FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

NOV 2 9 2004

Alonzo Ramos

Laredo, TX 78040

RE: MURs 5401 and 5422
Texans for Henry Cuellar
Congressional Committee

Dear Mr. Ramos:

On January 8, 2004 and March 10, 2004, the Federal Election Commission notified your clients, Texans for Henry Cuellar Congressional Committee and Rosendo Carranco, as treasurer, of complaints alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. Copies of the complaints were forwarded to your clients.

Upon further review of the allegations contained in the complaints, and information provided by your clients, the Commission, on November 24, 2004, found that there is reason to believe Texans for Henry Cuellar Congressional Committee and Rosendo Carranco, as treasurer, violated 2 U.S.C. §§ 434(b) and 441d(a) and 11 C.F.R. § 104.3(d). The Factual and Legal Analysis, which formed a basis for the Commission's findings, is attached for your information.

You may submit any factual or legal materials that 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

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 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 matter to be made public. If you have any questions, please contact Peter G. Blumberg, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Bradley A. Smith
Chairman

Enclosures
Factual and Legal Analysis

cc: Rosendo Carranco
Henry Cuellar

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Texans for Henry Cuellar Congressional Committee, and Rosendo Carranco, treasurer

MURs: 5401 and 5422

I. INTRODUCTION

These matters were generated by complaints filed against Texans for Henry Cuellar Congressional Committee (the "Committee") and Rosendo Carranco, as treasurer, by Manuel Medina (5401) and Ciro D. Rodriguez for Congress Committee (5422). The Committee is the authorized committee of congressional candidate Henry Cuellar in connection with his campaign for the 2004 Democratic Party primary nomination for the House of Representative in the 28th Congressional District in Texas. The complaint in MUR 5401 alleges that certain automated telephone broadcast advertisements (also known as "robocalls"), believed to have been placed by the Committee, failed to contain a required disclaimer. The complaint in MUR 5422 alleges that the Committee failed to file a Schedule C-1 with its 2004 Pre-Primary Report, which would have provided detailed information on a $200,000 bank loan the candidate obtained for the Committee.

II. FACTUAL AND LEGAL ANALYSIS

A. MUR 5401

The complaint alleges that certain automated telephone broadcast advertisements, made on or around December 19, 2003, failed to contain a required disclaimer stating

who paid for or authorized the communication. A recording of the pre-recorded message used in the calls was submitted in the complaint. The message, which is approximately 45 seconds long, criticizes Ciro Rodriguez, the primary election opponent of Henry Cuellar, alleging that Rodriguez used "tax dollars" to support his campaign, and urges the listener to call Rodriguez to voice disapproval. The advertisement concludes, "we can't afford any more of Ciro Rodriguez." It contains no disclaimer.

The Committee acknowledges paying for the calls and does not dispute the lack of a disclaimer. However, it contends that it was not required to use a disclaimer since, in its belief, automated telephone call programs are exempt from the general disclaimer requirements for "electioneering communication" that only apply to broadcast, cable or satellite communication. *See* 2 U.S.C. § 434(f)(3). The Committee's response ignores the fact that there is a disclaimer requirement for all general public political advertising funded by a political committee.

Whenever a political committee authorized by a candidate makes a disbursement for the purpose of financing any communication through any type of general public political advertising, it shall clearly state that the communication has been paid for and authorized by such authorized political committee. 2 U.S.C. § 441d(a)(1).[1] The

[1] Disclaimers are also required when any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising or makes a disbursement for an electioneering communication (as defined by 2 U.S.C. § 434(f)(3)). 2 U.S.C. § 441d(a). If the communication is paid for by other persons, but authorized by an authorized committee, its agents, or the candidate, it shall state so in the disclaimer. 2 U.S.C. § 441d(a)(2). If the candidate or the candidate's committee did not authorize the disbursement, the communication must state identifying information of the person who paid for it and state that the communication was not authorized by the candidate or the candidate's committee. 2 U.S.C.

implementing regulations for section 441d specify that the disclaimer requirements apply to "public communications." 11 C.F.R. § 110.11; *see Explanation and Justification for Regulations on Disclaimers, et al.*, 67 Fed. Reg. 76962, at 76963 (Dec. 13, 2002). "Public communications" are made by means of any broadcast, cable, or satellite communication, newspaper, magazine outdoor advertising facility, mass mailing, or telephone phone bank to the general public or any other form of general public political advertising. 2 U.S.C. § 431(22). "Telephone bank" means more than 500 telephone calls of an identical or substantially similar nature within any 30-day period. 2 U.S.C. § 431(24); 11 C.F.R. § 100.28. Telephone calls are substantially similar when they "include substantially the same template or language, but vary in non-material respects such as communications customized by the recipient's name, occupation, or geographic location." 11 C.F.R. § 100.28.

It is undisputed that the Committee paid for the automated telephone broadcast advertisements and that the advertisements failed to include a disclaimer stating that the Committee paid for them. Although the regulations do not specifically describe automated telephone broadcast advertisements as a communication requiring a disclaimer, the regulations for telephone banks, and for general public political advertising, appear applicable. An automated telephone voice broadcast program functions like a "telephone bank," even if there was no use of live operators. If automated telephone voice broadcasts were to be viewed as being somehow distinct from

---

§ 441d(a)(3). If an authorized political committee's communication is broadcast through television or radio it must include a statement from the candidate that identifies the candidate and states that the candidate approved the communication. 2 U.S.C. § 441d(d).

telephone banks, it would appear that these robocall programs nevertheless are a form of general public political advertising to which the disclaimer requirement would apply. Thus, as a public communication financed by an authorized committee, a disclaimer is required. 2 U.S.C. § 441d(a). It is irrelevant whether or not these advertisements constitute electioneering communications under 2 U.S.C. §§ 434(f)(3) and 441d(a), because all general public political advertising paid for by a political committee requires the use of a disclaimer. Accordingly, there is reason to believe that Texans for Henry Cuellar Congressional Committee and Rosendo Carranco, as treasurer, violated 2 U.S.C. § 441d(a).

B. MUR 5422

1. Background

The second complaint, MUR 5422, alleges that the Committee failed to file a Schedule C-1 to its Pre-Primary Report of February 26, 2004, which would have provided detailed information on a $200,000 bank loan the candidate obtained for the committee from the International Bank of Commerce of Laredo, Texas on February 3, 2004. The complaint suggests that without the detailed information, such as the interest rate, a description of the collateral, the value of the collateral, and a certification from the lender that the information about the loan set forth in the Schedule is accurate, it cannot be determined whether this was a "sweetheart" loan provided by the bank, which is "located in the candidate's hometown" and whose "executives are actively supporting" the candidate's campaign. The Reports Analysis Division sent a request for additional information ("RFAI") to the Committee on March 16, 2004 inquiring about the missing

Schedule C-1 and loan documents, requesting a response by April 15, 2004. An unsigned Schedule C-1 was filed electronically on April 27, 2004, two months late and without the loan documents. The Committee filed a signed paper copy of the Schedule C-1, along with loan documents, on May 10, 2004.

In response to the complaint, the Committee claims that an application error in its filing vendor's software caused the failure to file the Schedule C-1. The Committee asserts that its vendor's mistake was related to a Commission-mandated upgrade in electronic filing software and could have been avoided had the Commission timely notified the software vendor of the required upgrade, providing the vendor the necessary time to correct software glitches. However, numerous notices were issued concerning the upgrade.[2]

2. Analysis

When a candidate receives a loan for use in connection with his or her campaign, the candidate receives the loan as an agent of his or her authorized committee. 2 U.S.C.

---

[2] The Electronic Filing Office ("EFO") upgraded the electronic filing format from Version 5.0 to Version 5.1 on November 25, 2003, although the system continued to accept reports filed in either format through February 9, 2004. When the Committee's Pre-Primary Report was due, on February 26, 2004, reports adhering to 5.1 specifications were required. The change primarily related to the manner in which reported information was presented on the report form (*i.e.* "the layout"). The upgrade was announced to the regulated community through several channels, including announcements on the Commission's website and in electronic mail messages (EFO confirms that messages were sent to the Committee, but it is unknown whether the Committee forwarded the information to its filing vendor). However, for a period continuing into March 2004, the Commission's "test-filing" site continued to accept format 5.0, even though the "live-filing" site would not. The vendor claims that had the test site rejected its test filings, it would have become aware of the upgrade sooner, and it would have been able to correct the glitches. However, the vendor did not demonstrate that fully-tested software would have prompted the filing of the Schedule C-1, which, due to special signatory requirements, required a separate filing.

§ 432(e)(2); 11 C.F.R. §§ 101.2 and 102.7(d). Such loans are reportable by the committee and itemizable as loans from the lender to the committee, rather than as loans from the candidate to the committee. 2 U.S.C. § 434(b)(3)(E); 11 C.F.R. § 104.3(a)(3)(vii)(B) and (a)(4)(iv).

All loans received by a committee, including loans guaranteed by the candidate, must be reported and continually itemized and reported until repaid. 2 U.S.C. § 434(b) and 11 C.F.R. § 104.3(a)(4)(iv) and (d); 11 C.F.R. § 104.11. A committee that obtains a loan from a bank must also file a Schedule C-1 with the first report due after a new loan or line of credit has been established.[3] 11 C.F.R. § 104.3(d)(1). Since a Schedule C-1 has special signature requirements, a committee filing its disclosure reports electronically must file the Schedule C-1 as a paper copy with its electronic submission, or as a digitized version in a separate file in the electronic submission, by the close of business on the prescribed filing date. 11 C.F.R. § 104.18(h)(2).

The applicable statutes and regulations are clear that loans from lending institutions must be reported with substantial specificity. In this case, the Committee reported the existence of a bank loan, but failed to provide detailed information

[3] Schedule C-1 requires that the following information be disclosed: (1) the date and amount of the loan or line of credit; (2) the interest rate and repayment schedule of the loan, or each draw on the line of credit; (3) the types and value of traditional collateral or other sources of repayment securing the loan or line of credit and whether that security interest is perfected; and (4) an explanation of the basis of the credit established if the bases in (3) are not applicable. 11 C.F.R. § 104.3(d)(1)(i)-(iv). The committee treasurer must sign the schedule on Line G and attach a copy of the loan agreement. 11 C.F.R. § 104.3(d)(2). The lending institution must sign the statement on Line I, attesting that: the terms of the loan and other information regarding the extension of the loan are accurate, the terms and condition of the loan are no more favorable than those extended to similarly situated borrowers, the lending institution is aware that the loan must be made on a basis which assures repayment, and that in making the loan it has complied with the regulations set forth at 11 C.F.R. §§ 100.82(a)-(d) and 100.142(a)-(d).

concerning the loan for over two months. Since the loan was made just prior to a primary election, significant details concerning the loan, including how it was collateralized, were not on the public record before the election.

In a recent MUR involving similar allegations concerning a bank loan and the failure to file a Schedule C-1, MUR 5198 (Cantwell), the Commission found reason to believe the Cantwell Committee violated 2 U.S.C. § 434(b) and voted to send an admonishment letter. The Office of General Counsel did not recommend that the Commission pursue conciliation for the reporting violation because the complaint's "core allegations" concerning an allegedly improper bank loan were unfounded and because the reporting violations appeared inadvertent and were resolved through prompt corrective action. In the present matter, although the reporting violation may have been inadvertent, prompt corrective action did not occur. The Committee filed its signed Schedule C-1 and loan documents several months late, and only after an RFAI was sent and a complaint was filed. In fact, the Committee did not even comply with the RFAI's request that the Schedule be filed within 30 days of the date of the request. In contrast, the Cantwell Committee had filed an amendment with the Schedule C-1 prior to receiving an RFAI requesting the information and prior to the filing of a complaint.

The Committee's confusion over the electronic filing requirements does not excuse the violation, especially given that the Commission issued multiple warnings concerning the software upgrade. Moreover, the Committee has not established that it would have timely filed the Schedule C-1 had it been aware of the software upgrade – the upgraded software did not contain a feature that would have prompted committees to file

the Schedule C-1, and in any event, the Schedule C-1 was to be filed separately in paper or digitized form, along with the loan documents, which the Committee could have accomplished regardless of what electronic filing software it was using.

Accordingly, insofar as the detailed loan schedule was required and not filed timely, there is reason to believe that Texans for Henry Cuellar Congressional Committee, and Rosendo Carranco, as treasurer, violated 2 U.S.C. § 434(b) and 11 C.F.R. § 104.3(d).