

FEDERAL ELECTION COMMISSION  
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FIRST GENERAL COUNSEL'S REPORT

**SENSITIVE**

PRE-MUR: 378

DATE ACTIVATED: June 24, 1999

STAFF MEMBER: Nancy E. Bell

SOURCE: INTERNALLY GENERATED

RESPONDENT(S): Persons unknown

RELEVANT STATUTES: 2 U.S.C. § 441d

INTERNAL REPORTS CHECKED: Disclosure Documents

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

This matter arises as the result of a referral dated April 12, 1999, from the Election Fraud Unit, Secretary of State of the State of California ("State"). The referral is in turn based upon information discovered during the State's inquiry into the dissemination, on November 2, 1998, of fraudulent mailers and phone calls to registered Democrats in the 10<sup>th</sup> Congressional District of California, purportedly on behalf of Representative George Miller (D-CA) advocating the defeat of Representative Ellen Tauscher.<sup>1</sup>

II. FACTUAL AND LEGAL ANALYSIS

Pursuant to 2 U.S.C. § 441d(a), whenever any person makes an expenditure for the purpose of financing a communication expressly advocating the election or defeat of a clearly

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<sup>1</sup> Rep. Miller and the Democratic Party reportedly have brought suit in state court against GOP congressional candidate Charles Ball and his campaign manager alleging they should have stopped the fraudulent campaign mailer and phone operation.

identified candidate, such communication must state specific information concerning who authorized and paid for the communication.

Material attached to the referral confirms that a letter purportedly sent to the 10th Districts' 122,000 registered Democratic households, dated November 1, 1998, contains no disclaimer identifying who paid for the mailed piece. This one-page letter is type-written on the personalized letterhead stationary of the East Bay Democratic Committee, a non-existent committee. Furthermore, the letter bears a fraudulent address, and carries the name George Miller at the end. Representative Miller, who represents the neighboring congressional district and is a strong supporter of Tauscher, reportedly denounced the mailer and any involvement thereof. Press reports submitted with the referral also note reports of an anonymous "voter suppression" phone bank campaign in which Democrats were urged on the evening of November 2, 1998, "[d]on't vote for Ellen Tauscher." Records of interviews with recipients of these telephone calls transmitted by the State with the referral indicate that the callers identified themselves as being from the "East Bay Democratic Committee."

The mailings and phone calls lacked a disclaimer required of express advocacy communications by Section 441d.<sup>2</sup> Such a disclaimer would have accurately revealed the person(s) paying for the last minute campaign and would have indicated whether the communications were authorized by a campaign committee. Whether the activity also implicates

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<sup>2</sup> As stated in MUR 4735 (Bordonaro), First General Counsel's Report, dated March 16, 1999, this Office supports the notion that there is no legal distinction for treating commercial phone bank operations containing express advocacy differently from other express advocacy communications made to the general public. However, this Office recommended and the Commission determined, based on the application of prior Commission practice to the facts present at the preliminary stage of that investigation, not to pursue that theory of Section 441d liability in MUR 4735. At this juncture in the present matter, though, this Office believes that prudence dictates an acknowledgment that the application of Section 441d liability to the aforementioned phone calls may be warranted on facts which may arise during future investigation.

violations of Section 441h (misrepresentation of campaign authority) depends upon whether another campaign committee was behind the mailers.

### III. CONCLUSIONS

The anti-Tauscher letters and follow-up telephone calls contain language that expressly advocates the defeat of Rep. Tauscher and, thus, meet the statutory requirements to necessitate the inclusion of a disclaimer statement. Furthermore, the persons responsible for the letters and the telephone calls utilized a fraudulent identity. Accordingly, the persons who authorized and paid for these communications appear to have knowingly and willfully violated Section 441d(a). On the current record, the responsible person(s) are currently unknown. Therefore, to initiate an investigation, this Office recommends that the Commission find reason to believe that persons unknown knowingly and willfully violated 2 U.S.C. § 441d(a). See, e.g., MUR 2791.<sup>3</sup>

To ascertain the identity of the persons responsible for the funding, creation and distribution of the letters and telephone calls, this Office intends to immediately initiate an informal investigation utilizing contacts with relevant state agencies, the Postal Inspector, and vendors who provided services to candidates and their committees in the 1998 Congressional campaign for the 10<sup>th</sup> District. Moreover, as this aforementioned activity appears similarly patterned to that which occurred in MUR 4735 (Bordonaro), this Office intends to follow-up on investigative leads which arose from that matter as well. In the event that vendor witnesses determined to be highly relevant to the investigation appear more comfortable cooperating in response to a formal request for information (as has been the experience of this Office), this Office will seek Commission approval for subpoenas as necessary.

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<sup>3</sup> The possibility also exists that the funds supporting the mailing and telephone effort may have originated from a prohibited source(s). See 2 U.S.C. §§ 441a, 441b, 441c, 441e, and 441f.

This Office also recommends that the Commission approve the appropriate Factual and Legal Analyses based on the above analysis. If and when respondents are identified, appropriate Factual and Legal Analyses will be transmitted along with reason to believe notifications. And, if during the course of the investigation information is ascertained which indicates that another campaign committee was responsible for said activity, this Office will recommend findings as to a Section 441h violation.

IV. RECOMMENDATIONS

1. Open a MUR.
2. Find reason to believe that persons unknown knowingly and willfully violated 2 U.S.C. § 441d(a).
3. Approve the appropriate Factual and Legal Analyses and letters.

Lawrence M. Noble  
General Counsel

Date

7/23/99

BY:

  
Lois G. Lerner  
Associate General Counsel