



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

Carol A. Laham
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

MAY 8 2007

RE: MUR 5823
Citizens Club Citizens Club for Growth, Inc.
Citizens Club for Growth, Inc. PAC and Pat
Toomey, in his official capacity as treasurer

Dear Ms. Laham:

On September 29, 2006, the Federal Election Commission notified your clients, Citizens Club for Growth, Inc. and Citizens Club for Growth, Inc. PAC and Pat Toomey, in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 1, 2007, the Commission found, on the basis of the information in the complaint and information provided by your client, that there is no reason to believe Citizens Club for Growth, Inc. violated 2 U.S.C. § 441b by making prohibited in-kind contributions in the form of coordinated communications to Walberg for Congress or by funding candidate endorsements featured on the website it shares with Citizens Club for Growth, Inc. PAC. At the same time, the Commission voted to dismiss as a matter of prosecutorial discretion to conserve Commission resources allegations that Citizens Club for Growth, Inc. violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee, violated 2 U.S.C. § 441a(f) by knowingly accepting excessive contributions, or, in the alternative, made prohibited corporate expenditures in violation of 2 U.S.C. § 441b. *See Complaint, FEC v. Club for Growth, Inc.*, No. 1:05-CV-01851 (RMU) (D.D.C. filed Sept. 19, 2005).

The Commission also found that there is no reason to believe Citizens Club for Growth, Inc. PAC and Pat Toomey, in his official capacity as treasurer, violated 2 U.S.C. §§ 434 and 441a(a)(1) by making and failing to report excessive in-kind contributions in the form of coordinated communications to Walberg for Congress, 2 U.S.C. § 434 by failing to report disbursements associated with candidate endorsements featured on its website, or 2 U.S.C. §§ 434 and 441a(a)(1) by making and failing to report excessive in-kind contributions in the form of coordinated communications in connection with candidate endorsements featured on its website. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). A Factual and Legal Analysis, which more fully explains

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Citizens Club for Growth, Inc

Citizens Club for Growth, Inc. PAC and Pat Toomey, in his official capacity as treasurer

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the Commission's findings, is enclosed for your information. A Statement of Reasons further explaining the Commission's decision in this matter will follow.

If you have any questions, please contact Julie McConnell, Acting Assistant General Counsel, at (202) 694-1650.

Sincerely,

Thomasenia P. Duncan
Acting General Counsel



BY: Ann Marie Terzaken
Acting Associate General Counsel for
Enforcement

Enclosure
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

MUR 5823

Respondents: Citizens Club for Growth, Inc. (f/k/a Club for Growth, Inc.)
Citizens Club for Growth, Inc. PAC and Pat Toomey, in his official
capacity as treasurer (f/k/a Club for Growth, Inc. PAC)
Walberg for Congress and Jeffrey Yeutter, in his official capacity as
treasurer

I. INTRODUCTION

Schwarz for Congress, the authorized committee of former Congressman Joe Schwarz, alleges that Club for Growth, Inc., now known as Citizens Club for Growth, Inc. ("CFG"); Club for Growth, Inc. PAC and Pat Toomey, in his official capacity as treasurer, now known as Citizens Club for Growth, Inc. PAC ("CFG PAC"); and Walberg for Congress and Jeffrey Yeutter, in his official capacity as treasurer, violated the Federal Election Campaign Act of 1971, as amended ("the Act").¹ First, the complaint alleges that CFG failed to register and report as a political committee despite having solicited, received and spent millions of dollars to influence federal elections in the 2000, 2002, 2004 and 2006 election cycles, knowingly accepted excessive contributions, and made prohibited corporate expenditures. Because these violations are in large part the subject of ongoing district court litigation, and because the complainant here relies primarily on information set forth in the district court complaint filed against CFG, the Commission dismisses this allegation as a matter of prosecutorial discretion to conserve Commission resources.

Second, the complaint alleges that CFG and CFG PAC used common vendors to unlawfully coordinate with Walberg for Congress in disseminating advertisements advocating

¹ Club for Growth, Inc. recently changed its name to Citizens Club for Growth, Inc. and the name of its separate segregated fund to Citizens Club for Growth, Inc. PAC. See IRS Form 8871, Notice of Section 527 Status (Feb 9, 2007), FEC Form 1, Statement of Organization (Jan 29, 2007)

1 the defeat of Walberg's opponent, Congressman Schwarz.² While CFG, CFG PAC, and
2 Walberg for Congress may have used at least one common vendor, the responses substantially
3 refute the allegation that this resulted in the use or conveyance of material information. As
4 discussed below, the Commission finds no reason to believe that CFG and CFG PAC made, or
5 Walberg for Congress knowingly accepted, prohibited and/or excessive in-kind contributions in
6 the form of coordinated communications.

7 Third, the complaint alleges that CFG, rather than CFG PAC, paid for portions of its
8 website endorsing federal candidates, asserting that CFG PAC failed to report these expenses as
9 in-kind contributions in its disclosure reports. In its response, CFG and CFG PAC provided
10 comprehensive information, including an affidavit from its Executive Director, showing that
11 CFG PAC paid for and properly reported expenditures for the photographs and promotional
12 materials endorsing federal candidates on its website. As a result, the Commission finds no
13 reason to believe that CFG made prohibited corporate expenditures by funding website
14 endorsements of federal candidates or that CFG PAC failed to report website expenses in its
15 disclosure reports.

16 Finally, in a related allegation, the complaint alleges that the candidate endorsements on
17 CFG and CFG PAC's website feature photographs and promotional materials prepared by the
18 candidates or their agents and, thus, were coordinated. In its response, however, CFG PAC avers
19 that it prepared the candidate endorsements on its website independently in-house or using web
20 designers. In addition, because the candidate endorsements appeared on CFG PAC's own

² In connection with this allegation, the complaint provides information suggesting that CFG and CFG PAC may have coordinated with several other federal candidates it endorsed, including Sharron Angle, Steve Laffey, and Pat Toomey. See Compl. at ¶¶ 9, 10. The complaint appears to provide this information to establish a pattern and practice of coordination through the use of common vendors to support the allegation that CFG and CFG PAC coordinated with the Walberg campaign, and not to raise a formal complaint as to coordination with Angle, Laffey, and Toomey. See Compl. at ¶ 11. As a result, the Commission does not address potential coordination between CFG and CFG PAC and the Angle, Laffey, and Toomey campaigns in this matter.

1 website, they would not meet the content standard for coordination even if the photographs and
2 promotional materials had been prepared by the candidates. Accordingly, and as discussed
3 further below, the Commission finds no reason to believe that CFG PAC failed to report in-kind
4 contributions in the form of coordinated communications.

5 **II. FACTUAL BACKGROUND**

6 CFG, a Virginia corporation established in May 1999 and organized under section 527 of
7 the Internal Revenue Code, represented itself as a membership organization with a separate
8 segregated fund, CFG PAC, during the 2000, 2002, 2004 and 2006 election cycles. Since 2000,
9 CFG has conducted candidate research and funded numerous advertisements featuring federal
10 candidates, including express advocacy communications totaling at least \$1.28 million between
11 2000 and 2004, while CFG PAC has endorsed, collected and bundled contributions to, and
12 funded express advocacy communications in support of federal candidates who meet its specified
13 requirements. *See generally* Complaint, *FEC v. Club for Growth, Inc.*, No. 1:05-CV-01851
14 (RMU) (D.D.C. filed Sept. 19, 2005).

15 In 2006, CFG PAC endorsed Tim Walberg, a Republican challenger who defeated
16 incumbent Congressman Joe Schwarz in the primary election in Michigan's 7th Congressional
17 District held on August 8, 2006, and went on to win the general election.³ According to its
18 website, CFG PAC endorsed Walberg early in his race, raised more than \$600,000 in bundled
19 contributions to the Walberg campaign from members, and made more than \$500,000 in
20 independent expenditures, including television and radio advertisements that began airing on

³ See Our PAC's 2006 Election Record, available at http://www.clubforgrowth.org/2006/11/our_pacs_2006_election_record.php (Nov 8, 2006)

1 July 27, 2006, urging viewers to vote against Congressman Schwarz.⁴ Around the same time,
2 beginning on June 12, 2006, CFG funded television and radio advertisements that criticized
3 Congressman Schwarz's voting record on taxes and called him "shockingly" or "extremely"
4 liberal.⁵

5 The complaint alleges that CFG and CFG PAC coordinated these advertisements with
6 Walberg for Congress through the use of three common vendors: Red Sea LLC and its polling
7 affiliate, Basswood Research; National Research, owned by Adam Geller, a former principal in
8 Jamestown Associates; and Jamestown Associates. Specifically, the complaint alleges that,
9 during the 2006 cycle, CFG and CFG PAC used Red Sea for media consulting, production and
10 purchasing and Basswood Research and National Research for polling while, at the same time,
11 Walberg for Congress used Jamestown Associates for media purchasing and National Research
12 for polling. *See* Compl. at ¶¶ 9, 11.

13 As discussed in more detail below, two of the entities identified in the complaint do not
14 appear to have been common vendors. In an affidavit, Jon Lerner, the principal of Red Sea and
15 Basswood Research, avers that, although his companies provided media consulting and polling
16 to CFG and CFG PAC in Michigan and other states in 2006, including for the television and
17 radio advertisements aired in Michigan featuring Congressman Schwarz, they did not provide
18 services to Walberg for Congress.⁶ *See* Affidavit of Jon Lerner ("Lerner Aff.") at ¶¶ 3-4.

⁴ *See* Tim Walberg Wins in MI-07!, available at http://www.clubforgrowth.org/2006/08/tim_walberg_wins_in_mi07.php (Aug 8, 2006), Pork on TV, available at http://www.clubforgrowth.org/2006/07/pork_on_tv.php (July 27, 2006)

⁵ *See* Club for Growth Launches Ad Campaign in Michigan, available at http://www.clubforgrowth.org/2006/06/club_for_growth_launches_ad_ca.php (June 12, 2006) CFG appears to have stopped airing these advertisements at the beginning of the electioneering communications period on July 9, 2006, as it did not report electioneering communications by its unincorporated bank account, Club for Growth net, until October 27, 2006

⁶ Red Sea conducts polling under the trade name Basswood Research, but Basswood Research is not a separate entity, and CFG and CFG PAC's response uses the name Red Sea to refer to both entities *See* Lerner Aff at ¶ 3.

1 Similarly, Jamestown Associates provided media services to Walberg for Congress in 2006, but
2 CFG and CFG PAC assert that they did not engage Jamestown Associates directly as a vendor
3 during the 2006 cycle, and that their vendors in Michigan did not use Jamestown Associates as a
4 subvendor or use Jamestown Associates personnel for purposes of CFG or CFG PAC
5 communications.⁷ See Affidavit of David Keating ("Keating Aff.") at ¶ 29. While the complaint
6 emphasizes that the majority shareholder in National Research, Adam Geller, previously worked
7 for Jamestown Associates, Geller states that he left Jamestown Associates in 2002 and
8 maintained no employment or other relationship with Jamestown Associates. See CFG Resp.,
9 Affidavit of Adam Geller ("Geller Aff. I") at ¶¶ 1, 3; see also Walberg for Congress Resp.,
10 Affidavit of Adam Geller ("Geller Aff. II") at ¶ 3.

11 By contrast, during the 2006 cycle, National Research conducted polling for both
12 Walberg for Congress and for CFG and CFG PAC. CFG and CFG PAC assert, however, that
13 National Research provided no services in connection with CFG and CFG PAC's advertisements
14 or other activities in Michigan. See CFG Resp. at 8-9; Geller Aff. I at ¶ 6. Further, the
15 Executive Director of CFG, David Keating, avers that no CFG or CFG PAC employee had a
16 conversation with the Walberg campaign or its agents about the campaign's plans, projects,
17 activities, or needs as they related to advertisements or independent expenditures, about the
18 possibility of CFG or CFG PAC running advertisements or making independent expenditures, or
19 about actual advertisements or independent expenditures.⁸ See Keating Aff. at ¶¶ 7, 11-15.
20 Adam Geller, the owner of National Research, similarly avers that neither he nor any other

⁷ In other states, Red Sea used Jamestown Associates as a subvendor for media placement or Jamestown Associates personnel as administrative or clerical support for media buys. See CFG Resp. at 4, 5, 8 n 4, see also Lerner Aff. at ¶¶ 4, 8, 15.

⁸ CFG PAC states that it discussed communications associated with its November 2005 endorsement of Tim Walberg with Walberg for Congress and its agents and identified and reported the costs of these communications as in-kind contributions. See Keating Aff. at ¶ 12

1 National Research employee discussed the Walberg campaign's plans projects, activities or
2 needs with CFG, CFG PAC, or its agents, used information from the Walberg campaign for the
3 benefit of CFG or CFG PAC, or used information from CFG or CFG PAC for the benefit of the
4 Walberg campaign. *See* Geller Aff. I at ¶¶ 6-10; Geller Aff. II at ¶¶ 2, 6.

5 Importantly, CFG and CFG PAC assert that, as a matter of policy and practice, they
6 isolate consultants or employees who also provide services to the candidates clearly identified in
7 their advertisements (or their opponents and authorized committees). *See* Keating Aff. at ¶¶ 7, 8.
8 For example, Keating states that CFG and CFG PAC "closed off" Adam Geller, National
9 Research and its agents from any discussions involving Michigan as soon as National Research
10 became affiliated with Walberg for Congress, dropping Geller off calls and asking him to leave
11 meetings before commencing any Michigan discussions. *See id.* at ¶ 8; *see also* Geller Aff. I at
12 ¶ 6. Both Keating and Geller assert that, as a result of this policy, National Research did not
13 have access to information regarding CFG and CFG PAC's operations in Michigan, including its
14 budget for advertisements aired in Michigan, and CFG and CFG PAC were not aware of the
15 Walberg campaign's plans, projects, activities or needs. *See* Keating Aff. at ¶ 13; Geller Aff. I at
16 ¶¶ 6-8.

17 **III. LEGAL ANALYSIS**

18 **A. ALLEGED POLITICAL COMMITTEE STATUS**

19 The complaint alleges that CFG failed to register and report as a political committee
20 based on its conduct in the 2000, 2002, 2004 and 2006 election cycles, that it knowingly
21 accepted excessive contributions, and, in the alternative, that it made prohibited corporate
22 expenditures. *See* Compl. at ¶¶ 4, 5, 12-17, 18-20, 21-23. These are substantially the same
23 allegations that are at issue in the Commission's district court litigation involving CFG.

1 *See* Complaint, *FEC v. Club for Growth, Inc.*, No. 1:05-CV-01851 (RMU) (D.D.C. filed Sept.
2 19, 2005). By its own admission, the complaint bases the political committee allegations in large
3 part on publicly available materials filed in the district court litigation, and it provides no
4 additional information beyond the coordination allegations discussed below establishing that
5 CFG met the requirements for political committee status. *See* Compl. at ¶ 5. Given this overlap
6 and the limited amount of new information in the complaint, which consists primarily of
7 allegations that CFG continued to raise and spend millions of dollars in support of
8 specific federal candidates into the 2006 cycle, it would be duplicative and an inefficient use of
9 the Commission's resources to pursue the political committee allegations in a parallel
10 proceeding.

11 Accordingly, the Commission dismisses as a matter of prosecutorial discretion
12 allegations that CFG violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a
13 political committee, violated 2 U.S.C. § 441a(f) by knowingly accepting excessive contributions,
14 or, in the alternative, made prohibited corporate expenditures in violation of 2 U.S.C. § 441b.
15 *See Heckler v. Chaney*, 470 U.S. 821 (1985).

16 **B. ALLEGED COORDINATION BETWEEN CFG AND WALBERG**
17 **FOR CONGRESS**

18 The complaint alleges that CFG and CFG PAC used common vendors to coordinate with
19 Walberg for Congress in disseminating advertisements advocating the defeat of Walberg's
20 opponent, Congressman Schwarz. CFG and CFG PAC, however, provide detailed responses and
21 affidavits stating that the allegedly common vendors were isolated as a matter of policy and did
22 not use or convey material information, refuting the speculative allegations in the complaint.
23 Based on the information in their responses, and as discussed in more detail below, the
24 Commission finds no reason to believe that CFG and CFG PAC made, or Walberg for Congress

1 knowingly accepted, prohibited and/or excessive in-kind contributions in the form of coordinated
2 communications.

3 A communication is coordinated with a candidate, an authorized committee, a political
4 party committee, or an agent of any of the foregoing when it: (1) is paid for by a person other
5 than that candidate, authorized committee, political party committee, or agent of any of the
6 foregoing; (2) satisfies at least one of the content standards in 11 C.F.R. § 109.21(c)
7 (electioneering communication, republication of campaign material, public communication
8 containing express advocacy, public communication within 120 or 90 days of an election); and
9 (3) satisfies at least one of the conduct standards in 11 C.F.R. § 109.21(d) (request or suggestion,
10 material involvement, substantial discussion, common vendor, former employee or contractor,
11 republication of campaign material).

12 Here, CFG and CFG PAC advertisements appear to meet both the payment prong and the
13 content standard. According to its website, *see supra* p. 3, CFG and CFG PAC each funded
14 television and radio advertisements featuring Congressman Schwarz, the Republican incumbent
15 in Michigan's 7th Congressional District, and these advertisements aired within 120 or 90 days
16 of the Republican primary held on August 8, 2006.⁹ In addition, CFG PAC admits that the
17 advertisements it paid for expressly advocated the defeat of Congressman Schwarz. *See* CFG
18 Resp. at 3-4. As a result, the advertisements at issue meet the payment prong under 11 C.F.R.
19 § 109.21(a)(1) and the content standard under 11 C.F.R. § 109.21(c)(3) and/or (4).

⁹ Prior to July 10, 2006, the 120-day period for public communications applied to all federal elections. *See* Coordinated Communications, 71 Fed. Reg. 33,190, 33,193 (June 8, 2006). Although the Commission decreased the time period to 90 days for public communications referring to Senate and House candidates, this change was effective July 10, 2006. CFG funded advertisements prior to that date, and the 120-day period applied between June 12 and July 10, 2006. Even if the 90-day period applied during that time, however, the advertisements funded by CFG and CFG PAC would meet the content standard under 11 C.F.R. § 109.21(c)(4).

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1 The advertisements aired by CFG and CFG PAC, however, do not appear to meet the
2 common vendor conduct standard, which requires that (1) the person paying for the
3 communication contracts with or employs a commercial vendor to create, produce or distribute
4 the communication; (2) that commercial vendor provided certain enumerated services, including
5 media content development, polling, media production, and political or media consulting, to the
6 candidate who is clearly identified in the communication, or the candidate's authorized
7 committee, the candidate's opponent, the opponent's authorized committee, or a political party
8 committee, during the previous 120 days;¹⁰ and (3) that commercial vendor uses or conveys
9 material information to the person paying for the communication about the campaign plans,
10 projects, activities, or needs of the clearly identified candidate, the candidate's opponent, or a
11 political party committee or material information used previously by the vendor in providing
12 services to the candidate who is clearly identified in the communication, or the candidate's
13 authorized committee, the candidate's opponent, the opponent's authorized committee, or a
14 political party committee. *See* 11 C.F.R. § 109.21(d)(4); *see also* Coordinated Communications,
15 71 Fed. Reg. at 33,209-210.

16 (1) Red Sea LLC

17 During the 2006 cycle, CFG and CFG PAC used Red Sea and its polling subsidiary,
18 Basswood Research, for media consulting and polling in Michigan and other states. The media
19 consulting services provided by Red Sea in Michigan included the television and radio
20 advertisements featuring Congressman Schwarz. *See* Affidavit of Jon Lerner ("Lerner Aff.") at
21 ¶¶ 3-4. Red Sea, however, did not provide any services to Walberg for Congress during the 2006

¹⁰ The 120-day period for determining whether an individual or entity qualifies as a common vendor became effective on July 10, 2006. *See* Coordinated Communications, 71 Fed. Reg. at 33,204. Prior to this date, individuals or entities qualified as common vendors if they provided the specified services within the same election cycle. *See* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 436 (Jan. 3, 2003).

1 cycle, much less within 120 days of providing services to CFG and CFG PAC. *See id.* at ¶ 5. As
2 a result, Red Sea fails as a common vendor under 11 C.F.R. § 109.21(d)(4)(ii).

3 (2) Jamestown Associates

4 Jamestown Associates provided media services to Walberg for Congress in 2006. As
5 discussed above, CFG and CFG PAC assert that they did not engage Jamestown Associates
6 directly as a vendor during the 2006 cycle or in Michigan, and that their vendors in Michigan did
7 not use Jamestown Associates as a subvendor for purposes of CFG or CFG PAC
8 communications. *See Keating Aff.* at ¶ 29. In other states, however, Red Sea used Jamestown
9 Associates personnel as clerical and administrative support for media buys, and may have done
10 so for purposes of CFG or CFG PAC communications.¹¹ In these instances, Jamestown
11 Associates personnel had no independent decisionmaking or discretionary authority to make
12 media buys. *See CFG Resp.* at 4, 5, 8 n.4; *see also Lerner Aff.* at ¶¶ 4, 8, 15.

13 Because the coordination regulations were not intended to reach common vendors who
14 are used solely as media time buyers and who do not have adequate decisionmaking control or
15 knowledge of communications, the indirect relationship between CFG, CFG PAC and
16 Jamestown Associates created by Red Sea's use of Jamestown Associates and its personnel does
17 not trigger the common vendor conduct standard. *See Coordinated and Independent*
18 *Expenditures*, 68 Fed. Reg. at 437. Moreover, Tom Blakely, the President of Jamestown
19 Associates, avers that Jamestown Associates did not convey to or use on behalf of CFG PAC

¹¹ Red Sea does not address whether it used Jamestown Associates personnel as clerical and administrative support for CFG or CFG PAC media buys outside of Michigan, and CFG avers that its vendors did not use Jamestown Associates for purposes of CFG or CFG PAC communications in Michigan, Nevada or Rhode Island. *See Lerner Aff.* at ¶¶ 4, 8-9, 15, *Keating Aff.* at ¶ 29. Red Sea also states that it used Jamestown Associates as a subvendor for media placement in connection with consulting services it provided to candidates in Nevada and Rhode Island. *See Lerner Aff.* at ¶¶ 8-9, 15. Although the affidavits may leave open some questions about the scope of the relationship between Jamestown Associates and CFG in other states, they sufficiently refute the allegations of coordination between CFG, CFG PAC, and Walberg for Congress, and provide no basis to infer that Jamestown Associates used or conveyed material information elsewhere. *See Keating Aff.* at ¶¶ 7-24, 29, *Lerner Aff.* at ¶¶ 4, 8-9, 15.

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1 information about the campaign's plans, projects, activities or needs or information used
2 previously by Jamestown Associates in providing services to Walberg for Congress. *See*
3 Affidavit of Tom Blakely ("Blakely Aff.") at ¶¶ 12, 16. In addition, and as discussed above,
4 David Keating avers that no CFG or CFG PAC employee discussed campaign plans, projects,
5 activities, or needs as they related to advertisements or independent expenditures, the possibility
6 of CFG or CFG PAC running advertisements or making independent expenditures, or actual
7 issue advertisements or independent expenditures with Walberg for Congress or its agents, while
8 Jon Lerner asserts that Red Sea did not communicate with CFG, CFG PAC or the Walberg
9 campaign or its agents about matters pertaining to the 2006 election in Michigan. *See* Keating
10 Aff. at ¶¶ 7, 11-15; Lerner Aff. at ¶¶ 6-7. Given that Jamestown Associates was an agent of both
11 Walberg for Congress and Red Sea, these statements appear to encompass it as well, and we
12 have no information to the contrary. As a result, there is no basis to investigate whether CFG,
13 CFG PAC and Walberg for Congress coordinated their communications through Jamestown
14 Associates.

15 (3) National Research

16 As discussed above, National Research performed polling for Walberg for Congress and
17 for CFG and CFG PAC during the 2006 cycle, but it did not provide services in connection with
18 CFG and CFG PAC's advertisements or activities in Michigan. *See* CFG Resp. at 4, 8; Geller
19 Aff. I at ¶¶ 5-6. Although CFG and CFG PAC claim that the absence of overlapping media
20 services in Michigan means that National Research is not a common vendor, the coordination
21 regulations contain no such *per se* geographic limitation for determining whether a vendor
22 qualifies as a common vendor. *See* Coordinated and Independent Expenditures, 68 Fed. Reg. at
23 436-437.

CFG, CFG PAC and National Research, however, aver that National Research did not use or convey material information to CFG or CFG PAC about the plans, projects, activities, or needs of Walberg for Congress, or material information it used in providing services to Walberg for Congress and, thus, does not meet 11 C.F.R. § 109.21(d)(4)(iii).¹² Moreover, CFG and CFG PAC assert that, pursuant to their policy and practice, they isolated Adam Geller, National Research and its agents, preventing them from gaining access to information about CFG and CFG PAC's advertising budget or plans for advertisements or independent expenditures – essentially, that CFG and CFG PAC created a firewall between them and any common vendors. CFG and CFG PAC fail to establish that they have a written firewall policy that was distributed to all relevant employees, consultants, and clients and, thus, do not meet the technical requirements for the safe harbor in 11 C.F.R. § 109.21(h).¹³ Nonetheless, their representations regarding the policy and practice of isolating common vendors sufficiently refute the speculative allegations of common vendor coordination, particularly when considered with the other information in their sworn statements.¹⁴

¹² CFG, CFG PAC and its vendors also deny any facts that would meet the other conduct standards for coordination with the Walberg campaign. *See* CFG Resp at 10-11; Keating Aff. at ¶¶ 8, 11-15; Lerner Aff. at ¶¶ 6-7; Geller Aff I at ¶ 9.

¹³ Effective July 10, 2006, the coordination regulations provide a safe harbor for organizations that establish a firewall between its employees and those of a common vendor or former employee. *See* 11 C.F.R. § 109.21(h). Specifically, the common vendor and former employee conduct standards are not met if the vendor, former employee, or political committee has established and implemented a firewall designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the communication and those employees or consultants currently or previously providing services to the candidate clearly identified in the communication, or the candidate's authorized committee, the candidate's opponent, the opponent's authorized committee, or a political party committee. The firewall must be described in a written policy that is distributed to all relevant employees, consultants, and clients affected by the policy. In an enforcement context, the Commission will weigh the credibility and specificity of any coordination allegation against the credibility and specificity of the facts presented in the response showing that the safe harbor are satisfied, and recommend that a person seeking to use the firewall safe harbor should be prepared to provide reliable information, including affidavits, about an organization's firewall and how and when the firewall policy was distributed and implemented. *See* Coordinated Communications, 71 Fed. Reg. at 33,206-207.

¹⁴ This conclusion is consistent with MUR 5506 (EMILY's List), in which the Commission found no reason to believe that EMILY's List coordinated with Castor for Senate because the organization asserted that employees, volunteers, and consultants were barred, as a matter of policy, from interacting with federal candidates, political

(4) Conclusion

Accordingly, based on the comprehensive responses submitted by CFG, CFG PAC, and Walberg for Congress, which sufficiently refute the coordination allegations in the complaint, the Commission finds no reason to believe that (i) CFG violated 2 U.S.C. § 441b by making prohibited in-kind contributions to Walberg for Congress in the form of coordinated communications; (ii) CFG PAC violated 2 U.S.C. §§ 434 and 441a(a)(1) by making and failing to report excessive in-kind contributions to Walberg for Congress in the form of coordinated communications; and (iii) Walberg for Congress violated 2 U.S.C. §§ 434, 441a(f) and 441b by knowingly accepting and failing to report excessive and prohibited in-kind contributions in the form of coordinated communications.

C. ALLEGATIONS REGARDING CFG AND CFG PAC'S WEBSITE

(1) Payment and Reporting

The complaint alleges that CFG PAC either did not pay for, or failed to report, expenditures for the photographs and promotional materials endorsing federal candidates on CFG PAC's website. CFG PAC, however, avers that it paid for and properly disclosed these expenditures. Specifically, CFG PAC states that it paid PJ Doland Web Design for the design of Internet communications and Primary Data Solutions for other costs related to Internet activity, and properly reported these expenses as expenditures, providing examples of reports in which it disclosed Internet expenditures. *See* CFG Response at 14-15; Keating Aff. at ¶¶ 25-28. CFG PAC further states that, on some occasions, it paid CFG a lump sum for costs related to Internet communications and, as the costs were actually incurred by the PAC, reduced the amount of the

party committees, or the agents of the foregoing, and with others within the organization regarding specified candidates or officeholders. Although EMILY's List did not claim that it had a written firewall policy, the Commission considered the organization's assertion of a firewall as one factor in determining that the response refuted the speculative allegations in the complaint. *See* MUR 5506 (EMILY's List), First General Counsel's Report dated Aug 9, 2005, at 6-7

1 operating expense payments to the report section for independent expenditures in its FEC
2 reports. *See id.* Based on this information, the Commission finds no reason to believe that CFG
3 PAC violated 2 U.S.C. § 434 by failing to report payments for website costs or that CFG violated
4 2 U.S.C. § 441b by making prohibited expenditures for website communications endorsing
5 federal candidates.

6 (2) Coordination

7 The complaint states that the candidate endorsements on CFG PAC's website feature
8 photographs and promotional materials prepared by the selected candidates or their agents. *See*
9 Compl. at ¶ 6. Although the complaint is vague on this point, it appears to allege that CFG PAC
10 may have coordinated its website communications with federal candidates by requesting or
11 suggesting that the candidates prepare such materials, by materially involving the candidates in
12 the content of the communication, by engaging in substantial discussions between CFG PAC and
13 its endorsed federal candidates, or by republishing campaign materials.

14 This allegation fails, however, because the candidate endorsements on CFG PAC's
15 website do not meet any of the content standards in 11 C.F.R. § 109.21(c). The electioneering
16 communications content standard, 11 C.F.R. § 109.21(c)(1), applies only to broadcast, cable and
17 satellite communications, not to Internet communications. *See* 2 U.S.C. § 434(f)(3)(A); 11
18 C.F.R. § 100.29(a). The content standards in 11 C.F.R. § 109.21(c)(2)-(4) require that the
19 communications be "public communications" under 11 C.F.R. § 100.26. Prior to May 12, 2006,
20 the definition of "public communications" excluded Internet communications, and the amended
21 definition applies only to Internet communications placed for a fee on another person's website.
22 *See Internet Communications*, 71 Fed. Reg. 18,589, 18,593-595, 18,599, 18,613 (Apr. 12, 2006).

1 Because the candidate endorsements at issue appeared on CFG PAC's own website, they do not
2 meet the content standard.

3 Further, David Keating avers that the materials on CFG PAC's website were prepared
4 independently by CFG PAC, either in-house or by a website designer, and that there were no
5 discussions with federal candidates and their agents meeting any of the conduct standards under
6 11 C.F.R. § 109.21(d)(1)-(6). *See* Keating Aff. at ¶ 28. The complaint provides no information
7 to the contrary. Accordingly, the Commission finds no reason to believe that CFG PAC violated
8 2 U.S.C. §§ 434 and 441a(a)(1) by making and failing to report excessive in-kind contributions
9 in the form of coordinated communications in connection with candidate endorsements featured
10 on its website.