no point was he “materially” involved in the content; he
19 does not deny *any* involvement.⁵⁵ Epstein’s blanket denial that his involvement was “material”

⁵³ Compl. at 4 (quoting Bethesda Beat Article).

⁵⁴ *See supra* notes 2, 6. This fact bolsters the credibility of the magazine reporting of communication between Epstein and Maryland USA: the reported expectation that Epstein would be the major funder of Maryland USA proved true.

⁵⁵ Joint Hoeber Resp., Aff. of Mark Epstein ¶ 6.

1 deprives the Commission of information and context necessary to assess the materiality of his
2 involvement.⁵⁶ And, as explained above, the factual circumstances raise a reasonable inference
3 that he may have been involved in Maryland USA’s strategies and communications in support of
4 his wife’s candidacy.

5 Fourth, the chronology of Epstein’s contributions to Maryland USA and other
6 circumstantial information further support the inference that the material involvement and
7 substantial involvement prongs are satisfied. As described above, the record suggests that
8 Epstein was in communication with Maryland USA around September 2015 regarding his
9 planned financing of the IEOPC’s efforts in support of his wife’s candidacy.⁵⁷ This
10 communication occurred in the middle of Epstein’s three-month tenure with the Committee,
11 during which time he, the Committee, and Hoeber acknowledged that he was privy to at least
12 some of the Committee’s “plans, strategies[,] and needs.”⁵⁸

13 The Committee amended its Statement of Organization on October 19, 2015, to reflect
14 that Epstein was no longer serving roles for the Committee.⁵⁹ Less than one week later, Epstein
15 made his first contribution to Maryland USA on October 26, 2015. That first \$300,000
16 contribution was all the money Maryland USA had raised at that time, and the IEOPC used those
17 funds to create advertisements supporting Hoeber.

18 Furthermore, the day after Epstein made his first contribution to Maryland USA—just
19 days after he resigned his positions with the Committee—Maryland USA paid \$13,266.57 to a

⁵⁶ *Cf.* 2003 Coordination E&J at 434.

⁵⁷ *See* Bethesda Beat Article.

⁵⁸ Joint Hoeber Resp. at 2.

⁵⁹ FEC Form 1, Amended Statement of Organization, Amie Hoeber for Congress (Oct. 19, 2015); Joint Hoeber Resp. at 2.

1 law firm for legal fees. It seems likely that Maryland USA paid the firm, at least in part, for
2 work it had already performed, especially where Maryland USA's original Statement of
3 Organization listed the law firm as a contact.⁶⁰ Since the IEOPC paid the firm solely with
4 money from Epstein and the record indicates the parties were in communication in or before
5 September regarding his plans to be the group's major source of funding, it stands to reason that
6 he was aware of and agreed to pay for that work as late as the time of their assumed
7 communications in September 2015.

8 While the record does not provide specific information to link Epstein and Maryland
9 USA's communications and involvement to one particular communication, that showing is not
10 necessary.⁶¹ Instead, the entirety of the record evidence suggests that Epstein had information
11 regarding the Committee's plans, strategies, and needs, and was materially involved in and/or
12 had substantial discussions with Maryland USA regarding its communications strategy in
13 support of Epstein's wife's candidacy.⁶²

14 To rebut the allegations, Respondents rely on Epstein's affidavit, which states that he was
15 not materially involved with the content of Maryland USA's communications, did not have any
16 position or role with the IEOPC, and did not communicate with Maryland USA regarding the
17 Committee's "plans, projects, activities, or needs."⁶³ However, these conclusory assertions do

⁶⁰ See Maryland USA Statement of Organization at 1 (14:27 July 22, 2015). The IEOPC amended its Statement of Organization later the same day, excluding the law firm email address. See Maryland USA Amended Statement of Organization at 1 (17:01 July 22, 2015).

⁶¹ See 2003 Coordination E&J at 434.

⁶² See Joint Hoeber Resp. at 2.

⁶³ *Id.*, Aff. of Mark Epstein ¶¶ 6-7.

1 not sufficiently rebut the facts suggesting significant connections among Epstein, Hoeber,
2 Maryland USA, and the Committee.

3 In sum, the record contains information that (1) a candidate's spouse served formal roles
4 with her authorized campaign committee during its first few months; (2) during which time he
5 was privy to the campaign's plans, strategies, and needs; (3) during which time he reportedly
6 communicated with an IEOPC his plans to be the group's major source of funding; (4) the
7 spouse then made a \$300,000 contribution to the IEOPC within a week of resigning his formal
8 roles with his wife's authorized campaign committee; (5) the \$300,000 contribution was the
9 IEOPC's first contribution; (6) the \$300,000 contribution funded the IEOPC's first
10 communications in support of the candidate and payment of legal fees to a law firm for services
11 rendered during the group's organization period; (7) the spouse ultimately contributed all but
12 \$8,709 out of the total \$3,808,709 the IEOPC raised during the election cycle; (8) the candidate's
13 wife was the only candidate the IEOPC supported during the election cycle; and (9) there are
14 prudential reasons to doubt the only affidavit submitted by the Respondents.

15 Taken together, the circumstances support a conclusion that Epstein, the Committee, and
16 Maryland USA impermissibly coordinated.⁶⁴ Thus, the Commission finds reason to believe that
17 Mark Epstein violated 52 U.S.C. § 30116(a) by making excessive and prohibited in-kind
18 contributions in the form of coordinated communications, and Amie Hoeber and Amie Hoeber
19 for Congress and Chris Marston in his official capacity as treasurer violated 52 U.S.C. § 30116(f)

⁶⁴ These facts create a reasonable inference both that Epstein, the Committee, and Maryland USA engaged in conduct that would satisfy both the "substantial discussion" and "material involvement" subparts of the conduct prong.

1 by knowingly accepting excessive and prohibited in-kind contributions in the form of
2 coordinated communications and failing to disclose these contributions.⁶⁵

3 **B. Common Vendors**

4 The “common vendor” conduct standard is satisfied if all of the following are true:

5 (i) the person paying for the communication employs a commercial vendor⁶⁶ to “create, produce,
6 or distribute” the communication; (ii) the vendor has provided certain delineated services to the
7 recipient of the contribution during the 120 days preceding the communication; and (iii) the
8 vendor conveys non-public information about the campaign’s “plans, projects, activities, or
9 needs,” or services previously provided to the campaign by the vendor, and that information is
10 material to the creation, production, or distribution of the communication.⁶⁷

11 The available record indicates that Wilson Perkins provided polling services to both
12 Maryland USA and the Committee, while i360 provided data services to those groups.⁶⁸ There
13 is, however, no information that i360 created, produced, or distributed a communication on
14 behalf of Maryland USA or the Committee.⁶⁹ In contrast, if any poll conducted by Wilson
15 Perkins consisted of more than 500 telephone calls, then that poll would be considered a

⁶⁵ See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007).

⁶⁶ “Commercial vendor” means any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services. 11 C.F.R. § 116.1(c).

⁶⁷ *Id.* § 109.21(d)(4)(i)-(iii).

⁶⁸ Compl. at 5.

⁶⁹ See F&LA at 14, MUR 6888 (Republican National Committee, *et al.*) (finding that i360 is not involved in “creating, producing, or distributing communications in any way.”).

1 telephone bank, a type of public communication.⁷⁰

2 Despite the possibility that Wilson Perkins made public communications, the record does
3 not raise a sufficient inference that either vendor conveyed non-public information about the
4 Committee to Maryland USA. Wilson Perkins completed its work for Maryland USA about two
5 months before starting work for the Committee, which seems inconsistent with the allegation that
6 it shared the Committee's information with Maryland USA.⁷¹ The Respondents also assert that
7 Wilson Perkins used a firewall to prevent the dissemination of such information.⁷² Therefore,
8 the available information does not indicate that the common vendor standard has been satisfied.

⁷⁰ See 11 C.F.R. § 100.26 (defining public communication to include a telephone bank); *id.* § 100.28 (defining a telephone bank as more than 500 calls of an identical or substantially similar nature made within a 30-day period); *see also* F&LA at 4-5, MUR 5835 (DCCC) (finding that a poll involving more than 500 calls constituted a public communication).

⁷¹ See Compl. at 5.

⁷² Joint Hoeber Resp. at 7; *see supra* note 27. Respondents did not provide copies of the actual signed firewall agreement.

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FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Maryland USA and Joel Ritter in his
official capacity as treasurer

MUR 7139

I. INTRODUCTION

The Complaint alleges that Maryland USA, an independent-expenditure-only committee (“IEOPC”), republished campaign materials from, and coordinated with, Amie Hoeber for Congress, the principal campaign committee for Amie Hoeber’s 2016 congressional campaign (the “Committee”), in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”). The Complaint alleges that coordination occurred because Mark Epstein (“Epstein”), Amie Hoeber’s husband, both served as the Committee’s Assistant Treasurer and Custodian of Records and contributed almost all of Maryland USA’s funds, and because Maryland USA and the Committee used two common vendors. For the reasons stated below, the Commission finds reason to believe that Maryland USA impermissibly republished the Committee’s campaign materials and coordinated its communications with the Committee.

II. FACTUAL BACKGROUND

Maryland USA is an IEOPC that registered with the Commission on July 22, 2015, one week before the Committee.¹ Amie Hoeber (“Hoeber”) was the only candidate that Maryland USA supported during the 2016 election cycle.² On October 26, 2015, one week after he left Hoeber’s campaign, Epstein made a \$300,000 contribution to Maryland USA, and it appears that Maryland USA made its first public communications during November 2015, which cost

¹ FEC Form 1, Statement of Organization, Maryland USA (July 22, 2015); *see* FEC Form 1, Statement of Organization, Amie Hoeber for Congress (July 29, 2015).

² *See* 2015 Year-End Report, Maryland USA (Jan. 28, 2016); Amended Pre-Primary Report, Maryland USA (Aug. 22, 2016); July Quarterly Report, Maryland USA (July 14, 2016); October Quarterly Report, Maryland USA (Oct. 13, 2016); Pre-General Report, Maryland USA (Oct. 27, 2016); Post-General Report, Maryland USA (Dec. 6, 2016); 2016 Year-End Report, Maryland USA (Jan. 26, 2017).

1 \$200,989.43.³ In 2016, Epstein contributed \$3,500,000 more to Maryland USA.⁴ In sum,
2 Epstein contributed \$3,800,000 of the \$3,808,709 Maryland USA raised.⁵ Maryland USA
3 ultimately spent \$3,193,922.32 on independent expenditures that either supported Hoeber or
4 opposed her general election opponent, John Delaney.⁶

5 The Complaint alleges Respondent violated the Act in three ways. First, it alleges that
6 Maryland USA republished the Committee’s campaign materials.⁷ The Complaint states that on
7 October 15, 2015, the Committee released an online video announcing Hoeber’s candidacy (the
8 “Announcement Video”).⁸ The three-minute-and-nine-second Announcement Video features
9 Hoeber speaking into the camera while standing in front of a building.⁹ The Complaint alleges
10 that Maryland USA created three videos using footage from the Announcement Video:

- 11 • Declaration 30 HD 2 is a 30-second video that uses 18 seconds of content from the
12 Announcement Video;
- 13
- 14 • Declaration 15 HD is a 15-second video that uses 9 seconds of content from the
15 Announcement Video;
- 16
- 17 • Stronger America HD 30 1119 is a 30-second video that uses 9 seconds of content
18 from the Announcement Video.¹⁰

³ See Compl. at 2, 7; 2015 Year-End Report, Maryland USA.

⁴ See 2015 Year-End Report, Maryland USA; 2016 Year-End Report, Maryland USA.

⁵ See *supra* note 2.

⁶ See 2015 Year-End Report, Maryland USA; 2016 Year-End Report, Maryland USA.

⁷ Compl. at 4-5.

⁸ *Id.* at 4.

⁹ *Id.*

¹⁰ *Id.* at 4-5.

1 Maryland USA made three expenditures on November 21, 2015, that appear to be for the
2 production of these videos.¹¹ The expenditures are described as: “Mobile Advertising
3 (Production, ‘Declaration’ 30);” “Mobile Advertising (Production, ‘Declaration’ 15);” and
4 “Mobile Advertising (Production, ‘Stronger America’ 30).”¹² These three expenditures total
5 \$15,515.¹³ On November 20, 2015, the day before these three expenditures, Maryland USA
6 made another expenditure for “Mobile Advertising (Placement),” in the amount of
7 \$181,199.43.¹⁴ These expenditures were the first independent expenditures by Maryland USA;
8 its next independent expenditure was on December 4, 2015.¹⁵

9 Next, the Complaint alleges that Epstein, while an agent of the Committee, must have
10 communicated with Maryland USA to learn that it was going to support Hoeber, and Epstein told
11 the IEOPC that he was going to fund its communications.¹⁶ The Complaint alleges that the
12 available information “strongly suggests” that Maryland USA’s public communications resulted
13 from substantial discussions between it, the Committee, and their agents, or that Hoeber, her

¹¹ See 2015 Year-End Report, Maryland USA at 12-14.

¹² *Id.*

¹³ *Id.* A fourth expenditure, for “Mobile Advertising (Production, ‘Stronger America’ 15),” was also reported on November 21, 2015, for \$4,275, but does not appear to contain any content from Hoeber’s Announcement Video. *Id.*

¹⁴ *Id.*

¹⁵ *Id.* Maryland USA disclosed a \$6,125.00 independent expenditure on December 4, 2015, for “Cable Advertising (Production Cost).” *Id.* Its next independent expenditure was \$147,840.00 on January 19, 2016, for “Cable Advertising (Placement Cost),” after Epstein’s second contribution to the IEOPC, \$400,000 on January 4, 2016. See 2015 Year-End Report, Maryland USA at 14; 2016 Pre-Primary Report, Maryland USA at 14.

¹⁶ Compl. at 5-7.

1 campaign, or her agents were materially involved in decisions leading to the communications.¹⁷
2 In support, the Complaint cites a November 30, 2015, article from *Bethesda Magazine*, which
3 states that “sources told Bethesda Beat in early September that the major source of funding for
4 Maryland USA is expected to be Hoeber’s husband, Mark Epstein. . . .”¹⁸

5 The Complaint’s final allegation is that Maryland USA and the Committee each used two
6 common vendors: Wilson Perkins Allen Opinion Research (“Wilson Perkins”) and i360 LLC
7 (“i360”).¹⁹ Specifically, Maryland USA spent a combined \$28,300 for polling services from
8 Wilson Perkins in November and December of 2015, and the Committee spent \$25,200 on
9 February 14, 2016, for public opinion research from Wilson Perkins.²⁰ The Committee also paid
10 i360 \$2,144.59 for voter telephone contacts in March 2016, and Maryland USA paid i360 \$2,500
11 for database services on April 1, 2016.²¹ The Complaint alleges that use of these common
12 vendors shows coordination between Maryland USA and the Committee.²²

13 Maryland USA submitted a response that denies any violations of the Act.²³ Maryland
14 USA’s response asserts that the three videos contain only brief snippets from the Announcement

¹⁷ *Id.* at 6-7. The allegation regarding Epstein’s contributions does not rely on any specific communication, but instead relies on all of Maryland USA’s communications in support of Hoeber. The Commission considered all of these communications, not just the three videos that relate to the Announcement Video, which are the only communications that are specifically mentioned in the Complaint.

¹⁸ *Id.* at 4 (quoting Louis Peck, *Super PAC Spends \$200,000 to Boost Candidate in Crowded Dist. 6 GOP Contest*, BETHESDA BEAT (Nov. 30, 2015) [hereinafter Bethesda Beat Article], <http://www.bethesdamagazine.com/Bethesda-Beat/2015/Super-PAC-Spends-200000-to-Boost-Candidate-In-Crowded-Dist-6-GOP-Contest/>).

¹⁹ *Id.* at 5.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 7-8.

²³ Maryland USA Resp. (Nov. 16, 2016).

1 Video, and therefore are exempted from the republication regulation.²⁴ It also states that both
2 Wilson Perkins and i360 used firewalls to prevent the flow of information between Maryland
3 USA and the Committee.²⁵

4 **III. LEGAL ANALYSIS**

5 The Act prohibits any person from making, and any candidate or committee from
6 knowingly accepting, contributions in excess of the limits stated in 52 U.S.C. § 30116.²⁶ In the
7 2016 cycle, an individual was permitted to contribute up to \$2,700 to a candidate per election.²⁷
8 In addition, IEOPCs are prohibited from making contributions to federal candidates.²⁸

9 **A. Republication of Campaign Materials**

10 The Act provides that the “financing by any person of the dissemination, distribution, or
11 republication, in whole or *in part*, of any broadcast or any written, graphic, or other form of
12 campaign materials prepared by the candidate, his campaign committees, or their authorized
13 agents shall be considered to be an expenditure.”²⁹ The republication of campaign materials
14 prepared by a candidate’s authorized committee is an in-kind contribution, because the person

²⁴ *Id.* at 4; *see* 11 C.F.R. § 109.23(b)(4).

²⁵ Maryland USA Resp. at 2. Maryland USA states that it possesses each vendor’s firewall policy and can make them available to the Commission. *Id.*

²⁶ 52 U.S.C. § 30116(a), (f).

²⁷ 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1). Epstein contributed \$2,700 to Hoeber’s primary election campaign; the Committee did not disclose the receipt of a contribution from Epstein for the general election. *See* 2015 October Quarterly Report at 12, Amie Hoeber for Congress (Oct. 15, 2015).

²⁸ *See* 52 U.S.C. § 30116(a) (prohibition on excessive contributions); *id.* § 30118(a) (prohibition on corporate contributions); Advisory Op. 2010-11 (Commonsense Ten).

²⁹ 52 U.S.C. § 30116(a)(7)(B)(iii) (emphasis added); *see also* 11 C.F.R. § 109.23(a). For republication, the Commission has concluded that “campaign materials” include any material belonging to or emanating from a campaign. *See, e.g.*, MUR 5743 (Betty Sutton) (candidate photo obtained from campaign website); MUR 5672 (Save American Jobs) (video produced and used by candidate’s campaign subsequently hosted on association’s website).

1 financing the republication “has provided something of value to the candidate [or] authorized
2 committee.”³⁰ Thus, an IEOPC’s republication of a Committee’s campaign materials is
3 prohibited.³¹ The Commission has stated that “Congress has addressed republication of
4 campaign materials through [52 U.S.C. § 30116(a)(7)(B)(iii)] in a context where the
5 candidate/author generally views republication of his or her campaign material, *even in part*, as a
6 benefit” and “can be reasonably construed only as for the purpose of influencing an election.”³²
7 The candidate who prepared the campaign material does not receive or accept an in-kind
8 contribution, and is not required to report an expenditure, unless the dissemination, distribution,
9 or republication of campaign materials is a coordinated communication.³³

10 The videos created by Maryland USA appear to impermissibly republish Hoerber’s
11 Announcement Video. Declaration 30 HD 2 republishes 18 seconds in a 30-second video;
12 Declaration 15 HD republishes 9 seconds in a 15-second video; and Stronger America HD 30
13 republishes 9 seconds in a 30-second video.³⁴

14 Maryland USA’s campaign filings seemingly indicate that it spent \$15,515 on
15 November 21, 2015, to produce the three videos; these expenditures were described as being for

³⁰ See Explanation and Justification, Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 442 (Jan. 3, 2003) [hereinafter 2003 Coordination E&J].

³¹ See 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(a); Advisory Op. 2010-11 (Commonsense Ten); F&LA at 4-7, MUR 6535 (Restore Our Future) (finding reason to believe that an IEOPC violated the Act by republishing campaign materials to support Mitt Romney’s 2012 presidential campaign that were originally published by Romney’s 2008 campaign).

³² 2003 Coordination E&J at 443 (emphasis added); see also Explanation and Justification, *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,191 (June 8, 2006).

³³ 11 C.F.R. § 109.23(a).

³⁴ Compl. at 4-5; Maryland USA Resp. at 4.

1 the production of “mobile advertising.”³⁵ Maryland USA’s filings also indicate that it spent
2 \$181,199.43 for the placement of “mobile advertising” on November 20, 2015.³⁶ The IEOPC
3 paid to produce only one other video around this time – “Stronger America 15.”³⁷ These
4 expenditures for the production/placement of “mobile advertising” were the first expenditures
5 made by Maryland USA, and it did not make another expenditure until December 4, 2015.³⁸
6 These facts create a reasonable inference that Maryland USA spent some of its \$181,199 ad buy
7 on the three videos that republish Hoeber’s campaign materials. The internet exception in the
8 Commission’s regulations does not exempt Maryland USA’s payments from the expenditure
9 definition because the exemption only applies to communications placed on the internet at no or
10 nominal cost.³⁹

11 These expenditures indicate that Maryland USA financed the republication of footage
12 from the Announcement Video and thus made an in-kind contribution to the Committee. The
13 Commission therefore finds reason to believe that Maryland USA violated 52 U.S.C. § 30116(a).

14 **B. Coordinated Communications**

15 Under the Act, “coordinated” means made in cooperation, consultation or concert with,
16 or at the request or suggestion of, a candidate, a candidate’s authorized committee, or a political
17 party committee.⁴⁰ For purposes of this definition, any reference to a candidate, a candidate’s

³⁵ 2015 Year-End Report, Maryland USA at 12-14.

³⁶ *Id.*

³⁷ *Id.* This video was also described as being for “mobile advertising,” but it does not appear to republish campaign materials.

³⁸ *Id.*

³⁹ *See* 11 C.F.R. §§ 100.26, 100.155.

⁴⁰ *See* 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20(a).

1 authorized committee, or a political party committee includes an agent thereof.⁴¹ Any
2 expenditure that is coordinated is an in-kind contribution to the candidate or committee with
3 which it is coordinated.⁴² Under the Commission’s regulations, an expenditure for a
4 communication is coordinated when the communication:

5 (1) Is paid for, in whole or in part, by a person other than that candidate, authorized
6 committee, or political party committee;

7
8 (2) Satisfies at least one of the content standards⁴³ in paragraph (c) of [§ 109.21]; and

9
10 (3) Satisfies at least one of the conduct standards in paragraph (d) of [§ 109.21].⁴⁴

11 The conduct standard is satisfied when, among other things, a candidate or her authorized
12 committee is materially involved in decisions regarding a communication or a communication is
13 made after substantial discussion about the communication with a candidate or her authorized
14 committee.⁴⁵ A candidate is “materially involved” in decisions if she conveys approval or

⁴¹ See 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.20(a).

⁴² See 52 U.S.C. § 30116(a)(7)(B)(i)-(ii); see also 11 C.F.R. §§ 109.20, 109.21(b).

⁴³ The content standard is satisfied if the communication at issue meets at least one of the following content standards: (1) a communication that is an electioneering communication under 11 C.F.R. § 100.29; (2) a public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate or the candidate’s authorized committee; (3) a public communication that expressly advocates the election or defeat of a clearly identified candidate for federal office; (4) a public communication, in relevant part, that refers to a clearly identified House or Senate candidate, and is publicly distributed or disseminated in the clearly identified candidate’s jurisdiction 90 days or fewer before the candidate’s primary election; or (5) a public communication that is the functional equivalent of express advocacy. 11 C.F.R. § 109.21(c)(1)-(5).

⁴⁴ *Id.* § 109.21(a). The six types of conduct that satisfy the conduct standard are: (1) request or suggestion; (2) material involvement; (3) substantial discussion; (4) common vendor; (5) former employee; and (6) republication. *Id.* § 109.21(d)(1)-(6).

⁴⁵ *Id.* § 109.21(d)(2), (3). Material involvement occurs when a candidate, authorized committee, or political party committee is materially involved in decisions regarding: (i) the content of the communication; (ii) the intended audience for the communication; (iii) the means or mode of the communication; (iv) the specific media outlet used for the communication; (v) the timing or frequency of the communication; or (vi) the size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite. *Id.* § 109.21(d)(2).

1 disapproval of the third party payor’s plans.⁴⁶ It is not necessary that the involvement of the
2 candidate be traced directly to one specific communication.⁴⁷ Rather, a candidate’s involvement
3 is material to a decision regarding a particular communication if that communication is one of a
4 number of communications, and the candidate was materially involved in decisions regarding the
5 strategy for those communications.⁴⁸ A discussion is “substantial” if information about the
6 plans, projects, or needs of the candidate is conveyed to a person paying for the communication
7 and that information is material to the creation, production, or distribution of the
8 communication.⁴⁹ A determination of whether a communication was made with material
9 involvement or after substantial discussion with a candidate or campaign is necessarily a fact-
10 based determination.⁵⁰ Under the Commission’s regulations, any person who has actual
11 authority, either express or implied, to engage in activities on behalf of a Federal candidate that
12 would satisfy the conduct standard of § 109.21’s coordination test is considered an agent of that
13 candidate.⁵¹

14 The available record demonstrates that Maryland USA paid for public communications
15 that expressly advocated in support of Hoeber’s candidacy; thus, the payment and content prongs
16

⁴⁶ See 2003 Coordination E&J at 434.

⁴⁷ See *id.*

⁴⁸ *Id.* For example, if a candidate is materially involved in a decision about the content or timing of a 10-part advertising campaign, then each of the 10 communications is coordinated without the need for further inquiry into the decisions regarding each individual advertisement on its own. *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 433.

⁵¹ See 11 C.F.R. 109.3(b) (defining “agent”); see also 2003 Coordination E&J at 423-24.

1 of the coordinated communication test are satisfied.⁵² Regarding the conduct prong, the
2 available information supports a reasonable inference that Epstein, as an agent of the Hoeber
3 campaign, shared information between the Committee and Maryland USA that would satisfy the
4 material involvement or substantial discussion elements.

5 The facts indicate that Epstein was an agent of the Committee in some capacity. He was
6 the Committee's Assistant Treasurer and Custodian of Records from the Committee's inception,
7 he served nearly three months, and he resigned from the Committee four days after Hoeber
8 formally announced her candidacy via the Announcement Video on October 15, 2015.⁵³ The
9 Commission possesses information that Epstein was privy to at least some of the campaign's
10 plans, strategies, and needs during that service. These factors create a reasonable inference that
11 Epstein may have been an agent of the Committee authorized to engage in conduct that could
12 satisfy § 109.21(d) during the three months he served a formal position with the campaign.

13 The available information also suggests that Epstein may have been an agent of the
14 Committee after he left his formal positions with the campaign because he is Hoeber's husband.
15 As husband and wife, Hoeber and Epstein presumably had numerous opportunities to discuss
16 Hoeber's campaign while and after Epstein held positions with the campaign, information that
17 Epstein could have passed to Maryland USA.

⁵² See *supra* notes 2, 6. Maryland USA expressly denies that the conduct standard has been met, but makes no such denial as to the first two prongs of the coordination test. See Maryland USA Resp. at 2. It appears that the four videos discussed in Sections II and III.A, *supra*, are among the communications that satisfy the content standard: they expressly advocate the election of Hoeber, see 11 C.F.R. § 100.22(a), and Maryland USA's \$181,199 expenditure apparently for the placement of these videos qualifies them as public communications, see 11 C.F.R. § 100.26 (communications placed for a fee on another person's Web site). More broadly, Maryland USA disclosed almost \$3.2 million in independent expenditures in support of Hoeber, indicating express advocacy communications.

⁵³ Epstein served as Assistant Treasurer and Custodian of Records from July 29, 2015, until October 19, 2015. See FEC Form 1, Statement of Organization, Amie Hoeber for Congress (July 29, 2015); FEC Form 1, Amended Statement of Organization, Amie Hoeber for Congress (Oct. 19, 2015).

1 It is reasonable to infer that, outside of any formal association with the campaign, the
2 husband of a political candidate may be more aware of his spouse's campaign's plans, strategies,
3 and needs than individuals with other familial relationships to the candidate. While the
4 Commission has previously considered family relationships and found that the existence of a
5 close family relationship, standing alone, does not satisfy the conduct standard, it has never
6 considered a spousal relationship specifically, and there are important reasons to weigh that
7 relationship differently than a parent-child or sibling relationship, especially when that spouse
8 held an official campaign position.⁵⁴ The unique nature of a spousal relationship creates more
9 opportunities for confidential communications and shared confidences. For this reason, spouses
10 enjoy privileged status within other aspects of the law, such as the spousal communications and
11 testimonial privileges.⁵⁵ In that light, it is reasonable to infer that Epstein and Hoeber discussed
12 Hoeber's campaign and Epstein was aware of the campaign's plans, strategies, and needs after he
13 left his formal positions with the Committee.

14 Therefore, it is possible that Epstein, armed with information about the campaign's plans,
15 strategies, and needs, acted as an agent of the Committee by virtue of his relationship with
16 Hoeber even after he resigned his campaign positions. In other contexts, the law recognizes a
17 husband and wife's spousal relationship as a fact supporting the conclusion that one spouse acted

⁵⁴ Compare with F&LA at 4-5, MUR 7067 (Murphy) (finding no reason to believe where the father of a federal candidate and a family owned business contributed \$450,000 and \$300,000, respectively, to an IEOPC that supported the candidate); F&LA at 5-9, MUR 6668 (Chen) (finding no reason to believe where the brother of a federal candidate provided \$765,000 of the \$1,115,000 received by an IEOPC that supported the candidate).

⁵⁵ See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 2 FEDERAL EVIDENCE §§ 5:39-:40.

1 as an agent of the other spouse.⁵⁶ That conclusion is bolstered when the husband served his
2 wife’s campaign in an official capacity during the months from its organization to announcement
3 of the candidacy, especially if he acted as an agent of the Committee in some regard during that
4 time.

5 Thus, Epstein’s spousal relationship to Hoeber magnifies the likelihood that he had
6 access to confidential and material information regarding the campaign’s strategies and acted as
7 an agent of the Committee both while Epstein served as Assistant Treasurer and Custodian of
8 Records and later when he was making contributions to Maryland USA as Hoeber’s husband.

9 **1. Material Involvement and Substantial Discussion**

10 The record contains evidence and circumstances that, taken together, are sufficient to
11 raise a reasonable inference that Epstein was materially involved with, and/or had substantial
12 discussions with Maryland USA regarding its activity in support of Epstein’s wife’s candidacy.

13 First, the record contains information that Epstein was in communication with Maryland
14 USA regarding his planned contributions. A magazine reported that it had learned in September
15 2015 that Epstein was expected to be the “major source of funding” for Maryland USA.⁵⁷ That
16 expectation implies Epstein communicated with Maryland USA regarding its support for his
17 wife’s campaign. Moreover, it suggests that they were communicating around September 2015
18 while he was still working for the Committee and was aware of the Committee’s plan, strategies,

⁵⁶ See, e.g., 5 WILLISTON ON CONTRACTS § 11:9 (4th ed. July 2019 Update) (“The courts have had repeated occasion to observe that while the marital relationship in and of itself does not give rise to an agency relationship, it is competent evidence to be considered with other circumstances to establish that one spouse was in fact acting as agent for the other.”); *id.* (“The general view here... is that the agency of either spouse is a question of fact to be determined by the usual rules relating to principal and agent, except that... because of the marital relation, inferences may be more readily drawn supporting the existence of the agency.”).

⁵⁷ Compl. at 4 (quoting Bethesda Beat Article).

1 and needs through his official position as Assistant Treasurer and Custodian of Records.

2 Notably, Maryland USA does not deny or even address this account.

3 Second, Epstein ultimately contributed \$3,800,000 to Maryland USA: essentially all the
4 money the IEOPC raised and more than the \$3,193,922.32 the IEOPC spent on independent
5 expenditures in support of Hoeber or in opposition of her opponent.⁵⁸ It seems implausible that
6 Epstein would have no material input regarding nearly \$3.2 million in ads his contributions
7 funded, particularly when he was essentially the IEOPC's sole contributor, he served a formal
8 role with the campaign the advertisements supported, had information regarding the campaign's
9 plans, strategies, and needs, and the candidate whose campaign the advertisements supported
10 was his wife.

11 Third, the chronology of Epstein's contributions to Maryland USA and other
12 circumstantial information further support the inference that the material involvement and
13 substantial involvement prongs are satisfied. As described above, the record suggests that
14 Epstein was in communication with Maryland USA around September 2015 regarding his
15 planned financing of the IEOPC's efforts in support of his wife's candidacy.⁵⁹ This
16 communication occurred in the middle of Epstein's three-month tenure with the Committee,
17 during which time he was privy to at least some of the Committee's plans, strategies, and needs.

18 The Committee amended its Statement of Organization on October 19, 2015, to reflect
19 that Epstein was no longer serving roles for the Committee.⁶⁰ Less than one week later, Epstein

⁵⁸ *See supra* notes 2, 6. This fact bolsters the credibility of the magazine reporting of communication between Epstein and Maryland USA: the reported expectation that Epstein would be the major funder of Maryland USA proved true.

⁵⁹ *See* Bethesda Beat Article.

⁶⁰ FEC Form 1, Amended Statement of Organization, Amie Hoeber for Congress (Oct. 19, 2015).

1 made his first contribution to Maryland USA on October 26, 2015. That first \$300,000
2 contribution was all the money Maryland USA had raised at that time, and the IEOPC used those
3 funds to create advertisements supporting Hoeber.

4 Furthermore, the day after Epstein made his first contribution to Maryland USA—just
5 days after he resigned his positions with the Committee—Maryland USA paid \$13,266.57 to a
6 law firm for legal fees. It seems likely that Maryland USA paid the firm, at least in part, for
7 work it had already performed, especially where Maryland USA’s original Statement of
8 Organization listed the law firm as a contact.⁶¹ Since the IEOPC paid the firm solely with
9 money from Epstein and the record indicates the parties were in communication in or before
10 September regarding his plans to be the group’s major source of funding, it stands to reason that
11 he was aware of and agreed to pay for that work as late as the time of their assumed
12 communications in September 2015.

13 While the record does not provide specific information to link Epstein and Maryland
14 USA’s communications and involvement to one particular communication, that showing is not
15 necessary.⁶² Instead, the entirety of the record evidence suggests that Epstein had information
16 regarding the Committee’s plans, strategies, and needs, and was materially involved in and/or
17 had substantial discussions with Maryland USA regarding its communications strategy in
18 support of Epstein’s wife’s candidacy.

19 In sum, the record contains information that (1) a candidate’s spouse served formal roles
20 with her authorized campaign committee during its first few months; (2) during which time he

⁶¹ See Maryland USA Statement of Organization at 1 (14:27 July 22, 2015). The IEOPC amended its Statement of Organization later the same day, excluding the law firm email address. See Maryland USA Amended Statement of Organization at 1 (17:01 July 22, 2015).

⁶² See 2003 Coordination E&J at 434.

1 was privy to the campaign’s plans, strategies, and needs; (3) during which time he reportedly
2 communicated with an IEOPC his plans to be the group’s major source of funding; (4) the
3 spouse then made a \$300,000 contribution to the IEOPC within a week of resigning his formal
4 roles with his wife’s authorized campaign committee; (5) the \$300,000 contribution was the
5 IEOPC’s first contribution; (6) the \$300,000 contribution funded the IEOPC’s first
6 communications in support of the candidate and payment of legal fees to a law firm for services
7 rendered during the group’s organization period; (7) the spouse ultimately contributed all but
8 \$8,709 out of the total \$3,808,709 the IEOPC raised during the election cycle; and (8) the
9 candidate’s wife was the only candidate the IEOPC supported during the election cycle.

10 Taken together, the circumstances support a conclusion that Epstein, the Committee, and
11 Maryland USA impermissibly coordinated.⁶³ Thus, the Commission finds reason to believe that
12 Maryland USA and Joel Ritter in his official capacity as treasurer violated 52 U.S.C. § 30116(a)
13 by making excessive and prohibited in-kind contributions in the form of coordinated
14 communications.⁶⁴

15 2. Common Vendors

16 The “common vendor” conduct standard is satisfied if all of the following are true:

17 (i) the person paying for the communication employs a commercial vendor⁶⁵ to “create, produce,
18 or distribute” the communication; (ii) the vendor has provided certain delineated services to the

⁶³ These facts create a reasonable inference both that Epstein, the Committee, and Maryland USA engaged in conduct that would satisfy both the “substantial discussion” and “material involvement” subparts of the conduct prong.

⁶⁴ See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007).

⁶⁵ “Commercial vendor” means any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services. 11 C.F.R. § 116.1(c).

1 recipient of the contribution during the 120 days preceding the communication; and (iii) the
2 vendor conveys non-public information about the campaign’s “plans, projects, activities, or
3 needs,” or services previously provided to the campaign by the vendor, and that information is
4 material to the creation, production, or distribution of the communication.⁶⁶

5 The available record indicates that Wilson Perkins provided polling services to both
6 Maryland USA and the Committee, while i360 provided data services to those groups.⁶⁷ There
7 is, however, no information that i360 created, produced, or distributed a communication on
8 behalf of Maryland USA or the Committee.⁶⁸ In contrast, if any poll conducted by Wilson
9 Perkins consisted of more than 500 telephone calls, then that poll would be considered a
10 telephone bank, a type of public communication.⁶⁹

11 Despite the possibility that Wilson Perkins made public communications, the record does
12 not raise a sufficient inference that either vendor conveyed non-public information about the
13 Committee to Maryland USA. Wilson Perkins completed its work for Maryland USA about two
14 months before starting work for the Committee, which seems inconsistent with the allegation that
15 it shared the Committee’s information with Maryland USA.⁷⁰ Maryland USA also asserts that

⁶⁶ *Id.* § 109.21(d)(4)(i)-(iii).

⁶⁷ Compl. at 5.

⁶⁸ See F&LA at 14, MUR 6888 (Republican National Committee, *et al.*) (finding that i360 is not involved in “creating, producing, or distributing communications in any way.”).

⁶⁹ See 11 C.F.R. § 100.26 (defining public communication to include a telephone bank); *id.* § 100.28 (defining a telephone bank as more than 500 calls of an identical or substantially similar nature made within a 30-day period); see also F&LA at 4-5, MUR 5835 (DCCC) (finding that a poll involving more than 500 calls constituted a public communication).

⁷⁰ See Compl. at 5.

- 1 both vendors used firewalls to prevent the dissemination of such information.⁷¹ Therefore, the
- 2 available information does not indicate that the common vendor standard has been satisfied.

⁷¹ Maryland USA Resp. at 2. Maryland USA did not provide copies of the actual signed firewall agreements.