



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
Mark DeSaulnier;)	MUR 6207
Mark DeSaulnier for Senate 2012;)	
DeSaulnier for Congress and Rita Copeland, in her official capacity as treasurer;)	
Shara Perkins, Campaign Manager for DeSaulnier for Congress)	

STATEMENT OF REASONS

I. INTRODUCTION

On July 14, 2010, the Commission voted to exercise its prosecutorial discretion and dismiss the allegations that California State Senator and former Congressional candidate, Mark DeSaulnier ("DeSaulnier"), Mark DeSaulnier for Senate 2012 ("State Committee"), DeSaulnier for Congress and Rita Copeland, in her official capacity as treasurer ("Federal Committee") (also collectively referred to as "Respondents") violated 2 U.S.C. § 441i(e)(1)(B) and 2 U.S.C. § 441i(f)(1) of the Federal Election Campaign Act of 1971, as amended ("Act") in connection with a mass mailing paid for by the State Committee.¹ This Statement of Reasons sets forth the basis for our decision.

In addition, as set forth in the accompanying Factual and Legal Analysis, the Commission found: (1) no reason to believe that the Federal Committee violated 2 U.S.C. §§ 441a or 441b by making excessive or prohibited in-kind contributions via coordinated expenditures; (2) no reason to believe that the State Committee and the Federal Committee accepted excessive or prohibited contributions in violation of 2 U.S.C. § 441a(f) or 441b or failed to report such contributions in

¹ Chairman Matthew S. Petersen, Vice Chair Cynthia L. Bauerly, Commissioner Caroline C. Hunter, Commissioner Donald F. McGahn II and Commissioner Ellen L. Weintraub voted in favor of the motion. Commissioner Steven T. Walther did not vote.

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violation of 2 U.S.C. § 434(b); (3) no reason to believe that the State Committee violated 2 U.S.C. § 441d; and (4) no reason to believe that Shara Perkins violated any provision of the Act or regulations. Accordingly, the Commission voted to close the file.

II. FACTUAL AND LEGAL ANALYSIS

A. Background

Mark DeSaulnier is a California State Senator representing the 7th District who was originally elected to office in November 2008, and was a declared candidate for re-election to the State Senate in 2012. On or about March 26, 2009, DeSaulnier announced his intent to run for the soon-to-be-vacated seat in California's 10th Congressional District.

During the 90-day period prior to the September 1, 2009, special primary election for the 10th Congressional District nomination, the State Committee sent two mailings entitled "Your Health Services Guide: Courtesy of Senator Mark DeSaulnier" ("Health Services Guide") and "PARENTS GUIDE TO: A Safe and Healthy Family by Senator Mark DeSaulnier" ("Parents Guide"). According to Respondents, the mailers were distributed to "voters in the overlapping California State Senate district and the 10th Congressional district." Although neither the complaint nor the response indicates the amount spent on the mailers, the State Committee's disclosure reports reflect two payments to Shallman Communications on June 25, 2009, for campaign literature and mailings (\$51,885.20) and postage, delivery and messenger services (\$30,016.15).

The complaint, as amended, alleges that the Respondents: (1) violated 2 U.S.C. §§ 441i(e)(1) and 441i(f)(1) by using non-federal funds for "federal election activity"; (2) violated 2 U.S.C. §§ 441a(1)(A) and 441b by making excessive and prohibited contributions via unreported coordinated communications; and (3) violated 2 U.S.C. § 441d(c)(2) by failing to comply with the Act's disclaimer requirements. Respondents assert that the State Committee's spending of non-federal funds on behalf of a State candidate who is also a Federal candidate is explicitly exempted from the Act's restrictions pursuant to 2 U.S.C. §§ 441i(e)(2) and 441i(f)(2) and 11 C.F.R. §§ 300.63 and 300.72. The General Counsel recommended that the Commission find reason to believe that the Respondents violated 2 U.S.C. §§ 441i(o)(1)(B) and 441i(f)(1) in connection with the "Health Services Guide" but that the "Parents Guide" did not violate the Act. As discussed below, we agreed that the Parents Guide did not violate the Act, and dismissed the allegation concerning the Health Services Guide as a matter of prosecutorial discretion.

B. Legal Analysis

The Act prohibits Federal candidates or officeholders, or their agents, from spending or disbursing funds in connection with any non-Federal election, unless the funds comply with the limits and prohibitions of the Act and are otherwise consistent with State law. 2 U.S.C. § 441i(e)(1)(B); 11 C.F.R. § 300.62. DeSaulnier was subject to 2 U.S.C. § 441i(e)(1)(B) because he was a candidate for Federal office at the time he spent funds through his State Committee for the distribution of the mailers.

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The Act, however, provides for an exemption to Section 441i(e)(1)(B) for a Federal candidate, an officeholder who is also a candidate for State or local office, or an agent of either, if the solicitation, receipt, or spending of funds is solely in connection with that candidate's election to State or local office, is permitted under State law, and refers only to that State or local candidate, to any other candidate for the same State or local office, or both. 2 U.S.C. § 441i(e)(2); 11 C.F.R. § 300.63. The legislative history, suggests that Congress intended only to prohibit references to those federal candidates who are "on the ballot for the same election and are not their opponents for state office." See 148 Cong. Rec. S1992 (March 18, 2002).

The Act also prohibits a candidate for State or local office, an individual holding State or local office, or an agent of such a candidate or individual from spending any funds for a public communication described in section 301(20)(A)(iii) (2 U.S.C. § 431(20)(A)(iii)) unless the funds are subject to the limitations, prohibitions, and reporting requirements of this Act. 2 U.S.C. § 441i(f)(1); 11 C.F.R. § 300.71. Section 431(20)(A)(iii) includes public communications that refer to a clearly identified candidate for Federal office and that promote, attack, support, or oppose ("PASO") a candidate for that office, regardless of whether the communication expressly advocates a vote for or against the candidate.² 2 U.S.C. § 431(20)(A)(iii).

Section 441i(f)(2) provides that the prohibition set forth in Section 441i(f)(1) shall not apply if the communication involved is in connection with an election for State or local office and refers only to the individual subject to 441i(f) or to any other candidate for the State or local office held or sought by such individual, or both, provided that the communication does not PASO any candidate for Federal office. 2 U.S.C. § 441i(f)(2); 11 C.F.R. § 300.72. The legislative history offers the following explanation for the two provisions in Section 441i(f): "Prohibits candidates for state or local office from spending soft money on public communications that promote or attack a clearly identified candidate for Federal office. Exempts communications which refer to a federal candidate who is also a candidate for state or local office." See 148 Cong. Rec. S1993 (March 18, 2002).

a. Health Services Guide

The Health Services Guide refers to DeSaulnier in his capacity as a State Senator, lists health care resources in the state of California, describes DeSaulnier's involvement as a State Senator in health care issues, and discusses national "health care reform." The focus of the Guide is the provision of information about local health care resources. In view of the Guide's discussion of health care issues and DeSaulnier's involvement in those issues as a State Senator, as well as a statement from another State Senator praising DeSaulnier (*see infra*), it appears that disbursements for the Guide may have been in connection with a non-Federal election within the meaning of Section 441i(e). Cf. Advisory Opinion 2009-26 (Coulson).

The State Committee's reports to the California Fair Political Practices Commission indicate that it received contributions from corporations and labor unions, which are permitted by

² The term "public communication" includes mass mailings such as those at issue here. 2 U.S.C. § 431(22) (defining public communication).

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California law, but are not permitted under the Act. 2 U.S.C. § 441b. Therefore, it appears the funds the State Committee used to pay for the mailer may have been from sources prohibited by the Act from making contributions in connection with an election for Federal office.

Section 441i(e)(2) may be read to say that any reference to any person other than the individual subject to 441i(e)(1)(B) or his opponent in a State or local election would preclude application of the exemption. Under such a reading, the inclusion of a photograph of the candidate's family would prevent the exemption from applying. However, Congress could not have intended such a result, and therefore we decline to adopt this reading of the provision. Here, the Guide contains a small picture of President Obama delivering the State of the Union address. The picture takes up one corner of one of the Guide's twelve pages. In the picture, Vice President Biden stands next to the President, with Speaker of the House Nancy Pelosi partially visible in the background. In 2009, the year in which the Guide was distributed, neither President Obama nor Vice President Biden or Speaker Pelosi was on the ballot.

Further, the mailer includes a picture of State Senator Tom Torlakson, who represents a different district than DeSaulnier, and a quote from Torlakson praising DeSaulnier. In light of the context of the references at issue and the legislative history of 441i(e) and 441i(f), we concluded that the references to Obama, Biden, Pelosi and Torlakson were insufficient to require that the Guide be paid for with funds subject to the amount limitations and source prohibitions of the Act. Accordingly, we voted to exercise our prosecutorial discretion, pursuant to *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), to dismiss the allegation that the Respondents violated 2 U.S.C. § 441i(e)(1)(B) and 441i(f)(1).

b. Parents Guide

The Parents Guide satisfies the plain language of the exemption set forth in 2 U.S.C. § 441i(e)(2) and 11 C.F.R. § 300.63. Specifically, the Parents Guide does not refer to any individual other than DeSaulnier, and appears to be related solely to his position as a State officeholder and State candidate. Because DeSaulnier, as a State candidate, qualifies for the exception, neither he nor his State Committee were required to use only funds that complied with the limits and prohibitions of the Act for this mailer.³ Accordingly, the Parents Guide does not violate 2 U.S.C. § 441i(e)(1)(B).⁴

Similarly, the Parents Guide, which merely identifies DeSaulnier, plainly satisfies the requirements of the 441i(f)(2) exception. Specifically, the Commission has stated that the mere identification of an individual who is a Federal candidate does not, in itself, promote, support, attack or oppose that candidate. *See, e.g.,* Advisory Opinions 2009-26 (Coulson), 2007-34

³The Complainant asserted that given the proximity in time to the Federal election in comparison to the State election, the distribution of the mailers was suspicious, at best. The pertinent legislative history does not indicate that Congress intended to impose a restriction on the timing of an expenditure or receipt of funds in connection with a State or local election as set forth in Section 441i(e). *See, e.g.,* 148 Cong. Rec. S2096-02 (March 20, 2002). As here, provided that the requirements of the Section 441i(e) exception are satisfied, the timing of a communication is immaterial to the application of the exception. *See* 2 U.S.C. §§ 441i(e)(1)(B) and 441i(e)(2); 11 C.F.R. §§ 300.62 and 300.63.

⁴Because the Parents Guide qualifies for this exemption, the Commission does not address whether funds expended on the Parents Guide were spent "in connection with an election" under section 441i(e)(1)(B).

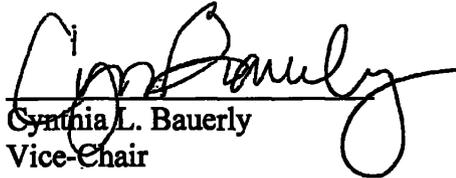
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(Jackson) and 2003-25 (Weinzapfel). Therefore, the Parents Guide, and thus the funds spent by DeSaulnier and the State Committee were not required to be subject to the reporting requirements, and contribution limitations and prohibitions of the Act. 2 U.S.C. § 441i(f)(2). Accordingly, the Parents Guide does not violate 2 U.S.C. § 441i(f)(1).

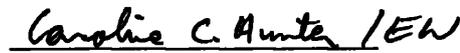
9/8/10
Date


Matthew S. Petersen
Chairman

9/8/10
Date


Cynthia L. Bauerly
Vice-Chair

9/8/10
Date


Caroline C. Hunter
Commissioner

9/8/10
Date


Donald F. McGahn II
Commissioner

9/8/10
Date


Ellen L. Weintraub
Commissioner

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