

FEDERAL ELECTION COMMISSION**FIRST GENERAL COUNSEL'S REPORT****MUR 7628**

DATE COMPLAINT FILED: Aug. 5, 2019

DATE OF NOTIFICATION: Aug. 7, 2019

LAST RESPONSE RECEIVED: Oct. 18, 2019

DATE ACTIVATED: Feb. 11, 2021

EXPIRATION OF SOL: Aug. 1, 2024

ELECTION CYCLE: 2020

COMPLAINANT:

Common Cause

Paul Ryan

RESPONDENTS:

Kobach for Senate

Elizabeth Curtis

in her official capacity as treasurer

We Build the Wall, Inc.

Kris Kobach

MUR 7636

DATE COMPLAINT FILED: Oct. 2, 2019

DATE OF NOTIFICATION: Oct. 9, 2019

LAST RESPONSE RECEIVED: Mar. 20, 2020

DATE ACTIVATED: Feb. 11, 2021

EXPIRATION OF SOL: Aug. 1, 2024

ELECTION CYCLE: 2020

COMPLAINANT:

Campaign Legal Center

Margaret Christ

RESPONDENTS:

Kobach for Senate

Elizabeth Curtis

in her official capacity as treasurer

WeBuildtheWall, Inc.

Kris Kobach

Pre-MUR 628

DATE SUBMITTED: Oct. 2, 2019

DATE OF NOTIFICATION: Oct. 9, 2019

LAST RESPONSE RECEIVED: Feb. 2, 2021

DATE ACTIVATED: Feb. 11, 2021

1 EXPIRATION OF SOL: Earliest: July 18, 2024
 2 Latest: Aug. 1, 2024
 3 ELECTION CYCLE: 2020

4
 5 **SOURCE:** *Sua Sponte* Submission

6
 7 **RESPONDENTS:** Kobach for Senate
 8 Elizabeth Curtis
 9 in her official capacity as treasurer
 10 Kris Kobach

11
 12 **RELEVANT STATUTES AND
 13 REGULATIONS:**

14 52 U.S.C. § 30101(8)(A)(i)
 15 52 U.S.C. § 30104(a)(1)
 16 52 U.S.C. § 30104(b)
 17 52 U.S.C. § 30118
 18 52 U.S.C. § 30120(a)(1)
 19 11 C.F.R. § 100.52
 20 11 C.F.R. § 110.11
 21 11 C.F.R. § 114.2(b), (f)

22 **INTERNAL REPORTS CHECKED:** Disclosure Reports

23
 24 **FEDERAL AGENCIES CHECKED:** None

25 **I. INTRODUCTION**

26 The Complaints in these matters involve allegations that WeBuildtheWall, Inc.
 27 (“WBTW”), a 501(c)(4) non-profit organization, made a prohibited in-kind corporate
 28 contribution to Kris Kobach and Kris Kobach for Senate and Elizabeth Curtis in her official
 29 capacity as treasurer (the “Committee”) by sending an email on August 1, 2019, to the WBTW
 30 email list, displaying the WBTW logo, and soliciting contributions for the Committee, in
 31 violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).¹ The MUR
 32 7628 Complaint also alleges that WBTW spent funds not subject to the limits, prohibitions, and

¹ MUR 7628 Compl. at 7-10 (Aug. 5, 2019); MUR 7636 Compl. at 4-5 (Aug. 13, 2019).

1 reporting requirements of the Act to disseminate the email.² Both the Committee and WBTW
2 deny the allegations, asserting that the Committee rented the WBTW email list for \$2,000, which
3 they assert was the fair market value for the list, and that any other violations are the result of
4 vendor error.³

5 In Pre-MUR 628, the Committee filed a *sua sponte* Submission regarding an additional
6 email that was sent to the WBTW email list on July 18, 2019, soliciting contributions to the
7 Committee without the required disclaimer.⁴ The Committee asserts that the omitted disclaimer
8 was the result of vendor error, the Committee discovered this earlier email while taking
9 “investigative and remedial action” with regard to the August 1, 2019, email, and it issued a
10 corrected email containing a disclaimer within 24 hours of discovering the error.⁵

11 As set forth below, we recommend that the Commission dismiss the disclaimer and soft
12 money allegations. We also recommend the Commission find reason to believe that the \$2,000
13 rental for the WBTW email list was significantly below fair market value and therefore
14 constituted an in-kind and unreported corporate contribution to the Committee. We further
15 recommend that the Commission find reason to believe that the use of the WBTW logo was an
16 in-kind and unreported corporate contribution to the Committee. We recommend that the
17 Commission enter into pre-probable cause conciliation with Respondents.

² *Id.*

³ Committee Resp. at 1 (Oct. 2, 2019), MUR 7628; WBTW Resp. at 1-2 (Oct. 3, 2019), MUR 7628.

⁴ Submission at 1 (Oct. 2, 2019), Pre-MUR 628.

⁵ *Id.* at 2-3.

1 **II. FACTUAL BACKGROUND**

2 Kris Kobach was a candidate for U.S. Senate in Kansas in 2020.⁶ WBTW is a 501(c)(4)
 3 non-profit organization that raises money to build portions of a wall on the USA-Mexico
 4 border.⁷ Kobach serves as general counsel for WBTW, and it is a paid position.⁸ Brian Kolfage
 5 is the President of WBTW.⁹ Dustin Stockton is a director of WBTW and President of Stockton
 6 Strategies, LLC (“Stockton Strategies”), a digital fundraising vendor retained by both the
 7 Committee and WBTW.¹⁰

8 On July 10, 2019, Stockton Strategies entered into an agreement “to rent from WBTW, at
 9 a cost of \$2,000.00, use of its file of email addresses for purposes of prospecting contributions to

⁶ Kris Kobach, Statement of Candidacy (July 8, 2019). Kobach lost the primary election on Aug. 4, 2020. Kobach is now a candidate for Kansas Attorney General. Kris Kobach Campaign Finance Appointment of Treasurer Report, Kansas Governmental Ethics Commission (Apr. 28, 2021), http://ethics.ks.gov/CFAScanned/StWide/2022ElecCycle/Treasurers/SW02KK_AT.pdf.

⁷ WBTW Articles of Incorporation, Florida Dept. of State, Div. of Corporations. (Dec. 12, 2018). Brian Kolfage is the only listed director on the original Articles of Incorporation. *Id.* Prior to the formal incorporation of WBTW, Kolfage reportedly created a GoFundMe campaign called, “We The People Will Build the Wall” in December 2018 to raise money for the federal government to build a border wall on the USA-Mexico border. *See* Abigail Hess, *A GoFundMe Campaign Raised \$20 million For A Border Wall—Now All Of The Funds Will Be Returned*, Jan. 11, 2019, CNBC, <https://www.cnbc.com/2019/01/11/gofundme-that-raised-20-million-for-border-wall-will-return-funds.html>. However, Kolfage reportedly subsequently determined the federal government would not be able to accept the money, at which point Kolfage created WBTW and gave contributors the choice of a refund or to have their contribution transferred to WBTW. *Id.* WBTW has four directors: Brian Kolfage (President), Amanda Shea (Secretary/Treasurer), Kris Kobach (Director), and Dustin Stockton (Director). WeBuildTheWall, Inc., 2019 Florida Not For Profit Corporation Annual Report at 1 (July 15, 2019), <http://search.sunbiz.org/Inquiry/CorporationSearch/GetDocument?aggregateId=domnp-n19000000009-98698443-58d3-4b71-ad00-e2e2f8f17ffc&transactionId=n19000000009-2a1c88f1-ff1e-4468-952f-df2fb3f3b374&formatType=PDF>.

⁸ *See* 2019 Kobach for Senate Financial Disclosure at 7; *see also* Jonathan Shorman, *et al.*, *As Kobach Pursues U.S. Senate, Border Wall Group He Represents Leaves Anger In Its Wake*, THE WICHITA EAGLE, July 21, 2019, <https://www.kansas.com/news/politics-government/article232855972.html>; *see also* WBTW Resp. at 1.

⁹ *See* WBTW Resp. at 1, MUR 7628; *see also* We Build The Wall Team, WEBUILDTHEWALL, <https://webuildthewall.us/ourteam/> (last visited Aug. 2, 2021).

¹⁰ *See* Kobach and Committee Resp. to First Request for Information at 4 (July 27, 2020), Pre-MUR 628. Stockton Strategies, LLC is a digital fundraising vendor and Nevada corporation. Stockton Affidavit, Kobach and Committee Resp. Ex. 1 at 1-3. Stockton Strategies does not have a website.

1 Stockton Strategies' candidate clients in 2019.”¹¹ The agreement between WBTW and Stockton
 2 Strategies was drafted by Kobach in his capacity as General Counsel for WBTW,¹² and Kobach
 3 was “asked his opinion concerning the list rental price.”¹³ The WBTW list was only used for the
 4 Committee and not for any other Stockton clients.¹⁴ The Committee reimbursed Stockton
 5 Strategies for the full \$2,000 rental price.¹⁵ The Committee asserts it entered into an agreement
 6 with “Stockton’s company to perform fundraising services.”¹⁶

7 Stockton sent emails to WBTW’s 295,000-person email list on July 18, 2019, and
 8 August 1, 2019, from the WBTW server. The July 18 email was sent from “Brian Kolfage—
 9 WeBuildTheWall, Inc. info@webuildthewall.us” and included the WBTW logo, an
 10 announcement supporting Kobach’s Senate candidacy, a solicitation for campaign contributions
 11 to Kobach’s campaign, and the email was signed by Kolfage. The Committee concedes that this

¹¹ Stockton Affidavit ¶5. Despite Stockton’s representations that he was prospecting for multiple clients, a query of disbursements in the FEC database reveals payments to Stockton Strategies from only one federal committee client in 2019—the Committee. *See* FEC Contributor Database Query: https://www.fec.gov/data/disbursements/?data_type=processed&recipient_name=stockton+strategies&two_year_transaction_period=2018&two_year_transaction_period=2020&two_year_transaction_period=2022; *see also* Kobach and Committee Resp. to First Request for Information at 2, Pre MUR 628 (indicating Stockton Strategies did not use the WBTW list for any other clients). Although it is possible Stockton had non-federal political committee clients, a search of state campaign finance disclosure records for Kansas, Nevada and Texas, the states Stockton was known to work in, do not reveal any payments to Stockton. *See generally* Kansas Secretary of State Campaign, Finance—Viewer, https://kssos.org/elections/cfr_viewer/cfr_examiner_entry.aspx (last visited Aug. 2, 2021); Nevada Secretary of State, Campaign Finance Disclosure, https://www.nvsos.gov/soscandidateservices/anonymouaccess/cfdsearchuu/search.aspx#individual_search (last visited Aug 2, 2021); Texas Ethics Commission, Search Campaign Finance Reports, <https://www.ethics.state.tx.us/search/cf/> (last visited Aug. 2, 2021).

¹² Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628

¹³ Kobach and Committee Resp. to Second Request for Information at 2, Pre-MUR 628

¹⁴ Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628

¹⁵ *Id.*; *see also id.* at Exs. B-D.

¹⁶ Kobach and Committee Resp. at 1 (referencing a July 15, 2019 fundraising agreement), MUR 7628. Stockton was also working on WBTW fundraising efforts at the same time. *See* Kobach and Committee Resp. to First Request for Information at 5, Pre-MUR 628.

1 email should have included a disclaimer, but did not.¹⁷ The August 1, 2019, email was sent from
2 “Kris Kobach—WeBuildTheWall, Inc. info@webuildthewall.us” and contained the WBTW
3 logo, and a letter, signed by Kobach as general counsel for WBTW, announcing his Senate
4 candidacy and soliciting support and contributions.¹⁸

5 The MUR 7628 Complaint alleges that WBTW made an in-kind corporate contribution to
6 the Committee by sending the August 1, 2019, email to the WBTW list and failing to include a
7 required disclaimer identifying who paid for the solicitation.¹⁹ The MUR 7636 Complaint
8 alleges that WBTW violated the corporate facilitation prohibition by using its logo and resources
9 to send the email.²⁰ The Committee responds that it did not receive a contribution from WBTW,
10 but instead paid for the use of WBTW’s email list by reimbursing Stockton Strategies for the
11 \$2,000 list rental.²¹ WBTW similarly responds that because it rented its list to Stockton
12 Strategies, it did not make an in-kind corporate contribution to the Committee.²² Both the
13 Committee and WBTW respond that Stockton was responsible for failing to include the
14 disclaimer and using the WBTW email server,²³ and Stockton admits he was at fault.²⁴ The

¹⁷ Submission at 1-2, Ex. 2, Pre-MUR 628.

¹⁸ MUR 7628 Compl. at Ex. 1.

¹⁹ *Id.* at 2, 7, 10.

²⁰ MUR 7637 Compl. at 4-5.

²¹ Kobach and Committee Resp. at 1, MUR 7628.

²² WBTW Resp. at 2-5, MUR 7628.

²³ Kobach and Committee Resp. at 2 MUR 7628; WBTW Resp. at 3, MUR 7628.

²⁴ Stockton Affidavit ¶¶8-9.

1 Committee further responds that once it became aware that the emails lacked a disclaimer, it
2 issued corrected emails containing a disclaimer.²⁵

3 **III. LEGAL ANALYSIS**

4 **A. Disclaimer Allegations**

5 The MUR 7628 Complaint alleges that the August 1, 2019, email failed to include a
6 required disclaimer identifying who paid for the solicitation.²⁶ The Committee acknowledges
7 that its August 1 email — as well as its July 18, 2019, email — failed to include a disclaimer.²⁷
8 The Act and Commission regulations require a disclaimer whenever a political committee makes
9 a disbursement for the purpose of financing any public communication through any broadcast,
10 cable, satellite communication, newspaper, magazine, outdoor-advertising facility, mailing, or
11 any other type of general public political advertising.²⁸ If a communication requiring a
12 disclaimer is paid for and authorized by a candidate, a candidate's authorized committee, or its
13 agents, the disclaimer must clearly state that the communication was paid for by the authorized
14 committee.²⁹

15 A disclaimer was required in this case because the Committee's July 18, 2019, and
16 August 1, 2019, emails were "electronic mail of more than 500 substantially similar
17 communications" sent by a political committee.³⁰ Respondents do not contest the allegation that

²⁵ Kobach and Committee Resp. at 2, MUR 7628.

²⁶ MUR 7628 Compl. at 2, 7, 10.

²⁷ Submission at 1-2, Pre-MUR 628.

²⁸ 52 U.S.C. §§ 30101(22), 30120; *see also* 11 C.F.R. §§ 100.26, 110.11.

²⁹ 52 U.S.C. § 30120(a)(1); *see also* 11 C.F.R. § 110.11(b)(1).

³⁰ 11 C.F.R. § 110.11(a)(1).

1 the emails required a disclaimer.³¹ Rather, Respondents blame the error on Stockton Strategies,
2 which they describe as a vendor.³² The Commission has generally not pursued disclaimer
3 violations that resulted from inadvertent vendor error.³³ In this case, Stockton Strategies appears
4 to be a vendor and Stockton asserts in his sworn affidavit that it was his inadvertent error.³⁴ The
5 Committee also sent corrective emails including a proper disclaimer shortly after the emails
6 issued and before their formal notification of the MUR 7628 Complaint.³⁵ Under these
7 circumstances, we recommend that the Commission dismiss the disclaimer allegations.

8 **B. Alleged In-Kind Contributions**

9 The MUR 7628 Complaint alleges that the use of the WBTW email list constituted a
10 prohibited in-kind corporate contribution. Corporations are prohibited from making a
11 contribution to a candidate's committee, and candidates are prohibited from knowingly accepting
12 or receiving a prohibited contribution.³⁶ A "contribution" includes "any gift, subscription, loan,
13 advance, or deposit of money or anything of value made by any person for the purpose of

³¹ Kobach and Committee Resp. at 2, MUR 7628.

³² *Id.*

³³ See Factual & Legal Analysis at 8, MUR 6846 (DeFazio for Congress) (dismissing disclaimer violation due to vendor error, noting that the respondent took remedial action and that the Commission has declined to pursue cases based on vendor error); Factual & Legal Analysis at 7, MUR 5991 (U.S. Term Limits) (same).

³⁴ Stockton Affidavit ¶9.

³⁵ *Id.* ¶11-12; see also Submission at 3, Pre-MUR 628. Respondents did issue corrective emails, but only after the Common Cause Press Release regarding their Complaint in MUR 7628. See Common Cause Press Release dated Aug. 2, 2019 at 3:46 PM Eastern Standard Time, <https://www.commoncause.org/press-release/doj-fec-complaints-filed-against-kris-kobach-we-build-the-wall-inc-for-illegal-campaign-solicitation/> (last visited: Aug. 2, 2021). The corrected emails went out just minutes after the press release. See Submission at Ex. 5, Pre-MUR 628. The correction email for the August 1 email has a time stamp of Aug. 2, 2019 at 3:28 PM Central Time. Considering the time zone differences this email was sent 18 minutes after the Common Cause press release. See *id.* at Ex. 6. The correction email for the July 18 email has a time stamp of Aug. 2, 2019 at 3:09 PM. Considering the time zone differences this email was sent 23 minutes after the press release.

³⁶ See 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1).

1 influencing any election for Federal office.”³⁷ “Anything of value” includes all in-kind
2 contributions, including the provision of goods or services without charge or at a charge that is
3 less than the usual and normal charge.³⁸ The Commission’s regulations define “usual and
4 normal charge” as “the price of those goods in the market from which they ordinarily would have
5 been purchased at the time of the contribution.”³⁹ Finally, the Act requires committee treasurers
6 to file reports of receipts and disbursements in accordance with the provisions of 52 U.S.C.
7 § 30104.⁴⁰ Political committees are required to report the name and address of each person who
8 makes a contribution aggregating more than \$200 per calendar year, or per election cycle for
9 authorized committees, as well as the date, amount, and purpose of such payments.⁴¹

10 As a corporation, WBTW is prohibited from making contributions to candidates for
11 federal office. If the \$2,000 list rental price is the usual and normal charge for this list, then
12 WBTW would have made no contribution to the Committee. As set forth below, the available
13 information indicates that the \$2,000 list rental price was substantially below the usual and
14 normal charge for the list’s rental; therefore, WBTW appears to have made, and the Committee

³⁷ 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a); *see also* 52 U.S.C. § 30118(b)(2) (“‘contribution or expenditure’ . . . includes any direct or indirect payment . . . gift of money, or any services, or anything of value”).

³⁸ *See* 11 C.F.R. § 100.52(d)(1); *see also* Advisory Opinion 2010-30 (Citizens United) (holding, “so long as Citizens United does not rent its list to Federal candidates, authorized committees, political party committees, or other political committees for less than the usual and normal charge, the rental of the list will not constitute a corporate expenditure by Citizens United.”); First Gen. Counsel’s Rpt. at 5 & Cert. ¶1, MUR 5682 (Bachmann for Congress) (finding the respondent assigned an appropriate valuation to a mailing list where the respondent had consulted with a “reputable list broker” regarding the “proper fair market value” of the list).

³⁹ *Id.* § 100.52(d)(2).

⁴⁰ 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1(a); *see also* 52 U.S.C. § 30104(b) (contents of the required reports).

⁴¹ 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a)(4).

1 appears to have accepted, an in-kind corporate contribution, and the Committee failed to report
2 it.⁴²

3 According to WBTW, the market rate for its email list containing 295,000 addresses was
4 1/10 of a cent per email per use (for six uses).⁴³ By contrast, the Committee states that the
5 agreed-upon market rate was 2/3 of a cent per email (with no number of uses stated).⁴⁴ WBTW
6 does not explain how it determined 1/10 of a cent per email address per use (for six uses) was the
7 appropriate “market rate.” The Committee asserts that the rate was a fair price since the list did
8 not consist of known contributors to any political campaign and had not yet been tested as a
9 fundraising list for any political campaign.⁴⁵

10 The Committee’s descriptions of the list as untested and non-political are questionable in
11 light of the following facts. The list consisted of “all individuals who had made any donation, of
12 any amount, to WBTW throughout its history” including the original “GoFundMe donors,”
13 whose combined donations totaled \$25 million for the border wall campaign.⁴⁶ Thus, the list
14 was not an untested roster of potentially interested persons, but a list of people who had actually
15 donated money for a specific cause. Further, the factual context suggests that the list is also

⁴² See Factual & Legal Analysis at 5-6, MUR 5939 (MoveOn.org Political Action, *et al.*) (concluding the available information suggests that the \$64,575 rate initially agreed upon by MOPA and The Times was less than the usual and normal price of \$142,083 for an advertisement guaranteed to run on a particular day; the difference between these two figures, \$77,508, would have constituted a corporate contribution from The Times to MOPA if MOPA had not paid the higher rate of \$142,083 on September 24, 2007). A candidate acts as an agent of an authorized Committee. See 52 U.S.C. § 30102(b)(2).

⁴³ WBTW Resp. at 2, MUR 7628.

⁴⁴ Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628.

⁴⁵ *Id.*; see also Kobach and Committee Resp. to Second Request for Information at 3, Pre-MUR 628 (noting that \$2,000 was an appropriate price due to the *untested nature* of the non-political list).

⁴⁶ *Id.*; see also n.7 above. WBTW also rented the list out to Ranch Property Marketing and Management to sell WBTW branded merchandise in exchange for 15% of total sales. See Kobach and Committee Resp. to Second Request for Information at 3, Pre-MUR 628.

1 political in nature. The list use agreement between Stockton Strategies and WBTW stated that
2 the list was “to be used by Stockton Strategies in conducting fundraising on behalf of political
3 candidates who support the construction of border fencing on the United States — Mexico
4 border by the federal government.”⁴⁷ The email list consisted of persons whose previous
5 donations indicate an interest in the same specific political issue — border security — as the
6 candidates on whose behalf Stockton Strategies would fundraise. Moreover, Kobach had been
7 part of WBTW since its formation, the solicitation emails identified candidate Kobach as
8 WBTW’s general counsel, and it appears that Kobach was the only candidate for which Stockton
9 used the list.

10 The WBTW list rental price appears to be significantly lower than other list rental prices
11 cited in past Commission matters.⁴⁸ In MUR 6110 (Obama Victory Fund and Democratic
12 National Committee), a vendor was compensated “\$3,000 for . . . use of the email list, which
13 contained 20,000 email addresses, and for use . . . of the internet.”⁴⁹ This equals 15 cents per
14 email address in 2008, or 18 cents per email address when adjusted for inflation.⁵⁰ In MUR
15 6937 (NextGen Climate Action Committee), NextGen bought a political committee’s email list
16 containing 111,136 names for \$177,817.60 in 2015 for a “blended rate of \$1.60 per name.”⁵¹

⁴⁷ Kobach and Committee Resp. to First Request for Information, Pre-MUR 628 at Ex. B.

⁴⁸ Understanding that the Commission hasn’t necessarily determined that the following list prices necessarily represent fair market value, a survey of the cited prices still provides a point for comparison.

⁴⁹ Factual & Legal Analysis at 20, MUR 6110 (Obama Victory Fund and Democratic National Committee).

⁵⁰ See CPI Inflation Calculator, U.S. Bureau of Labor and Statistics,
https://www.bls.gov/data/inflation_calculator.htm (last visited Aug. 2, 2021).

⁵¹ Factual & Legal Analysis at 4, MUR 6937 (NextGen Climate Action Committee).

1 The Commission has deemed transactions permissible when the price is “determined by
2 the market’s view of the value of the list.”⁵² WBTW, however, did not provide any justification
3 for how the market rate for the WBTW list was determined, but rather, Kolfage simply stated the
4 “market rate is approximately 1/10 of a cent per email record.”⁵³ In previous matters, detailed
5 factual records have been provided to establish a market rate and prove that a bargained-for
6 exchange occurred. The parties here have not made a similar showing, and they even disagree as
7 to what the agreed-upon market rate was.⁵⁴

8 A review of publicly available information regarding list rental prices reveals a wide
9 range, depending on the nature of the list, but all of these prices were significantly higher than
10 rate WBTW charged the Committee. According to one 2019 article in Roll Call, “Each rented
11 name could cost in the \$2 to \$3 range, depending on the vendor and the parameters of the deal.”⁵⁵
12 Names on a smaller, more localized or issue-specific campaign could cost between \$5 and \$8,

⁵² *Id.*; see also Factual & Legal Analysis at 27-28, MURs 4382/4401 (Dole for President) (finding the exchange of a mailing list for Dole’s signature endorsement was not a bargained for exchange and that the committee failed to establish the signature was something of equal value); Advisory Opinion 2012-31 at 4 (AT&T) (concluding the rate structure of text messaging services to political committees “reflects commercial considerations and does not reflect considerations outside of a business relationship.”). The Commission reiterated these considerations in numerous Advisory Opinions. See Advisory Opinion 1994-10 (Franklin National Bank); Advisory Opinion 2012-28 (CTIA II); Advisory Opinion 2012-26 (m-Qube II); see also Advisory Opinion 1981-46 at 2 (Dellums) (determining whether a transaction involving the exchange of mailing lists between a candidate committee and another entity results in a contribution, is based on whether the transaction involved a “a bargained-for exchange of consideration in a commercial transaction).

⁵³ MUR 7628 WBTW Resp., Kolfage Affidavit ¶9.

⁵⁴ See Factual & Legal Analysis at 7, MUR 5181 (Ashcroft 2000) (concluding that the available information failed to establish whether the exchange at issue was a bargained-for exchange of equal value based in part on the committee’s failure to provide any information regarding the value of the mailing list and the use of then-Senator Ashcroft’s signature or an explanation as to how the items can be considered items of equal value); see also notes 43-44 above.

⁵⁵ Simone Pathe, *Your Email Address Could Be Worth \$8 To A Political Campaign*, ROLL CALL, April 11, 2019, <https://www.rollcall.com/2019/04/11/your-email-address-could-be-worth-8-to-a-political-campaign>.

1 while names on a big national list could cost as little as 40 or 50 cents.”⁵⁶ One list broker,
2 Granite Lists, markets very specific Republican lists.⁵⁷ One seemingly comparable example is a
3 35,938-person email list consisting of contributors who made at least a \$15 contribution to Ron
4 Johnson for Senate for \$120 per 1,000 emails.⁵⁸ This equates to 12 cents per email address,
5 which is 120 times the rate used in the WBTW list rental agreement. One of the least expensive
6 rates in the 2020 election cycle was offered by a company called Excelsior Strategies, which was
7 renting 1,000 email addresses of Trump Supporters for \$35.⁵⁹ Yet, this rate is still at least five
8 times the WBTW rate. Moreover, the WBTW list rental was not for only one use, but for either
9 six uses, according to WBTW’s response, or unlimited use over a six-month period, according to
10 the list rental agreement.⁶⁰ Political Resources, Inc., is a list broker that displays prices for
11 specific email lists on its website in the range of \$90-\$110 per 1,000 email addresses, which is
12 90-110 times the WBTW rate.⁶¹ Based on the highly targeted nature of the WBTW list, it is
13 doubtful that the list would have a market value 35 to 90 times lower than the low range of the
14 current rates for list rentals. The WBTW list is much more comparable to the Ron Johnson list
15 from Granite lists, which was listed for 120 times the rental rate of the WBTW list. According to

⁵⁶ *Id.*

⁵⁷ Karl Evers-Hillstrom and Camille Erickson, *Your Email Is For Sale—And 2020 Candidates Are Paying Up*, THE CENTER FOR RESPONSIVE POLITICS, June 13, 2019, <https://www.opensecrets.org/news/2019/06/email-list-for-sale-2020-candidates-are-paying>.

⁵⁸ *Id.*

⁵⁹ Kenneth Vogel and Maggie Haberman, *Now For Rent: Email Addresses And Phone Numbers For Millions Of Trump Supporters*, THE NEW YORK TIMES, Oct. 13, 2018, <https://www.nytimes.com/2018/10/13/us/politics/trump-political-data.html>.

⁶⁰ *Compare* WBTW Response at 2, MUR 7628 *with* Kobach and Committee Response to First Request for Information Ex. B, Pre-MUR 628.

⁶¹ Political Resources, Inc., Direct Mail Lists, <https://www.politicalresources.com/mailing-list/direct-mail-email-lists> (last visited: Aug. 2, 2021).

1 the Roll Call article, an issue-specific campaign could be charging five to eight dollars per
2 name.⁶² Using these rates, the WBTW list would have a one-time rental market rate of at least
3 \$70,000. Given this information, the \$2,000 list price appears to be significantly lower than any
4 comparable market rate.

5 In addition, the presence of Kobach and Stockton on both sides of the transaction raises
6 further questions about its commercial reasonableness. The Committee initially indicated that
7 Kobach “did not participate” in the decision to rent WBTW’s email list to Stockton Strategies,
8 although the Committee asserts that Kobach drafted the agreement in his capacity as WBTW’s
9 general counsel.⁶³ Subsequently, the Committee indicated Kobach “was asked his opinion
10 concerning the list rental price,” and Kobach “agreed that \$2,000 was within the market range
11 and was appropriate, given the untested nature of the non-political list.”⁶⁴ Ultimately, Kobach
12 received the rented email list for that price, as the Committee was the only entity that used the
13 list, and the Committee reimbursed Stockton Strategies for the entire rental price.⁶⁵ Further,
14 Stockton was a director of WBTW and the President of Stockton Strategies, which was retained
15 by both WBTW and the Committee, and Stockton was involved on both sides of the transaction.

16 Additional factors cast doubt on the commercial reasonableness of the list rental
17 agreement. Although Respondents have provided copies of the July 10 agreement between
18 WBTW and Stockton Strategies and the July 15 agreement between Stockton Strategies and the

⁶² Simone Pathe, *Your Email Address Could Be Worth \$8 To A Political Campaign*, ROLL CALL, April 11, 2019, <https://www.rollcall.com/2019/04/11/your-email-address-could-be-worth-8-to-a-political-campaign>.

⁶³ Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628.

⁶⁴ Kobach and Committee Resp. to Second Request for Information at 2, Pre-MUR 628.

⁶⁵ *Id.*; Kobach and Committee Resp. to First Request for Information at 3, Exs. B-D, Pre-MUR 628.

1 Committee, the agreements are unsigned.⁶⁶ The Committee responds that although it never
2 signed the agreement, it was the intention of the parties for the agreements to be binding.⁶⁷
3 Further, Respondents could not provide any dated documented communications regarding the list
4 rental agreement; they state that all such communication were oral.⁶⁸

5 In summary, the available information indicates that the \$2,000 rental price was
6 significantly below market rate, Respondents have been unable to articulate how the rate was
7 determined, and WBTW and Kobach were on both sides of the rental transaction. Therefore, we
8 recommend that the Commission find reason to believe that WBTW made an in-kind
9 contribution, Kobach and the Committee knowingly received a corporate contribution, and the
10 Committee failed to report it.⁶⁹

11 **C. Corporate Logo**

12 The MUR 7636 Complaint alleges that WBTW violated the prohibition on corporate
13 contributions by including the WBTW logo at the top of the August 1, 2019, solicitation email.⁷⁰
14 The *sua sponte* Submission also included copies of the earlier July 18, 2019, email, as well as

⁶⁶ Kobach and Committee Resp. to First Request for Information at 3, Exs. A-B, Pre-MUR 628.

⁶⁷ Kobach and Committee Resp. to Second Request for Information at 1, Pre-MUR 628.

⁶⁸ *Id.* at 2.

⁶⁹ Although Kobach, as a director of WBTW, could potentially be liable under 52 U.S.C. § 30118(a) for consenting to WBTW's corporate contribution, the available information regarding his involvement on the WBTW side of the transaction is unclear. *See* Kobach and Committee Resp. to Second Request for Information at 2, Pre-MUR 628. In addition, Kobach's role as general counsel of WBTW could raise issues of attorney-client privilege. Under these circumstances, and his clearer involvement as a candidate receiving the contribution, we do not make any recommendation as to Kobach possibly consenting to the contribution.

⁷⁰ The MUR 7636 Complaint alleges that the WBTW has thereby violated the prohibition on corporate facilitation. *See* 11 C.F.R. § 114.2(f)(1). However, the Commission has previously analyzed the use of corporate logos in candidate committee advertising under the section 52 U.S.C. § 30118(a) statutory prohibition on corporate contributions, and we do so here.

1 both “correction” emails showing that each email included the WBTW logo.⁷¹ The Commission
2 has previously determined that a corporation’s name, trade name, trademarks, and service marks
3 are things of value owned by the corporation, and that allowing a committee to use them in a
4 manner suggesting the corporation’s support or endorsement of a candidate may constitute an in-
5 kind contribution.⁷² The WBTW logo in these emails is significant in that it appears at the top of
6 every email sent to the WBTW list. The WBTW logo has an underlying meaning and message
7 that is distinguishable from previous corporate logo circumstances that the Commission has
8 deemed to be *de minimis*.⁷³ Corporate logo scenarios that the Commission has deemed to be *de*
9 *minimis* involve small business where the value of the corporate name was hard to calculate,⁷⁴ or
10 where the use of the logo was to demonstrate the business acumen of the candidate.⁷⁵ In
11 contrast, Kobach’s use of the WBTW logo signaled to WBTW contributors that contributing to
12 and electing Kobach would advance WBTW’s border-security agenda. Under these
13 circumstances, the WBTW corporate logo had substantial value.⁷⁶ Therefore, we recommend

⁷¹ Submission, Exs. 3-6, Pre-MUR 628.

⁷² See Factual & Legal Analysis at 4-5, MUR 7302 (Tom Campbell for North Dakota); see also Advisory Opinion 2007-10 (Reyes) at 2-3 (concluding that a committee may not recognize the corporate employers of individual contributors for the stated reason for including corporate employer’s names, trademarks, or service marks was to encourage contributions to the committee).

⁷³ See, e.g., Factual & Legal Analysis at 7, MUR 6542 (Mullin for Congress, *et al.*) (dismissing committee’s use of a plumbing company’s logo in print and video advertising as *de minimis*); Factual & Legal Analysis at 12-13, MUR 6110 (Obama for America) (dismissing committee’s use of corporate logos on advertising for a fundraising concert because the value of the names and logos of these particular businesses is likely insubstantial).

⁷⁴ See Factual & Legal Analysis at 12-13, MUR 6110 (Obama for America) (dismissing committee’s use of corporate logos on advertising for a fundraising concert because the value of the names and logos of these particular businesses is likely insubstantial).

⁷⁵ See Factual & Legal Analysis at 4-5, MUR 7302 (Tom Campbell for North Dakota).

⁷⁶ See Advisory Opinion 2007-10 at 2 (Reyes) (recognizing an individual contributor’s corporate employer by displaying the corporate logo at each hole at a gold fundraiser would be a violation of the Act).

1 that the Commission find reason to believe that WBTW made, and the Committee received, an
2 in-kind contribution through the use of the WBTW logo.

3 **D. Soft Money**

4 The MUR 7628 Complaint alleges that WBTW acted as an agent of the Committee and
5 spent soft money in connection with Kobach's federal campaign.⁷⁷ There is insufficient
6 information in the record to conclude that WBTW was acting as an agent of the Committee.
7 Further, the Commission has not previously analyzed in-kind corporate contributions to also be a
8 violation of the soft money provisions.⁷⁸ Therefore, we recommend that the Commission
9 dismiss this allegation.

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⁷⁷ MUR 7628 Compl. at 10.

⁷⁸ *See* 52 U.S.C. § 30125.

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V. RECOMMENDATIONS

1. Dismiss the allegation that Kris Kobach and Kris Kobach for Senate and Elizabeth Curtis in her official capacity as treasurer violated 52 U.S.C. § 30120(a)(1) and 11 C.F.R. § 110.11(a) by failing to include a required disclaimer;
2. Open a Matter Under Review in Pre-MUR 628;
3. Find reason to believe that WeBuildTheWall, Inc., violated 52 U.S.C. § 30118 by making a corporate contribution by renting the email list below market value to Kris Kobach and Kris Kobach for Senate and Elizabeth Curtis in her official capacity as treasurer;
4. Find reason to believe that WeBuildTheWall, Inc., violated 52 U.S.C. § 30118 by making a corporate contribution by permitting usage of its corporate logo to Kris

- 1 Kobach and Kris Kobach for Senate and Elizabeth Curtis in her official capacity as
- 2 treasurer;
- 3
- 4 5. Find reason to believe that Kris Kobach and Kris Kobach for Senate and Elizabeth
- 5 Curtis in her official capacity as treasurer violated 52 U.S.C. § 30118 by knowingly
- 6 accepting a corporate contribution by renting the email list below market value from
- 7 WeBuildTheWall Inc.;
- 8
- 9 6. Find reason to believe that Kris Kobach and Kris Kobach for Senate and Elizabeth
- 10 Curtis in her official capacity as treasurer violated 52 U.S.C. § 30118 by knowingly
- 11 accepting a corporate contribution by using WeBuildTheWall's corporate logo;
- 12
- 13 7. Find reason to believe that Kris Kobach for Senate and Elizabeth Curtis in her
- 14 official capacity as treasurer violated 52 U.S.C. § 30104(b) by failing to report the
- 15 in-kind contributions from WeBuildTheWall Inc.;
- 16
- 17 8. Dismiss the allegation that Kris Kobach and Kris Kobach for Senate and Elizabeth
- 18 Curtis in her official capacity as treasurer 52 U.S.C. § 30125(e)(1)(A) by receiving
- 19 prohibited non-federal funds from WeBuildTheWall, Inc.;
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- 21 9. Enter into conciliation with Kris Kobach and Kris Kobach for Senate and Elizabeth
- 22 Curtis in her official capacity and WeBuildTheWall, Inc., prior to a finding of
- 23 probable cause to believe;
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- 25 10. Approve the attached Conciliation Agreements;
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- 27 11. Approve the attached Factual and Legal Analyses; and
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12. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Associate General Counsel
for Enforcement

08.04.21
Date

Stephen Gura
Stephen Gura
Deputy Associate General Counsel
for Enforcement

Mark Allen
Mark Allen
Assistant General Counsel

Richard L. Weiss
Richard L. Weiss
Attorney

Attachments:

1. Factual and Legal Analysis for Kris Kobach and Kobach for Senate
2. Factual and Legal Analysis WeBuildTheWall, Inc.

1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENTS:** Kris Kobach **MUR 7628, 7636 & _____**
4 Kobach for Senate and Elizabeth Curtis
5 in her official capacity as treasurer

6 **I. INTRODUCTION**

7 The Complaints in these matters involve allegations that WeBuildtheWall, Inc.
8 (“WBTW”), a 501(c)(4) non-profit organization, made a prohibited in-kind corporate
9 contribution to Kris Kobach and Kris Kobach for Senate and Elizabeth Curtis in her official
10 capacity as treasurer (the “Committee”) by sending an email on August 1, 2019, to the WBTW
11 email list, displaying the WBTW logo, and soliciting contributions for the Committee, in
12 violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).¹ The MUR
13 7628 Complaint also alleges that WBTW spent funds not subject to the limits, prohibitions, and
14 reporting requirements of the Act to disseminate the email.² The Committee denies the
15 allegations, asserting that it rented the WBTW email list for \$2,000, which they assert was the
16 fair market value for the list, and that any other violations are the result of vendor error.³

17 In Pre-MUR 628, the Committee filed a *sua sponte* Submission regarding an additional
18 email that was sent to the WBTW email list on July 18, 2019, soliciting contributions to the
19 Committee without the required disclaimer.⁴ The Committee asserts that the omitted disclaimer
20 was the result of vendor error, the Committee discovered this earlier email while taking

¹ MUR 7628 Compl. at 7-10 (Aug. 5, 2019); MUR 7636 Compl. at 4-5 (Aug. 13, 2019).

² *Id.*

³ Committee Resp. at 1 (Oct. 2, 2019), MUR 7628.

⁴ Submission at 1 (Oct. 2, 2019), Pre-MUR 628.

MUR 7628, 7636 & ____ (Kris Kobach and Kobach for Senate)
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1 “investigative and remedial action” with regard to the August 1, 2019, email, and it issued a
2 corrected email containing a disclaimer within 24 hours of discovering the error.⁵

3 As set forth below, the Commission dismisses the disclaimer and soft money allegations.
4 Also, the Commission finds reason to believe that the \$2,000 rental for the WBTW email list was
5 significantly below fair market value and therefore constituted an in-kind and unreported
6 corporate contribution to the Committee. The Commission finds reason to believe that the use of
7 the WBTW logo was an in-kind and unreported corporate contribution to the Committee.

8 II. FACTUAL BACKGROUND

9 Kris Kobach was a candidate for U.S. Senate in Kansas in 2020.⁶ WBTW is a 501(c)(4)
10 non-profit organization that raises money to build portions of a wall on the USA-Mexico
11 border.⁷ Kobach serves as general counsel for WBTW, and it is a paid position.⁸ Brian Kolfage

⁵ *Id.* at 2-3.

⁶ Kris Kobach, Statement of Candidacy (July 8, 2019). Kobach lost the primary election on Aug. 4, 2020. Kobach is now a candidate for Kansas Attorney General. Kris Kobach Campaign Finance Appointment of Treasurer Report, Kansas Governmental Ethics Commission (Apr. 28, 2021), http://ethics.ks.gov/CFAScanned/StWide/2022ElecCycle/Treasurers/SW02KK_AT.pdf.

⁷ WBTW Articles of Incorporation, Florida Dept. of State, Div. of Corporations. (Dec. 12, 2018). Brian Kolfage is the only listed director on the original Articles of Incorporation. *Id.* Prior to the formal incorporation of WBTW, Kolfage reportedly created a GoFundMe campaign called, “We The People Will Build the Wall” in December 2018 to raise money for the federal government to build a border wall on the USA-Mexico border. *See* Abigail Hess, *A GoFundMe Campaign Raised \$20 million For A Border Wall—Now All Of The Funds Will Be Returned*, Jan. 11, 2019, CNBC, <https://www.cnbc.com/2019/01/11/gofundme-that-raised-20-million-for-border-wall-will-return-funds.html>. However, Kolfage reportedly subsequently determined the federal government would not be able to accept the money, at which point Kolfage created WBTW and gave contributors the choice of a refund or to have their contribution transferred to WBTW. *Id.* WBTW has four directors: Brian Kolfage (President), Amanda Shea (Secretary/Treasurer), Kris Kobach (Director), and Dustin Stockton (Director). WeBuildTheWall, Inc., 2019 Florida Not For Profit Corporation Annual Report at 1 (July 15, 2019), <http://search.sunbiz.org/Inquiry/CorporationSearch/GetDocument?aggregateId=domnp-n19000000009-98698443-58d3-4b71-ad00-e2e2f8f17ffc&transactionId=n19000000009-2a1c88f1-ff1e-4468-952f-df2fb3f3b374&formatType=PDF>.

⁸ *See* 2019 Kobach for Senate Financial Disclosure at 7; *see also* Jonathan Shorman, *et al.*, *As Kobach Pursues U.S. Senate, Border Wall Group He Represents Leaves Anger In Its Wake*, THE WICHITA EAGLE, July 21, 2019, <https://www.kansas.com/news/politics-government/article232855972.html>.

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1 is the President of WBTW.⁹ Dustin Stockton is a director of WBTW and President of Stockton
2 Strategies, LLC (“Stockton Strategies”), a digital fundraising vendor retained by both the
3 Committee and WBTW.¹⁰

4 On July 10, 2019, Stockton Strategies entered into an agreement “to rent from WBTW, at
5 a cost of \$2,000.00, use of its file of email addresses for purposes of prospecting contributions to
6 Stockton Strategies’ candidate clients in 2019.”¹¹ The agreement between WBTW and Stockton
7 Strategies was drafted by Kobach in his capacity as General Counsel for WBTW,¹² and Kobach
8 was “asked his opinion concerning the list rental price.”¹³ The WBTW list was only used for the
9 Committee and not for any other Stockton clients.¹⁴ The Committee reimbursed Stockton

⁹ See We Build The Wall Team, WEBUILDTHEWALL, <https://webuildthewall.us/ourteam/> (last visited Aug. 2, 2021).

¹⁰ See Kobach and Committee Resp. to First Request for Information at 4 (July 27, 2020), Pre-MUR 628. Stockton Strategies, LLC is a digital fundraising vendor and Nevada corporation. Stockton Affidavit, Kobach and Committee Resp. Ex. 1 at 1-3. Stockton Strategies does not have a website.

¹¹ Stockton Affidavit ¶5. Despite Stockton’s representations that he was prospecting for multiple clients, a query of disbursements in the FEC database reveals payments to Stockton Strategies from only one federal committee client in 2019—the Committee. See FEC Contributor Database Query: https://www.fec.gov/data/disbursements/?data_type=processed&recipient_name=stockton+strategies&two_year_transaction_period=2018&two_year_transaction_period=2020&two_year_transaction_period=2022; see also Kobach and Committee Resp. to First Request for Information at 2, Pre MUR 628 (indicating Stockton Strategies did not use the WBTW list for any other clients). Although it is possible Stockton had non-federal political committee clients, a search of state campaign finance disclosure records for Kansas, Nevada and Texas, the states Stockton was known to work in, do not reveal any payments to Stockton. See generally Kansas Secretary of State Campaign, Finance—Viewer, https://kssos.org/elections/cfr_viewer/cfr_examiner_entry.aspx (last visited Aug. 2, 2021); Nevada Secretary of State, Campaign Finance Disclosure, https://www.nvsos.gov/soscandidateservices/anonymoussaccess/cfdsearchuu/search.aspx#individual_search (last visited Aug. 2, 2021); Texas Ethics Commission, Search Campaign Finance Reports, <https://www.ethics.state.tx.us/search/cf/> (last visited Aug. 2, 2021).

¹² Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628

¹³ Kobach and Committee Resp. to Second Request for Information at 2, Pre-MUR 628

¹⁴ Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628

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1 Strategies for the full \$2,000 rental price.¹⁵ The Committee asserts it entered into an agreement
2 with “Stockton’s company to perform fundraising services.”¹⁶

3 Stockton sent emails to WBTW’s 295,000-person email list on July 18, 2019, and
4 August 1, 2019, from the WBTW server. The July 18 email was sent from “Brian Kolfage —
5 WeBuildTheWall, Inc. info@webuildthewall.us” and included the WBTW logo, an
6 announcement supporting Kobach’s Senate candidacy, a solicitation for campaign contributions
7 to Kobach’s campaign, and the email was signed by Kolfage. The Committee concedes that this
8 email should have included a disclaimer, but did not.¹⁷ The August 1, 2019, email was sent from
9 “Kris Kobach — WeBuildTheWall, Inc. info@webuildthewall.us” and contained the WBTW
10 logo, and a letter, signed by Kobach as general counsel for WBTW, announcing his Senate
11 candidacy and soliciting support and contributions.¹⁸

12 The MUR 7628 Complaint alleges that WBTW made an in-kind corporate contribution to
13 the Committee by sending the August 1, 2019, email to the WBTW list and failing to include a
14 required disclaimer identifying who paid for the solicitation.¹⁹ The MUR 7636 Complaint
15 alleges that WBTW violated the corporate facilitation prohibition by using its logo and resources
16 to send the email.²⁰ The Committee responds that it did not receive a contribution from WBTW,

¹⁵ *Id.*; *see also id.* at Exs. B-D.

¹⁶ Kobach and Committee Resp. at 1 (referencing a July 15, 2019 fundraising agreement), MUR 7628. Stockton was also working on WBTW fundraising efforts at the same time. *See* Kobach and Committee Resp. to First Request for Information at 5, Pre-MUR 628.

¹⁷ Submission at 1-2, Ex. 2, Pre-MUR 628.

¹⁸ MUR 7628 Compl. at Ex. 1.

¹⁹ *Id.* at 2, 7, 10.

²⁰ MUR 7637 Compl. at 4-5.

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1 but instead paid for the use of WBTW's email list by reimbursing Stockton Strategies for the
2 \$2,000 list rental.²¹ The Committee asserts that Stockton was responsible for failing to include
3 the disclaimer and using the WBTW email server,²² and Stockton admits he was at fault.²³ The
4 Committee further responds that once it became aware that the emails lacked a disclaimer, it
5 issued corrected emails containing a disclaimer.²⁴

6 **III. LEGAL ANALYSIS**

7 **A. Disclaimer Allegations**

8 The MUR 7628 Complaint alleges that the August 1, 2019, email failed to include a
9 required disclaimer identifying who paid for the solicitation.²⁵ The Committee acknowledges
10 that its August 1 email — as well as its July 18, 2019, email — failed to include a disclaimer.²⁶
11 The Act and Commission regulations require a disclaimer whenever a political committee makes
12 a disbursement for the purpose of financing any public communication through any broadcast,
13 cable, satellite communication, newspaper, magazine, outdoor-advertising facility, mailing, or
14 any other type of general public political advertising.²⁷ If a communication requiring a
15 disclaimer is paid for and authorized by a candidate, a candidate's authorized committee, or its

²¹ Kobach and Committee Resp. at 1, MUR 7628.

²² *Id.* at 2.

²³ Stockton Affidavit ¶¶8-9.

²⁴ Kobach and Committee Resp. at 2, MUR 7628.

²⁵ MUR 7628 Compl. at 2, 7, 10.

²⁶ Submission at 1-2, Pre-MUR 628.

²⁷ 52 U.S.C. §§ 30101(22), 30120; *see also* 11 C.F.R. §§ 100.26, 110.11.

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1 agents, the disclaimer must clearly state that the communication was paid for by the authorized
2 committee.²⁸

3 A disclaimer was required in this case because the Committee’s July 18, 2019, and
4 August 1, 2019, emails were “electronic mail of more than 500 substantially similar
5 communications” sent by a political committee.²⁹ Respondents do not contest the allegation that
6 the emails required a disclaimer.³⁰ Rather, Respondents blame the error on Stockton Strategies,
7 which they describe as a vendor.³¹ The Commission has generally not pursued disclaimer
8 violations that resulted from inadvertent vendor error.³² In this case, Stockton Strategies appears
9 to be a vendor and Stockton asserts in his sworn affidavit that it was his inadvertent error.³³ The
10 Committee also sent corrected emails including a proper disclaimer shortly after the emails
11 issued and before their formal notification of the MUR 7628 Complaint.³⁴ Under these
12 circumstances, the Commission dismisses the disclaimer allegations.

²⁸ 52 U.S.C. § 30120(a)(1); *see also* 11 C.F.R. § 110.11(b)(1).

²⁹ 11 C.F.R. § 110.11(a)(1).

³⁰ Kobach and Committee Resp. at 2, MUR 7628.

³¹ *Id.*

³² *See* Factual & Legal Analysis at 8, MUR 6846 (DeFazio for Congress) (dismissing disclaimer violation due to vendor error, noting that the respondent took remedial action and that the Commission has declined to pursue cases based on vendor error); Factual & Legal Analysis at 7, MUR 5991 (U.S. Term Limits) (same).

³³ Stockton Affidavit ¶9.

³⁴ *Id.* ¶11-12; *see also* Submission at 3, Pre-MUR 628. Respondents did issue corrective emails, but only after the Common Cause Press Release regarding their Complaint in MUR 7628. *See* Common Cause Press Release dated Aug. 2, 2019 at 3:46 PM Eastern Standard Time, <https://www.commoncause.org/press-release/doj-fec-complaints-filed-against-kris-kobach-we-build-the-wall-inc-for-illegal-campaign-solicitation/> (last visited: Aug. 2, 2021). The corrected emails went out just minutes after the press release. *See* Submission at Ex. 5, Pre-MUR 628. The correction email for the August 1 email has a time stamp of Aug. 2, 2019 at 3:28 PM Central Time. Considering the time zone differences this email was sent 18 minutes after the Common Cause press release. *See id.* The correction email for the July 18 email has a time stamp of Aug. 2, 2019 at 3:09 PM. Considering the time zone differences this email was sent 23 minutes after the press release.

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1 **B. Alleged In-Kind Contributions**

2 The MUR 7628 Complaint alleges that the use of the WBTW email list constituted a
3 prohibited in-kind corporate contribution. Corporations are prohibited from making a
4 contribution to a candidate’s committee, and candidates are prohibited from knowingly accepting
5 or receiving a prohibited contribution.³⁵ A “contribution” includes “any gift, subscription, loan,
6 advance, or deposit of money or anything of value made by any person for the purpose of
7 influencing any election for Federal office.”³⁶ “Anything of value” includes all in-kind
8 contributions, including the provision of goods or services without charge or at a charge that is
9 less than the usual and normal charge.³⁷ The Commission’s regulations define “usual and
10 normal charge” as “the price of those goods in the market from which they ordinarily would have
11 been purchased at the time of the contribution.”³⁸ Finally, the Act requires committee treasurers
12 to file reports of receipts and disbursements in accordance with the provisions of 52 U.S.C.
13 § 30104.³⁹ Political committees are required to report the name and address of each person who

³⁵ See 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1).

³⁶ 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a); see also 52 U.S.C. § 30118(b)(2) (“contribution or expenditure . . . includes any direct or indirect payment . . . gift of money, or any services, or anything of value”).

³⁷ See 11 C.F.R. § 100.52(d)(1); see also Advisory Opinion 2010-30 (Citizens United) (holding, “so long as Citizens United does not rent its list to Federal candidates, authorized committees, political party committees, or other political committees for less than the usual and normal charge, the rental of the list will not constitute a corporate expenditure by Citizens United.”); First Gen. Counsel’s Rpt. at 5 & Cert. ¶1, MUR 5682 (Bachmann for Congress) (finding the respondent assigned an appropriate valuation to a mailing list where the respondent had consulted with a “reputable list broker” regarding the “proper fair market value” of the list).

³⁸ *Id.* § 100.52(d)(2).

³⁹ 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1(a); see also 52 U.S.C. § 30104(b) (contents of the required reports).

1 makes a contribution aggregating more than \$200 per calendar year, or per election cycle for
2 authorized committees, as well as the date, amount, and purpose of such payments.⁴⁰

3 As a corporation, WBTW is prohibited from making contributions to candidates for
4 federal office. If the \$2,000 list rental price is the usual and normal charge for this list, then
5 WBTW would have made no contribution to the Committee. As set forth below, the available
6 information indicates that the \$2,000 list rental price was substantially below the usual and
7 normal charge for the list's rental; therefore, WBTW appears to have made, and the Committee
8 appears to have accepted, an in-kind corporate contribution, and the Committee failed to report
9 it.⁴¹

10 According to information available to the Commission, WBTW believes the market rate
11 for its email list containing 295,000 addresses was 1/10 of a cent per email per use (for six uses).
12 By contrast, the Committee states that the agreed-upon market rate was 2/3 of a cent per email
13 (with no number of uses stated).⁴² The Committee asserts that the rate was a fair price since the

⁴⁰ 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a)(4).

⁴¹ See Factual & Legal Analysis at 5-6, MUR 5939 (MoveOn.org Political Action, *et al.*) (concluding the available information suggests that the \$64,575 rate initially agreed upon by MOPA and The Times was less than the usual and normal price of \$142,083 for an advertisement guaranteed to run on a particular day; the difference between these two figures, \$77,508, would have constituted a corporate contribution from The Times to MOPA if MOPA had not paid the higher rate of \$142,083 on September 24, 2007). A candidate acts as an agent of an authorized Committee. See 52 U.S.C. § 30102(b)(2).

⁴² Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628.

1 list did not consist of known contributors to any political campaign and had not yet been tested
2 as a fundraising list for any political campaign.⁴³

3 The Committee’s descriptions of the list as untested and non-political are questionable in
4 light of the following facts. The list consisted of “all individuals who had made any donation, of
5 any amount, to WBTW throughout its history” including the original “GoFundMe donors,”
6 whose combined donations totaled \$25 million for the border wall campaign.⁴⁴ Thus, the list
7 was not an untested roster of potentially interested persons, but a list of people who had actually
8 donated money for a specific cause. Further, the factual context suggests that the list is also
9 political in nature. The list use agreement between Stockton Strategies and WBTW stated that
10 the list was “to be used by Stockton Strategies in conducting fundraising on behalf of political
11 candidates who support the construction of border fencing on the United States—Mexico border
12 by the federal government.”⁴⁵ The email list consisted of persons whose previous donations
13 indicate an interest in the same specific political issue — border security — as the candidates on
14 whose behalf Stockton Strategies would fundraise. Moreover, Kobach had been part of WBTW

⁴³ *Id.*; see also Kobach and Committee Resp. to Second Request for Information at 3, Pre-MUR 628 (noting that \$2,000 was an appropriate price due to the *untested nature* of the non-political list).

⁴⁴ *Id.*; see also n.7 above. WBTW also rented the list out to Ranch Property Marketing and Management to sell WBTW branded merchandise in exchange for 15% of total sales. See Kobach and Committee Resp. to Second Request for Information at 3, Pre-MUR 628.

⁴⁵ Kobach and Committee Resp. to First Request for Information, Pre-MUR 628 at Ex. B.

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1 since its formation, the solicitation emails identified candidate Kobach as WBTW’s general
2 counsel, and it appears that Kobach was the only candidate for which Stockton used the list.

3 The WBTW list rental price appears to be significantly lower than other list rental prices
4 cited in past Commission matters.⁴⁶ In MUR 6110 (Obama Victory Fund and Democratic
5 National Committee), a vendor was compensated “\$3,000 for . . . use of the email list, which
6 contained 20,000 email addresses, and for use . . . of the internet.”⁴⁷ This equals 15 cents per
7 email address in 2008, or 18 cents per email address when adjusted for inflation.⁴⁸ In MUR
8 6937 (NextGen Climate Action Committee), NextGen bought a political committee’s email list
9 containing 111,136 names for \$177,817.60 in 2015 for a “blended rate of \$1.60 per name.”⁴⁹

10 The Commission has deemed transactions permissible when the price is “determined by
11 the market’s view of the value of the list.”⁵⁰ In previous matters, detailed factual records have
12 been provided to establish a market rate and prove that a bargained-for exchange occurred. The
13 Committee here has not made a similar showing.⁵¹

⁴⁶ Understanding that the Commission hasn’t necessarily determined that the following list prices necessarily represent fair market value, a survey of the cited prices still provides a point for comparison.

⁴⁷ Factual & Legal Analysis at 20, MUR 6110 (Obama Victory Fund and Democratic National Committee).

⁴⁸ See CPI Inflation Calculator, U.S. Bureau of Labor and Statistics, https://www.bls.gov/data/inflation_calculator.htm (last visited Aug. 2, 2021).

⁴⁹ Factual & Legal Analysis at 4, MUR 6937 (NextGen Climate Action Committee).

⁵⁰ *Id.*; see also Factual & Legal Analysis at 27-28, MURs 4382/4401 (Dole for President) (finding the exchange of a mailing list for Dole’s signature endorsement was not a bargained for exchange and that the committee failed to establish the signature was something of equal value); Advisory Opinion 2012-31 at 4 (AT&T) (concluding the rate structure of text messaging services to political committees “reflects commercial considerations and does not reflect considerations outside of a business relationship.”). The Commission reiterated these considerations in numerous Advisory Opinions. See Advisory Opinion 1994-10 (Franklin National Bank); Advisory Opinion 2012-28 (CTIA II); Advisory Opinion 2012-26 (m-Qube II); see also Advisory Opinion 1981-46 at 2 (Dellums) (determining whether a transaction involving the exchange of mailing lists between a candidate committee and another entity results in a contribution, is based on whether the transaction involved a “a bargained-for exchange of consideration in a commercial transaction).

⁵¹ See Factual & Legal Analysis at 7, MUR 5181 (Ashcroft 2000) (concluding that the available information failed to establish whether the exchange at issue was a bargained-for exchange of equal value based in part on the

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1 A review of publicly available information regarding list rental prices reveals a wide
2 range, depending on the nature of the list, but all of these prices were significantly higher than
3 rate WBTW charged the Committee. According to one 2019 article in Roll Call, “Each rented
4 name could cost in the \$2 to \$3 range, depending on the vendor and the parameters of the deal.⁵²
5 Names on a smaller, more localized or issue-specific campaign could cost between \$5 and \$8,
6 while names on a big national list could cost as little as 40 or 50 cents.”⁵³ One list broker,
7 Granite Lists, markets very specific Republican lists.⁵⁴ One seemingly comparable example is a
8 35,938 person email list consisting of contributors who made at least a \$15 contribution to Ron
9 Johnson for Senate for \$120 per 1,000 emails.⁵⁵ This equates to 12 cents per email address,
10 which is 120 times the rate used in the WBTW list rental agreement. One of the least expensive
11 rates in the 2020 election cycle was offered by a company called Excelsior Strategies, which was
12 renting 1,000 email addresses of Trump Supporters for \$35.⁵⁶ Yet, this rate is still at least five
13 times the WBTW rate. Moreover, the WBTW list rental was not for only one use, but for either
14 six uses, or unlimited use over a six-month period, according to the list rental agreement.⁵⁷

committee’s failure to provide any information regarding the value of the mailing list and the use of then-Senator Ashcroft’s signature or an explanation as to how the items can be considered items of equal value).

⁵² Simone Pathe, *Your Email Address Could Be Worth \$8 To A Political Campaign*, ROLL CALL, April 11, 2019, <https://www.rollcall.com/2019/04/11/your-email-address-could-be-worth-8-to-a-political-campaign>.

⁵³ *Id.*

⁵⁴ Karl Evers-Hillstrom and Camille Erickson, *Your Email Is For Sale—And 2020 Candidates Are Paying Up*, THE CENTER FOR RESPONSIVE POLITICS, June 13, 2019, <https://www.opensecrets.org/news/2019/06/email-list-for-sale-2020-candidates-are-paying>.

⁵⁵ *Id.*

⁵⁶ Kenneth Vogel and Maggie Haberman, *Now For Rent: Email Addresses And Phone Numbers For Millions Of Trump Supporters*, THE NEW YORK TIMES, Oct. 13, 2018, <https://www.nytimes.com/2018/10/13/us/politics/trump-political-data.html>.

⁵⁷ Kobach and Committee Resp. to First Request for Information at Ex. B, Pre-MUR 628.

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1 Political Resources, Inc., is a list broker that displays prices for specific email lists on its website
2 in the range of \$90-\$110 per 1,000 email addresses, which is 90-110 times the WBTW rate.⁵⁸
3 Based on the highly targeted nature of the WBTW list, it is doubtful that the list would have a
4 market value 35 to 90 times lower than the low range of the current rates for list rentals. The
5 WBTW list is much more comparable to the Ron Johnson list from Granite lists, which was
6 listed for 120 times the rental rate of the WBTW list. According to the Roll Call article, an
7 issue-specific campaign could be charging five to eight dollars per name.⁵⁹ Using these rates,
8 the WBTW list would have a one-time rental market rate of at least \$70,000. Given this
9 information, the \$2,000 list price appears to be significantly lower than any comparable market
10 rate.

11 In addition, the presence of Kobach and Stockton on both sides of the transaction raises
12 further questions about its commercial reasonableness. The Committee initially indicated that
13 Kobach “did not participate” in the decision to rent WBTW’s email list to Stockton Strategies,
14 although the Committee asserts that Kobach drafted the agreement in his capacity as WBTW’s
15 general counsel.⁶⁰ Subsequently, the Committee indicated Kobach “was asked his opinion
16 concerning the list rental price,” and Kobach “agreed that \$2,000 was within the market range
17 and was appropriate, given the untested nature of the non-political list.”⁶¹ Ultimately, Kobach
18 received the rented email list for that price, as the Committee was the only entity that used the

⁵⁸ Political Resources, Inc., Direct Mail Lists, <https://www.politicalresources.com/mailing-list/direct-mail-email-lists> (last visited: Aug. 2, 2021).

⁵⁹ Simone Pathe, *Your Email Address Could Be Worth \$8 To A Political Campaign*, ROLL CALL, April 11, 2019, <https://www.rollcall.com/2019/04/11/your-email-address-could-be-worth-8-to-a-political-campaign>.

⁶⁰ Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628.

⁶¹ Kobach and Committee Resp. to Second Request for Information at 2, Pre-MUR 628.

1 list, and the Committee reimbursed Stockton Strategies for the entire rental price.⁶² Further,
2 Stockton was a director of WBTW and the President of Stockton Strategies, which was retained
3 by both WBTW and the Committee, and Stockton was involved on both sides of the transaction.

4 Additional factors cast doubt on the commercial reasonableness of the list rental
5 agreement. Although Respondents have provided copies of the July 10 agreement between
6 WBTW and Stockton Strategies and the July 15 agreement between Stockton Strategies and the
7 Committee, the agreements are unsigned.⁶³ The Committee responds that although it never
8 signed the agreement, it was the intention of the parties for the agreements to be binding.⁶⁴
9 Further, Respondents could not provide any dated documented communications regarding the list
10 rental agreement; they state that all such communication were oral.⁶⁵

11 In summary, the available information indicates that the \$2,000 rental price was
12 significantly below market rate, the Committee has been unable to articulate how the rate was
13 determined, and WBTW and Kobach were on both sides of the rental transaction. Therefore, the
14 Commission finds reason to believe Kobach and the Committee knowingly received an in-kind
15 corporate contribution from WBTW, and the Committee failed to report it.

16 **C. Corporate Logo**

17 The MUR 7636 Complaint alleges that WBTW violated the prohibition on corporate
18 contributions by including the WBTW logo at the top of the August 1, 2019, solicitation email.⁶⁶

⁶² *Id.*; Kobach and Committee Resp. to First Request for Information at 3, Exs. B-D, Pre-MUR 628.

⁶³ Kobach and Committee Resp. to First Request for Information at 3, Ex. A-B, Pre-MUR 628.

⁶⁴ Kobach and Committee Resp. to Second Request for Information at 1, Pre-MUR 628.

⁶⁵ *Id.* at 2.

⁶⁶ The MUR 7636 Complaint alleges that the WBTW has thereby violated the prohibition on corporate facilitation. *See* 11 C.F.R. § 114.2(f)(l). However, the Commission has previously analyzed the use of corporate

1 The *sua sponte* Submission also included copies of the earlier July 18, 2019, email, as well as
2 both “correction” emails showing that each email included the WBTW logo.⁶⁷ The Commission
3 has previously determined that a corporation’s name, trade name, trademarks, and service marks
4 are things of value owned by the corporation, and that allowing a committee to use them in a
5 manner suggesting the corporation’s support or endorsement of a candidate may constitute an in-
6 kind contribution.⁶⁸ The WBTW logo in these emails is significant in that it appears at the top of
7 every email sent to the WBTW list. The WBTW logo has an underlying meaning and message
8 that is distinguishable from previous corporate logo circumstances that the Commission has
9 deemed to be *de minimis*.⁶⁹ Corporate logo scenarios that the Commission has deemed to be *de*
10 *minimis* involve small business where the value of the corporate name was hard to calculate,⁷⁰ or
11 where the use of the logo was to demonstrate the business acumen of the candidate.⁷¹ In
12 contrast, Kobach’s use of the WBTW logo signaled to WBTW contributors that contributing to
13 and electing Kobach would advance WBTW’s border-security agenda. Under these

logos in candidate committee advertising under the section 52 U.S.C. § 30118(a) statutory prohibition on corporate contributions, and we do so here.

⁶⁷ Submission, Exs. 3-6, Pre-MUR 628.

⁶⁸ See Factual & Legal Analysis at 4-5, MUR 7302 (Tom Campbell for North Dakota); see also Advisory Opinion 2007-10 (Reyes) at 2-3 (concluding that a committee may not recognize the corporate employers of individual contributors for the stated reason for including corporate employer’s names, trademarks, or service marks was to encourage contributions to the committee).

⁶⁹ See, e.g., Factual & Legal Analysis at 7, MUR 6542 (Mullin for Congress, *et al.*) (dismissing committee’s use of a plumbing company’s logo in print and video advertising as *de minimis*); Factual & Legal Analysis at 12-13, MUR 6110 (Obama for America) (dismissing committee’s use of corporate logos on advertising for a fundraising concert because the value of the names and logos of these particular businesses is likely insubstantial).

⁷⁰ See Factual & Legal Analysis at 12-13, MUR 6110 (Obama for America) (dismissing committee’s use of corporate logos on advertising for a fundraising concert because the value of the names and logos of these particular businesses is likely insubstantial).

⁷¹ See Factual & Legal Analysis at 4-5, MUR 7302 (Tom Campbell for North Dakota).

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- 1 circumstances, the WBTW corporate logo had substantial value.⁷² Therefore, the Commission
- 2 finds reason to believe that the Committee received, an in-kind corporate contribution through
- 3 the use of the WBTW logo and failed to report it.

⁷² See Advisory Opinion 2007-10 at 2 (Reyes) (recognizing an individual contributor's corporate employer by displaying the corporate logo at each hole at a gold fundraiser would be a violation of the Act).

FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS****RESPONDENT:** WeBuildTheWall, Inc. **MURs 7628 & 7636****I. INTRODUCTION**

The Complaints in these matters allege that WeBuildtheWall, Inc. (“WBTW”), a 501(c)(4) non-profit organization, made a prohibited in-kind corporate contribution to Kris Kobach and Kris Kobach for Senate and Elizabeth Curtis in her official capacity as treasurer (the “Committee”) by sending an email on August 1, 2019, to the WBTW email list, displaying the WBTW logo, and soliciting contributions for the Committee, in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).¹ The MUR 7628 Complaint also alleges that WBTW spent funds not subject to the limits, prohibitions, and reporting requirements of the Act to disseminate the email.² WBTW denies the allegations, asserting that it rented its email list to the Committee for \$2,000, which WBTW asserts was the fair market value for the list, and that any other violations are the result of vendor error.³ According to the information available to the Commission, an additional email was sent to the WBTW email list on July 18, 2019, soliciting contributions to the Committee.

As set forth below, the Commission finds reason to believe that the \$2,000 rental for the WBTW email list was significantly below fair market value and therefore constituted an in-kind corporate contribution to the Committee. The Commission also finds reason to believe that the use of the WBTW logo was an in-kind corporate contribution to the Committee.

¹ MUR 7628 Compl. at 7-10 (Aug. 5, 2019); MUR 7636 Compl. at 4-5 (Aug. 13, 2019).

² *Id.*

³ WBTW Resp. at 1-2 (Oct. 3, 2019), MUR 7628.

1 **II. II. FACTUAL BACKGROUND**

2 WBTW is a 501(c)(4) non-profit organization that raises money to build portions of a
3 wall on the USA-Mexico border.⁴ Kris Kobach serves as general counsel for WBTW, and it is a
4 paid position.⁵ Kobach was a candidate for U.S. Senate in Kansas in 2020.⁶ Brian Kolfage is
5 the President of WBTW.⁷ According to information available to the Commission, Dustin
6 Stockton is a director of WBTW and President of Stockton Strategies, LLC (“Stockton
7 Strategies”), a digital fundraising vendor retained by both the Committee and WBTW.⁸

8 On July 10, 2019, Stockton Strategies entered into an agreement to rent from WBTW, at
9 a cost of \$2,000.00, use of its file of email addresses for purposes of prospecting contributions to
10 Stockton Strategies’ candidate clients in 2019. The Committee reimbursed Stockton Strategies

⁴ WBTW Articles of Incorporation, Florida Dept. of State, Div. of Corporations. (Dec. 12, 2018). Brian Kolfage is the only listed director on the original Articles of Incorporation. *Id.* Prior to the formal incorporation of WBTW, Kolfage reportedly created a GoFundMe campaign called, “We The People Will Build the Wall” in December 2018 to raise money for the federal government to build a border wall on the USA-Mexico border. *See* Abigail Hess, *A GoFundMe Campaign Raised \$20 million For A Border Wall—Now All Of The Funds Will Be Returned*, Jan. 11, 2019, CNBC, <https://www.cnbc.com/2019/01/11/gofundme-that-raised-20-million-for-border-wall-will-return-funds.html>. However, Kolfage reportedly subsequently determined the federal government would not be able to accept the money, at which point Kolfage created WBTW and gave contributors the choice of a refund or to have their contribution transferred to WBTW. *Id.* WBTW has four directors: Brian Kolfage (President), Amanda Shea (Secretary/Treasurer), Kris Kobach (Director), and Dustin Stockton (Director). WeBuildTheWall, Inc., 2019 Florida Not For Profit Corporation Annual Report at 1 (July 15, 2019), <http://search.sunbiz.org/Inquiry/CorporationSearch/GetDocument?aggregateId=domnp-n19000000009-98698443-58d3-4b71-ad00-e2e2f8f17ffc&transactionId=n19000000009-2a1c88f1-ff1e-4468-952f-df2fb3f3b374&formatType=PDF>.

⁵ *See* 2019 Kobach for Senate Financial Disclosure at 7; *see also* Jonathan Shorman, *et al.*, *As Kobach Pursues U.S. Senate, Border Wall Group He Represents Leaves Anger In Its Wake*, THE WICHITA EAGLE, July 21, 2019, <https://www.kansas.com/news/politics-government/article232855972.html>; *see also* WBTW Resp. at 1.

⁶ Kris Kobach, Statement of Candidacy (July 8, 2019).

⁷ *See* WBTW Resp. at 1, MUR 7628; *see also* We Build The Wall Team, WEBUILDTHEWALL, <https://webuildthewall.us/ourteam/> (last visited Aug. 2, 2021).

⁸ Stockton Strategies does not have a website.

1 for the full \$2,000 rental price. According to information available to the Commission the
2 Committee entered into an agreement with Stockton’s company to perform fundraising services.
3 Stockton sent emails to WBTW’s 295,000-person email list on July 18, 2019, and
4 August 1, 2019, from the WBTW server. The July 18 email was sent from “Brian Kolfage —
5 WeBuildTheWall, Inc. info@webuildthewall.us” and included the WBTW logo, an
6 announcement supporting Kobach’s Senate candidacy, a solicitation for campaign contributions
7 to Kobach’s campaign, and the email was signed by Kolfage. The August 1, 2019, email was
8 sent from “Kris Kobach — WeBuildTheWall, Inc. info@webuildthewall.us” and contained the
9 WBTW logo, and a letter, signed by Kobach as general counsel for WBTW, announcing his
10 Senate candidacy and soliciting support and contributions.⁹

11 The MUR 7628 Complaint alleges that WBTW made an in-kind corporate contribution to
12 the Committee by sending the August 1, 2019, email to the WBTW list. The MUR 7636
13 Complaint alleges that WBTW violated the corporate facilitation prohibition by using its logo
14 and resources to send the email.¹⁰ WBTW responds that because it rented its list to Stockton
15 Strategies, it did not make an in-kind corporate contribution to the Committee.¹¹

16 **III. LEGAL ANALYSIS**

17 **A. Alleged In-Kind Contributions**

18 The MUR 7628 Complaint alleges that the use of the WBTW email list constituted a
19 prohibited in-kind corporate contribution. Corporations are prohibited from making a
20 contribution to a candidate’s committee, and candidates are prohibited from knowingly accepting

⁹ MUR 7628 Compl. at Ex. 1.

¹⁰ MUR 7637 Compl. at 4-5.

¹¹ WBTW Resp. at 2-5, MUR 7628.

1 or receiving a prohibited contribution.¹² A “contribution” includes “any gift, subscription, loan,
2 advance, or deposit of money or anything of value made by any person for the purpose of
3 influencing any election for Federal office.”¹³ “Anything of value” includes all in-kind
4 contributions, including the provision of goods or services without charge or at a charge that is
5 less than the usual and normal charge.¹⁴ The Commission’s regulations define “usual and
6 normal charge” as “the price of those goods in the market from which they ordinarily would have
7 been purchased at the time of the contribution.”¹⁵ Finally, the Act requires committee treasurers
8 to file reports of receipts and disbursements in accordance with the provisions of 52 U.S.C.
9 § 30104.¹⁶

10 As a corporation, WBTW is prohibited from making contributions to candidates for
11 federal office. If the \$2,000 list rental price is the usual and normal charge for this list, then
12 WBTW would have made no contribution to the Committee. As set forth below, the available
13 information indicates that the \$2,000 list rental price was substantially below the usual and

¹² See 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1).

¹³ 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a); *see also* 52 U.S.C. § 30118(b)(2) (“contribution or expenditure . . . includes any direct or indirect payment . . . gift of money, or any services, or anything of value”).

¹⁴ See 11 C.F.R. § 100.52(d)(1); *see also* Advisory Opinion 2010-30 (Citizens United) (holding, “so long as Citizens United does not rent its list to Federal candidates, authorized committees, political party committees, or other political committees for less than the usual and normal charge, the rental of the list will not constitute a corporate expenditure by Citizens United.”); First Gen. Counsel’s Rpt. at 5 & Cert. ¶1, MUR 5682 (Bachmann for Congress) (finding the respondent assigned an appropriate valuation to a mailing list where the respondent had consulted with a “reputable list broker” regarding the “proper fair market value” of the list).

¹⁵ 11 C.F.R. § 100.52(d)(2).

¹⁶ 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1(a); *see also* 52 U.S.C. § 30104(b) (contents of the required reports).

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1 normal charge for the list’s rental; therefore, WBTW appears to have made an in-kind corporate
2 contribution.¹⁷

3 According to WBTW, the market rate for its email list containing 295,000 addresses was
4 1/10 of a cent per email per use (for six uses).¹⁸ By contrast, according to information available
5 to the Commission, the Committee believed that the agreed-upon market rate was 2/3 of a cent
6 per email (with no number of uses stated). WBTW does not explain how it determined 1/10 of a
7 cent per email address per use (for six uses) was the appropriate “market rate.”

8 The list consisted of “all individuals who had made any donation, of any amount, to
9 WBTW throughout its history” including the original “GoFundMe donors,” whose combined
10 donations totaled \$25 million for the border wall campaign. Thus, the list was not an untested
11 roster of potentially interested persons, but a list of people who had actually donated money for a
12 specific cause. Further, the factual context suggests that the list is also political in nature. The
13 list use agreement between Stockton Strategies and WBTW stated that the list was to be used by
14 Stockton Strategies in conducting fundraising on behalf of political candidates who support the
15 construction of border fencing on the United States — Mexico border by the federal government.
16 The email list consisted of persons whose previous donations indicate an interest in the same
17 specific political issue — border security — as the candidates on whose behalf Stockton
18 Strategies would fundraise. Moreover, Kobach had been part of WBTW since its formation, the

¹⁷ See Factual & Legal Analysis at 5-6, MUR 5939 (MoveOn.org Political Action, *et al.*) (concluding the available information suggests that the \$64,575 rate initially agreed upon by MOPA and The Times was less than the usual and normal price of \$142,083 for an advertisement guaranteed to run on a particular day; the difference between these two figures, \$77,508, would have constituted a corporate contribution from The Times to MOPA if MOPA had not paid the higher rate of \$142,083 on September 24, 2007). A candidate acts as an agent of an authorized Committee. See 52 U.S.C. § 30102(b)(2).

¹⁸ WBTW Resp. at 2, MUR 7628.

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1 solicitation emails identified candidate Kobach as WBTW’s general counsel, and it appears that
2 Kobach was the only candidate for which Stockton used the list.

3 The WBTW list rental price appears to be significantly lower than other list rental prices
4 cited in past Commission matters.¹⁹ In MUR 6110 (Obama Victory Fund and Democratic
5 National Committee), a vendor was compensated “\$3,000 for . . . use of the email list, which
6 contained 20,000 email addresses, and for use . . . of the internet.”²⁰ This equals 15 cents per
7 email address in 2008, or 18 cents per email address when adjusted for inflation.²¹ In MUR
8 6937 (NextGen Climate Action Committee), NextGen bought a political committee’s email list
9 containing 111,136 names for \$177,817.60 in 2015 for a “blended rate of \$1.60 per name.”²²

10 The Commission has deemed transactions permissible when the price is “determined by
11 the market’s view of the value of the list.”²³ WBTW, however, did not provide any justification
12 for how the market rate for the WBTW list was determined, but rather, Kolfage simply stated the
13 “market rate is approximately 1/10 of a cent per email record.”²⁴ In previous matters, detailed

¹⁹ Understanding that the Commission hasn’t necessarily determined that the following list prices necessarily represent fair market value, a survey of the cited prices still provides a point for comparison.

²⁰ Factual & Legal Analysis at 20, MUR 6110 (Obama Victory Fund and Democratic National Committee).

²¹ See CPI Inflation Calculator, U.S. Bureau of Labor and Statistics, https://www.bls.gov/data/inflation_calculator.htm (last visited Aug. 2, 2021).

²² Factual & Legal Analysis at 4, MUR 6937 (NextGen Climate Action Committee).

²³ *Id.*; see also Factual & Legal Analysis at 27-28, MURs 4382/4401 (Dole for President) (finding the exchange of a mailing list for Dole’s signature endorsement was not a bargained for exchange and that the committee failed to establish the signature was something of equal value); Advisory Opinion 2012-31 at 4 (AT&T) (concluding the rate structure of text messaging services to political committees “reflects commercial considerations and does not reflect considerations outside of a business relationship.”). The Commission reiterated these considerations in numerous Advisory Opinions. See Advisory Opinion 1994-10 (Franklin National Bank); Advisory Opinion 2012-28 (CTIA II); Advisory Opinion 2012-26 (m-Qube II); see also Advisory Opinion 1981-46 at 2 (Dellums) (determining whether a transaction involving the exchange of mailing lists between a candidate committee and another entity results in a contribution, is based on whether the transaction involved a “a bargained-for exchange of consideration in a commercial transaction).

²⁴ MUR 7628 WBTW Resp., Kolfage Affidavit ¶9.

1 factual records have been provided to establish a market rate and prove that a bargained-for
2 exchange occurred. WBTW has not provided a detailed factual record.²⁵

3 A review of publicly available information regarding list rental prices reveals a wide
4 range, depending on the nature of the list, but all of these prices were significantly higher than
5 rate WBTW charged the Committee. According to one 2019 article in Roll Call, “Each rented
6 name could cost in the \$2 to \$3 range, depending on the vendor and the parameters of the deal.²⁶
7 Names on a smaller, more localized or issue-specific campaign could cost between \$5 and \$8,
8 while names on a big national list could cost as little as 40 or 50 cents.”²⁷ One list broker,
9 Granite Lists, markets very specific Republican lists.²⁸ One seemingly comparable example is a
10 35,938 person email list consisting of contributors who made at least a \$15 contribution to Ron
11 Johnson for Senate for \$120 per 1,000 emails.²⁹ This equates to 12 cents per email address,
12 which is 120 times the rate used in the WBTW list rental agreement. One of the least expensive
13 rates in the 2020 election cycle was offered by a company called Excelsior Strategies, which was
14 renting 1,000 email addresses of Trump Supporters for \$35.³⁰ Yet, this rate is still at least five

²⁵ See Factual & Legal Analysis at 7, MUR 5181 (Ashcroft 2000) (concluding that the available information failed to establish whether the exchange at issue was a bargained-for exchange of equal value based in part on the committee’s failure to provide any information regarding the value of the mailing list and the use of then-Senator Ashcroft’s signature or an explanation as to how the items can be considered items of equal value).

²⁶ Simone Pathe, *Your Email Address Could Be Worth \$8 To A Political Campaign*, ROLL CALL, April 11, 2019, <https://www.rollcall.com/2019/04/11/your-email-address-could-be-worth-8-to-a-political-campaign>.

²⁷ *Id.*

²⁸ Karl Evers-Hillstrom and Camille Erickson, *Your Email Is For Sale—And 2020 Candidates Are Paying Up*, THE CENTER FOR RESPONSIVE POLITICS, June 13, 2019, <https://www.opensecrets.org/news/2019/06/email-list-for-sale-2020-candidates-are-paying>.

²⁹ *Id.*

³⁰ Kenneth Vogel and Maggie Haberman, *Now For Rent: Email Addresses And Phone Numbers For Millions Of Trump Supporters*, THE NEW YORK TIMES, Oct. 13, 2018, <https://www.nytimes.com/2018/10/13/us/politics/trump-political-data.html>.

1 times the WBTW rate. Moreover, the WBTW list rental was not for only one use, but for either
2 six uses, according to WBTW's Response, or unlimited use over a six-month period, according
3 to the list rental agreement.³¹ Political Resources, Inc., is a list broker that displays prices for
4 specific email lists on its website in the range of \$90-\$110 per 1,000 email addresses, which is
5 90-110 times the WBTW rate.³² Based on the highly targeted nature of the WBTW list, it is
6 doubtful that the list would have a market value 35 to 90 times lower than the low range of the
7 current rates for list rentals. The WBTW list is much more comparable to the Ron Johnson list
8 from Granite lists, which was listed for 120 times the rental rate of the WBTW list. According to
9 the Roll Call article, an issue-specific campaign could be charging five to eight dollars per
10 name.³³ Using these rates, the WBTW list would have a one-time rental market rate of at least
11 \$70,000. Given this information, the \$2,000 list price appears to be significantly lower than any
12 comparable market rate.

13 In addition, the presence of Kobach and Stockton on both sides of the transaction raises
14 further questions about its commercial reasonableness. Information available to the Commission
15 indicates that Kobach drafted the agreement in his capacity as WBTW's general counsel and was
16 asked his opinion concerning the list rental price, and Kobach agreed that \$2,000 was within the
17 market range and was appropriate, given the untested nature of the non-political list. Ultimately,
18 Kobach received the rented email list for that price, as the Committee was the only entity that
19 used the list, and the Committee reimbursed Stockton Strategies for the entire rental price.

³¹ See WBTW Resp. at 2, MUR 7628.

³² Political Resources, Inc., Direct Mail Lists, <https://www.politicalresources.com/mailing-list/direct-mail-email-lists> (last visited: Aug. 2, 2021).

³³ Simone Pathe, *Your Email Address Could Be Worth \$8 To A Political Campaign*, ROLL CALL, April 11, 2019, <https://www.rollcall.com/2019/04/11/your-email-address-could-be-worth-8-to-a-political-campaign>.

1 Further, Stockton was a director of WBTW and the President of Stockton Strategies, which was
2 retained by both WBTW and the Committee, and Stockton was involved on both sides of the
3 transaction.

4 Additional factors cast doubt on the commercial reasonableness of the list rental
5 agreement. The July 10 agreement between WBTW and Stockton Strategies and another
6 relevant agreement, dated July 15, between Stockton Strategies and the Committee regarding the
7 email list, are unsigned. Information available to the Commission indicates that although the
8 agreements are unsigned, it was the intention of the parties for the agreements to be binding.

9 In summary, the available information indicates that the \$2,000 rental price was
10 significantly below market rate, Respondent has been unable to articulate how the rate was
11 determined, and WBTW and Kobach were on both sides of the rental transaction. Therefore, the
12 Commission finds reason to believe that WBTW made an in-kind corporate contribution.

13 **B. Corporate Logo**

14 The MUR 7636 Complaint alleges that WBTW violated the prohibition on corporate
15 contributions by including the WBTW logo at the top of the August 1, 2019, solicitation email.³⁴
16 Information available to the Commission reveals an earlier July 18, 2019, email, that also
17 included the WBTW logo. The Commission has previously determined that a corporation's
18 name, trade name, trademarks, and service marks are things of value owned by the corporation,
19 and that allowing a committee to use them in a manner suggesting the corporation's support or

³⁴ The MUR 7636 Complaint alleges that the WBTW has thereby violated the prohibition on corporate facilitation. *See* 11 C.F.R. § 114.2(f)(1). However, the Commission has previously analyzed the use of corporate logos in candidate committee advertising under the section 52 U.S.C. § 30118(a) statutory prohibition on corporate contributions, and the Commission does so here.

1 endorsement of a candidate may constitute an in-kind contribution.³⁵ The WBTW logo in these
2 emails is significant in that it appears at the top of every email sent to the WBTW list. The
3 WBTW logo has an underlying meaning and message that is distinguishable from previous
4 corporate logo circumstances that the Commission has deemed to be *de minimis*.³⁶ Corporate
5 logo scenarios that the Commission has deemed to be *de minimis* involve small business where
6 the value of the corporate name was hard to calculate,³⁷ or where the use of the logo was to
7 demonstrate the business acumen of the candidate.³⁸ In contrast, Kobach's use of the WBTW
8 logo signaled to WBTW contributors that contributing to and electing Kobach would advance
9 WBTW's border-security agenda. Under these circumstances, the WBTW corporate logo had
10 substantial value.³⁹ Therefore, the Commission finds reason to believe that WBTW made an in-
11 kind corporate contribution through the use of the WBTW logo.

³⁵ See Factual & Legal Analysis at 4-5, MUR 7302 (Tom Campbell for North Dakota); see also Advisory Opinion 2007-10 (Reyes) at 2-3 (concluding that a committee may not recognize the corporate employers of individual contributors for the stated reason for including corporate employer's names, trademarks, or service marks was to encourage contributions to the committee).

³⁶ See, e.g., Factual & Legal Analysis at 7, MUR 6542 (Mullin for Congress, *et al.*) (dismissing committee's use of a plumbing company's logo in print and video advertising as *de minimis*); Factual & Legal Analysis at 12-13, MUR 6110 (Obama for America) (dismissing committee's use of corporate logos on advertising for a fundraising concert because the value of the names and logos of these particular businesses is likely insubstantial).

³⁷ See Factual & Legal Analysis at 12-13, MUR 6110 (Obama for America) (dismissing committee's use of corporate logos on advertising for a fundraising concert because the value of the names and logos of these particular businesses is likely insubstantial).

³⁸ See Factual & Legal Analysis at 4-5, MUR 7302 (Tom Campbell for North Dakota).

³⁹ See Advisory Opinion 2007-10 at 2 (Reyes) (recognizing an individual contributor's corporate employer by displaying the corporate logo at each hole at a gold fundraiser would be a violation of the Act).

ELW office edits 3/23/22

1 **FEDERAL ELECTION COMMISSION**2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENTS:** Kris Kobach **MUR 7628, 7636 & _____**
 4 Kobach for Senate and Elizabeth Curtis
 5 in her official capacity as treasurer

6 **I. INTRODUCTION**

7 The Complaints in these matters involve allegations that WeBuildtheWall, Inc.
 8 (“WBTW”), a 501(c)(4) non-profit organization, made a prohibited in-kind corporate
 9 contribution to Kris Kobach and Kris Kobach for Senate and Elizabeth Curtis in her official
 10 capacity as treasurer (the “Committee”) by sending an email on August 1, 2019, to the WBTW
 11 email list, displaying the WBTW logo, and soliciting contributions for the Committee, in
 12 violation of the Federal Election Campaign Act of 1971, as amended (the “Act”).¹ The MUR
 13 7628 Complaint also alleges that WBTW spent funds not subject to the limits, prohibitions, and
 14 reporting requirements of the Act to disseminate the email.² The Committee denies the
 15 allegations, asserting that it rented the WBTW email list for \$2,000, which they assert was the
 16 fair market value for the list, and that any other violations are the result of vendor error.³

17 In Pre-MUR 628, the Committee filed a *sua sponte* Submission regarding an additional
 18 email that was sent to the WBTW email list on July 18, 2019, soliciting contributions to the
 19 Committee without the required disclaimer.⁴ The Committee asserts that the omitted disclaimer
 20 was the result of vendor error, the Committee discovered this earlier email while taking

¹ MUR 7628 Compl. at 7-10 (Aug. 5, 2019); MUR 7636 Compl. at 4-5 (Aug. 13, 2019).

² MUR 7628 Compl. at 9.

³ Committee Resp. at 1 (Oct. 2, 2019), MUR 7628.

⁴ Submission at 1 (Oct. 2, 2019), Pre-MUR 628.

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1 “investigative and remedial action” with regard to the August 1, 2019, email, and it issued a
2 corrected email containing a disclaimer within 24 hours of discovering the error.⁵

3 As set forth below, the Commission dismisses the disclaimer and soft money allegations.
4 Also, the Commission finds reason to believe that the \$2,000 rental for the WBTW email list was
5 significantly below fair market value and therefore constituted an in-kind and unreported
6 corporate contribution to the Committee. The Commission finds reason to believe that the use of
7 the WBTW logo was an in-kind and unreported corporate contribution to the Committee.

8 II. FACTUAL BACKGROUND

9 Kris Kobach was a candidate for U.S. Senate in Kansas in 2020.⁶ WBTW is a 501(c)(4)
10 non-profit organization that raises money to build portions of a wall on the USA-Mexico
11 border.⁷ Kobach serves as general counsel for WBTW, and it is a paid position.⁸ Brian Kolfage

⁵ *Id.* at 2-3.

⁶ Kris Kobach, Statement of Candidacy (July 8, 2019). Kobach lost the primary election on Aug. 4, 2020. Kobach is now a candidate for Kansas Attorney General. Kris Kobach Campaign Finance Appointment of Treasurer Report, Kansas Governmental Ethics Commission (Apr. 28, 2021), http://ethics.ks.gov/CFAScanned/StWide/2022ElecCycle/Treasurers/SW02KK_AT.pdf.

⁷ WBTW Articles of Incorporation, Florida Dept. of State, Div. of Corporations. (Dec. 12, 2018). Brian Kolfage is the only listed director on the original Articles of Incorporation. *Id.* Prior to the formal incorporation of WBTW, Kolfage reportedly created a GoFundMe campaign called, “We The People Will Build the Wall” in December 2018 to raise money for the federal government to build a border wall on the USA-Mexico border. *See* Abigail Hess, *A GoFundMe Campaign Raised \$20 million For A Border Wall—Now All Of The Funds Will Be Returned*, Jan. 11, 2019, CNBC, <https://www.cnbc.com/2019/01/11/gofundme-that-raised-20-million-for-border-wall-will-return-funds.html>. However, Kolfage reportedly subsequently determined the federal government would not be able to accept the money, at which point Kolfage created WBTW and gave contributors the choice of a refund or to have their contribution transferred to WBTW. *Id.* WBTW has four directors: Brian Kolfage (President), Amanda Shea (Secretary/Treasurer), Kris Kobach (Director), and Dustin Stockton (Director). WeBuildTheWall, Inc., 2019 Florida Not For Profit Corporation Annual Report at 1 (July 15, 2019), <http://search.sunbiz.org/Inquiry/CorporationSearch/GetDocument?aggregateId=domnp-n19000000009-98698443-58d3-4b71-ad00-e2e2f8f17ffc&transactionId=n19000000009-2a1c88f1-ff1e-4468-952f-df2fb3f3b374&formatType=PDF>.

⁸ *See* 2019 Kobach for Senate Financial Disclosure at 7; *see also* Jonathan Shorman, *et al.*, *As Kobach Pursues U.S. Senate, Border Wall Group He Represents Leaves Anger In Its Wake*, THE WICHITA EAGLE, July 21, 2019, <https://www.kansas.com/news/politics-government/article232855972.html>.

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1 is the President of WBTW.⁹ Dustin Stockton is a director of WBTW and President of Stockton
2 Strategies, LLC (“Stockton Strategies”), a digital fundraising vendor retained by both the
3 Committee and WBTW.¹⁰

4 On July 10, 2019, Stockton Strategies entered into an agreement “to rent from WBTW, at
5 a cost of \$2,000.00, use of its file of email addresses for purposes of prospecting contributions to
6 Stockton Strategies’ candidate clients in 2019.”¹¹ The agreement between WBTW and Stockton
7 Strategies was drafted by Kobach in his capacity as General Counsel for WBTW,¹² and Kobach
8 was “asked his opinion concerning the list rental price.”¹³ The WBTW list was only used for the
9 Committee and not for any other Stockton clients.¹⁴ The Committee reimbursed Stockton

⁹ See We Build The Wall Team, WEBUILDTHEWALL, <https://webuildthewall.us/ourteam/> (last visited Aug. 2, 2021).

¹⁰ See Kobach and Committee Resp. to First Request for Information at 4 (July 27, 2020), Pre-MUR 628. Stockton Strategies, LLC is a digital fundraising vendor and Nevada corporation. Stockton Affidavit, Kobach and Committee Resp. Ex. 1 at 1-3. Stockton Strategies does not have a website.

¹¹ Stockton Affidavit ¶5. Despite Stockton’s representations that he was prospecting for multiple clients, a query of disbursements in the FEC database reveals payments to Stockton Strategies from only one federal committee client in 2019—the Committee. See FEC Contributor Database Query: https://www.fec.gov/data/disbursements/?data_type=processed&recipient_name=stockton+strategies&two_year_transaction_period=2018&two_year_transaction_period=2020&two_year_transaction_period=2022; see also Kobach and Committee Resp. to First Request for Information at 2, Pre MUR 628 (indicating Stockton Strategies did not use the WBTW list for any other clients). Although it is possible Stockton had non-federal political committee clients, a search of state campaign finance disclosure records for Kansas, Nevada and Texas, the states Stockton was known to work in, do not reveal any payments to Stockton. See generally Kansas Secretary of State Campaign, Finance—Viewer, https://kssos.org/elections/cfr_viewer/cfr_examiner_entry.aspx (last visited Aug. 2, 2021); Nevada Secretary of State, Campaign Finance Disclosure, https://www.nvsos.gov/soscandidateservices/anonymoussaccess/cfdsearchuu/search.aspx#individual_search (last visited Aug. 2, 2021); Texas Ethics Commission, Search Campaign Finance Reports, <https://www.ethics.state.tx.us/search/cf/> (last visited Aug. 2, 2021).

¹² Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628.

¹³ Kobach and Committee Resp. to Second Request for Information at 2, Pre-MUR 628.

¹⁴ Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628.

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1 Strategies for the full \$2,000 rental price.¹⁵ The Committee asserts it entered into an agreement
2 with “Stockton’s company to perform fundraising services.”¹⁶

3 Stockton sent emails to WBTW’s 295,000-person email list on July 18, 2019, and
4 August 1, 2019, from the WBTW server. The July 18 email was sent from “Brian Kolfage —
5 WeBuildTheWall, Inc. info@webuildthewall.us” and included the WBTW logo, an
6 announcement supporting Kobach’s Senate candidacy, a solicitation for campaign contributions
7 to Kobach’s campaign, and the email was signed by Kolfage. The Committee concedes that this
8 email should have included a disclaimer, but did not.¹⁷ The August 1, 2019, email was sent from
9 “Kris Kobach — WeBuildTheWall, Inc. info@webuildthewall.us” and contained the WBTW
10 logo, and a letter, signed by Kobach as general counsel for WBTW, announcing his Senate
11 candidacy and soliciting support and contributions.¹⁸

12 The MUR 7628 Complaint alleges that WBTW made an in-kind corporate contribution to
13 the Committee by sending the August 1, 2019, email to the WBTW list and failing to include a
14 required disclaimer identifying who paid for the solicitation.¹⁹ The MUR 7636 Complaint
15 alleges that WBTW violated the corporate facilitation prohibition by using its logo and resources
16 to send the email.²⁰ The Committee responds that it did not receive a contribution from WBTW,

¹⁵ *Id.*; *see also id.* at Exs. B-D.

¹⁶ Kobach and Committee Resp. at 1 (referencing a July 15, 2019 fundraising agreement), MUR 7628. Stockton was also working on WBTW fundraising efforts at the same time. *See* Kobach and Committee Resp. to First Request for Information at 5, Pre-MUR 628.

¹⁷ Submission at 1-2, Pre-MUR 628.

¹⁸ MUR 7628 Compl. at Ex. 1.

¹⁹ *Id.* at 2, 7, 10.

²⁰ MUR 7637 Compl. at 4-5.

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1 but instead paid for the use of WBTW's email list by reimbursing Stockton Strategies for the
2 \$2,000 list rental.²¹ The Committee asserts that Stockton was responsible for failing to include
3 the disclaimer and using the WBTW email server,²² and Stockton admits he was at fault.²³ The
4 Committee further responds that once it became aware that the emails lacked a disclaimer, it
5 issued corrected emails containing a disclaimer.²⁴

6 **III. LEGAL ANALYSIS**

7 **A. Disclaimer Allegations**

8 The MUR 7628 Complaint alleges that the August 1, 2019, email failed to include a
9 required disclaimer identifying who paid for the solicitation.²⁵ The Committee acknowledges
10 that its August 1 email — as well as its July 18, 2019, email — failed to include a disclaimer.²⁶
11 The Act and Commission regulations require a disclaimer whenever a political committee makes
12 a disbursement for the purpose of financing any public communication through any broadcast,
13 cable, satellite communication, newspaper, magazine, outdoor-advertising facility, mailing, or
14 any other type of general public political advertising.²⁷ If a communication requiring a
15 disclaimer is paid for and authorized by a candidate, a candidate's authorized committee, or its

²¹ Kobach and Committee Resp. at 1, MUR 7628.

²² *Id.* at 2.

²³ Stockton Affidavit ¶¶8-9.

²⁴ Kobach and Committee Resp. at 2, MUR 7628.

²⁵ MUR 7628 Compl. at 2, 7, 10.

²⁶ Submission at 1-2, Pre-MUR 628.

²⁷ 52 U.S.C. §§ 30101(22), 30120; *see also* 11 C.F.R. §§ 100.26, 110.11.

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1 agents, the disclaimer must clearly state that the communication was paid for by the authorized
2 committee.²⁸

3 A disclaimer was required in this case because the Committee's July 18, 2019, and
4 August 1, 2019, emails were "electronic mail of more than 500 substantially similar
5 communications" sent by a political committee.²⁹ Respondents do not contest the allegation that
6 the emails required a disclaimer.³⁰ Rather, Respondents blame the error on Stockton Strategies,
7 which they describe as a vendor.³¹ The Commission has generally not pursued disclaimer
8 violations that resulted from inadvertent vendor error.³² In this case, Stockton Strategies appears
9 to be a vendor and Stockton asserts in his sworn affidavit that it was his inadvertent error.³³ The
10 Committee also sent corrected emails including a proper disclaimer shortly after the emails
11 issued and before their formal notification of the MUR 7628 Complaint.³⁴ Under these
12 circumstances, the Commission dismisses the disclaimer allegations.

²⁸ 52 U.S.C. § 30120(a)(1); *see also* 11 C.F.R. § 110.11(b)(1).

²⁹ 11 C.F.R. § 110.11(a)(1).

³⁰ Kobach and Committee Resp. at 2, MUR 7628.

³¹ *Id.*

³² *See* Factual & Legal Analysis at 8, MUR 6846 (DeFazio for Congress) (dismissing disclaimer violation due to vendor error, noting that the respondent took remedial action and that the Commission has declined to pursue cases based on vendor error); Factual & Legal Analysis at 7, MUR 5991 (U.S. Term Limits) (same).

³³ Stockton Affidavit ¶ 9.

³⁴ *Id.* ¶11-12; *see also* Submission at 3, Pre-MUR 628. Respondents did issue corrective emails, but only after the Common Cause Press Release regarding their Complaint in MUR 7628. *See* Common Cause Press Release dated Aug. 2, 2019 at 3:46 PM Eastern Standard Time, <https://www.commoncause.org/press-release/doj-fec-complaints-filed-against-kris-kobach-we-build-the-wall-inc-for-illegal-campaign-solicitation/> (last visited: Aug. 2, 2021). The corrected emails went out just minutes after the press release. *See* Submission at Ex. 5, Pre-MUR 628. The correction email for the August 1 email has a time stamp of Aug. 2, 2019 at 3:28 PM Central Time. Considering the time zone differences this email was sent 18 minutes after the Common Cause press release. *See id.* The correction email for the July 18 email has a time stamp of Aug. 2, 2019 at 3:09 PM. Considering the time zone differences this email was sent 23 minutes after the press release.

B. Alleged In-Kind Contributions

1 **B. Alleged In-Kind Contributions**

2 The MUR 7628 Complaint alleges that the use of the WBTW email list constituted a

3 prohibited in-kind corporate contribution. Corporations are prohibited from making a

4 contribution to a candidate’s committee, and candidates are prohibited from knowingly accepting

5 or receiving a prohibited contribution.³⁵ A “contribution” includes “any gift, subscription, loan,

6 advance, or deposit of money or anything of value made by any person for the purpose of

7 influencing any election for Federal office.”³⁶ “Anything of value” includes all in-kind

8 contributions, including the provision of goods or services without charge or at a charge that is

9 less than the usual and normal charge.³⁷ The Commission’s regulations define “usual and

10 normal charge” as “the price of those goods in the market from which they ordinarily would have

11 been purchased at the time of the contribution.”³⁸ Finally, the Act requires committee treasurers

12 to file reports of receipts and disbursements in accordance with the provisions of 52 U.S.C.

13 § 30104.³⁹ Political committees are required to report the name and address of each person who

³⁵ See 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b)(1).

³⁶ 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52(a); *see also* 52 U.S.C. § 30118(b)(2) (“contribution or expenditure” . . . includes any direct or indirect payment . . . gift of money, or any services, or anything of value”).

³⁷ See 11 C.F.R. § 100.52(d)(1); *see also* Advisory Opinion 2010-30 (Citizens United) (holding, “so long as Citizens United does not rent its list to Federal candidates, authorized committees, political party committees, or other political committees for less than the usual and normal charge, the rental of the list will not constitute a corporate expenditure by Citizens United.”); First Gen. Counsel’s Rpt. at 5 & Cert. ¶1, MUR 5682 (Bachmann for Congress) (finding the respondent assigned an appropriate valuation to a mailing list where the respondent had consulted with a “reputable list broker” regarding the “proper fair market value” of the list).

³⁸ 11 C.F.R. § 100.52(d)(2).

³⁹ 52 U.S.C. § 30104(a)(1); 11 C.F.R. § 104.1(a); *see also* 52 U.S.C. § 30104(b) (contents of the required reports).

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1 makes a contribution aggregating more than \$200 per calendar year, or per election cycle for
2 authorized committees, as well as the date, amount, and purpose of such payments.⁴⁰

3 As a corporation, WBTW is prohibited from making contributions to candidates for
4 federal office. If the \$2,000 list rental price is the usual and normal charge for this list, then
5 WBTW would have made no contribution to the Committee. As set forth below, the available
6 information indicates that the \$2,000 list rental price was substantially below the usual and
7 normal charge for the list's rental; therefore, WBTW appears to have made, and the Committee
8 appears to have accepted, an in-kind corporate contribution, and the Committee failed to report
9 it.⁴¹

10 According to information available to the Commission, WBTW believes the market rate
11 for its email list containing 295,000 addresses was 1/10 of a cent per email per use (for six uses).
12 By contrast, the Committee states that the agreed-upon market rate was 2/3 of a cent per email
13 (with no number of uses stated).⁴² The Committee asserts that the rate was a fair price since the

⁴⁰ 52 U.S.C. § 30104(b)(3)(A); 11 C.F.R. § 104.3(a)(4).

⁴¹ See Factual & Legal Analysis at 5-6, MUR 5939 (MoveOn.org Political Action, *et al.*) (concluding the available information suggests that the \$64,575 rate initially agreed upon by MOPA and The Times was less than the usual and normal price of \$142,083 for an advertisement guaranteed to run on a particular day; the difference between these two figures, \$77,508, would have constituted a corporate contribution from The Times to MOPA if MOPA had not paid the higher rate of \$142,083 on September 24, 2007). A candidate acts as an agent of an authorized Committee. See 52 U.S.C. § 30102(b)(2).

⁴² Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628.

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1 list did not consist of known contributors to any political campaign and had not yet been tested
2 as a fundraising list for any political campaign.⁴³

3 The Committee’s descriptions of the list as untested and non-political are questionable in
4 light of the following facts. The list consisted of “all individuals who had made any donation, of
5 any amount, to WBTW throughout its history” including the original “GoFundMe donors,”
6 whose combined donations totaled \$25 million for the border wall campaign.⁴⁴ Thus, the list
7 was not an untested roster of potentially interested persons, but a list of people who had actually
8 donated money for a specific cause. Further, the factual context suggests that the list is also
9 political in nature. The list use agreement between Stockton Strategies and WBTW stated that
10 the list was “to be used by Stockton Strategies in conducting fundraising on behalf of political
11 candidates who support the construction of border fencing on the United States—Mexico border
12 by the federal government.”⁴⁵ The email list consisted of persons whose previous donations
13 indicate an interest in the same specific political issue — border security — as the candidates on
14 whose behalf Stockton Strategies would fundraise. Moreover, Kobach had been part of WBTW

⁴³ *Id.*; see also Kobach and Committee Resp. to Second Request for Information at 3, Pre-MUR 628 (noting that \$2,000 was an appropriate price due to the *untested nature* of the non-political list).

⁴⁴ *Id.*; see also n.7 above. WBTW also rented the list out to Ranch Property Marketing and Management to sell WBTW branded merchandise in exchange for 15% of total sales. See Kobach and Committee Resp. to Second Request for Information at 3, Pre-MUR 628.

⁴⁵ Kobach and Committee Resp. to First Request for Information, Pre-MUR 628 at Ex. B.

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1 since its formation, the solicitation emails identified candidate Kobach as WBTW’s general
2 counsel, and it appears that Kobach was the only candidate for which Stockton used the list.

3 The WBTW list rental price appears to be significantly lower than other list rental prices
4 cited in past Commission matters.⁴⁶ In MUR 6110 (Obama Victory Fund and Democratic
5 National Committee), a vendor was compensated “\$3,000 for . . . use of the email list, which
6 contained 20,000 email addresses, and for use . . . of the internet.”⁴⁷ This equals 15 cents per
7 email address in 2008, or 18 cents per email address when adjusted for inflation.⁴⁸ In MUR
8 6937 (NextGen Climate Action Committee), NextGen bought a political committee’s email list
9 containing 111,136 names for \$177,817.60 in 2015 for a “blended rate of \$1.60 per name.”⁴⁹

10 The Commission has deemed transactions permissible when the price is “determined by
11 the market’s view of the value of the list.”⁵⁰ In previous matters, detailed factual records have
12 been provided to establish a market rate and prove that a bargained-for exchange occurred. The
13 Committee here has not made a similar showing.⁵¹

⁴⁶ Understanding that the Commission hasn’t necessarily determined that the following list prices necessarily represent fair market value, a survey of the cited prices still provides a point for comparison.

⁴⁷ Factual & Legal Analysis at 20, MUR 6110 (Obama Victory Fund and Democratic National Committee).

⁴⁸ See CPI Inflation Calculator, U.S. Bureau of Labor and Statistics, https://www.bls.gov/data/inflation_calculator.htm (last visited Aug. 2, 2021).

⁴⁹ Factual & Legal Analysis at 4, MUR 6937 (NextGen Climate Action Committee).

⁵⁰ *Id.*; see also Factual & Legal Analysis at 27-28, MURs 4382/4401 (Dole for President) (finding the exchange of a mailing list for Dole’s signature endorsement was not a bargained for exchange and that the committee failed to establish the signature was something of equal value); Advisory Opinion 2012-31 at 4 (AT&T) (concluding the rate structure of text messaging services to political committees “reflects commercial considerations and does not reflect considerations outside of a business relationship.”). The Commission reiterated these considerations in numerous Advisory Opinions. See Advisory Opinion 1994-10 (Franklin National Bank); Advisory Opinion 2012-28 (CTIA II); Advisory Opinion 2012-26 (m-Qube II); see also Advisory Opinion 1981-46 at 2 (Dellums) (determining whether a transaction involving the exchange of mailing lists between a candidate committee and another entity results in a contribution, is based on whether the transaction involved a “a bargained-for exchange of consideration in a commercial transaction”).

⁵¹ See Factual & Legal Analysis at 7, MUR 5181 (Ashcroft 2000) (concluding that the available information failed to establish whether the exchange at issue was a bargained-for exchange of equal value based in part on the

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1 A review of publicly available information regarding list rental prices reveals a wide
2 range, depending on the nature of the list, but all of these prices were significantly higher than
3 rate WBTW charged the Committee. According to one 2019 article in Roll Call, “Each rented
4 name could cost in the \$2 to \$3 range, depending on the vendor and the parameters of the deal.
5 Names on a smaller, more localized or issue-specific campaign could cost between \$5 and \$8,
6 while names on a big national list could cost as little as 40 or 50 cents.”⁵² One list broker,
7 Granite Lists, markets very specific Republican lists.⁵³ One seemingly comparable example is a
8 35,938 person email list consisting of contributors who made at least a \$15 contribution to Ron
9 Johnson for Senate for \$120 per 1,000 emails.⁵⁴ This equates to 12 cents per email address,
10 which is 120 times the rate used in the WBTW list rental agreement. One of the least expensive
11 rates in the 2020 election cycle was offered by a company called Excelsior Strategies, which was
12 renting 1,000 email addresses of Trump supporters for \$35.⁵⁵ Yet, this rate is still at least five
13 times the WBTW rate. Moreover, the WBTW list rental was not for only one use, but for either
14 six uses, or unlimited use over a six-month period, according to the list rental agreement.⁵⁶
15 Political Resources, Inc., is a list broker that displays prices for specific email lists on its website

committee’s failure to provide any information regarding the value of the mailing list and the use of then-Senator Ashcroft’s signature or an explanation as to how the items can be considered items of equal value).

⁵² Simone Pathe, *Your Email Address Could Be Worth \$8 To A Political Campaign*, ROLL CALL, April 11, 2019, <https://www.rollcall.com/2019/04/11/your-email-address-could-be-worth-8-to-a-political-campaign>.

⁵³ Karl Evers-Hillstrom and Camille Erickson, *Your Email Is For Sale—And 2020 Candidates Are Paying Up*, THE CENTER FOR RESPONSIVE POLITICS, June 13, 2019, <https://www.opensecrets.org/news/2019/06/email-list-for-sale-2020-candidates-are-paying>.

⁵⁴ *Id.*

⁵⁵ Kenneth Vogel and Maggie Haberman, *Now For Rent: Email Addresses And Phone Numbers For Millions Of Trump Supporters*, THE NEW YORK TIMES, Oct. 13, 2018, <https://www.nytimes.com/2018/10/13/us/politics/trump-political-data.html>.

⁵⁶ Kobach and Committee Resp. to First Request for Information at Ex. B, Pre-MUR 628.

1 in the range of \$90-\$110 per 1,000 email addresses, which is 90-110 times the WBTW rate.⁵⁷
2 Based on the highly targeted nature of the WBTW list, it is doubtful that the list would have a
3 market value 35 to 90 times lower than the low range of the current rates for list rentals. The
4 WBTW list is much more comparable to the Ron Johnson list from Granite lists, which was
5 listed for 120 times the rental rate of the WBTW list. According to the Roll Call article, an
6 issue-specific campaign could be charging five to eight dollars per name.⁵⁸ Using these rates,
7 the WBTW list would have a one-time rental market rate of at least \$70,000. Given this
8 information, the \$2,000 list price appears to be significantly lower than any comparable market
9 rate.

10 In addition, the presence of Kobach and Stockton on both sides of the transaction raises
11 further questions about its commercial reasonableness. The Committee initially indicated that
12 Kobach “did not participate” in the decision to rent WBTW’s email list to Stockton Strategies,
13 although the Committee asserts that Kobach drafted the agreement in his capacity as WBTW’s
14 general counsel.⁵⁹ Subsequently, the Committee indicated Kobach “was asked his opinion
15 concerning the list rental price,” and Kobach “agreed that \$2,000 was within the market range
16 and was appropriate, given the untested nature of the non-political list.”⁶⁰ Ultimately, Kobach
17 received the rented email list for that price, as the Committee was the only entity that used the

⁵⁷ Political Resources, Inc., Direct Mail Lists, <https://www.politicalresources.com/mailing-list/direct-mail-email-lists> (last visited: Aug. 2, 2021).

⁵⁸ Simone Pathe, *Your Email Address Could Be Worth \$8 To A Political Campaign*, ROLL CALL, April 11, 2019, <https://www.rollcall.com/2019/04/11/your-email-address-could-be-worth-8-to-a-political-campaign>.

⁵⁹ Kobach and Committee Resp. to First Request for Information at 3, Pre-MUR 628.

⁶⁰ Kobach and Committee Resp. to Second Request for Information at 2, Pre-MUR 628.

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1 list, and the Committee reimbursed Stockton Strategies for the entire rental price.⁶¹ Further,
2 Stockton was a director of WBTW and the President of Stockton Strategies, which was retained
3 by both WBTW and the Committee, and Stockton was involved on both sides of the transaction.

4 Additional factors cast doubt on the commercial reasonableness of the list rental
5 agreement. Although Respondents have provided copies of the July 10 agreement between
6 WBTW and Stockton Strategies and the July 15 agreement between Stockton Strategies and the
7 Committee, the agreements are unsigned.⁶² The Committee responds that although it never
8 signed the agreement, it was the intention of the parties for the agreements to be binding.⁶³
9 Further, Respondents could not provide any dated documented communications regarding the list
10 rental agreement; they state that all such communication were oral.⁶⁴

11 In summary, the available information indicates that the \$2,000 rental price was
12 significantly below market rate, the Committee has been unable to articulate how the rate was
13 determined, and WBTW and Kobach were on both sides of the rental transaction. Therefore, the
14 Commission finds reason to believe Kobach and the Committee knowingly received an in-kind
15 corporate contribution from WBTW, and the Committee failed to report it.

16 **C. Corporate Logo**

17 The MUR 7636 Complaint alleges that WBTW violated the prohibition on corporate
18 contributions by including the WBTW logo at the top of the August 1, 2019, solicitation email.⁶⁵

⁶¹ *Id.*; Kobach and Committee Resp. to First Request for Information at 3, Exs. B-D, Pre-MUR 628.

⁶² Kobach and Committee Resp. to First Request for Information at 3, Ex. A-B, Pre-MUR 628.

⁶³ Kobach and Committee Resp. to Second Request for Information at 1, Pre-MUR 628.

⁶⁴ *Id.* at 2.

⁶⁵ The MUR 7636 Complaint alleges that the WBTW has thereby violated the prohibition on corporate facilitation. *See* 11 C.F.R. § 114.2(f)(1). However, the Commission has previously analyzed the use of corporate

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1 The *sua sponte* Submission also included copies of the earlier July 18, 2019, email, as well as
2 both “correction” emails showing that each email included the WBTW logo.⁶⁶ The Commission
3 has previously determined that a corporation’s name, trade name, trademarks, and service marks
4 are things of value owned by the corporation, and that allowing a committee to use them in a
5 manner suggesting the corporation’s support or endorsement of a candidate may constitute an in-
6 kind contribution.⁶⁷ The WBTW logo in these emails is significant in that it appears at the top of
7 every email sent to the WBTW list. The WBTW logo has an underlying meaning and message
8 that is distinguishable from previous corporate logo circumstances that the Commission has
9 deemed to be *de minimis*.⁶⁸ Corporate logo scenarios that the Commission has deemed to be *de*
10 *minimis* involve small business where the value of the corporate name was hard to calculate,⁶⁹ or
11 where the use of the logo was to demonstrate the business acumen of the candidate.⁷⁰ In
12 contrast, Kobach’s use of the WBTW logo signaled to WBTW contributors that contributing to
13 and electing Kobach would advance WBTW’s border-security agenda. Under these

logos in candidate committee advertising under the section 52 U.S.C. § 30118(a) statutory prohibition on corporate contributions, and we do so here.

⁶⁶ Submission, Exs. 3-6, Pre-MUR 628.

⁶⁷ See Factual & Legal Analysis at 4-5, MUR 7302 (Tom Campbell for North Dakota); see also Advisory Opinion 2007-10 (Reyes) at 2-3 (concluding that a committee may not recognize the corporate employers of individual contributors for the stated reason for including corporate employer’s names, trademarks, or service marks was to encourage contributions to the committee).

⁶⁸ See, e.g., Factual & Legal Analysis at 7, MUR 6542 (Mullin for Congress, *et al.*) (dismissing committee’s use of a plumbing company’s logo in print and video advertising as *de minimis*); Factual & Legal Analysis at 12-13, MUR 6110 (Obama for America) (dismissing committee’s use of corporate logos on advertising for a fundraising concert because the value of the names and logos of these particular businesses is likely insubstantial).

⁶⁹ See Factual & Legal Analysis at 12-13, MUR 6110 (Obama for America) (dismissing committee’s use of corporate logos on advertising for a fundraising concert because the value of the names and logos of these particular businesses is likely insubstantial).

⁷⁰ See Factual & Legal Analysis at 4-5, MUR 7302 (Tom Campbell for North Dakota).

1 circumstances, the WBTW corporate logo had substantial value.⁷¹ Therefore, the Commission
2 finds reason to believe that the Committee received, an in-kind corporate contribution through
3 the use of the WBTW logo and failed to report it.

4 **D. Soft Money**

5 The Act prohibits federal candidates, their agents, and entities that are directly or
6 indirectly established, financed, maintained, or controlled by or acting on behalf of federal
7 candidates and officeholders, from soliciting, receiving, directing, transferring, or spending funds
8 in connection with a federal election “unless the funds are subject to the limitations, prohibitions,
9 and reporting requirements of th[e] Act.”⁷² Funds not subject to the limitations, prohibitions,
10 and reporting requirements of the Act are colloquially referred to as “soft money.”

11 The MUR 7628 Complaint alleges that Kobach, through his agent WBTW, spent soft
12 money raised by WBTW. Complainant’s allegation is premised on WBTW spending soft money
13 to disseminate the August 1, 2019 fundraising email. As discussed above, the Commission
14 analyzes the allegations regarding the use of WBTW’s email list under 52 U.S.C. § 30118 and
15 finds reason to believe Kobach and the Committee received impermissible in-kind corporate
16 contributions from WBTW in connection with the use of the email list. The Commission
17 dismisses as a matter of prosecutorial discretion the allegation that Respondents violated 52
18 U.S.C. § 30125(e)(1)(A).⁷³

19

⁷¹ See Advisory Opinion 2007-10 at 2 (Reyes) (recognizing an individual contributor’s corporate employer by displaying the corporate logo at each hole at a gold fundraiser would be a violation of the Act).

⁷² 52 U.S.C. § 30125(e)(1)(A)-(B).

⁷³ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).