



## KELLOGG, HANSEN, TODD, FIGEL &amp; FREDERICK, P.L.L.C.

SUMNER SQUARE  
1615 M STREET, N.W.  
SUITE 400  
WASHINGTON, D.C. 20036-3215

(202) 326-7900

FACSIMILE:  
(202) 326-7999

April 29, 2019

*Via Electronic Mail (cela@fec.gov)*Jeff S. Jordan, Esq.  
Federal Election Commission  
1050 First St., NE  
Washington, DC 20463

Re: P-MUR 621 &amp; MUR 7562

Dear Mr. Jordan:

On behalf of our clients, Jonathon Morgan and Popily, Inc. d/b/a New Knowledge, we submit this response to the complaints associated with MUR 7562 (dated January 9, 2019) and P-MUR 621 (dated February 1, 2019). Neither complaint provides reason to believe that Mr. Morgan or New Knowledge violated the Federal Election Campaign Act of 1971, as amended (the "FECA"), during Alabama's special senatorial election in 2017.

First, the complaints do not comply with the due-process protections codified in the FECA and Commission regulations governing complaints. The factual allegations in both complaints are drawn exclusively from unsworn newspaper articles: the complaint for P-MUR 621 cites one article, and the complaint for MUR 7562 cites the same article as P-MUR 621 plus two more. Neither complainant has personal knowledge of the allegations, and the cited articles include information from unnamed – and unsworn – sources. The requirement that complaints be sworn to under penalty of perjury, 11 C.F.R. § 111.4(c), and should contain a "clear and concise recitation of the facts which describe a violation," *id.* § 111.4(d)(3), provide important due-process protections, including "notice, issue narrowing, [and] pleading facts with particularity," MUR 5878 (Ariz. State Dem. Central Comm.) at 5 n.14 (Sept. 19, 2013) (Statement of Reasons of Vice Chairman McGahn and Commissioners Hunter and Petersen). The due-process concerns raised by complainants' reliance on news reports are particularly problematic here, given that the complaints are vague about precisely what conduct described in the articles violated the FECA, and many statements in the articles are just plain wrong.

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Second, neither complaint provides reason to believe that Mr. Morgan or New Knowledge violated the FECA. The P-MUR 621 complaint alleges that Mr. Morgan and New Knowledge expressly advocated for a candidate without providing the disclaimer required in 52 U.S.C. § 30120. Even if taken as true, however, the attached news article provides no evidence — explicit or implicit — of express advocacy. The complaint cannot, therefore, support reason to believe that a violation has occurred.

The MUR 7562 complaint cites two additional news articles but also fails to support reason to believe Mr. Morgan or New Knowledge violated the FECA. Although this complaint fails to specify which FECA provision was purportedly violated, assuming that it too intends to allege a disclaimer violation, the additional facts in this complaint do not provide reason to believe a violation occurred. The Facebook page established by New Knowledge was designed to test whether re-posting news articles from popular sources like The Hill, Politico, NBC News, AL.com (an Alabama news site), and the Wall Street Journal would de-polarize online political discourse, and New Knowledge spent about \$10,536 on Facebook advertising to promote those re-posted articles. Neither re-posting news articles, nor paying to promote them, is unlawful or requires a disclaimer under § 30120. New Knowledge also communicated through the Facebook page with a long-shot write-in candidate for Senate, endorsed him, and spent about \$1,078 (out of the \$10,536 spent by New Knowledge in total) to promote Facebook posts about him — more than one-third of which went toward promoting a news article about his campaign. But the write-in candidate — who ultimately received only about 255 votes — was not a “candidate” as defined in the FECA. Therefore, to the extent ACP expressly advocated for the write-in candidate at all, those communications do not fall within the scope of § 30120.

### **BACKGROUND**

Mr. Morgan founded Popily, Inc. d/b/a New Knowledge in 2015 to study the ever-evolving online data ecosystem and provide online reputation-management and data-security services. New Knowledge is incorporated in Delaware and is not owned, controlled by, or affiliated with a candidate, candidate committee, or political party.

Mr. Morgan is an experienced researcher and analyst of data security and the ability of social media to influence political discourse and polarization. For example, Mr. Morgan developed software that tracked conflicts around the world in real time through social media usage, and he co-authored a study for the Brookings Institution analyzing the use of Twitter by ISIS supporters.<sup>1</sup> Mr. Morgan is also the founder of Data for Democracy, a nonprofit volunteer

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<sup>1</sup> See Ushahidi, “About Ushahidi,” <https://www.usahidi.com/about> (accessed Apr. 29, 2019); J.M. Berger & Jonathon Morgan, *The ISIS Twitter Census: Defining and Describing the Population of ISIS Supporters on Twitter*, The Brookings Project on U.S. Relations with the Islamic World (Mar. 2015), <https://brook.gs/2GjBTYm> (accessed Apr. 29, 2019).

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organization that encourages “objective, rigorous data analysis that keeps people informed and engaged, and supports them in forming their independent opinions.”<sup>2</sup>

Other New Knowledge employees also have extensive experience studying social media and its effects on political discourse and polarization. For example, New Knowledge employees have testified about digital misinformation campaigns before Congress and co-authored studies of Russia’s electoral disinformation campaigns.<sup>3</sup>

In 2017, New Knowledge was engaged by American Engagement Technologies to conduct a small research project on the ability of “counter-messaging” to reduce political polarization. New Knowledge sought to measure whether Internet users in polarized ideological environments would be receptive to news and information from sources outside the so-called online echo chamber. New Knowledge decided to run this study during the special election in Alabama because it was one of the few federal elections in 2017 and, given that self-identified conservatives outnumbered self-identified liberals in Alabama by a large margin, the election was not expected to be competitive.

To support the research project, in or about September 2017 New Knowledge created a Facebook page called Alabama Conservative Politics (“ACP”). The ACP Facebook page was created and administered by a New Knowledge contractor using his real name. ACP aggregated and re-posted links to web-based articles from popular news sources like the Washington Post, Fox News, The Hill, National Review, Slate, the Chicago Tribune, AL.com, the Alabama Political Reporter, NBC, Yahoo, Politico, the Associated Press, and the Wall Street Journal. When re-posting news articles, ACP often included a pull-quote from, or brief comment about, the article. Some of the re-posted articles were about the Alabama senatorial election, and others were about topics in state or national politics unrelated to the election. Contrary to the allegations in the MUR 7562 complaint, these articles from popular news sources that were re-posted on ACP’s Facebook page did not contain “misinformation.”

New Knowledge paid Facebook \$10,536 to promote ACP’s Facebook posts.<sup>4</sup> The promoted posts appeared on the Facebook pages of other Facebook users, along with ACP’s name. If users clicked on the ad they were taken to the news article. Facebook’s advertising

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<sup>2</sup> See Data for Democracy, “Our Goals,” <https://www.datafordemocracy.org/about-us> (accessed Apr. 29, 2019).

<sup>3</sup> See Testimony of Renee DiResta, “Foreign Influence Operations’ Use of Social Media Platforms,” U.S. Senate Select Comm. on Intelligence (Aug. 1, 2018), <https://bit.ly/2LmAhz4> (accessed Apr. 29, 2019); New Knowledge, *The Tactics & Tropes of the Internet Research Agency* (Dec. 17, 2018), <https://bit.ly/2UHMTsH> (accessed Apr. 29, 2019).

<sup>4</sup> Approximately \$370 of the \$10,536 was spent on advertising on Instagram. Instagram is owned by Facebook and uses the same advertising platform as Facebook.

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tools allowed New Knowledge to use Facebook's pre-existing demographic profiles to determine which types of Facebook users would see promoted posts (e.g., based on the Facebook user's geography or likely partisan affiliation).

Using Facebook's analytical tools that show advertisers information about which Facebook users interact with ads, New Knowledge tracked which of the articles it posted were most read, received the most comments and "likes," and were most widely "shared." New Knowledge then analyzed which articles received the most attention, and why, to measure whether exposure to articles from a variety of media sources affected the views of Facebook users visiting a self-described conservative Facebook page.

The MUR 7562 complaint refers to "two" Facebook pages. Based on the newspaper stories attached to the complaint, the other Facebook page (besides ACP) that the complaint appears to be referencing was called "Dry Alabama." New Knowledge was not involved in and has no information regarding the "Dry Alabama" Facebook page.

On November 18, 2017, a write-in candidate for Senate named Mac Watson contacted ACP through Facebook Messenger (Facebook's instant-messaging platform) to seek ACP's endorsement. ACP endorsed Mr. Watson and announced the endorsement in a Facebook post. New Knowledge subsequently paid Facebook to promote the post with ACP's endorsement, a post with a link to an interview with Mac Watson by the Alabama Political Reporter, and several posts on Mr. Watson's website or Facebook page. Of the \$10,536 New Knowledge spent to promote ACP's Facebook posts, about \$1,078 was spent to promote posts about Mr. Watson (about \$395 of which went to promote the Alabama Political Reporter article). New Knowledge never spoke to Mr. Watson in person or by phone, but Mr. Watson and ACP communicated intermittently through Facebook Messenger. Mr. Watson ultimately received approximately 255 write-in votes.<sup>5</sup>

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<sup>5</sup> This figure was calculated from a review of the county-specific results reported by the Alabama Secretary of State. See Ala. Sec'y of State, *Canvas of Results for the Special General Election held on Dec. 12, 2017*, Write-In Appendix (Dec. 28, 2017), <https://bit.ly/2Gs77MO> (accessed Apr. 29, 2019). It includes write-in votes for names similar to Mac Watson's.

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## DISCUSSION

### **I. The Complaints Deny Mr. Morgan and New Knowledge Due Process**

The “procedural safeguards” codified in the FEC’s regulations governing complaints serve to “protect respondents,” “prevent unwarranted or premature discovery,” and “streamline enforcement by . . . allowing the Commission to better focus its resources.” MUR 5878 (Ariz. State Dem. Central Comm.) at 6 (Statement of Reasons of Vice Chairman McGahn and Commissioners Hunter and Petersen). They provide important due-process protections, including a fair opportunity for those accused of FECA violations to respond to the “legal and factual issues of the case,” as required by 52 U.S.C. § 30109(3). For this reason, the FECA’s rules regarding complaints are designed to ensure “notice, issue narrowing, [and] pleading facts with particularity.” MUR 5878 (Ariz. State Dem. Central Comm.) at 5 n.14 (Statement of Reasons of Vice Chairman McGahn and Commissioners Hunter and Petersen). Both complaints fall short of satisfying the procedural protections required by the FECA.

The FECA requires that complaints must be “signed and sworn to by the person filing such complaint . . . and shall be made under penalty of perjury.” 52 U.S.C. § 30109(a)(1). As numerous Commissioners have recognized, “unsworn news reports by authors who are not first-hand complainants or witnesses before the Commission present legal and practical problems for the Commission and respondents and, in any event, may be of limited probative value.” MUR 6518 (Newt Gingrich, et al.) at 6 (June 2, 2016) (Statement of Reasons of Chairman Petersen and Commissioners Hunter and Goodman) (finding no reason to believe there was a violation when the allegations were based on “two unsworn press accounts”); *see also* MUR 5843 (ACORN) at 4 (Dec. 31, 2007) (Statement of Reasons of Vice Chairman Mason and Commissioner von Spakovsky) (finding no reason to believe when “[t]he complaint is based solely on allegations in an Internet video and a newspaper story to which no one has sworn, and Complainant itself claims no personal knowledge of the alleged facts”).

Here, the complainants appear to have no personal knowledge of the accuracy of the newspaper reports attached to the complaints. *See* 11 C.F.R. § 111.4(c) (“complaint[s] should differentiate between statements based upon personal knowledge and statements based upon information and belief,” which the complaints did not do). The complainants have not, therefore, meaningfully “sworn” to “the contents of the complaint,” subject to “the statutes governing perjury.” *Id.* § 111.4(b)-(c). Nor could they. The newspaper articles attached to the complaints do not provide sources – much less sworn sources – for many of their claims. For example, the New York Times article dated December 19, 2018, cites an “internal report” that neither New Knowledge nor (presumably) the complainants have ever seen, as well as quoting (and paraphrasing) unsworn statements from third parties. Neither Mr. Morgan, New Knowledge, nor the Commission can evaluate the reliability of the unidentified and unsworn sources of information in the articles. *See* MUR 5878 (Ariz. State Dem. Central Comm.) at 6 (Statement of Reasons of Vice Chairman McGahn and Commissioners Hunter and Petersen) (“[T]he

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Commission must identify the sources of information and examine the facts and reliability of the sources to determine whether they reasonably give[] rise to a belief in the truth of the allegations presented.”) (citation omitted; second alteration in original). Unsworn and unsourced reporting risks the same unreliability as an anonymous complaint, which FECA regulations strictly prohibit. *See* 11 C.F.R. § 111.4(b).

Additionally, “complaints based upon an author’s unsworn summary observations or paraphrases provide questionable legal and factual bases upon which to substantiate reason to believe finding” because “journalists often write quickly and their observations may be factually incorrect.” MUR 6518 (Newt Gingrich, et al.) at 6-7 (Statement of Reasons of Chairman Petersen and Commissioners Hunter and Goodman). Indeed, there are numerous inaccuracies in the complaints’ cited articles:

1. Craig Timberg, Tony Romm, & Aaron C. Davis, *Researcher Whose Firm Wrote Report on Russian Interference Used Questionable Online Tactics During Ala. Senate Race*, Wash. Post (Dec. 19, 2018).
  - The article states that New Knowledge purchased Twitter “retweets” and implies that the “retweets” were related to New Knowledge’s research project in Alabama. New Knowledge never purchased “retweets” – or used Twitter in any way – in connection with its work in Alabama.
  - The article characterizes New Knowledge’s research project as an attempt to “mimic existing disinformation operations.” As described above, ACP re-posted news articles from popular, widely read news sources and endorsed Mr. Watson’s campaign. There was no disinformation.
2. Scott Shane & Alan Blinder, *Secret Experiment in Alabama Senate Race Imitated Russian Tactics*, N.Y. Times (Dec. 19, 2018).
  - The New York Times article references an “internal report” describing an “Alabama project” that is broader than and quite different from New Knowledge’s research project. New Knowledge has never seen the “internal report” referenced in the article.
  - According to the article’s description of the “internal report,” the project “involved a scheme to link the [Roy] Moore campaign to thousands of Russian accounts that suddenly began following the Republican candidate on Twitter.” New Knowledge did not use Twitter in connection with its research project during the Alabama special election, and, as the New York Times correctly reported, New Knowledge has no information about the source of these Twitter followers.

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- According to the article, the purpose of the “project” was to “enrage and energize Democrats” and “depress turnout” among Republicans. As described above (and as Mr. Morgan is quoted in the article), these were not the purposes of New Knowledge’s work.
  - The article states that the “internal report” claims that ACP “got [Mr. Watson] interviews with The Montgomery Advertiser and The Washington Post.” Neither ACP nor New Knowledge arranged for the Montgomery Advertiser, the Washington Post, or any other news source to interview Mr. Watson.
  - The article reports that Mr. Watson’s Twitter followers jumped from about 100 to 10,000 at an unspecified time. If true, New Knowledge has no information about why this occurred.
3. Scott Shane & Alan Blinder, *Democrats Faked Online Push to Outlaw Alcohol in Alabama Race*, N.Y. Times (Jan. 7, 2019).
- This article describes websites created by at least three groups of activists during the Alabama election, including the “Dry Alabama” Facebook page, the “Southern Caller” Facebook page, and unnamed “websites for Christian conservatives.” New Knowledge has no knowledge of these websites’ activities in Alabama.

These inaccuracies call into doubt the probative value of any factual allegations drawn from these articles.

The due-process concerns inherent in complaints premised on news articles are amplified when, as here, the complaints gesture at the attached news articles but are vague about which specific facts they allege violated the FECA. The Commission’s regulations call for complaints to provide “a *clear and concise recitation of the facts* which describe a violation of a statute or regulation over which the Commission has jurisdiction.” See 11 C.F.R. § 111.4(d) (emphasis added). But because the notice and issue-narrowing functions of the FECA’s complaint procedures are lacking in the news-article-based complaints, Mr. Morgan and New Knowledge are forced to respond to the news articles as a whole.

These problems are exacerbated in the complaint for MUR 7562, which fails to provide reasonable notice about both the facts and the law. Based on its three attached newspaper articles, the complaint alleges that New Knowledge “funded projects to create two false Facebook pages in connection with the recent special election for the United States Senate in Alabama in December of 2017.” As the New York Times article dated January 7, 2019, explains, the “Dry Alabama” Facebook page – which appears to be the second Facebook page referenced in the complaint – was not created by New Knowledge. The complaint provides no further guidance about which aspects of the conduct described in the three articles the

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complainant believes were unlawful. Nor does the complaint identify which FECA provision the complainant thinks has been violated – or even what *type* of violation is in view.

Given the serious due-process and notice problems raised by the vague, unsworn newspaper-derived allegations in the complaints, the Commission should decline to find that the complaints here include adequate factual support for reason to believe that a FECA violation occurred. *See* MUR 6661 (Robert E. Murray, et al.) at 7 (June 2, 2016) (Statement of Reasons of Chairman Petersen and Commissioners Hunter, and Goodman) (“[A]llegations based upon unsworn news reports, anonymous sources, and an author’s summary conclusions and paraphrases provide questionable legal basis to substantiate a reason to believe finding.”); MUR 6056 (Protect Colorado Jobs, Inc., et al.) at 8-9 (June 1, 2009) (Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn) (“Ultimately, OGC’s coordination analysis relies upon a rather lengthy chain of unsworn suppositions and hearsay. Other than the allegations by anonymous sources connected to the Complainant’s campaign made most prominently in the *Statesman* article, no other evidence was provided. Without more, the links in the chain of anonymous suppositions and hearsay set forth above are too weak to sustain a[] [reason to believe] finding and subject Respondents to a Federal investigation.”).

## II. The Complaints Do Not Support Reason To Believe a FECA Violation Occurred

### A. P-MUR 621 Fails To Allege a Disclaimer Violation

The P-MUR 621 complaint included one attached one news article – the Washington Post article dated December 19, 2018 – and alleges that Mr. Morgan and New Knowledge “posted materials on social media, such as Facebook and Twitter, misrepresenting [its] identity, which may have expressly advocated for the election or defeat of a federal candidate.” The only provision of the FECA specifically referenced in the P-MUR 621 complaint is 52 U.S.C. § 30120. Section 30120(a) provides as follows:

[W]henever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate . . . , or makes a disbursement for an electioneering communication (as defined in section 30104(f)(3) of this title), such communication—

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;



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(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.

*See also* 11 C.F.R. § 110.11(b) (implementing § 30120(a)).<sup>6</sup> No candidate or political committee paid for or authorized any of ACP's communications, and the Washington Post article does not suggest otherwise. Sections 30120(a)(1) and (a)(2) are therefore inapplicable.

Nor was ACP required to include a disclaimer for independent expenditures as described in § 30120(a)(3). The FECA requires disclosures for (1) "electioneering communications" and (2) public communications "expressly advocating" the election or defeat of a "clearly identified candidate." 52 U.S.C. § 30120(a); *see also* 11 C.F.R. § 110.11(a)-(b). "Electioneering communications" are limited to communications "publicly distributed by a television station, radio station, cable television system, or satellite system." 11 C.F.R. § 100.29(b)(1). Internet-based communications are outside the scope of "electioneering communications." *See* AO 2016-08 (eBundler) at 7 (Aug. 16, 2016) (proposed activity was not electioneering communication "given that all relevant communications will take place on the internet"). Because ACP's communications were exclusively online, they were not electioneering communications under the FECA.

The complaint in P-MUR 621 provides no evidence that ACP's posts expressly advocated the election or defeat of a clearly identified candidate under § 30120(a)(3). Express advocacy "[u]ses phrases such as 'vote for the President,' 're-elect your Congressman,' [or] 'support the Democratic nominee,'" 11 C.F.R. § 100.22(a), or is so "unambiguous" that "reasonable minds could not differ as to whether [they] encourage[d] action to elect or defeat one or more clearly identified candidate(s) or encourage[d] some other kind of action," *id.* § 100.22(b). The Washington Post article that supplies the sole factual basis for the P-MUR 621 complaint offers no examples of express advocacy, nor does it suggest that the ACP Facebook page contained express advocacy.<sup>7</sup> On the contrary, the article's only reference to clearly identified candidates is a paraphrase of Mr. Morgan's statement that ACP was *not* "intended to affect the outcome of the race between Republican Roy Moore and Democrat Doug Jones."

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<sup>6</sup> The remaining provisions in § 30120 govern disclosures in newspapers, magazines, radio, and television, and thus are not relevant to the Internet communications at issue here.

<sup>7</sup> As noted above, the Washington Post article wrongly implies that New Knowledge used Twitter in connection with its work in Alabama, when in fact it did not. Regardless, the article does not provide any reason to believe that New Knowledge tweeted express advocacy.

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“Speculation and presumption . . . are not a sufficient basis on which to find reason to believe.” MUR 7135 (Donald J. Trump for President, Inc., *et al.*) at 6 (Sept. 6, 2018) (Statement of Reasons of Chair Hunter and Commissioner Petersen). Given that the Washington Post article does not claim, much less offer evidence, that the ACP Facebook page contained express advocacy, even if the unsworn facts in the article were taken as true, the complaint contains no factual basis for a disclaimer violation under § 30120(a)(3).<sup>8</sup> *See* MUR 6082 (Majority Action) at 5 (July 14, 2009) (Statement of Reasons of Vice Chairman Petersen and Commissioner Hunter) (“[T]he sole basis for determining that Majority Action may have engaged in express advocacy communications is a newspaper article that mentions a mailer not specifically attributable to Majority Action . . . . Without any specific evidence tying Majority Action to a communication that we have not seen but that might contain express advocacy, we could not find reason to believe that Majority Action triggered political committee status . . . .”). The Commission must find reason to believe that a violation occurred based on the allegations in the complaint itself, but it cannot do so here. *See* MUR 6296 (Kenneth R. Buck, *et al.*) at 7 (June 14, 2011) (Statement of Reasons of Vice-Chair Hunter and Commissioners McGahn and Petersen) (“[T]he Act’s complaint requirements and limits on Commission investigatory authority serve no purpose if the Commission proceeds anytime it can imagine a scenario under which a violation may have occurred.”); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (“[M]ere ‘official curiosity’ will not suffice as the basis for FEC investigations.”).

**B. If the MUR 7562 Complaint Alleges a Disclaimer Violation, It Fails To Provide Reason To Believe That a Disclaimer Was Required**

The MUR 7562 complaint does not specifically identify any alleged violation – or type of violation – of the FECA. But if the complaint’s reference to New Knowledge’s alleged “creat[ion] [of] two false Facebook pages” is interpreted to mean that the ACP Facebook page was “false” because it lacked proper disclaimers, the complaint fails to provide reason to believe that Mr. Morgan and New Knowledge violated the FECA.

**1. The ACP Facebook Page’s Re-Posting of News Articles Did Not Require Disclaimers**

ACP’s re-posting of articles from popular news sources like the Associated Press, Fox News, and the Chicago Tribune did not contain express advocacy, and therefore the ads promoting the re-posted articles did not require disclaimers under § 30120. New Knowledge

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<sup>8</sup> The Washington Post article cited in the P-MUR 621 complaint does not reference write-in candidate Mac Watson (much less express advocacy on behalf of Mr. Watson), and therefore communications regarding Mac Watson are not within the scope of this complaint. For the reasons discussed below, New Knowledge did not violate the disclaimer requirement in § 30120(a)(3) with respect to Mr. Watson.

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simply re-posted articles from these news organizations on ACP's Facebook page (sometimes with a pull-quote or short commentary) and advertised the posts so that they appeared on others' Facebook pages. Many of the articles that ACP re-posted did not discuss any candidate at all, and those that discussed candidates Roy Moore and Doug Jones were, as described above, written by well-known news outlets. New Knowledge believes the ACP site, including the \$10,536 that it spent on advertising, complied with § 30120's disclaimer requirement, and the MUR 7562 complaint offers no facts to the contrary.

The news articles re-posted by ACP are also exempt from § 30120's disclaimer requirement because they fall within the FECA's media exemption and the First Amendment principles underlying the exemption. Under the FECA, "[a]ny cost incurred in covering or carrying a news story, commentary or editorial by any . . . Web site . . . is not a contribution [or expenditure] unless the facility is owned or controlled by any political party, political committee, or candidate." 11 C.F.R. § 100.73 (contributions); *id.* § 100.132 (expenditures); *see also* FEC, Internet Communications, 71 Fed. Reg. 18,589, 18,608 (Apr. 12, 2006) ("the media exemption applies to media entities that cover or carry news stories, commentary, and editorials on the Internet, just as it applies to media entities that cover or carry news stories, commentary, and editorials in traditional media"). ACP re-posted news stories, sometimes with brief commentary. This news aggregation and commentary is not subject to disclosure requirements under the FECA.

Because New Knowledge is not owned or controlled by a political party, candidate committee, or candidate, the Commission uses the two-step analysis adopted in *Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1214-15 (S.D.N.Y. 1981), to determine whether the media exemption applies. First, "the Commission asks whether the entity engaging in the activity is a press entity as described by the Act and Commission regulations." AO 2005-16 (Fired Up!) at 4 (Nov. 18, 2005). "In determining whether an entity is a press entity, the Commission has focused on whether the entity in question is in the business of producing on a regular basis a program that disseminates news stories, commentary, and/or editorials." AO 2007-20 (XM Radio) at 4 (Oct. 30, 2007). ACP exercised editorial control over the news content on its Facebook page, and regularly aggregated and re-posted news content of interest to the page's readership, sometimes with brief commentary. ACP is therefore similar to the website at issue in AO 2005-16 (Fired Up!), which was an "unabashedly progressive" site that "generally consists of commentary on, quotes from, and summaries of, news articles appearing on other entities' websites, with hyperlinks to the quoted and summarized articles." The Commission held that the website qualified as a media entity under the FECA. *Id.* at 2; *see also* AO 2016-01 (Ethiq) at 3 (Apr. 14, 2016) (holding that a "website and app [that] will provide news and information about candidates and businesses to users, through both curated and original news content," qualified for the media exemption).

Second, "in determining the scope of the exception, the Commission considers . . . whether the press entity is acting as a press entity in conducting the activity at issue (*i.e.*, whether

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the entity is acting in its ‘legitimate press function’.” AO 2005-16 (Fired Up!) at 4 (quoting *Reader’s Digest*, 509 F. Supp. at 1215). Two relevant considerations are “whether the entity’s materials are available to the general public and are comparable in form to those ordinarily issued by the entity.” *Id.* ACP meets these criteria. The ACP Facebook page was accessible to the general public (through Facebook), and ACP’s consistent practice was to re-post news articles with, at times, very brief commentary. Many other news organizations routinely advertise their articles, including on Facebook.

In addition to the lack of express advocacy involved in re-posting news articles, and the media exemption, any suggestion that New Knowledge’s re-posted news articles required disclaimers is further undermined by the fact that the need for disclaimers on Facebook ads was in dispute until the Commission clarified – several days *after* the Alabama special election – that such ads must generally contain the full disclosures described in § 30120(a). *Compare* AO 2017-12 (Take Back Action Fund) (Dec. 15, 2017) (holding that full disclosures were required) *with* Advisory Opinion Request, 2011-09 (Facebook) (Apr. 26, 2011) (Commission failed to issue an advisory opinion regarding disclosures required for small Facebook ads), *and* Advisory Opinion Request, 2013-18 (Revolution Messaging) (Sept. 11, 2013) (Commission failed to issue an advisory opinion regarding disclosures required for mobile banner ads). The potential for uncertainty about the disclaimer requirements for Facebook ads was particularly acute here, given that ACP’s “ads” were not designed as traditional ads, but rather were shared articles from third-party news sources that had previously been posted on ACP’s own Facebook page. Additionally, Facebook has revised its own Political Ads Policy since the Alabama special election, and (according to Facebook) additional disclosures about sponsored political ads are now available to Facebook users. For example, “election-related and issue ads on Facebook and Instagram in the US must be clearly labeled – including a ‘Paid for by’ disclosure from the advertiser at the top of the ad.”<sup>9</sup> As a result of these guidelines, the disclosure requirements imposed by Facebook today are significantly different from those in place during the Alabama special election, and the requirements that apply to advertisers are clearer now than they were when ACP was in operation.

## **2. No Disclaimers Were Required on Posts About Mr. Watson Because He Was Not a “Candidate” Under the FECA**

The disclaimer requirement in § 30120(a)(3) applies only to express advocacy of “candidates.” *See* 52 U.S.C. § 30120(a) (requiring disclaimers for “communications expressly advocating the election . . . of a clearly identified *candidate*”) (emphasis added). New Knowledge is not aware of any evidence that Mr. Watson was a “candidate” as defined by the FECA. Because he was not a “candidate,” the disclosure requirements in § 30120(a) – as well as

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<sup>9</sup> Rob Leathern, *Shining a Light on Ads with Political Content*, Facebook Newsroom (May 24, 2018), <https://bit.ly/2IMT04S> (accessed Apr. 29, 2019).

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most other FECA provisions – would not apply to ACP’s posts about Mr. Watson regardless of their message .

Under the FECA,

[t]he term “candidate” means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election—

(A) if such individual has received contributions aggregating in excess of \$5,000 or has made expenditures aggregating in excess of \$5,000; or

(B) if such individual has given his or her consent to another person to receive contributions or make expenditures on behalf of such individual and if such person has received such contributions aggregating in excess of \$5,000 or has made such expenditures aggregating in excess of \$5,000.

*Id.* § 30101(2);<sup>10</sup> *see also* 11 C.F.R. § 100.3(a). This definition of “candidate” applies “when used in th[e] [FECA].” 52 U.S.C. § 30101; *see also* AO 1994-05 (William D. White) at 2 (Apr. 18, 1994) (“[Y]ou are not a candidate for purposes of the Act and Commission regulations if neither your total of campaign contributions received, nor your total of campaign expenditures made, exceeds \$5,000 for the . . . election cycle.”).<sup>11</sup> Therefore, it applies to § 30120.

According to the FEC’s public records, Mr. Watson never filed a “Statement of Candidacy” (FEC Form 2) in 2017, which would-be candidates are required to file once they meet the conditions in § 30101(2). Given Mr. Watson’s low vote total (about 255) and the informal nature of his write-in campaign, it is likely that Mr. Watson did not raise (or spend) anywhere near \$5,000 during his campaign. Regardless, New Knowledge is entitled to rely on Mr. Watson’s own representation that, by declining to file a “Statement of Candidacy,” he was never a “candidate for Federal office” for purposes of the FECA.

Because the disclosure requirement in § 30120(a) applies only to express advocacy of a “candidate,” and because Mr. Watson was not a “candidate” under the FECA, ACP was not required to include disclosures on its communications about Mr. Watson’s campaign.

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<sup>10</sup> The “purpose[ ] of this paragraph,” i.e., § 30101(2), is to provide a definition of “candidate” when that term is used throughout the FECA. *See* 52 U.S.C. § 30101.

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### 3. Even if Mr. Watson Were a “Candidate,” Few if Any Facebook Posts Required Disclaimers

Even if Mr. Watson were a “candidate” under the FECA, few if any of ACP’s posts included express advocacy that would require a disclaimer. Ninety percent of the \$10,536 that New Knowledge spent on Facebook advertising went to re-posted articles unrelated to Mr. Watson. And, although New Knowledge can no longer access ACP’s Facebook posts, it is likely that few if any of the advertised Facebook posts about Mr. Watson included express advocacy. For example, \$395 of the \$1,078 spent to advertise posts about Mr. Watson promoted an interview with Mr. Watson by the news website Alabama Political Reporter. The other ads shared Mr. Watson’s Facebook posts and events, which primarily served to update ACP’s readers of Mr. Watson’s campaign event and website.

Nor was ACP’s endorsement of Mr. Watson improper. Corporations are permitted to endorse candidates and communicate those endorsements to the general public. *See* 11 C.F.R. § 114.4(c)(6)(i). Similarly, “[d]isbursements for announcements of endorsements to the general public are not contributions or expenditures” – and thus not subject to the disclaimer requirements in § 30120(a) – provided that “[t]he public announcement is not coordinated with a candidate” and “[d]isbursements for any press release . . . are de minimis.” *Id.* 114.4(c)(6)(ii). New Knowledge did not coordinate the announcement of ACP’s endorsement with Mr. Watson, and it spent only \$11 – a de minimis sum – to promote the Facebook post announcing its endorsement.<sup>12</sup> The Facebook announcement here served the same function as a traditional press release.

### CONCLUSION

As described above, the complaints’ exclusive reliance on news articles is improper and fails to provide reasonable notice of the facts and law at issue. And, in any event, Mr. Morgan and New Knowledge did not violate the FECA. The New Knowledge research project had no effect on the Alabama special election, and advertising to promote news articles did not require a disclaimer. The ACP Facebook page’s endorsement of Mac Watson likewise had no effect on the election – Mr. Watson received only 255 votes in a race in which 1.35 million votes were cast<sup>13</sup> – and New Knowledge did not have to include disclaimers on its posts about Mr. Watson because he was never a “candidate” under the FECA. In total, New Knowledge spent \$1,078 to promote Facebook posts related to Mr. Watson, and after the Alabama special election the

<sup>12</sup> ACP’s endorsement was promoted through two ad buys, one that ran from November 16-20, 2017, and cost \$5.43, and the other that ran from November 19-22, 2017, and cost \$5.60.


<sup>13</sup> Ala. Sec’y of State, Primary/Primary Run-Off/General Election Statistics – State of Alabama (June 25, 2018), <https://www.sos.alabama.gov/sites/default/files/voter-pdfs/turnout.pdf> (accessed Apr. 29, 2019).

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the Commission (and Facebook itself) clarified the rules for when disclosures are required for Facebook postings. Finally, there is no evidence that the ACP Facebook page (or New Knowledge or Mr. Morgan) ever disseminated false information. The Commission should find no reason to believe a violation of the FECA occurred and close the file in these matters.

Sincerely,



John Thorne  
*Counsel to Jonathon Morgan and  
Popily, Inc. d/b/a New Knowledge*