



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

MAR - 9 2007

Manuel Medina

San Antonio, TX 78214

RE: MUR 5401

Dear Mr. Medina:

This is in reference to the complaint you filed with the Federal Election Commission on January 5, 2004, concerning the Henry Cuellar for Congress Campaign. Based on that complaint, on November 24, 2004, the Commission found that there was reason to believe Texans for Henry Cuellar Congressional Campaign and Rosendo Carranco, in his official capacity as treasurer ("the Committee"), violated 2 U.S.C. § 441d(a), a provision of the Federal Election Campaign Act of 1971, as amended, and instituted an investigation of this matter. However, after considering the circumstances of this matter, the Commission determined to take no further action as to the Committee, and closed the file in this matter on March 6, 2007.

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 copy of the dispositive Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed for your information.

The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 2 U.S.C. § 437g(a)(8). If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg", with a long, sweeping horizontal line extending to the right.

Peter G. Blumberg
Attorney

Enclosure
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

Matter Under Review 5401

RESPONDENTS: Texans for Henry Cuellar Congressional Campaign,
and Rosendo Carranco in his official capacity as treasurer

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This matter was initiated by a complaint filed with the Federal Election Commission. The complaint alleged that certain automated telephone broadcast advertisements made by the Respondents on or around December 19, 2003, failed to contain a required disclaimer stating who paid for or authorized the communication.¹ The Committee's response to the initial complaint contended 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 ignored the fact that there is a disclaimer requirement for all general public political advertising funded by a political committee, and failed to provide information that would establish that the automated call did not require a disclaimer.

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

¹ 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.

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authorized by such authorized political committee. 2 U.S.C. § 441d(a)(1).² The 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.

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, appeared applicable. An

² 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. § 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).

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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 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. In either case, a disclaimer would be required. 2 U.S.C. § 441d(a). On this basis, the Commission initially found reason to believe that the Respondents had violated 2 U.S.C. § 441d(a), and initiated an investigation.

The Commission's investigation into the Committee's automatic calling program included reviewing the Committee's call list and interviewing the campaign manager who was responsible for directing the program. The investigation revealed that while the Committee's automated calling program failed to include disclaimers, it also appears to never have used substantially the same script to call more than 500 telephone numbers. Accordingly, these calls did not meet the threshold amount of calls required for the disclaimer requirements.³ See 2 U.S.C. § 431(24); 11 C.F.R. § 100.28. (disclaimer rules apply to "telephone banks," programs involving more than 500 telephone calls of an identical or substantially similar nature made within any 30-day period).

Therefore, the Commission determined to take no further action with respect to the allegations in MUR 5401.

³ Campaign manager Colin Strother, who is now Congressman Cuellar's chief of staff, stated the campaign used an inexpensive, off-the-shelf autodialer purchased by the candidate over the Internet and used by him prior to the 2004 campaign to promote his private law practice and various charitable endeavors. Strother acknowledged that he was the author of several different scripts that the Committee used for the autodialer program and that he did not include disclaimers with the campaign messages. The calls were made to targeted areas of Laredo known to be strongholds of Cuellar's election opponent. The Committee obtained the phone numbers in these neighborhoods from Aristotle International, and the list of numbers, which was provided to this Office, amounted to 378 telephone numbers. Strother stated that the list of phone numbers submitted to this Office was complete and contained the only numbers ever called by the campaign.