

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR: 7668

DATE COMPLAINT FILED: December 11, 2019

DATE OF NOTIFICATION: December 12, 2019

LAST RESPONSE RECEIVED: January 27, 2020

DATE ACTIVATED: May 15, 2020

EXPIRATION OF SOL: November 21, 2024 –

March 4, 2025

ELECTION CYCLE: 2020

COMPLAINANTS:

Republican National Lawyers Association
Michael Thielen

RESPONDENTS:

Bloomberg News
Mike Bloomberg 2020, Inc. and Hayden Horowitz,
as treasurer
Michael R. Bloomberg
Bloomberg L.P.
John Micklethwait

MUR: 7669

DATE COMPLAINT FILED: December 10, 2019

DATE OF NOTIFICATION: December 13, 2019

LAST RESPONSE RECEIVED: January 27, 2020

DATE ACTIVATED: May 15, 2020

EXPIRATION OF SOL: November 21, 2024 –

March 4, 2025

ELECTION CYCLE: 2020

COMPLAINANTS:

Media Research Center
L. Brent Bozell, III

RESPONDENTS:

Bloomberg News
Mike Bloomberg 2020, Inc. and Hayden Horowitz,
as treasurer
Michael R. Bloomberg
Bloomberg L.P.
John Micklethwait

MUR: 7685

DATE COMPLAINT FILED: January 27, 2020

DATE OF NOTIFICATION: January 29, 2020
 LAST RESPONSE RECEIVED: March 26, 2020
 DATE ACTIVATED: May 15, 2020

EXPIRATION OF SOL: November 21, 2024 –
 March 4, 2025
 ELECTION CYCLE: 2020

COMPLAINANT:

Mark A. Green

RESPONDENTS:

Bloomberg News
 Mike Bloomberg 2020, Inc. and Hayden Horowitz,
 as treasurer
 Michael R. Bloomberg
 Bloomberg L.P.
 John Micklethwait

**RELEVANT STATUTES AND
 REGULATIONS:**

52 U.S.C. § 30101(1), (7), (8), (9), (25)
 52 U.S.C. § 30104
 52 U.S.C. § 30116(a)
 52 U.S.C. § 30118(a)
 11 C.F.R. § 100.2(b), (c)
 11 C.F.R. § 100.16
 11 C.F.R. § 100.22
 11 C.F.R. § 100.26
 11 C.F.R. § 100.52
 11 C.F.R. § 100.73
 11 C.F.R. § 100.132
 11 C.F.R. § 109.21
 11 C.F.R. § 110.1
 11 C.F.R. § 110.10
 11 C.F.R. § 114.2(b)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaints in these matters allege that Bloomberg News and Bloomberg L.P. made prohibited in-kind contributions to Mike Bloomberg and Mike Bloomberg 2020, Inc. in violation of the Federal Election Campaign Act of 1971, as amended (the “Act”), after Bloomberg News

1 announced that it would forgo any investigations of Bloomberg and his Democratic opponents
2 during the 2020 Democratic presidential primary elections.¹ According to the Complaints,
3 Bloomberg News, a global news service, is not entitled to the press exemption because it failed
4 to provide reasonably equal coverage to all of Bloomberg's opponents by continuing to
5 investigate the Trump administration and by failing to cover negative stories about Bloomberg.²
6 The MUR 7668 and MUR 7669 Complaints further allege that Bloomberg News was required to
7 register and report as a political committee as a result of its alleged contributions to Mike
8 Bloomberg 2020, Inc. in violation of the Act.³

9 Respondents assert that Bloomberg News's coverage of the Democratic Presidential
10 primary elections during the time that Bloomberg was a candidate is excluded from the definition
11 of a contribution or expenditure under the media exemption.⁴ Respondents further assert that
12 Bloomberg News provided reasonably equal coverage of Bloomberg's Democratic opponents as
13 required by the media exemption, and that then-President Trump did not qualify as an opposing
14 candidate during the primary elections under the Act.

15 The available information indicates that Bloomberg News's decision not to investigate
16 Bloomberg or his opponents during his candidacy did not result in prohibited in-kind
17 contributions. First, the record indicates that the media exemption applies to *bona fide* news
18 articles published by Bloomberg News under 11 C.F.R. §§ 100.73, 100.132. Second, although
19 the media exemption does not cover opinion articles when a media entity is owned by a

¹ MUR 7668 Compl. at 4-6 (Dec. 11, 2019); MUR 7669 Compl. at 7 (Dec. 10, 2019); MUR 7685 Compl. at 1 (Jan. 27, 2020).

² MUR 7668 Compl. at 4-6; MUR 7669 Compl. at 6-7; MUR 7685 Compl. at 6-8.

³ MUR 7668 Compl. at 5; MUR 7669 Compl. at 3, 7.

⁴ MURs 7668 and 7669 Resp. at 3-4; MUR 7685 Resp. at 5-6.

1 candidate, such articles published by Bloomberg News do not appear to constitute in-kind
2 contributions because of the lack of sufficient information suggesting that those articles qualified
3 as coordinated communications under 11 C.F.R. § 109.21(a). Accordingly, we recommend that
4 the Commission dismiss the allegations that Bloomberg News, Bloomberg L.P., and John
5 Micklethwait made, and Bloomberg and Mike Bloomberg 2020, Inc. and Hayden Horowitz in
6 his official capacity as treasurer accepted, prohibited in-kind contributions in violation of
7 52 U.S.C. §§ 30116 or 30118.

8 Although we have identified four opinion articles that arguably should have been
9 reported as independent expenditures because they expressly advocated the election or defeat of
10 a federal candidate and because Bloomberg News was owned by a candidate, we do not
11 recommend that the Commission expend resources pursuing this potential violation. Those
12 articles appear to represent only a small fraction of the opinion articles that Bloomberg News, a
13 long-standing press entity, published during the relevant time period. We therefore recommend
14 that the Commission exercise its prosecutorial discretion and dismiss the allegation that
15 Bloomberg News and Bloomberg L.P. violated 52 U.S.C. § 30104(c) by failing to report
16 independent expenditures.⁵

17 Finally, it does not appear that Bloomberg News became a political committee because
18 the available information does not indicate that its major purpose was the nomination or election
19 of a federal candidate. Accordingly, we recommend that the Commission find no reason to
20 believe that Bloomberg News failed to register and report as a political committee in violation of
21 52 U.S.C. §§ 30102, 30103, and 30104.

⁵ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

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II. FACTUAL BACKGROUND

A. Organization of Bloomberg News

Bloomberg News is a global news service with more than 2,400 journalists in over 150 bureaus across more than 70 countries.⁶ Bloomberg News has been in operation since at least 1996.⁷ Respondents state that Bloomberg News delivers over 5,000 stories a day to more than 80 million consumers through an international network of print, television, radio, and digital media.⁸ Bloomberg News publishes both its own stories and those from other news organizations.⁹ Bloomberg News is owned by Bloomberg L.P., a limited partnership, whose incorporated general partner is Bloomberg, Inc.¹⁰ Michael Bloomberg is a co-founder and the majority shareholder of Bloomberg L.P.¹¹

B. Bloomberg News's Coverage of the 2020 Presidential Campaign during Bloomberg's Candidacy

On November 21, 2019, Bloomberg filed his statement of candidacy for presidency,¹² and his authorized committee, Mike Bloomberg 2020, Inc. and Hayden Horowitz in his official capacity as treasurer (the "Committee"), filed its statement of organization.¹³ On November 24,

⁶ MURs 7668 and 7669 Resp. at 2; MUR 7685 Resp. at 2.

⁷ *See* Advisory Opinion 1996-16 at 1-2 (Bloomberg). Bloomberg News was known as Bloomberg Business News at that time. MURs 7668 and 7669 Resp. at 2; MUR 7685 Resp. at 2.

⁸ MURs 7668 and 7669 Resp. at 2; MUR 7685 Resp. at 2.

⁹ MURs 7668 and 7669 Resp. at 2; MUR 7685 Resp. at 2.

¹⁰ MUR 7669 Compl. at 4; MUR 7685 Resp. at 2. The exact corporate structure of Bloomberg L.P. is unclear, and it is unknown from the available information whether it should be treated as a partnership under 11 C.F.R. § 110.1(e).

¹¹ MUR 7669 Compl. at 3-4; MUR 7685 Resp. at 2. The MUR 7685 Complaint alleges that Bloomberg owns 89% of Bloomberg L.P. MUR 7685 Compl. at 1-2.

¹² Michael Bloomberg Statement of Candidacy (Nov. 21, 2019).

¹³ Mike Bloomberg 2020, Inc. Statement of Organization (Nov. 21, 2019).

2019, Bloomberg publicly announced his decision to run as a Democratic candidate for President,¹⁴ and on the same day, Bloomberg News's Editor-in-Chief, John Micklethwait, sent a memorandum to staff stating that Bloomberg News would be making changes to its news coverage in light of Bloomberg's candidacy.¹⁵ The memo stated in part:

So Mike is running.

There is no point in trying to claim that covering this presidential campaign will be easy for a newsroom that has built up its reputation for independence in part by not writing about ourselves (and very rarely about our direct competitors). No previous presidential candidate has owned a journalistic organization of this size. We have electoral laws to follow – to do with both balance and opinion. We will certainly obey them, but I think we need to do more than just that – and I believe we can. So this is how we will proceed.

...

The place where Mike has had the most contact with Editorial is Bloomberg Opinion: our editorials have reflected his view. David Shipley, Tim O'Brien and some members of the Board responsible for those editorials will take a leave of absence to join Mike's campaign. We will suspend the Board, so there will be no unsigned editorials. Our columnists, who produce the majority of Bloomberg Opinion's content, will continue to speak for themselves, and we will continue to take some op-ed articles from outsiders (although not op-eds on the election). ...

On News, we will write about virtually all aspects of this presidential contest in much the same way as we have done so far. We will describe who is winning and who is losing. We will look at policies and their consequences. We will carry polls, we will interview candidates and we will track their campaigns, including Mike's. ... And in the stories we write on the presidential contest, we will make clear that our owner is now a candidate.

That covers the vast majority of what this newsroom does. We will continue our tradition of not investigating Mike (and his family and foundation) and we will

¹⁴ MURs 7668 and 7669 Resp. at 2; MUR 7685 Resp. at 2; *see also* MUR 7685 Compl. at note 1 (citing Alexander Burns, *Michael Bloomberg Joins 2020 Democratic Field for President*, N.Y. TIMES (Nov. 26, 2019), <https://www.nytimes.com/2019/11/24/us/politics/michael-bloomberg-2020-presidency.html>).

The MUR 7669 Complaint asserts that Bloomberg filed to appear as a candidate in the Democratic Primary in Alabama on or about November 8, 2019, raising the potential that Bloomberg became a candidate prior to November 21, 2019. MUR 7669 Compl. at 1.

¹⁵ *See* MUR 7669 Compl. at 2; MUR 7669 Compl. at 3-4.

1 extend the same policy to his rivals in the Democratic primaries. We cannot treat
 2 Mike's Democratic competitors differently from him. If other credible
 3 journalistic institutions publish investigative work on Mike or the other
 4 Democratic candidates, we will either publish those articles in full, or summarize
 5 them for our readers – and we will not hide them. For the moment, our P&I team
 6 will continue to investigate the Trump administration, as the government of the
 7 day. If Mike is chosen as the Democratic presidential candidate (and Donald
 8 Trump emerges as the Republican one), we will reassess how we do that.

9 To those who would rather that we did not write about Mike at all, I would reply
 10 that Bloomberg News has handled these conflicts before – and proved our
 11 independence. We are following the same policy that we have applied to
 12 Bloomberg LP and our direct rivals in the financial markets and media: we will
 13 report on but do not investigate Reuters and CNBC. When Mike ran for mayor,
 14 we reported on the facts of his campaign and summarized other articles.

15 So those are the principles that we will follow. They are broad – and so there will
 16 be decisions to be made at the margin. That is what editors are for. ...¹⁶

17 Consistent with these portions of Micklethwait's November 24, 2019, memorandum, Bloomberg
 18 News continued to cover the 2020 presidential campaign between Bloomberg's November 24,
 19 2019, announcement that he was running for President and Bloomberg's March 4, 2020,
 20 announcement that he was leaving the presidential race.¹⁷ Further, Bloomberg News asserts that
 21 it suspended its editorial board and published no unsigned editorials during Bloomberg's

¹⁶ Letter from John Micklethwait, Editor-in-Chief, Bloomberg News to Bloomberg News Staff (Nov. 24, 2019), cited in MUR 7685 Resp. at Ex. A (emphasis added) (hereinafter, "Letter from Micklethwait"); *see also* MUR 7668 Compl. at Ex. A (citing @Oliver Darcy, TWITTER (Nov. 24, 2019 11:25 a.m.), <https://twitter.com/oliverdarcy/status/1198638671374761985?lang=en>); MUR 7685 Compl. at Ex. A; MURs 7668 and 7669 Resp. at 2.

This memo generated news coverage. *See, e.g.*, MUR 7669 Compl. at 4 (citing Lauren Hirsch and Brian Schwartz, *Bloomberg News will not investigate Mike Bloomberg or his Democratic Rivals During Primary*, CNBC (Nov. 24, 2019), <https://www.cnn.com/2019/11/24/bloomberg-news-will-not-investigate-mike-bloomberg-or-his-democratic-rivals-during-primary.html>); MUR 7669 Compl. at 5 (citing Michael Calderone, *Bloomberg News: We Won't Investigate Mike During Presidential Campaign*, POLITICO (Nov. 24, 2019) <https://www.politico.com/news/2019/11/24/bloomberg-news-investigate-mike-2020-073369>).

¹⁷ *Our Election Coverage Snapshot*, BLOOMBERG (Feb. 3, 2020), <https://www.bloomberg.com/features/2020-election-coverage-snapshot/> (hereinafter "*Election Coverage Snapshot*") (cited at MUR 7685 Resp. at 3-4).

1 candidacy,¹⁸ but it appears to have published at least 64 campaign-related opinion articles written
2 by its columnists during that time.¹⁹

3 In its Response to MUR 7685, Bloomberg News reported that it conducted a “self-audit”
4 of its coverage of the 2020 presidential campaign, entitled “*Our Election Coverage Snapshot*,”
5 between the time of Bloomberg’s candidacy announcement and March 2, 2020.²⁰ According to
6 the audit, Bloomberg News published on the Bloomberg Terminal and its website around 1,100
7 stories on the Democratic primaries and Donald Trump’s re-election campaign.²¹ The audit
8 indicates that Bloomberg News published the following number of articles about each
9 Democratic candidate:²²

¹⁸ MUR 7685 Resp. at 2.

¹⁹ See Appendix A (listing the 64 opinion articles) (available in VBM).

²⁰ MUR 7685 Resp. at 3-4 (citing *Election Coverage Snapshot*).

²¹ *Election Coverage Snapshot*. Some of the articles published by Bloomberg News are only available to Bloomberg Professional Service subscribers on a Bloomberg Terminal. As a result, this Office has been unable to review all articles identified by Bloomberg News’s analysis. Bloomberg News acknowledged that the audit “is a broad one and that categorizing stories is an inexact science,” that “some stories are tagged to more than one candidate,” and that “[p]assing references and standalone headlines [were] not included.” *Id.* Bloomberg News explained that the analysis did not include broadcast segments from Bloomberg TV, Radio, and QuickTake because “whenever [it] has done a significant broadcast interview, [it has] written a story about it.” *Id.*

²² *Id.* (cited at MUR 7685 Resp. at 3-4).

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Candidate	Story Count	Percent
Sanders	189	17
Biden	159	14
Warren	144	13
Bloomberg	124	11
Buttigieg	99	9
Klobuchar	38	3
Other	32	3
Yang	17	2
Steyer	12	1
General	311	28
Total	1,125	-

- 1 In addition to its analysis of its coverage of the Democratic primaries, Bloomberg News's audit
 2 identified articles related to Trump's reelection campaign.²³

Candidate	Story Count	Percent
Trump	92	75
General	31	25
Total	124	-

- 3 Bloomberg News also ran articles that could be viewed as negative about Bloomberg
 4 during his candidacy. While the MUR 7685 Complaint asserts that Bloomberg News failed to
 5 report on Bloomberg's business interests in China, his widely reported failure to register for the
 6 Nevada caucuses, and his statement that he was never asked until his presidential run about
 7 "stop-and-frisk" policing tactics when he was New York City's mayor,²⁴ it appears that
 8 Bloomberg News did run such stories. Respondents indicate that Bloomberg News published on
 9 the Bloomberg Terminal a *Washington Post* article about Bloomberg's business interests in

²³ *Id.* Bloomberg News's analysis only included stories regarding his reelection campaign, and not those related to his role as president or coverage of the Trump's administration. *Id.*

²⁴ MUR 7685 Compl. at 3-4.

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1 China that was cited in the MUR 7685 Complaint.²⁵ Bloomberg News also published an original
 2 story about Bloomberg's decision to skip the Nevada caucuses, and Respondents assert that
 3 Bloomberg News also published an Associated Press newswire about his decision.²⁶ Further,
 4 although we located no articles referencing Bloomberg's statement that he was never asked until
 5 his presidential run about "stop-and-frisk" policing tactics while New York City's mayor,
 6 Bloomberg News published four original articles regarding Bloomberg's stop-and-frisk policy.²⁷
 7 In addition, Bloomberg News published a number of articles that could be considered critical of
 8 Bloomberg's performance at the Democratic presidential debates.²⁸ Based on the information

²⁵ See MUR 7685 Resp. at 4-5; *Election Coverage Snapshot* (identifying Michael Kranish, *Bloomberg Business in China Have Grown. That Could Create Unprecedented Entanglements if He is Elected*, WASH. POST. (Jan.1, 2020)).

²⁶ See John Harney, *Michael Bloomberg to Skip Nevada Caucuses*, BLOOMBERG NEWS (Jan. 2, 2020), <https://www.bloomberg.com/news/articles/2020-01-02/sanders-raised-34-5-million-in-fourth-quarter-campaign-update?sref=WKhMV7TW>; MUR 7685 Resp. at 4.

²⁷ See Mark Niquette, *Bloomberg Seeks to Move Past 'Stop and Frisk' Controversy*, BLOOMBERG NEWS (Feb. 12, 2020), <https://www.bloomberg.com/news/articles/2020-02-12/bloomberg-seeks-to-move-past-the-stop-and-frisk-controversy?sref=WKhMV7TW>; Mark Niquette, *Michael Bloomberg Audio Emerges of His Stop and Frisk Defense*, BLOOMBERG NEWS (Feb. 11, 2020), <https://www.bloomberg.com/news/articles/2020-02-11/purported-bloomberg-audio-emerges-of-his-stop-and-frisk-defense?sref=WKhMV7TW>; Mark Niquette, *Michael Bloomberg Reiterates Apology for 'Stop and Frisk'*, BLOOMBERG NEWS (Dec. 3, 2019), <https://www.bloomberg.com/news/articles/2019-12-03/michael-bloomberg-reiterates-apology-for-stop-and-frisk?sref=WKhMV7TW>; see also *Election Coverage Snapshot* (identifying an article titled *Biden calls Bloomberg Stop-and-Frisk Policy 'Abhorrent,'* which was available to Bloomberg Professional Service subscribers on the Bloomberg Terminal).

²⁸ See, e.g., Ryan Teague Beckwith, *Bloomberg Tries to Get Past Stumbles Before Super Tuesday*, BLOOMBERG NEWS (Feb. 23, 2020), <https://www.bloomberg.com/news/articles/2020-02-23/bloomberg-tries-to-get-past-stumbles-before-super-tuesday?sref=WKhMV7TW>; Mark Niquette and Max Abelson, *Michael Bloomberg Will Release Some Women from NDAs if They Ask*, BLOOMBERG NEWS (Feb. 21, 2020), <https://www.bloomberg.com/news/articles/2020-02-21/bloomberg-says-he-will-release-women-from-ndas-if-they-ask?sref=WKhMV7TW>; Misyrlena Egkolfopoulou, *Warren Hits Bloomberg Over NDAs for Workers: Campaign Update*, BLOOMBERG NEWS (Dec. 16, 2019), <https://www.bloomberg.com/news/articles/2019-12-16/biden-sanders-top-democratic-field-in-new-poll-campaign-update?sref=WKhMV7TW>; Misyrlena Egkolfopoulou and Joe Weisenthal, *Elizabeth Warren Accuses Michael Bloomberg of 'Buying the Election'*, BLOOMBERG NEWS (Dec. 4, 2019), <https://www.bloomberg.com/news/articles/2019-12-05/warren-accuses-michael-bloomberg-of-buying-the-election?sref=WKhMV7TW>.

presented in the audit, Respondents assert Bloomberg was neither underrepresented nor overrepresented in Bloomberg News's stories about the Democratic primaries.²⁹

III. LEGAL ANALYSIS

A. Legal Standard

The Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations prohibit corporations from making contributions or expenditures to a candidate or their authorized committee, and prohibit candidates, political committees, and their officers and employees from knowingly accepting such a prohibited contribution.³⁰ Similarly, the Act and Commission regulations prohibit any person from making a contribution to an authorized committee that exceeded \$2,800 during the 2020 primary election cycle.³¹ Commission regulations provide that contributions from a partnership shall be attributed to the partnership and to each partner in direct proportion to his or her share of the partnership profits.³²

A "contribution" includes "any gift, subscription, loan, advance, or deposit of money or anything of value"³³ and an "expenditure" includes "any purchase, payment, distribution, loan,

²⁹ See MUR 7685 Resp. at 3-5, citing *Election Coverage Snapshot*. Our analysis focused on the news articles identified by Bloomberg News's audit. There is no available information that suggests that the percentage of Bloomberg News's coverage of Bloomberg as compared to the other Democratic candidates was significantly different in its television or radio coverage. In addition, Complainants have identified no specific television or radio coverage that they assert was a violation of the Act.

³⁰ 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(b); Advisory Opinion 2010-11 at 2-3 (Commonsense Ten). The Act and Commission regulations also prohibit any officer or director of a corporation from consenting to any contribution or expenditure by the corporation. 52 U.S.C. § 30118(a); 11 C.F.R. § 114.2(e).

³¹ 52 U.S.C. § 30116(a)(1)(A); 11 C.F.R. § 110.1(b)(1). This limit does not apply to contribution made by a candidate to his authorized committee. 11 C.F.R. § 110.10.

³² 11 C.F.R. § 110.1(e)(1), (g)(2). Alternatively, a partnership may select a different method for determining the proportion as long as there is a corresponding adjustment to the profits of the partners to whom the contribution is attributed. *Id.* § 110.1(e)(2).

³³ 52 U.S.C. § 30101(8)(A)(i).

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advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.”³⁴ The term “anything of value” includes in-kind contributions, defined as the provision of any goods or services without charge or at a charge that is less than the usual and normal charge for such goods and services.³⁵

The Act exempts from the definition of expenditure “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.”³⁶ This exclusion is generally referred to as the “press exemption” or “media exemption.”³⁷ Commission regulations further exclude from the definitions of “contribution” and “expenditure” the “cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, . . . unless the facility is owned or controlled by any political party, political committee, or candidate.”³⁸

³⁴ 52 U.S.C. § 30101(9)(A)(1).

³⁵ 11 C.F.R. § 100.52(d)(1).

³⁶ 52 U.S.C. § 30101(9)(B)(i).

³⁷ Advisory Opinion 2010-08 at 3 (Citizens United) (“AO 2010-08”).

³⁸ 11 C.F.R. §§ 100.73 (excluding bona fide news coverage from the definition of “contribution”); 100.132 (same as to the definition of “expenditure”); *see also* 52 U.S.C. § 30101(9)(B)(i). The Act and Commission regulations also include a similar exemption from the definition of “electioneering communication” for a communication that appears in a news story, commentary, or editorial distributed through the facilities of any broadcast, cable, or satellite television or radio station, unless such facilities are owned or controlled by any political party, political committee, or candidate. 52 U.S.C. § 30104(f)(3)(B); 11 C.F.R. § 100.29(c)(2).

1 The Commission uses a two-step analysis to determine whether the media exemption
 2 applies.³⁹ First, the Commission considers whether the entity in question is a media entity,
 3 focusing on whether the entity produces, on a regular basis, a program that disseminates news
 4 stories, editorials, and/or commentary.⁴⁰ Second, the Commission considers two factors in
 5 determining the scope of the exemption: (1) whether the media entity is owned or controlled by
 6 a political party, political committee, or candidate; and (2) whether the media entity is acting as a
 7 media entity in conducting the activity at issue (*i.e.*, whether the entity is acting in its “legitimate
 8 press function”).⁴¹ When the media entity is owned or controlled by a political party, political
 9 committee, or candidate, Commission regulations provide that the media exemption only applies
 10 to the costs for a news story that: (a) “represents a *bona fide* news account communicated in a
 11 publication of general circulation”; and (b) “is part of a general pattern of campaign-related news
 12 accounts that give reasonably equal coverage to all opposing candidates in the circulation or
 13 listening area.”⁴²

³⁹ See *Fed. Election Comm’n v. Phillips Pub., Inc.*, 517 F. Supp. 1308, 1313 (D.D.C. 1981) (“[T]he initial inquiry is limited to whether the press entity is owned or controlled by any political party or candidate and whether the press entity was acting as a press entity with respect to the conduct in question.”).

⁴⁰ Factual and Legal Analysis (F&LA) at 5-6, MUR 7206 (Bonneville International Corp., *et al.*) (“Bonneville F&LA”); F&LA at 6-7, MUR 7148 (Citizens for Joe Miller, *et al.*) (“Citizens for Joe Miller F&LA”); Advisory Opinion 2019-05 (System73) at 4 (“AO 2019-05”); Advisory Opinion 2016-01 at 2 (Ethiq) (“AO 2016-01”); Advisory Opinion 2010-08 at 2 (Citizens United) (“AO 2010-08”).

⁴¹ Bonneville F&LA at 5; Citizens for Joe Miller F&LA at 7; AO 2019-05 at 4; AO 2016-01 at 3; AO 2010-08 at 5; AO 2010-08 at 3.

⁴² 11 C.F.R. §§ 100.73, 100.132; *see also* Citizens for Joe Miller F&LA at 7 (quoting *Reader’s Digest Ass’n, Inc. v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981)); F&LA at 3, MUR 4064 (The Messenger, Inc.) (“Even if the publication is owned or controlled by the candidate, the cost for a news story is not a contribution so long as the news story represents a *bona fide* news account communicated in a publication of general circulation and which is part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation area.”).

1 In contrast to *bona fide* news, commentaries and editorials that are distributed by entities
 2 owned or controlled by a political party, committee, or candidate are not covered by the media
 3 exemption and may be considered as contributions or expenditures.⁴³ Consequently, the
 4 Commission has considered whether costs for such commentaries and editorials constitute an in-
 5 kind contribution to the candidate or committee if the communications were coordinated with the
 6 candidate.⁴⁴ In Advisory Opinion 2005-07 (Andy Mayberry for Congress), the Commission
 7 determined that the opinion columns at issue, which were written by a candidate and paid for by
 8 the candidate-owned incorporated media company, would constitute coordinated
 9 communications under 11 C.F.R. § 109.21 and thus be a prohibited in-kind contribution to the
 10 candidate.⁴⁵ The Commission found that the articles in question met the payment, conduct, and

⁴³ See Advisory Opinion 2005-07 at 3 (Andy Mayberry for Congress) (“AO 2005-07”) (“Because you are a candidate for Federal office and your opinion columns are distributed through publications that you co-own, those opinion columns are not exempt from the definitions of ‘contribution’ or ‘expenditure’ under the press or media exemption.”); F&LA at 4, MUR 4305 (Forbes, Inc.) (“Forbes F&LA”).

⁴⁴ Prior to the enactment of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), the Commission similarly determined that costs for commentaries paid for by candidate-owned press entities were not entitled to the media exemption but applied a different legal standard given that the coordination rules in 11 C.F.R. § 109.21 were not yet in effect. Instead, the Commission concluded that commentaries paid for by candidate-owned press entities could constitute in-kind contributions to the candidate if commentaries mentioned a candidate in an election-related context and were coordinated with a candidate. Forbes F&LA at 4-5, 8, MUR 4305 (Forbes for President, *et al.*). In determining whether there was coordination, the Commission appeared to conduct a fact-specific analysis, examining the extent to which the candidate was involved in the creation and dissemination of the commentaries. *Id.* at 9-10. Further, the Commission considered whether a particular commentary was “campaign-related” using a multi-factor test. *Id.* at 8-10; see also F&LA at 7-9, MUR 4064 (The Messenger, Inc.) (concluding that an in-kind contribution resulted when the publication was incorporated one month after the candidate filed his statement of candidacy, was distributed for free in the congressional district in which he was running, ran commentaries and editorials written by the candidate and by his campaign manager, and lacked neutrality); Conciliation Agreement ¶¶ IV.5-9, MUR 2268 (Neighbors for Epperson) (concluding that free air time provided to the candidate to broadcast editorials on his candidate-owned radio station was an in-kind contribution). We do not apply the standards used in these pre-BCRA matters, given that the Commission in AO 2005-07 adopted a revised analysis based upon 11 C.F.R. § 109.21.

⁴⁵ AO 2005-07 at 2-6 (citing 11 C.F.R. § 109.21). On the other hand, the Commission determined that the media exemption applied to the expenses of publishing and distributing editions of the newspaper and magazine that contained *bona fide* news stories about Federal elections and candidates “because the news stories were part of a general pattern of campaign-related news account that give reasonably equal coverage to all opposing candidates in the circulation area.” *Id.* at 6.

content prongs of the Commission's coordinated communications test⁴⁶ because: (1) the media company, and not the candidate, paid for the articles; (2) the candidate was materially involved in the making and airing of the articles because he authored and edited them; and (3) the articles were public communications that referred to a clearly identified candidate circulated to voters in the candidate's district within 120 days of a federal election.⁴⁷

B. The Available Information Indicates that the Media Exemption Applies to *Bona Fide* News, but Not to the Opinion Articles, Published by Bloomberg News

1. The Media Exemption Appears to Apply to Costs for *Bona Fide* News Accounts of Bloomberg News

Bloomberg News qualifies as a media entity because it has had a long history of publishing articles and commentaries on a wide range of issues, including politics.⁴⁸ According to Respondents, Bloomberg News employs over 2,400 journalists in over 160 bureaus around the world and delivers 5,000 stories a day to more than 80 million consumers through print, television, radio and digital media.⁴⁹ As a media entity owned by a candidate, the press exemption covers *bona fide* news stories that are part of a pattern of campaign-related news that

⁴⁶ The Commission's coordinated communication regulation specifies that a payment for a communication is an in-kind contribution to the candidate or authorized committee with whom it is coordinated if it satisfies the following three-pronged test: (1) the communication is paid for by a person other than the Federal candidate or authorized committee in question; (2) one or more of the six conduct standards set forth in 11 C.F.R. § 109.21(d) are satisfied; and (3) one or more of the four content standards set forth in 11 C.F.R. § 109.21(c) are satisfied. 11 C.F.R. § 109.21.

⁴⁷ AO 2005-07 at 3-5.

⁴⁸ The MUR 7668 Complainant asserts that Bloomberg News should not be considered a media entity given its stated policy of not investigating the candidates in the Democratic primary. MUR 7668 Compl. at 5. However, the media exemption does not require that media entities owned by a candidate conduct their news coverage using any specific method, only that the media entities owned by a candidate provide reasonably equal coverage to opposing candidates in order to qualify for the media exemption for *bona fide* news stories that are part of a pattern of campaign-related news. See 11 C.F.R. §§ 100.73, 100.132.

⁴⁹ MUR 7668 and 7669 Resp. at 2; MUR 7685 Resp. at 2.

gives reasonably equal coverage to opposing candidates and would not protect commentaries or editorials published on the website.⁵⁰

The Complaints allege that Bloomberg News's decision to forgo investigating Bloomberg, as announced in Bloomberg News Editor-in-Chief John Micklethwait's memorandum, was a prohibited in-kind contribution to Bloomberg and the Committee. Specifically, the Complaints in MURs 7668 and 7669 allege that Bloomberg News's policy of not investigating Bloomberg or his Democratic opponents when continuing to investigate the Trump administration was a contribution to the Committee.⁵¹ Similarly, the MUR 7685 Complaint alleges that Bloomberg News made a prohibited contribution to the Committee because Bloomberg News continued to publish negative stories about Bloomberg's Democratic opponents when refraining from publishing such stories about Bloomberg.⁵² The Complaints do not point to any particular news stories that they contend constitute a contribution or expenditure, but instead appear to argue that the policy articulated in Micklethwait's memorandum is itself a violation of the Act and Commission regulations.

The Commission has not previously addressed the media exemption in this context, where a candidate-owned media company allegedly adopts a policy of declining to investigate the candidate. However, Commission regulations provide that the media exemption will apply to a candidate-owned media entity if the *bona fide* news stories are "part of a general pattern of campaign-related news accounts that give reasonably equal coverage to all opposing candidates

⁵⁰ 11 C.F.R. §§ 100.73, 100.132; *see also* F&LA at 7, MUR 7163 (Citizens for Joe Miller); Forbes F&LA at 4, MUR 4305.

⁵¹ MUR 7668 Compl. at 6; MUR 7669 Compl. at 6-7.

⁵² MUR 7685 Compl. at 1.

1 in the circulation or listening area.”⁵³ Therefore, the regulatory principle of “reasonably equal
2 coverage” could be applied by analogy to the circumstances here, where Bloomberg News’s
3 alleged decision not to investigate Bloomberg or his opponents appears permissible if it treated
4 those candidates reasonably equally.

5 Here, the available information indicates that Bloomberg News treated Bloomberg and
6 his Democratic opponents in a similar manner in that Bloomberg News did not publish any
7 investigative news articles about any of the candidates. Further, Bloomberg News’s analysis, if
8 accurate, shows that the percentage of articles it published about each candidate is roughly
9 similar to the Democratic Party’s delegate count following Bloomberg’s announcement that he
10 was withdrawing from the race on March 4, 2020.⁵⁴ At that time, Joseph Biden had 664
11 Democratic delegates, Bernie Sanders had 573 delegates, Elizabeth Warren had 64 delegates,
12 Bloomberg had 61 delegates, Pete Buttigieg had 26 delegates, Amy Klobuchar had 7 delegates,
13 and Tulsi Gabbard had 2 delegates.⁵⁵ Bloomberg News did not run more articles concerning
14 Bloomberg than the delegate count front-runners Biden and Sanders. Similarly, Bloomberg
15 News ran fewer articles about Bloomberg (124 stories) as compared to Warren (144 stories),
16 who was the closest other candidate in terms of delegate count (61 delegates for Bloomberg

⁵³ 11 C.F.R. §§ 100.73, 100.132.

⁵⁴ See Lauren Leatherby and Sarah Almukhtar, *Democratic Delegate Count and Primary Election Results 2020*, N.Y. TIMES (Mar. 6, 2020), <https://web.archive.org/web/20200308194447/https://www.nytimes.com/interactive/2020/us/elections/delegate-count-primary-results.html> (cited in MUR 7685 Resp. at 4).

⁵⁵ *Id.*

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1 compared to 64 delegates for Warren).⁵⁶ Likewise, Bloomberg News's coverage was roughly
2 similar to polls of the Democratic candidates conducted during this time.⁵⁷

3 Further, the available information does not support the allegation in the MUR 7685
4 Complaint that Bloomberg News failed to cover negative articles about Bloomberg.⁵⁸ That
5 information indicates that Bloomberg News published numerous articles critical of Bloomberg,
6 such as the articles about Bloomberg's business interests in China, his decision to skip the
7 Nevada caucuses, his stop-and-frisk policy, and his debate performances.⁵⁹

8 Because the proportion of Bloomberg News's Democratic primary coverage that was
9 focused on Bloomberg was not significantly out of line with his popularity among voters, at least
10 as measured by the delegate counts at the time and contemporaneous polling, and included news
11 articles critical of Bloomberg, Bloomberg News appears to have provided reasonably equal
12 coverage to Bloomberg's opponents in the Democratic primary based on the circumstances
13 presented in this matter. Because the coverage was also part of a general pattern of campaign-
14 related news reporting by Bloomberg News, the media exemption appears to apply to the *bona*
15 *fide* news stories published by Bloomberg News.

⁵⁶ MUR 7685 Resp. at 4.

⁵⁷ Although poll results varied, multiple polls found Bloomberg to be in third or fourth place in popularity during this time. *See, e.g.,* Eli Yokley, *Democratic Primary Voters Flock Back to Biden After South Carolina Victory*, MORNING CONSULT (Mar. 2, 2020), <https://morningconsult.com/2020/03/02/post-south-carolina-poll-joe-biden/> (Bloomberg was in third place in poll conducted March 1, 2020); *Fox News Poll: February 23-26, 2020*, FOX NEWS (Feb. 27, 2020), <https://www.foxnews.com/politics/fox-news-poll-february-23-26-2020> (Bloomberg in third place in poll conducted February 23-26); *Sanders Hits Highest Support since August*, THE HILL, (Jan. 14, 2020), <https://thehill.com/hilltv/rising/478208-sanders-hits-highest-support-since-august> (Bloomberg was in fourth place in poll conducted January 12-14, 2020).

⁵⁸ MUR 7685 Compl. at 3-4.

⁵⁹ *See supra* Part II.B.

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1 With respect to Bloomberg News's coverage of Trump during the Democratic primary
 2 elections,⁶⁰ Micklethwait's memo stated that Bloomberg News would continue to investigate the
 3 "Trump Administration."⁶¹ From the time that candidate Bloomberg announced he was running
 4 for president on November 24, 2019, to March 2, 2020, when he left the race, Bloomberg
 5 News's analysis determined that it published 92 news stories about Trump. That number is
 6 lower than the number of stories about candidate Bloomberg (124), but not by a very large
 7 margin. Further, of the 124 articles covering Bloomberg's campaign, some of the articles were
 8 critical of his campaign.⁶² Accordingly, based upon the circumstances presented in this matter,
 9 there is insufficient information to support a reason to believe finding that Bloomberg News's

⁶⁰ MUR 7668 Compl. at 6; MUR 7669 Compl. at 6-7.

⁶¹ *Cf. Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates*, 60 Fed. Reg. 64,260, 64,266 (corporations or labor organizations are permitted "to invite their restricted class, other employees or the general public to attend a speech given by an officeholder or other prominent individual who is also a federal candidate, if the speech is not campaign-related and the individual is not appearing in his or her capacity as a candidate for Federal office"); Advisory Opinion 2012-11 at 5-6 (Free Speech) (advertisements criticizing the President's health care policy and providing Free Speech's views on the issue was not express advocacy under 11 C.F.R. § 100.22 when there was no electoral references); Advisory Opinion 1996-11 at 5-6 (NRL) (National Right to Life Conventions, Inc. may invite current officeholders running for federal office to speak at a convention without violating the Act when, among other things, there is no express advocacy for the nomination, election, or defeat of any candidate and the candidacy is only "briefly note[d]" but not discussed).

⁶² *See supra* notes 28, 59 and accompanying text.

coverage of the 2020 presidential candidates was not reasonably equal⁶³ and to warrant an investigation into the decision-making of a press entity, raising First Amendment concerns.⁶⁴

2. Editorials Published by Bloomberg News During Bloomberg's Candidacy Do Not Appear to Constitute In-Kind Contributions as a Result of Coordinated Communications

As described above, Bloomberg News did not completely stop publishing all editorials during Bloomberg's candidacy. Rather, while it stopped publishing unsigned editorials, which reflect the views of the Editorial Board, it continued to publish opinion articles written by its columnists, who apparently expressed their own views. Under Commission precedent regarding candidate-owned press entities, the media exemption does not apply to those articles.⁶⁵ Instead,

⁶³ Respondents contend that because Bloomberg was not running against Trump in the same election, Trump was not an opposing candidate to Bloomberg. Resp. at 4-5. Although the Commission has not previously addressed the meaning of the term "opposing candidate" in the context of the media exemption, the Act and Commission regulations treat a "primary election" and a "general election" as separate elections. *See, e.g.*, 52 U.S.C. §§ 30101(1)(A) (defining "election" as "a general, special, primary, or runoff election"), 30101(25) ("a primary election and a general election shall be considered to be separate elections" for purposes of determining an election cycle), 30116(a) (specifying contribution limits for any election, which apply separately for a primary and general election); 11 C.F.R. § 100.2(b), (c) (distinguishing between a general election and a primary election). Bloomberg News Editor-in-Chief John Micklethwait's November 24 memorandum stated that Bloomberg News would "reassess" how it covered the Trump administration if Bloomberg was chosen as the Democratic presidential candidate. MUR 7685 Resp. at Ex. A (emphasis added); *see also* MUR 7668 Compl. at Ex. A (citing @Oliver Darcy, TWITTER (Nov. 24, 2019 11:25 a.m.), <https://twitter.com/oliverdarcy/status/1198638671374761985?lang=en>); MUR 7685 Compl. at Ex. A.

⁶⁴ An investigation of a legitimate media entity requires attention be paid to the First Amendment protections afforded to the editorial and business decisions of a media entity. *See, e.g., Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (rejecting a state law compelling newspapers to give candidates a right of reply, and noting that "the choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment"); *Mills v. State of Ala.*, 384 U.S. 214, 218–19 (1966) ("[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press ... to play an important role in the discussion of public affairs.").

⁶⁵ *See supra* Part III.A.

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1 if these articles constituted coordinated communications, then they would be treated as in-kind
2 contributions from Bloomberg News to Bloomberg and his campaign.⁶⁶

3 Commission regulations set forth a three-prong test to determine if a communication is a
4 “coordinated communication.”⁶⁷ First, a person other than the federal candidate or the
5 candidate’s authorized committee must pay for all or part of the communication.⁶⁸ Second, the
6 communication must satisfy at least one content standard.⁶⁹ Third, the communication must
7 satisfy at least one conduct standard.⁷⁰

8 It appears that the payment prong is satisfied because Bloomberg News, not Bloomberg
9 personally, paid to publish the opinion articles at issue.⁷¹

10 Whether the content prong is satisfied here depends on whether the opinion articles
11 qualify as public communications.⁷² A public communication is a “communication by means of
12 any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising
13 facility, mass mailing, or telephone bank to the general public, or any other form of general

⁶⁶ See, e.g., AO 2005-07 at 5 (opinion columns in candidate-owned periodical would be in-kind contribution if a coordinated communication); Forbes F&LA at 12, MUR 4305 (“Because of the candidate’s direct involvement in the creation and dissemination of the campaign-related communications [published in the candidate-owned magazine], the Commission concludes that an in-kind contribution occurred.”).

⁶⁷ 11 C.F.R. § 109.21(a); *see also* AO 2005-07 at 3.

⁶⁸ 11 C.F.R. § 109.21(a)(1).

⁶⁹ *Id.* § 109.21(a)(2), (c).

⁷⁰ *Id.* § 109.21(a)(3), (d).

⁷¹ Although not directly addressed in the response, Respondents do not dispute the Complaints’ assumptions that Bloomberg News paid for the cost of its election coverage.

⁷² The opinion articles do not qualify under 11 C.F.R. § 109.21(c)(1) because the articles are not electioneering communications under 11 C.F.R. § 100.29 since the articles were not broadcast, cable, or satellite communications.

1 public political advertising.”⁷³ “General public political advertising” does not include
 2 “communications over the Internet, except for communications placed for a fee on another
 3 person’s Web site.”⁷⁴ If the opinion articles qualify as public communications, the conduct
 4 prong would be satisfied because the articles referred to clearly identified presidential candidates
 5 and were publicly distributed nationwide within 120 days of primary elections.⁷⁵

6 The Commission has previously found that opinion columns in a newspaper or magazine
 7 are within the definition of “public communication” in 11 C.F.R. § 100.26.⁷⁶ However, it is
 8 unclear from the available information whether the opinion articles were published in a physical
 9 newspaper, and the Commission has not previously addressed whether an online edition of a
 10 newspaper qualifies as a newspaper under the regulation. Since, as discussed below, the conduct
 11 prong is not satisfied here, it is unnecessary to resolve this question at this time.

12 Turning to the conduct prong,⁷⁷ the Commission has determined that opinion columns
 13 authored by the candidate that are published in a candidate-owned newspaper satisfy the conduct

⁷³ 11 C.F.R. § 100.26.

⁷⁴ *Id.*

⁷⁵ 11 C.F.R. § 109.21(c)(4)(ii); *see also* 11 C.F.R. § 100.26.

⁷⁶ AO 2005-07 at 4.

⁷⁷ The conduct prong of the coordination test is satisfied if: (1) the communication was created, produced, or distributed at the request or suggestion of a candidate, campaign, or political party committee, or the payor suggests the communication and the candidate, campaign or political party committee assents to the suggestion (the “request or suggestion” standard); (2) the candidate, campaign, or political party committee was materially involved in decisions regarding the communication (the “material involvement” standard); (3) the communication was created, produced, or distributed after one or more substantial discussions between the payor and the candidate, campaign, or a political party committee involving information that is material to the communication (the “substantial discussion” standard); (4) a candidate, campaign, or political party committee and the payor used a common vendor that used or conveyed material information about the campaign’s plans, projects, activities or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication (the “common vendor” standard); (5) the communication is paid for by a person or by the employer of a person who was an employee or independent contractor of the candidate who is identified in the communication, the candidate’s authorized committee, the candidate’s opponent, the opponent’s authorized committee, or a political party committee during the previous 120 days; or (6) republication of campaign materials. 11 C.F.R. § 109.21(d).

1 standard.⁷⁸ When the candidate authors an opinion column to be published in a candidate-owned
 2 newspaper, the communication is (1) created, produced, or distributed at the request of the
 3 candidate; and (2) the candidate is materially involved in decisions regarding the
 4 communication.⁷⁹ Unlike those previous matters, however, the opinion articles here were
 5 written by other individuals, not by the candidate.

6 While Bloomberg owns a “majority stake” in Bloomberg News and appears to have had
 7 influence on the organization,⁸⁰ there is insufficient information indicating that the conduct
 8 prong was met here. Rather, John Micklethwait’s November 2019 memorandum constitutes
 9 contemporaneous information in the record indicating that Bloomberg News took steps to
 10 remove Bloomberg’s influence over its opinion articles by suspending the Editorial Board, which
 11 Micklethwait acknowledged reflected Bloomberg’s views.⁸¹ Micklethwait added that while
 12 Bloomberg News would continue publishing articles by its columnists, those columnists, “who
 13 produce the majority of Bloomberg Opinion’s content, will continue to speak for
 14 themselves”⁸² Further, we have found no other information suggesting that Bloomberg was
 15 involved in the operations of Bloomberg News during the time of his candidacy, that Bloomberg
 16 requested or suggested that Bloomberg News publish any of the opinion articles published

⁷⁸ AO 2005-07 at 4 (holding that the request or suggestion and material involvement conduct standards would be satisfied if the candidate authored opinion columns in a newspaper owned and edited by the candidate); Forbes F&LA at 2, 8-11, MUR 4305 (holding that “Fact and Comment” columns written by the candidate were in-kind corporate contributions).

⁷⁹ AO 2005-07 at 4.

⁸⁰ MUR 7685 Resp. at 2, Ex. A (noting that “[t]he place where Mike has had the most contact with Editorial is Bloomberg Opinion”).

⁸¹ Letter from Micklethwait, *supra* note 16. Cf. *LaBotz v. FEC*, 889 F. Supp. 2d 51, 62 (D.D.C. 2012) (recognizing that the “best evidence of why a decision was made as it was is usually an explanation, however brief, rendered *at the time of the decision*”) (citing *Ponte v. Real*, 471 U.S. 491, 509 (1985)).

⁸² *Id.*

during that time, or that Bloomberg had any discussions with Bloomberg News regarding information that was relevant to such articles. Therefore, there is insufficient information to support a reasonable inference that the opinion articles published during Bloomberg's candidacy were coordinated communications and resulted in in-kind contributions.⁸³

3. Bloomberg News Appears to Have Made Independent Expenditures

An "independent expenditure" is an expenditure for a communication expressly advocating the election or defeat of a clearly identified federal candidate that is not coordinated with a candidate, a candidate's authorized committee, or their agents, or a political party committee or its agents.⁸⁴ Any person other than a political committee who makes independent expenditures aggregating over \$250 in a calendar year with respect to a given election must file an independent expenditure disclosure report with the Commission pursuant to 52 U.S.C. § 30104(c).⁸⁵ In addition, political committees and other persons that make independent expenditures aggregating \$1,000 or more after the 20th day, but more than 24 hours, before the date of an election must report the expenditures by filing a 24-hour notice.⁸⁶

The Commission has not previously addressed whether opinion articles published by a candidate-owned media entity can constitute independent expenditures, but absent coordination,

⁸³ Because we conclude that the opinion articles do not constitute in-kind contributions, it is unnecessary to address the allegations that Bloomberg facilitated those contributions in violation of 11 C.F.R. §§ 114.2 or 300.61. *See* MUR 7668 Compl. at 1.

⁸⁴ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

⁸⁵ 52 U.S.C. § 30104 (c)(1). Persons, other than political committees, must disclose certain information about their disbursements for independent expenditures (including the name and address of each person who receives disbursements aggregating over \$200 in connection with an independent expenditure), and indicate the candidates the independent expenditures support or oppose. 52 U.S.C. § 30104(c)(2)(A).

⁸⁶ *See* 52 U.S.C. § 30104(g)(1)(A).

1 if the opinion articles here expressly advocated the election or defeat of a federal candidate, then
2 it appears that Bloomberg News or Bloomberg L.P. should have reported the costs for publishing
3 such articles as independent expenditures.

4 Commission regulations specify that a communication expressly advocates the election or
5 defeat of a clearly identified candidate under 11 C.F.R. § 100.22(a) if it uses phrases such as
6 those specifically enumerated in the text of the regulation (“vote for the President,” “re-elect
7 your Congressman,” “support the Democratic nominee,” “vote against Old Hickory,” “reject the
8 incumbent,” among other enumerated examples) or if it contains campaign slogans or individual
9 words that “in context can have no other reasonable meaning than to urge the election or defeat
10 of one or more clearly identified candidates such as posters, bumper stickers, advertisements,
11 etc., which say ‘Nixon’s the One,’ ‘Carter ’76,’ ‘Reagan/Bush,’ or ‘Mondale!’.”⁸⁷ In addition,
12 under 11 C.F.R. § 100.22(b), a communication expressly advocates the election or defeat of a
13 federal candidate “when taken as a whole and with limited reference to external events, such as
14 the proximity to the election,” the communication “could only be interpreted by a reasonable
15 person as containing advocacy of the election or defeat” of a clearly identified candidate
16 because: (1) it contains an “electoral portion” that is “unmistakable, unambiguous, and
17 suggestive of only one meaning”; and (2) reasonable minds could not differ as to whether it
18 encourages actions to elect or defeat a candidate or some other kind of action.⁸⁸

19 None of the opinion articles here appear to contain express advocacy under section
20 100.22(a). Although the opinion articles clearly identify candidates, none of the opinion articles
21 contain phrases such as those specifically enumerated in the text of the regulation or any

⁸⁷ 11 C.F.R. § 100.22(a).

⁸⁸ 11 C.F.R. § 100.22(b).

campaign slogans or individual words that urge the election or defeat of a specific candidate as required by 11 C.F.R. § 100.22(a).⁸⁹ Accordingly, it appears that the opinion articles do not satisfy the Commission's regulatory definition of express advocacy at 11 C.F.R. §100.22(a).

However, several of the opinion articles could be read as supporting the election or defeat of a federal candidate generally, and of those, we have identified four that most likely contain express advocacy under section § 100.22(b), as discussed below.

i. *The "Bernie Sanders Boycotts Pro-Israel Americans" Article*

The first article discusses Sanders's decision to not speak at the American Israel Public Affairs Committee (AIPAC) annual conference and questions whether Pro-Israel Americans should support Sanders's candidacy.⁹⁰ It begins with an unmistakable electoral portion, stating, "[w]ith Bernie Sanders emerging as the front-runner to win his party's presidential nomination, pro-Israel Americans must grapple with an uncomfortable question: does the Democratic Party still support the world's only Jewish state?"⁹¹

The article then concludes:

In 2020, on the verge of securing the Democratic presidential nomination, [Sanders's] views seem closer to the protesters in that crowd. In this sense, his decision to skip the AIPAC meeting is clarifying. It's now time to return the

⁸⁹ See, e.g., *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986). In *Massachusetts Citizens for Life, Inc.*, the Supreme Court held that the publication went beyond issue discussion to express advocacy when it contained an exhortation to "Vote Pro-Life," identified which candidates were considered by Massachusetts Citizens for Life to be pro-life and which were not, and featured the photographs of 13 "pro-life" candidates. *Id.* at 243-44, 249-50.

⁹⁰ Eli Lake, *Bernie Sanders Boycotts Pro-Israel Americans*, BLOOMBERG NEWS (Feb. 26, 2020), <https://www.bloomberg.com/opinion/articles/2020-02-26/bernie-sanders-aipac-boycott-shows-threat-to-us-israel-ties?sref=KjKPzFY6>.

⁹¹ *Id.*

1 favor. If Sanders wishes to boycott AIPAC, its members should boycott
 2 Sanders.⁹²

3 Given the unmistakable electoral context of this article, there is no ambiguity as to what
 4 “boycott Sanders” means, and reasonable minds could not disagree that this article urges AIPAC
 5 members to “boycott,” or vote against, Sanders as a candidate for the Democratic presidential
 6 nomination if he boycotts AIPAC. Therefore, this opinion article contains express advocacy
 7 under 11 C.F.R. §100.22(b).

8 ii. *The “Trump is Already Making Stuff Up About Voter*
 9 *Fraud” Article*

10 The next article, which argues that Trump is a threat to American democracy, also starts
 11 with unmistakable electoral references that discuss Trump’s presidential candidacy and the 2020
 12 general election:

13 While candidates jostle for advantage in the Democratic presidential primary, and
 14 the news media play the odds, President Donald Trump already knows the
 15 identity of his opponent. Indeed, his campaign, with the full support of the
 16 Republican Party, is already waging a vigorous crusade to destroy his opposition.
 17 No, it’s not Joe Biden, who inspired Trump’s shakedown of Ukraine. Trump’s
 18 gunning for bigger game: democracy itself.⁹³

19 It continues with numerous other electoral references, including, “[a]s November
 20 approaches, Trump plans to complement corrosive rhetoric with concrete action. In the words of
 21 one Trump campaign official, the GOP will be playing ‘offense’ on Election Day.”⁹⁴ The article
 22 concludes:

23 To protect American democracy from Trump himself, however, is a more
 24 demanding task. It will require an unflinching news media meeting an

⁹² *Id.*

⁹³ Francis Wilkinson, *Trump is Already Making Stuff Up About Voter Fraud*, BLOOMBERG NEWS (Feb. 16, 2020), <https://www.bloomberg.com/opinion/articles/2020-02-16/trump-is-already-making-stuff-up-about-voter-fraud?sref=KjKPzFY6>.

⁹⁴ *Id.*

authoritarian challenge that it has thus far largely failed to acknowledge. It will require a vigilant electorate, mindful of its own democratic imagination, prepared to take public action not just on the day of the vote but after. And it may well require a hefty helping of luck. America used to have an abundant supply. Let's hope it hasn't run out.⁹⁵

This paragraph contains a clear call to action to voters by asserting that "a vigilant electorate" must be "prepared to take public action not just on the day of the vote but after." In light of the unmistakable electoral portion of the article, reasonable minds could not disagree that the article's direction to take "action" on the "day of the vote" is exhorting the "electorate" to vote against Trump and therefore expressly advocates the defeat of Trump under section §100.22(b). Although the article refers to additional actions "after" "the day of the vote," it nonetheless unambiguously encourages actions to defeat him on Election Day as well.⁹⁶

iii. *The "2020 Election Is a Choice Between Democracy and Putinism" Article*

The third article argues that "Trump has spent his presidency attacking the rule of law from every imaginable direction," and that the 2020 Presidential election outcome will turn on whether Americans vote to maintain the rule of law.⁹⁷

This opinion article is express advocacy under 11 C.F.R § 100.22(b). There are numerous references, such as "Election Day," "presidential contest," "the Democratic primary," and "if Trump is re-elected," that are unambiguously electoral. The article also negatively discusses Trump by characterizing "his presidency [as] attacking [the] rule of law from every

⁹⁵ *Id.*

⁹⁶ See 11 C.F.R. § 100.22(b) (defining express advocacy as a communication "*containing* advocacy of the election or defeat of one or more clearly identified candidate(s)") (emphasis added).

⁹⁷ Francis Wilkinson, *2020 Election Is a Choice Between Democracy and Putinism*, BLOOMBERG NEWS, Feb. 14, 2020, available at <https://www.bloomberg.com/opinion/articles/2020-02-14/2020-election-rule-of-law-is-the-biggest-issue-for-democrats?sref=KjKPzFY6>.

1 imaginable direction,” and concludes: “If Trump wins, it’s true you can forget about Medicare,
 2 whether for some or all. More important, however, you can forget about the rule of law. It
 3 won’t just be battered, as it is today. It will be gone. Only the thugs won’t miss it.”⁹⁸ By
 4 claiming that a win for Trump would destroy the rule of law, when taken as a whole and with
 5 limited references to external events, this article can only be interpreted by a reasonable person
 6 as advocating Trump’s defeat in the November election.

7 iv. *The “‘Never Trump’ Movement’s Bittersweet Anniversary”*
 8 Article
 9

10 The fourth article begins with references to the founding of the “Never Trump”
 11 movement in 2016 whose members had “announced their opposition to [Trump’s] campaign.”⁹⁹
 12 The article includes a quote from a letter signed by the movement’s members, stating “[a]s
 13 committed and loyal Republicans, we are unable to support a party ticket with Mr. Trump at its
 14 head. We commit ourselves to working energetically to prevent the election of someone so
 15 utterly unfitted to the office.”¹⁰⁰

16 The article continues with an unmistakable electoral reference to the 2020 presidential
 17 election: “[n]ow, as they face Trump’s re-election campaign, so-called Never Trumpers face a
 18 stark choice: wandering four more years in the policy wilderness or wading into murky swamp
 19 waters and hoping for the best,” arguing that policy positions and actions taken by Trump since
 20 his election, should be of serious concern to Never Trumpers.¹⁰¹ The article concludes with a

⁹⁸ *Id.*

⁹⁹ James Gibney, *The ‘Never Trump’ Movement’s Bittersweet Anniversary*, BLOOMBERG NEWS (Mar. 2, 2020), <https://www.bloomberg.com/opinion/articles/2020-03-02/never-trump-movement-needs-help-from-never-again-trump-movement?sref=KjKPzFY6>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

clear call to action stating, “[w]hat’s needed *now* is for ‘Never Trumpers’ to stick to their resolve,” in other words, to oppose Trump’s re-election in 2020.¹⁰² In light of the unmistakable electoral portion of the article, reasonable minds could not disagree that the article encourages actions to defeat Trump, and the article contains express advocacy under section 100.22(b).

* * *

In sum, four of the opinion articles that we identified expressly advocated the election or defeat of a candidate under 11 C.F.R. § 100.22(b),¹⁰³ and therefore qualified as apparent independent expenditures,¹⁰⁴ which were not reported by Bloomberg News or Bloomberg L.P. under 52 U.S.C. § 30104(c).

Nevertheless, in light of the particular circumstances of this case and Bloomberg News’s status as a press entity, we do not recommend that the Commission pursue the allegation that Bloomberg News and Bloomberg L.P. failed to report these independent expenditures.¹⁰⁵ Out of the 64 campaign-related opinion articles published by Bloomberg News, we only identified four that arguably should have been reported as independent expenditures, and none were about Bloomberg. The associated cost of writing — potentially only a portion of the writer’s salary — and publishing the opinion articles on Bloomberg News’s own website was likely relatively

¹⁰² *Id.* at 4 (emphasis added).

¹⁰³ See Appendix A (identifying the 64 opinion articles) (available in VBM).

¹⁰⁴ 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16.

¹⁰⁵ See *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

modest.¹⁰⁶ Further, an investigation of Bloomberg News's editorial decisions would raise additional First Amendment issues.¹⁰⁷

3. Conclusion

As discussed above, the *bona fide* news stories published by Bloomberg News referencing Bloomberg or his opponents are covered by the media exemption because the coverage was part of a general pattern of campaign-related news accounts by Bloomberg News that provided reasonably equal coverage to Bloomberg's opponents. As a result, the *bona fide* news stories published by Bloomberg News are exempt from the definition of contribution or expenditure under the Act.

The opinion articles are not covered by the media exemption. However, there is insufficient information available to conclude that the opinion articles are coordinated communications, and hence the articles do not qualify as in-kind contributions. Therefore, we recommend that the Commission dismiss the allegation that Bloomberg News, Bloomberg L.P. or John Micklethwait made, or that Bloomberg or the Committee accepted, an excessive or

¹⁰⁶ When determining the amount in violation in previous matters involving candidate-owned media entities, the Office of General Counsel has previously used either the rate a general advertiser would pay for the media space or the publishing costs of the media coverage. See Probable Cause Brief at 16, MUR 4305 (Forbes, Inc.) (estimating the amount of the prohibited in-kind contribution based on the rates that a general advertiser would pay for the space); Supp. Probable Cause Brief at 2, MUR 4064 (The Messenger, Inc.) (“[T]he publishing costs of [issues containing significant campaign-related content] should be counted as prohibited in-kind contributions.”).

¹⁰⁷ Such an investigation would likely implicate the First Amendment protections afforded to the editorial and business decisions of a media entity. See, e.g., *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (rejecting a state law compelling newspapers to give candidates a right of reply, and noting that “the choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment”); *Mills v. State of Ala.*, 384 U.S. 214, 218–19 (1966) (“[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press ... to play an important role in the discussion of public affairs.”); First General Counsel's Rpt. at 16, MUR 6779 (Joel Gilbert) (recommending dismissal and noting that a “substantial investigation into the business judgment of the media entities involved” is “an inquiry at odds with the interests that the [media] exemption protects”).

1 prohibited contribution under 52 U.S.C. §§ 30116 or 30118. Although four of the opinion
 2 articles qualify as independent expenditures, we recommend that the Commission exercise its
 3 prosecutorial discretion and dismiss the allegation that Bloomberg News and Bloomberg L.P.
 4 violated 52 U.S.C. § 30104(c) by failing to report the independent expenditures.¹⁰⁸

5 **B. The Commission Should Find No Reason to Believe With Respect to the**
 6 **Allegations that Bloomberg News was Required to Register and Report as a**
 7 **Political Committee**

8 The Act and Commission regulations define a “political committee” as “any committee,
 9 club, association, or other group of persons which receives contributions aggregating in excess of
 10 \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000
 11 during a calendar year.”¹⁰⁹ In *Buckley v. Valeo*, the Supreme Court held that defining political
 12 committee status “only in terms of the annual amount of ‘contributions’ and ‘expenditures’”
 13 might be overbroad, reaching “groups engaged purely in issue discussion.”¹¹⁰ To cure that
 14 infirmity, the Court concluded that the term “political committee” “need only encompass
 15 organizations that are under the control of a candidate or the major purpose of which is the
 16 nomination or election of a candidate.”¹¹¹ Accordingly, under the statute as thus construed, an
 17 organization that is not controlled by a candidate must register as a political committee only if
 18 (1) it crosses the \$1,000 threshold and (2) it has as its “major purpose” the nomination or election
 19 of a federal candidate. Once an organization becomes a political committee, it is required to

¹⁰⁸ *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

¹⁰⁹ 52 U.S.C. § 30101(4)(A); 11 C.F.R. § 100.5(a).

¹¹⁰ 424 U.S. 1, 79 (1976).

¹¹¹ *Id.*

1 register with the Commission, comply with organizational and recordkeeping requirements, and
2 file disclosure reports with the Commission.¹¹²

3 The MUR 7668 and the MUR 7669 Complaints allege that Bloomberg News was
4 required to register as a political committee and file reports with the Commission because it
5 made contributions and expenditures to create and publish articles about the 2020 election.¹¹³
6 The available information fails to give rise to a reasonable inference that Bloomberg News meets
7 the major purpose component of the political committee analysis, assuming that the statutory
8 threshold is satisfied. The Commission has explained that, in order to determine an entity's
9 "major purpose," the Commission considers, among other things, a group's "overall conduct,"
10 including public statements about its mission, organization documents, the proportion of
11 spending related to "federal campaign activity," and whether it engaged in any activities that
12 were not campaign related.¹¹⁴

13 Bloomberg News's overall conduct demonstrates that its major purpose is not the
14 nomination or election of a federal candidate. Bloomberg News claims to have more than 2,400
15 journalists in over 150 bureaus across more than 70 countries and delivers over 5,000 stories a
16 day to more than 80 million consumers through an international network of print, television,
17 radio, and digital media.¹¹⁵ Bloomberg News covers a variety of topics, including business,

¹¹² 52 U.S.C. §§ 30102, 30103, and 30104.

¹¹³ MUR 7668 Compl. at 5; MUR 7669 Compl. at 3, 7.

¹¹⁴ *Political Committee Status: Supplemental Explanation and Justification*, 72 Fed. Reg. 5595, 5605 (Feb. 7, 2007).

¹¹⁵ MURs 7668 and 7669 Resp. at 2; MUR 7685 Resp. at 2.

financial, technological, science, and cultural news.¹¹⁶ Accordingly, we recommend that the Commission find no reason to believe with respect to the allegations that Bloomberg News failed to register and report as a political committee in violation of 52 U.S.C. §§ 30102, 30103, and 30104.

III. RECOMMENDATIONS

1. Dismiss the allegation that Bloomberg News, Bloomberg L.P., or John Micklethwait violated 52 U.S.C. §§ 30116 or 30118 by making excessive or prohibited in-kind contributions;
2. Dismiss the allegation that Mike Bloomberg 2020, Inc. and Hayden Horowitz in his official capacity as treasurer or Michael R. Bloomberg violated 52 U.S.C. §§ 30116 or 30118 by accepting excessive or prohibited in-kind contributions;
3. Dismiss the allegation that Bloomberg News or Bloomberg L.P. violated 52 U.S.C. § 30104(c) by failing to report independent expenditures;
4. Find no reason to believe that Bloomberg News violated 52 U.S.C. §§ 30102, 30103 and 30104 by failing to register as a political committee or file reports as a political committee with the Commission;
5. Approve the attached Factual and Legal Analysis;
6. Approve the appropriate letters; and

¹¹⁶ See Bloomberg News, available at <https://www.bloomberg.com>; see, e.g., F&LA at 1, MUR 7789 (Courier Newsroom, *et al.*) (dismissing allegations that Courier Newsroom, Inc., violated the Act by not registering, organizing, and reporting as a political committee where overall record indicates that as a press entity, it received no contributions and made no expenditures, and may not have the major purpose of nomination or electing federal candidates.); F&LA at 10-12, MUR 7562 (Popily, Inc. d/b/a Yonder f/k/a New Knowledge) (finding that respondent organization was not a political committee where its major purpose appeared to be cybersecurity research rather than influencing federal elections).

7. Close the file.

Lisa J. Stevenson
Acting General Counsel

Sept. 21, 2022

Date

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