



FEDERAL ELECTION COMMISSION

WASHINGTON, D C 20463

- FEB 20 2004

Benjamin L. Ginsberg, Esq.  
Patton Boggs LLP  
2550 M Street, NW  
Washington, DC 20037-1350

RE: MUR 5367  
U.S. Representative Darrell Issa

Dear Mr. Ginsberg:

On June 6, 2003, the Federal Election Commission notified your client, U.S. Representative Darrell Issa, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to Rep. Issa at that time.

Upon further review of the allegations contained in the complaint, and information provided by you, the Commission, on February 3, 2004, found that there is reason to believe your client violated 2 U.S.C. § 441i(e)(1)(B), a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be

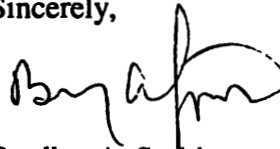
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demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Jesse B. Christensen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Bradley A. Smith  
Chairman

Enclosures

Factual and Legal Analysis

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

**RESPONDENT:** U.S. Representative Darrell Issa

**MUR 5367**

**I. GENERATION OF MATTER**

This matter was generated by a complaint filed with the Federal Election Commission by Raquelle de la Rocha. See 2 U.S.C. § 437g(a)(1).

**II. BACKGROUND**

Complainant alleges that Darrell Issa, a U.S. Representative from California's 49<sup>th</sup> Congressional District, violated the Federal Election Campaign Act of 1971, as amended ("the Act"), by "soliciting nearly half a million dollars in 'soft money' corporate contributions" on behalf of Rescue California . . . Recall Gray Davis ("Rescue California"). Rescue California, an unincorporated state ballot measure committee organized under section 527 of the Internal Revenue Code, successfully fought to remove former California Governor Gray Davis from office through a recall process set forth in the California Constitution. Complainant alleges that in addition to soliciting non-Federal funds (i.e., funds not subject to the Act's limitations and prohibitions) on behalf of Rescue California, Rep. Issa caused a significant amount of prohibited corporate funds to be donated to it from Greene Properties, Inc., a corporation he owns with his wife.

In sum, complainant alleges that Rep. Issa has violated the Bipartisan Campaign Reform Act's ("BCRA") prohibition on Federal officeholders raising, soliciting, and spending non-Federal funds. Rep. Issa contends that he did not violate the Act because, as a candidate for state

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office, his fundraising activities on behalf of Rescue California “fall within the exception to the non-Federal funds ban stated in 2 U.S.C. § 441i(e)(2).”

### **III. FACTUAL AND LEGAL ANALYSIS**

The Act, as amended by the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. 107-155, 116 Stat. 81 (March 27, 2002), provides, in pertinent part, that effective November 6, 2002, Federal officeholders and entities established, financed, maintained, or controlled by Federal officeholders may not solicit, receive, direct, transfer, spend, or disburse non-Federal funds “in connection with any election other than an election for Federal office,” unless such funds are subject to the Act’s contribution limits and prohibitions. 2 U.S.C. § 441i(e)(1)(B). The recall election was such an election. Moreover, the available information indicates that Rescue California was established, financed, maintained, or controlled by Rep. Issa. Thus, Rep. Issa appears to have violated the Act by soliciting and spending non-Federal funds. 2 U.S.C. § 441i(e)(1)(B). Though Rep. Issa was a gubernatorial candidate at one time, we conclude that section 441i(e)(2) is not applicable to his fundraising activities on behalf of Rescue California.

#### **A. The Recall Election was an “Election Other than an Election for Federal Office.”**

In Advisory Opinion 2003-12 (Flake), the Commission found that section 441i(e)(1)(B) applied not only to fundraising activities in connection with elections for state or local office, but also to ballot measure elections, like the California recall election. Rescue California is a state ballot measure committee that raised funds in connection with a state ballot measure election. Thus, like the committee at issue in Flake, Rescue California’s activities were in connection with “an election other than an election for Federal office.”

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The requester in AO 2003-12 was U.S. Representative Jeff Flake, the chairman and founder of Stop Taxpayer Money for Politicians ("STMP"), an organization seeking to qualify an Arizona ballot measure repealing portions of that State's campaign finance statute. *Id.* at 1. Rep. Flake asked the Commission, *inter alia*, whether STMP's activities were "in connection with an election" within the meaning of section 441i(e)(1)(B). *Id.* at 4. The Commission answered that STMP's activities were "in connection with any election other than an election for Federal office" pursuant to section 441i(e)(1)(B). *Id.* at 6. In reaching this conclusion, the Commission compared the term "any election other than an election for Federal Office" in section 441i(e)(1)(B) with language in section 441i(e)(1)(A) applying to activity "in connection with an election for Federal office," and section 441b(a) which applies to elections "to any political office." *Id.* Finding that Congress intended to set section 441i(e)(1)(B) apart from these more narrow provisions, the Commission advised the requester that section 441i(e)(1)(B) is "not limited to elections for a political office." *Id.*

The Commission further found that,

[A]ll activities of a ballot measure committee "established, financed, maintained, or controlled" by a Federal candidate [or officeholder] are "in connection with any election other than an election for Federal office." This includes activity in the signature-gathering and ballot qualification stage, as well as activity to win passage of the measure after it qualifies for the ballot. On the other hand, the Commission concludes that the activities of a ballot measure committee that is not "established, financed, maintained, or controlled" by a Federal [officeholder] are not "in connection with any election other than an election for Federal office" prior to the committee qualifying an initiative or ballot measure for the ballot, but are "in connection with any election other than an election for Federal office" after the committee qualifies an initiative or ballot measure for the ballot.

AO 2003-12 at 6. Consequently, if Rescue California was established, financed, maintained, or controlled by Rep. Issa, then all of its activity, not just that after the recall qualified for the ballot, would be "in connection with an election other than an election for Federal office."

**B. Rescue California was Established, Financed, Maintained, or Controlled by Rep. Issa.**

Because Rep. Issa provided Rescue California with seed money and needed capital throughout the ballot qualification period, and continued to fund the committee even after the recall measure qualified for the ballot, the available information indicates that he established, financed, and maintained Rescue California. To determine whether a Federal officeholder directly or indirectly established, financed, maintained, or controlled another entity and is therefore a "sponsor" of that entity, the Commission examines a variety of factors, set forth at 11 C.F.R. § 300.2(c)(2)(i) through (x). The Commission examines these non-exclusive factors "in the context of the overall relationship between the sponsor and the entity to determine whether the presence of any factor or factors is evidence that the sponsor directly or indirectly established, finances, maintains or controls the entity." 11 C.F.R. § 300.2(c)(2).

Applied to the current situation, the available information indicates:

- Rep. Issa had an active and significant role in the formation of Rescue California. 11 C.F.R. § 300.2(c)(2)(ix);
- Rep. Issa provided funds in a significant amount to Rescue California. 11 C.F.R. § 300.2(c)(2)(vii); and
- Rep. Issa caused and arranged funds in a significant amount to be provided to Rescue California on an ongoing basis. 11 C.F.R. § 300.2(c)(2)(viii).

**1. Rep. Issa had an active role in Rescue California's formation.**

Rep. Issa provided Rescue California with "seed money." 11 C.F.R. 300.2(c)(2)(ix). On May 8, 2003, Issa's company, Greene Properties, provided the first donation reported by Rescue California in the amount of \$100,000. Greene Properties apparently donated these funds before Rescue California had even filed its May 12, 2003 Statement of Organization with the California Secretary of State. Rescue California used this donation to finance the newly formed

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committee's activities. As such, Rep. Issa played an essential role in Rescue California's formation – its financing.

**2. Rep. Issa donated or caused to be donated funds in a significant amount to Rescue California.**

In his response, Rep. Issa acknowledged that he was a "funding source for the state law effort against the Governor." Response at 1. Moreover, in his August 7, 2003 speech withdrawing from the race, Rep. Issa stated, "I will continue with my wife's support to fund the effort to recall Gray Davis . . . ." Rene Sanchez and Kimberly Edds, *Calif. Gubernatorial Race Shapes Up*, Washington Post, August 7, 2003.

Reports filed with the California Secretary of State demonstrate the extent of Rep. Issa's financial involvement. Since May 8, 2003, Rep. Issa has donated or caused to be donated \$1,845,000, a facially significant amount, to Rescue California both through Greene Properties and in his own name. See 11 C.F.R. § 300.2(c)(2)(vii). The following chart shows donations to Rescue California by Greene Properties, presumably caused to be donated by Rep. Issa:

DATE	AMOUNT	DESCRIPTION
May 8, 2003	\$100,000	Direct donation
May 19, 2003	\$100,000	Payment from Greene Properties to Bader & Associates on behalf of Rescue California for "Petition Circulation" costs.
May 23, 2003	\$245,000	Direct donation.
May 30, 2003	\$200,000	Direct donation.
June 5, 2003	\$155,000	Direct donation.
June 10, 2003	\$200,000	Direct donation.
June 13, 2003	\$150,000	Direct donation.
June 20, 2003	\$130,000	Direct donation.
June 24, 2003	\$250,000	Payment from Greene Properties to Bader & Associates on behalf of Rescue California for "Petition Circulation" costs.
July 2, 2003	\$180,000	Direct donation
August 4, 2003	\$50,000	Direct donation.
<b>TOTAL:</b>	<b>\$ 1,760,000</b>	

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As the chart demonstrates, Greene Properties donated \$1.76 million to Rescue California.<sup>1</sup> Additionally, Rep. Issa donated \$85,000 to Rescue California in his own name. Thus, Rep. Issa caused significant payments to be made to Rescue California. In addition, these funds were donated regularly – indeed, almost weekly during the first two months of the crucial signature gathering period – indicating that the donations were made on an “ongoing basis.” In total, more than 60% of Rescue California’s \$3,053,772 in total reported receipts came from Greene Properties or Rep. Issa. These facts strongly indicate that in addition to financing Rescue California, Issa “maintained” that committee. 2 U.S.C. § 441i(e)(1)(B); 11 C.F.R. §§ 300.2(c)(2)(vii)-(viii).

Rep. Issa donated a “significant amount” to rescue California. 11 C.F.R. § 300.2(c)(2)(vii)-(viii). His role in providing Rescue California with its seed money, infusing the committee with needed cash throughout the ballot qualification period, and continuing to fund the committee even after the recall measure qualified for the ballot, indicates that he established, financed, and maintained Rescue California.

**C. Rep. Issa Appears to have Violated 2 U.S.C. § 441i(e).**

As discussed above, ample evidence suggests Rep. Issa sponsored Rescue California. The available information further suggests Rep. Issa violated the Act by soliciting funds on behalf of, donating to, and causing corporate funds to be donated to, Rescue California both before and after the recall measure qualified for the ballot.

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<sup>1</sup> Though several of these donations were reported as loans, the available information provides no indication that any party intended for the loans to be repaid.



**1. Rep. Issa apparently caused Greene Properties to donate corporate funds to Rescue California.**

Rep. Issa caused corporate funds to be donated to Rescue California. As stated above, Greene Properties is a corporation and, as such, would be prohibited from making contributions or expenditures in connection with a Federal election under 2 U.S.C. § 441b(a). Therefore, Rep. Issa, a Federal officeholder, violated the Act by causing Greene Properties to spend its corporate funds in connection with the recall election. As stated above, Rep. Issa caused Greene Properties to donate a total of \$1,760,000 to Rescue California.

**2. Rep. Issa personally donated more funds to Rescue California than would have been permissible under 2 U.S.C. § 441a(1)(C).**

In addition to his corporate donations, the available information suggests Rep. Issa violated the Act by spending his own funds in connection with the recall election because his donations were in excess of the amount permitted to be made to a political committee under 2 U.S.C. §§ 441a(1)-(3). The most Rep. Issa could contribute as an individual to "any other political committee" is \$5,000. 2 U.S.C. § 441a(1)(C). However, Rep. Issa donated \$35,000 to Rescue California in his own name on August 19, 2003, and an additional \$50,000 on October 2, 2003. Therefore, Rep. Issa spent or disbursed \$80,000 more from his own funds than was permissible under 2 U.S.C. § 441i(e)(1)(B)(i), all after the recall qualified for the ballot.

**3. Rep. Issa may have solicited additional prohibited or excessive funds.**

Rep. Issa may also have violated the Act by soliciting additional non-Federal funds. Complainant stated that donations to Rescue California from Dan Gamel, Inc., the Lincoln Club of Orange County, and the Morongo Indian Tribe were "a direct result of Mr. Issa's efforts." Complaint at 5. Press reports indicate that Mr. Gamel met with Rep. Issa, quoting him as saying, "He came . . . I met him, and we talked. I committed to give him \$10,000, and I also committed

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to give him \$100,000 if they got the required amount of signatures.” Richard A. Oppel Jr., *Leader of Effort to Recall Governor is Named in Dispute Over Campaign Finances*, New York Times, June 12, 2003, at A22. Disclosure reports indicate that Mr. Gamel donated \$10,000 on May 20, 2003. The president of the Lincoln Club of Orange County, Michael D. Capaldi, was also reported to have met with Rep. Issa, and to have said of the meeting, “It’s great to work together with friends on something this important . . . We appreciate Darrell’s entrepreneurship and will do everything we can to help make [the recall] a success.” Jean O. Pasco, *O.C. Republican Donors Pledge Funds for Recall*, Los Angeles Times, May 17, 2003. After the complaint was filed, however, Mr. Capaldi reportedly denied that Rep. Issa solicited funds, stating, “We talked before we made the contribution to find out what his plans were, but the initiative, the impetus, came from us.” Michael Finnegan, *Davis Ally Says Issa Broke Law in Recall Drive*, Los Angeles Times, May 29, 2003. The Lincoln Club donated \$81,350 between May 23 and July 21, 2003. While one report indicates the Morongo Indian Tribe met with Rep. Issa, disclosure reports do not indicate the Tribe made any donation. Oppel, *supra*.

The available information thus indicates reason to believe Rep. Issa may have solicited non-Federal funds in connection with the recall election in violation of 2 U.S.C. § 441i(e)(1)(B).

**D. The section 441i(e)(2) exception is inapplicable.**

Rep. Issa’s response rests on the argument that his activities in support of Rescue California are permissible under 2 U.S.C. § 441i(e)(2). Response at 2. That provision allows Federal candidates and officeholders running for state or local office to raise and spend non-Federal funds. 2 U.S.C. § 441i(e)(2). For several reasons, section 441i(e)(2) is inapplicable to Rep. Issa’s fundraising activities on behalf of Rescue California.

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**a. The narrow section 441i(e)(2) exception does not apply to fundraising activities on behalf of state ballot measure committees like Rescue California.**

Under the section 441i(e)(2) exception, section 441i(e)(1)

[D]oes not apply to the solicitation, receipt, or spending of funds [by a Federal officeholder] who is or was also a candidate for a State or local office *solely in connection with such election for State or local office* if the solicitation, receipt, or spending of funds is permitted under State law and refers only to such State or local candidate, or to any other candidate for the State or local office sought by such candidate, or both.”

2 U.S.C. § 441i(e)(2) (emphasis added). That exception thus allows Federal officeholders to raise money for their State or local campaign committees – activity presumptively governed by State or local law – without regard to the Act. However, the Commission’s Explanation & Justification for 11 C.F.R. § 300.63, the regulation implementing section 441i(e)(2), makes clear that the exception applies only to Federal candidates and officeholders raising funds “for their state campaign.” See E&J, 67 Fed. Reg. at 49107. Organizations supporting the recall generally are distinct from specific candidates’ campaign committees. Rep. Issa had two state campaign committees for which he is or was able to raise non-Federal funds under 2 U.S.C. § 441i(e)(2). Issa for Governor 2003 was formed as Rep. Issa’s campaign committee for the recall election, while Darrell Issa for Governor appears to have been formed as a campaign committee for the 2006 gubernatorial election. Both committees are still registered as “active” with the California Secretary of State.

Section 441i(e)(2)’s language demonstrates its limited scope. While under section 441i(e)(1)(B) Federal officeholders are prohibited from soliciting, receiving, or spending non-Federal funds “in connection with *any election* other than an election for Federal office,” section 441i(e)(2) allows such individuals to solicit, raise, and spend funds “solely in connection with

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*such election for State or local office.” 2 U.S.C. §§ 441i(e)(1)(B), 441i(e)(2) (emphases added).*

The Commission has viewed such distinctions as significant.

In AO 2003-12, the Commission stated, “Where Congress uses different terms, it must be presumed that it means different things.” AO 2003-12 at 5. In keeping with this canon of statutory construction, the Commission interpreted section 441i(e)(1)(B) to include state ballot measure elections as opposed to only elections for political office. AO 2003-12. “Congress expressly chose to limit the reach of section 441b(a) to those non-Federal elections for a ‘political office,’ while intending a broader sweep for section 441i(e)(1)(B), which applies to ‘any election’ . . . .” AO 2003-12 at 5 (footnote omitted). The 441i(e)(2) exception – like sections 441i(e)(1)(A) and 441b(a) – has a more narrow sweep, applying only to activities in connection with elections “for State or local office.” 2 U.S.C. § 441i(e)(2).

Rep. Issa contends his activities on behalf of Rescue California fall under section 441i(e)(2) “[because] the petition process for qualifying the recall election is a legal requirement to holding a new election for Governor and, therefore, part and parcel, under California law, of Mr. Issa’s candidacy for Governor.” Response at 2. However, Rescue California is a state ballot measure committee, not a campaign committee. As such, section 441i(e)(2) is not applicable to Rep. Issa’s fundraising activities on behalf of Rescue California.

**b. California law treats recall committees as distinct from candidate committees.**

Though California law is not binding on the Commission, it is noteworthy that California law treats Rescue California as a ballot measure committee, not a campaign committee. The California Fair Political Practices Commission (“CFPPC”) has recognized that “[r]ecall elections are unique because they have both the characteristics of a ballot measure and a candidate

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election.” CFPPC, Fact Sheet – Recall Elections, July 2003, at 1 (emphasis omitted).

Nonetheless, the CFPPC states unequivocally that a “recall falls within the definition of a ‘measure’ under section 82043 of the [California Elections Code]” and that, therefore,

[S]tate law treats recall elections as ballot measures, the ‘issue’ being whether the officeholder should be recalled. In contrast, the second part of the ballot is actually a candidate election . . . Because different rules sometimes apply between the two types of elections, the answers to questions about conduct related to ‘the recall’ depend on which part of the election is involved.

*Id.* While California law allows Rescue California to raise unlimited funds, replacement candidate committees are limited to \$21,200 per eligible donor. Ca. Gov’t Code § 85301; CFPPC Fact Sheet at 1, 2. Contrary to respondent’s assertion, recall committees and replacement candidate committees are different types of entities, serving different purposes, and are treated differently under California law. While Rep. Issa is free to raise and spend non-Federal funds for his two State campaign committees, he may only raise funds subject to the Act’s limits and prohibitions on behalf of Rescue California. In fact, Rep. Issa’s gubernatorial committees did take advantage of section 441i(e)(2), receiving funds from prohibited sources and in excess of the Act’s limits.

**c. Rescue California’s activities do not appear, under section 441i(e)(2), to “refer to” any particular candidate.**

Even if section 441i(e)(2) did apply to fundraising activities on behalf of state ballot measure committees like Rescue California, that provision may not apply to the particular activities at issue here. As stated above, section 441i(e)(2) allows Federal officeholders to raise and spend non-Federal funds in connection with a State or local election, “if the solicitation, receipt, or spending of funds is permitted under State law *and refers only to such State or local candidate, or to any other candidate for the State or local office sought by such candidate, or*

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*both.*” 2 U.S.C. § 441i(e)(2) (emphasis added). California sets no limits on fundraising by recall committees, so all donations to Rescue California are “permitted under state law.” See CFPPC Fact Sheet at 2. However, Rescue California does not appear to “refer” in its solicitations or advertising to Rep. Issa or any other candidate for governor in the replacement candidate election. Complaint at 6.

The complaint asserts that Rescue California’s “sole purpose is to recall Governor Davis,” and that it was “not formed to support Mr. Issa’s . . . campaign for governor.” *Id.* Indeed, California law prohibits recall committees controlled by a candidate from advocating the election of a replacement candidate. CFPPC Fact Sheet at 3. As such, though each of the numerous candidates on the ballot benefited from Rescue California’s efforts, that committee did not support or even refer to any one of them. *Id.* (“[while] an expenditure by a ballot measure committee that relates solely to the ballot measure question . . . may indirectly benefit the candidate’s election campaign, it does so without reference to the candidate himself or herself”). The only person Rescue California appears to have “referred to” was former Governor Davis, who, by law, could not be a candidate. Cal. Const. Art. II, § 15(c) (“If the majority vote on the question is to recall, the officer is removed and, if there is a candidate, the candidate who receives a plurality is the successor. The officer may not be a candidate.”); Cal. Gov’t Code § 11381(c). Thus, even if fundraising activities on behalf of a state ballot measure committee could satisfy the requirements of section 441i(e)(2), Rep. Issa’s efforts on behalf of Rescue California could not.

For the foregoing reasons, there is reason to believe Rep. Issa violated 2 U.S.C. § 441i(e)(1)(B).

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