IN AND BEFORE THE

FEDERAL ELECTION COMMISSION

IN RE:

David Vitter for U.S. Senate and	)	**MUR 5587R**
William Vanderbrook, in his official	)	
capacity as Treasurer,	)	
Respondent	)	

Response to Probable Cause Brief of Office of General Counsel

This Matter Under Review 5587R ("the MUR") arises from a complaint filed against Respondent David Vitter for U.S. Senate ("the Committee[1]") with respect to telephone calls paid for by the Committee.

The Office of General Counsel ("OGC") of the Federal Election Commission ("FEC" or "the Commission") has issued its recommendation that the Commission find probable cause that the Committee has violated the provisions of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"). The OGC has concluded (erroneously) that the phone calls made using two scripts furnished to the Commission violated the Act.

For different reasons, the OGC's analysis of both calling programs is wrong. Neither of the phone calling programs violate(d) the Act for the reasons set forth below and, accordingly, the Commission should find that no probable cause exists to believe that the Committee has violated the Act.

Facts and Argument

1. The "first phone bank" calls clearly identified the calls as being made by David Vitter for U.S. Senate. There are two sets of phone calls at issue in the MUR: the OGC refers to one set of calls as "the first 'poll' and describes these as calls "which involved advocacy and voter identification". See OGC Brief @ page 1. OGC asserts that approximately 400,000[2] calls fall into this category.

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[1] William Vanderbrook has been identified in the MUR in his official capacity as Treasurer for the Committee.

[2] Of the 400,000 calls made for voter identification and advocacy, it is impossible to ascertain with certainty the exact script used for all the various calling programs. That information has been provided to the OGC.

In the 'advocacy and voter identification' calls, the purpose was to advise the recipient that the call was generated by the Vitter campaign and to urge the voter to support David Vitter in the upcoming election.

In each instance involving these calls, the caller identified himself/herself *at the outset* as calling from and on behalf of David Vitter for U.S. Senate.

A script provided to the OGC demonstrated that the *first* statement from the caller from the Committee identified the source of the call, to-wit:

> "Hello, am I speaking with [voter surveyed]? This is [name of caller] and I'm working with the David Vitter for U.S. Senate Campaign. I have decided to work to elect David Vitter because..."

Then, the very *last* statement also indicates clearly that the call was generated by the David Vitter for U.S. Senate campaign, to-wit:

> "...Thank you for your time and we really do hope you will consider David Vitter for U.S. Senate when you go to vote."

Each telephone call began and ended with a clear reference to the fact that the call came from the Vitter campaign and there is no doubt that the source of the call was, in fact, the David Vitter for U.S. Senate campaign.

There was no effort to disguise or conceal the source of the call and the affirmative disclosure of the David Vitter campaign as the sponsor of the call was readily apparent, in prominent position and placement, and there can be *no* misconstruing of or confusion as to the source of the call.

According to the OGC, the 'violation' apparently occurred because the Committee did not use certain 'magic words' sufficient to constitute, in the OGC's view, a proper 'disclaimer' as opposed to simply disclosure of the source of the calls.

For its authority that the disclosure in these phone calls was insufficient and thus constituted a violation of the Act, OGC relies on the change of wording in 2 U. S. C. §441d from 'expenditure' to 'disbursement' when Congress enacted the Bipartisan Campaign Reform Act of 2002 ("BCRA").

However, in the Explanation and Justification (67 Fed. Reg. 76962, 76963) of the new disclaimer regulations implementing BCRA, the Commission made the opposite statement, indicating that the new regulations represented a significant change *only* for non-express advocacy calls. Because the 'advocacy and voter identification calls *are* express advocacy calls, the OGC's recommendation for a probable cause finding is misplaced, to-wit:

> "In BCRA, Congress provided that ''any communication'' for which a political committee makes a disbursement must include a disclaimer, expanding the scope of the disclaimer requirement for political committees *beyond communications constituting express advocacy and communications soliciting contributions*. Compare pre- and post-BCRA versions of 2 U.S.C. 441d(a). Revised paragraph (a)(1) of section 110.11 reads, ''[a]ll public communications for which a political committee makes a disbursement.''

Indeed, the Commission in the Notice of Proposed Rulemaking ("NPRM") when the proposed disclaimer regulations were first published indicated *no* substantive changes in the regulations governing express advocacy communications and certainly nothing was stated by the Commission to put the regulated community on notice of the type of change(s) the OGC now wishes to penalize the Committee for having failed to implement. See 67 Fed Reg 55348, 55349 (Aug. 29, 2002):

> "Proposed paragraph (a)(1)(ii) would require that ''[a]ll such communications by any person that expressly advocate the election or defeat of a clearly identified candidate'' must include a disclaimer. 2 U.S.C. 441d(a). The proposed rule would not substantively change the disclaimer requirement for express advocacy communications from the pre-BCRA version of the regulation."

The communication(s) at issue in the 'advocacy and voter identification calls' (as these calls are described by OGC in its Probable Cause brief) *are* express advocacy communications and, accordingly, should not be treated any differently *after* BCRA than pre-BCRA, according to the Commission's own statements *and* according to the discussion(s) before Congress regarding BCRA.

Congress clearly intended for the expanded disclaimer requirement(s) to apply to "general public political advertising", a term used by Congress but found nowhere in the Commission's regulations and which the Commission has declined to define. Instead, the Commission has swept "general public political advertising" within its definition of another term, "public communication". See 11 C.F.R. 100.26.

However, it appears that Congress was in fact interested in a more specific concept of 'advertising' as evidenced by the Committee Report of the House. In the *Report of the House Administration Committee, Bipartisan Campaign Reform Act Of 2002,* H.R. REP. 107-131(I), the only reference to this section of BCRA contains a specific reference to 'advertising' and further indicates that it is sponsorship 'identification' that is the requirement of the revised section, to-wit:

Sec. 312. Clarity standards for identification of sponsors of election-related advertising

* Requires sponsorship identification on all election-related advertising (including electioneering communications) by political committees and enhanced visibility of such identification in the communication.

The Committee submits that the identification of the Committee as the sponsor of the phone calls in its 'advocacy and voter identification calls' is not in doubt from the plain language of the script provided to the Commission and that such information was sufficient to meet the requirements of §441d.

Further, the notice to those who received calls from the Committee that the Committee was the source of the calls was "clear and conspicuous" which is, according to the Explanation and Justification, the purpose of the disclaimer requirements, to-wit:

"11 CFR 110.11(c) Disclaimer Specifications

A. Specifications for All Disclaimers

In BCRA, Congress created a number of specific requirements for disclaimers to be included in communications covered by the statute. ...Paragraph (c)(1) sets forth a general, "clear and conspicuous" requirement applicable to all disclaimers, regardless of the medium in which the communication is transmitted. Paragraph (c)(1) is a slightly revised version of the "clear and conspicuous" requirement in pre-BCRA 11 CFR 110.11(a)(5). The final sentence of paragraph (c)(1) provides that a disclaimer is not clear and conspicuous if it is difficult to read or hear, or if its placement is easily overlooked. This modifies the corresponding pre-BCRA provision, which was focused on print communications only, by generalizing it to apply to communications made through other media as well. This generalization is justified by BCRA's revision to section 441d, which broadened the scope of the statute." Explanation and Justification, 67 Fed. Reg. 76962, 76965

Here, the information was clear, conspicuous, was not difficult to hear and the placement was not easily overlooked. There is no evidence that any individual was misled or confused or misinformed by these 'advocacy and voter identification calls'. After all, the purpose of the notice requirement(s) is to avoid voter confusion, *not* to impose some mindless bureaucratic and government-imposed specific speech.

Further, the precise form of the 'disclaimer' is *not* mandated; rather, it is 'suggested' or provided 'by example'. Speaking of 'clear and conspicuous notice,

perhaps the Commission should re-examine its own publication on the subject of disclaimers, published in July 2003 to assist (presumably) with compliance with BCRA's new provisions. The brochure entitled Special Notices on Political Ads and Solicitations, is hardly sufficient to give notice to the regulated community that the Commission believed itself to have adopted new standards or regulations governing express advocacy voter phone calls. There are virtually *no* campaign veterans who would consider the calling program evidenced by these 'advocacy and voter identification calls' as an "ad" or a "general public political advertisement".

Neither the Committee nor a small company such as McRei, Inc., which has been making thousands of phone calls for federal campaigns over a period of many, many years would be on notice of any change in Commission policies, regulations or interpretations by virtue of the Commission's own publications and statements.

The Commission's brochure text defines a disclaimer notice in layman's terms *and* nowhere indicates that the *only* sufficient 'disclaimer' is some magic language from which the regulated community cannot depart, to-wit:

> **"What is a Disclaimer Notice?**
>
> For the purpose of this brochure, a "disclaimer" notice is defined as a statement placed on a public communication that identifies the person(s) who paid for the communication and, where applicable, the person(s) who authorized the communication. (emphasis added)
>
> **Messages Authorized and Financed by a Candidate**
> On a public communication that is authorized and paid for by a candidate or his/her campaign committee, the disclaimer notice must identify who paid for the message. 11 CFR 110.11(b)(1). Example: "Paid for by the Sheridan for Congress Committee."

Here, the Committee retained an expert telephone vendor with years of experience in making such calls, and the caller identified the Vitter campaign as the source of the calls. For the Commission to now assert that the magic words "paid for by" are more important than the identity of the sponsor and that, absent the 'magic words', there is no sufficient disclaimer is preposterous at worst and burdensome at the very least.

The Committee submits that its script amply advised all persons receiving the 'advocacy and voter identification calls' of the requisite notice under the Act as to their source as required by the Commission's regulations, albeit not in the exact form that the OGC now asserts is mandated.

There could be no confusion as to the source of the calls and, as such, the Committee asserts that it has fully and substantially complied with the requirements of §441d with respect to the scripts for the 'advocacy and voter identification' calls.

2. The Polling Calls Do Not Constitute "General Public Political Advertising". Further, the Commission Has Not Provided Notice of the Inclusion of Polling Calls in Its Definition of 'Public Communication' Subject to Disclaimer Requirements.

Another type of phone calls made by the David Vitter for Senate campaign were calls to likely voters to ascertain trends and opinions of voters in Louisiana that were *not* made for the purpose of advocacy or to identify specific votes and voters.

Rather, these are referred to by the phone vendor as "polling" calls, using a proprietary technique developed by the telephone vendor to help campaigns better target and refine their communications. See Affidavit of Sandy McRei, originally submitted to the OGC on July 27, 2004.

The OGC has also concluded that the changes under BCRA in 2 U.S.C. §441d mandate that all 'disbursements' by a Committee must now include a disclaimer, consisting of 'magic words' which state "Paid for by..." in order to comply with the Act.

Because of that determination, the Committee has been advised by OGC that this conclusion also extends to polling calls and, presumably, includes any and all opinion research in which more than 500 phone calls are made within a thirty (30) day period. That logic would, of course, now require disclaimers on all opinion research calls, include tracking polls, if the calling program involves more than 500 phone calls within a thirty day period – which most polling samples and certainly tracking calls would involve.

That is, quite simply, a conclusion unsupported by a single reference anywhere in the development of the law and regulations on this issue.

Nowhere in the statute, nowhere in the *Congressional Record,* the legislative history, the floor debate, or in the Commission's rulemaking publications is there a *single* reference to 'polling' phone calls. The statutory reference to 'phone banks' does not extend to telephone calls which are made for polling or research purposes, or to ascertain trends, overall percentages of support, tracking calls to determine the effectiveness of the campaign's advertising or the candidate's progress or the status of the campaign itself. No discussion of this type of telephone communication exists *anywhere* in the legal and legislative history of BCRA.

Neither does the legislative history before Congress indicate that BCRA requires polling contacts to be accompanied by the 'magic words disclaimer' and the Committee submits that had anyone considered that as a potential conclusion of the Commission, there would have been a specific exemption for polling calls to respect the historic treatment of such communications.

The Commission has never considered polling calls to require a disclaimer. As the Committee previously noted in its response to the Complaint in this MUR:

"Historically, the Commission has adhered to an industry standard reflecting the principle that telephone calls solely in the nature of opinion polling which do not expressly advocate a candidate or indicate any candidate preference are not considered 'advertising' subject to the regulations requiring disclaimers. In Advisory Opinion 1999-27, the Alaska Federation of Republican Women ("the Federation"), requested an advisory opinion concerning the application of the Act and Commission regulations to the conduct of a presidential straw poll. In that AO, the Commission noted, "...Moreover, if the public media advertising for participation in the poll does not contain any message expressly advocating the election or defeat of a candidate, the advertisements need not include a disclaimer". See 2 U.S.C. 441d(a); 11 CFR 110.11(a)(1)."

For the Commission to now depart from this reasoning without any notice to the regulated community is unacceptable.

Not only do the Commission's regulations fail to specifically incorporate "polling" calls in the Commission's new definition(s), there has never been any public indication that the Commission was contemplating imposing such a regulation or interpretation. There was no such reference in the NPRM on which the final rules are based and, had the Commission indicated in the NPRM that it was considering a change in its treatment of polling calls to require opinion polling to indicate the source of the calls, undoubtedly more than thirteen comments would have been received!

A line by line review of the Explanation and Justification of the Disclaimer Requirements discloses not a single mention of 'polling' calls as now being subject to the Disclaimer regulations.

The Commission's utter silence on this rather dramatic departure from the customary treatment of polling calls until this particular enforcement action provided absolutely no notice of the regulatory change and is, therefore, an abuse of discretion and denies this Committee the due process of law to which it is entitled.

As the Court in *Shays-Meehan, et al. v. Federal Election Commission*: --- F.Supp.2d ----, 2006 WL 825981 (D.D.C.) recently noted in the litigation challenging the Commission's decision not to promulgate regulations governing §527 organizations,

"...(i)t is possible, however, that an agency's reliance on adjudication (instead of rulemaking) can amount to an abuse of discretion. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974). In *Trans-Pac. Freight Conference of Japan/Korea v. Fed. Mar. Comm'n*, the court noted: Rule-making is an essential component of the administrative process and indeed is often the preferred procedure for the evolution of agency policies. Rule-making permits more precise definition of statutory standards than would otherwise arise through protracted, piecemeal litigation of particular issues. It allows all those

who may be affected by a rule an opportunity to participate in the deliberative process, while adjudicatory proceedings normally afford no such protection to nonparties. And because rule-making is prospective in operation and general in scope, rather than retroactive and condemnatory in effect, interested parties are given advance notice of the standards to which they will be expected to conform in the future, and uniformity of result is achieved." citing *Trans-Pac. Freight Conference of Japan/Korea v. Fed. Mar. Comm'n*, 650 F.2d 1235, 1244-45 (D.C. Cir. 1980).

Here, the Commission *did* promulgate new regulations on disclaimers but in doing so, the Commission totally failed to indicate in any way or at any point that a type of telephone calls which are an integral part of every serious federal campaign would be subject to new disclaimer and disclosure regulations that will, if implemented, utterly alter the nature and validity of the calls, the notice of which *every* federal campaign has a vested interest. Certainly, the Respondent Committee in this MUR had no such notice.

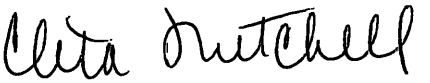
The Committee submits that the type of calls at issue in its polling, where no advocacy of any kind occurred and which were made for the purpose of tracking trends and effectiveness of the campaign were not contemplated by Congress as subject to §441d and the Commission's attempts to expand the definition of 'general public political advertising' to incorporate polling and research calls is a misinterpretation of BCRA.

Because the Commission failed to provide sufficient notice to the Committee of the change in the regulatory approach and further, because the Commission's interpretation of BCRA is not grounded in the plain language of the statute nor anywhere in the legislative history of the Act, the Committee submits that the Commission is without authority to proceed further with this enforcement action for the Committee's polling calls program.

CONCLUSION

For the reasons stated herein, Respondent David Vitter for US Senate responds that it did not violate the Act as described by the Office of General Counsel in its probable cause brief. Respondent moves the Commission to reject the recommendation from the Office of General Counsel and terminate further proceedings in this MUR.

Respectfully submitted,



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