



FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

BEFORE THE FEDERAL ELECTION COMMISSION

SENSITIVE

In the Matter of)
)
Senator Barbara Boxer,)
Senator Dianne Feinstein,)
Representative Nancy Pelosi, and)
Phil Angelides)

MUR 5711

**STATEMENT OF REASONS OF CHAIRMAN ROBERT D. LENHARD,
VICE CHAIRMAN DAVID M. MASON AND
COMMISSIONERS HANS A. von SPAKOVSKY AND STEVEN T. WALTHER**

The complaint in this matter alleged that Senators Boxer and Feinstein, Representative Pelosi, and Phil Angelides violated the Federal Election Campaign Act ("FECA" or the "Act"), 2 U.S.C. § 431 et seq., by soliciting funds in connection with a non-federal election in amounts that exceed the limits in the FECA.¹ The Commission voted 5-0 to approve recommendations to: (1) find no "reason to believe" Senator Boxer, Senator Feinstein, and Representative Pelosi violated 2 U.S.C. § 441a(a) and 11 C.F.R. § 300.61; (2) dismiss the allegation that Phil Angelides violated the Act by aiding and abetting Senator Boxer, Senator Feinstein, and Representative Pelosi's alleged violation of 2 U.S.C. § 441i(e); and (3) close the file.² The Commission, however, voted 5-0 to reject recommendations from the Office of General Counsel to dismiss the allegation that Senator Barbara Boxer, Senator Dianne Feinstein, and Representative Nancy Pelosi violated 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62, and instead voted to find no "reason to believe" that they violated the Act.³ We write separately to explain our reasons for this decision.

I. BACKGROUND

This matter concerns the solicitation of funds on the campaign website of California gubernatorial candidate Phil Angelides. See <http://www.angelides.com> (visited March 2006). The homepage included individual photographs of Senator Barbara Boxer, Senator Dianne Feinstein, Representative Nancy Pelosi, and California Assembly Speaker Fabian Nuñez under the heading "Campaign Co-Chairs," with each

¹ Compl at 1 (March 6, 2006)

² Voting affirmatively were Chairman Lenhard, Vice Chairman Mason, and Commissioners Toner, von Spakovsky and Walther. Commissioner Weintraub recused herself from the matter.

³ A determination of "reason to believe" a violation has occurred will be issued when the available information provides a basis for proceeding with the matter. Such determinations do not establish that a respondent violated the Act. The Commission finds no "reason to believe" when the complaint, any response filed by the respondent, and any publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law. In contrast, the Commission will elect to dismiss a matter when it does not merit further use of Commission resources even though there may be reason to believe that a violation may have occurred. See Commission Action in Matters at the Initial Stage in the Enforcement Process (F E C Feb 27, 2007), available at <http://www.fec.gov/agenda/2007/mtgdoc07-14.pdf> (visited March 13, 2007)

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identified by name and office held.⁴ Also included on the homepage were links labeled "Meet Phil," "Get Involved," "Issues," "Endorsements," "Media Center," "Volunteer Center," "Store," "Join," "Contribute," "Volunteer," "Contact Us," "Community Pages," and "Endorse Phil."⁵ Clicking the "Contribute" link redirected the reader to a separate web page that provided instructions on how to make a contribution to the Angelides campaign.⁶ This separate web page, which did not contain the names or likenesses of the federal officials, contained boxes for an individual to indicate his or her commitment to contribute between \$25 and \$22,300 to Angelides 2006. At the bottom of the "Contribute" web page, this statement appeared inside a box:

Angelides 2006 is a committee formed to support Phil Angelides's campaign for Governor of California in 2006. Under California and Federal law, Angelides 2006 may accept contributions of up to \$22,300 per election for the primary and general elections from individuals, businesses, corporations, unions, PACs and small contributor committees. Contributions from foreign nationals are prohibited, unless an individual is lawfully admitted for permanent residence in the United States.⁷

The complainant alleged that Respondents violated the "soft money" prohibitions enacted in the Bipartisan Campaign Reform Act ("BCRA"), specifically, 2 U.S.C. §§ 441i(e)(1)(A) and (B) and 11 C.F.R. §§ 300.61 and 300.62, which prohibit federal candidates, officeholders, and their agents ("covered individuals") from soliciting funds in connection with any non-federal election unless the funds are in amounts that do not exceed the Act's contribution limits and do not come from prohibited sources.

II. DISCUSSION

Pursuant to the FECA, covered individuals may not solicit, receive, direct, transfer or spend funds in connection with either federal or non-federal elections, unless the funds comply with federal contribution limits, source restrictions, and reporting requirements. See 2 U.S.C. §§ 441i(e)(1)(A) and (B) and 11 C.F.R. §§ 300.61 and 300.62. Specifically, a covered individual, whether in connection with a federal or non-federal election, may not raise funds from any person that exceed a limit of \$2,300 per election per candidate,⁸ and may not raise funds from corporations or labor organizations. At all times relevant to this matter, the Commission defined the term "solicit" to mean "to ask that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value whether the contribution, donation, transfer of funds, or thing of value, is to be made or provided directly, or through a conduit or intermediary."

⁴ <http://www.angelides.com> (unless otherwise noted, all Internet sites visited March 6, 2006)

⁵ After the filing of the complaint, the format of the homepage changed. Senators Boxer and Feinstein, Representative Pelosi, and Mr. Nuñez were no longer identified as "Campaign Co-Chairs" and their pictures were moved below new language stating "Join California's Democratic leaders - Sign your name to show your support." See <http://www.angelides.com> (visited May 3, 2006). The format of the homepage changed again and most recently identified Senators Boxer and Feinstein, Representative Pelosi, and Mr. Nuñez as "Campaign Co-Chairs" on a separate webpage titled "Endorsements." See <http://www.angelides.com> (visited November 9, 2006).

⁶ <http://www.angelides.com>

⁷ *Id.* Additionally, a rotating banner at the top of the homepage contained a picture of Mr. Angelides with Senators Boxer and Representative Pelosi. See Compl. at 3. Below the rotating banner were web links to other parts of the website labeled "Join," "Contribute," "Volunteer," "Contact Us," "Community Pages," and "En Español." Clicking the "Contribute" link redirected the reader to the separate webpage noted above that sought and allowed the making of a donation in amounts between \$25 and \$22,300. See <http://www.angelides.com>

⁸ At the time of the alleged violation, the individual contribution limit was \$2,100.

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See 11 C.F.R. § 300.2(m).⁹

The Commission has interpreted the solicitation prohibition at issue through several advisory opinions. See, e.g., AO 2003-03 (*Cantor*), AO 2003-36 (*Republican Governors Association* (“RGA”)), 2003-37 (*Americans for a Better Country* (“ABC”)). The Commission’s opinion in *Cantor* proves instructive to the questions presented here.

A. The *Cantor* Advisory Opinion

In *Cantor*, the Commission explained that covered individuals must comply with the FECA’s solicitation restrictions if they solicit contributions for federal or non-federal campaigns. Four operating principles arise out of the *Cantor* advisory opinion.

First, a covered individual may appear in written solicitations in connection with the election of state candidates, so long as the solicitation is expressly and entirely limited to amounts and from sources that comply with the Act’s contribution limits and source prohibitions. See AO 2003-03.

Second, if a written solicitation in connection with the election of state candidates asks for contributions, but does not specify an amount, a covered individual may appear in the written solicitation provided it contains express language stating that the federal officeholder or candidate is only soliciting amounts that comply with the Act’s contribution limits and source prohibitions. *Id*

Third, if a written solicitation in connection with the election of state candidates explicitly asks for donations of funds in amounts exceeding the Act’s contribution limits or from prohibited sources, then a covered individual may not appear in the solicitation regardless of whether there is an express statement limiting the covered individual’s solicitation to funds that comply with the amount limits and source prohibitions of the Act.¹⁰ *Id*

Fourth, a plain reading of *Cantor* leads to a final conclusion: a covered individual may freely assent to include his or her name or likeness in pre-event publicity that does not amount to a solicitation. This remains true even if separate, additional pre-event publicity is generated that would constitute a solicitation, but which otherwise lacks the covered individual’s name or likeness. *Id*

B. The *RGA* and *ABC* Advisory Opinions

The Commission again considered the involvement of covered individuals in fundraising for non-federal elections in the *RGA* Opinion See AO 2003-36. There, the question posed was whether a covered individual could have his or her name appear as the featured guest or speaker on written solicitations for a

⁹ Subsequent to the activity at issue here, the Commission revised the definition of “solicit” with an effective date of April 19, 2006 See 71 Fed Reg 13,926 (Mar 20, 2006) However, the Commission does not apply substantive regulations retroactively Cf *Robertson v FEC*, 45 F 3d 486, 490 (D C Cir 1995) (citing *Landgraf v USI Film Prods*, 511 U S 244, ___, 114 S Ct 1483, 1502 (1994)), *In re Missouri State Democratic Comm*, Matters Under Review 4831 & 5274, Statement of Reasons of Comm’r Toner at 2 (F E C Dec 4, 2003), available at <http://eqs.sdrdc.com/eqsdocs/00000704.pdf> (visited March 12, 2007). See also *Shays v FEC*, 337 F Supp 2d 28, 93 (D D C 2004) (noting that the Commission had concluded the Bipartisan Campaign Reform Act of 2002 (“BCRA”) “should not be interpreted in a manner that penalizes people for the way they ordered their affairs before the effective date of BCRA This will help ensure that BCRA is not enforced in a retroactive manner with respect to activities that were legal when performed” (quoting *Prohibited and Excessive Contributions*, 67 Fed Reg 49064, 49084 (2002))), *aff’d on other grounds*, 414 F 3d 76 (D C Cir 2005).

¹⁰ Commissioner von Spakovsky disagrees with the third principle of *Cantor* and its continued application However, this disagreement does not affect the analysis or outcome of this matter

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fundraising event. The Commission explained that “Section 441(e)(1) and section 300.62 do *not* apply to publicity for an event where that publicity does not constitute a solicitation or direction of non-Federal funds by a covered individual, nor to a Federal candidate or officeholder merely because he or she is a featured guest at a non-Federal fundraiser.” *Id.*

Similarly, in *ABC*, which primarily addressed the allocation of expenses by nonconnected committees and was superseded when the Commission enacted new regulations regarding the allocation of certain expenses (*see* 69 Fed. Reg. 68,056, 68,063 (Nov. 23, 2004)), the requestor asked if federal officeholders or candidates could be named in written invitations as “honored guests” or “featured speakers” at fundraising events for ABC’s non-federal account. *See* AO 2003-37. The Commission reasoned that:

if a candidate agrees or consents to be named in a fundraising solicitation as an honored guest, featured speaker or host, or if the invitation constitutes a solicitation for any other reason, then the solicitation must contain a clear and conspicuous statement that the entire solicitation is limited to funds that comply with the amount limits and source prohibitions of the Act.

See id. (Response to Question 18).

C. Analysis

The Commission has not directly addressed the factual circumstances raised here in earlier advisory opinions. The specific question raised in this case – whether, under the Act, federal officeholders and candidates are permitted to appear in websites that include solicitations for non-federal funds – was not asked or answered in the earlier advisory opinions. In this instance, the complaint involves two distinguishing features. First, the communications were featured on the Internet. Second, the covered individuals were referenced as “Campaign Co-Chairs.” While the Commission has not directly confronted the specific facts presented before it now, the guidelines established in the *Cantor*, *RGA*, and *ABC* advisory opinions provide persuasive guidance here.

As established by *Cantor*, a covered individual’s agreement to endorse a non-federal candidate in pre-event publicity does not, by itself, establish a solicitation. *See* AO 2003-03. Rather, the Commission has applied a two-factor test since 2003 to determine whether a communication qualifies as a solicitation. First, the Commission will inquire whether the pre-event publicity alone constitutes a solicitation. *Id.* Second, the Commission will determine whether the covered individual “approved, authorized, or agreed or consented to the use of his or her name or likeness in publicity, and that publicity contains a solicitation for donations.”¹³ *Id.*

The Internet homepage in question here featuring the names and likenesses of the Respondents along with a variety of information, text and links, including a single hyperlink featuring the word “contribute,” does not constitute a solicitation. In short, the Angelides campaign homepage featured a wide variety of

¹³ Here, the Respondents could not recall any request to use their name or likeness on the campaign homepage. *See* Joint Response at 1-2, Joint Supplemental Response at 1

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information and links in addition to the Respondents' names and likenesses. Along with several other links, visitors could select the "contribute" hyperlink, which would take them to a separate page where contributions could be collected. In the context of the Internet, the "contribute" button alone, when included among a variety of links, does not constitute a solicitation because it does not itself provide any address or other mechanism by which contributions can be made and because additional volitional action by the person viewing the page is required to obtain information about how to contribute, amounts sought, and other requirements.

Subsequent to the activity at issue here, the Commission revised the definition of "solicit" with an effective date of April 19, 2006. *See* 71 Fed. Reg. 13,926 (Mar 20, 2006). In the Commission's Explanation and Justification, it noted that "a communication does not become a solicitation simply by providing a mailing address, phone number, or Web address unless the address or number is specifically dedicated to facilitating the making of a contribution or donation." *Id.* at 13,931. Indeed, under the newly promulgated definition of "solicit," a communication is a solicitation if it "is specifically dedicated to facilitating the making of a contribution or donation, or automatically redirects the Internet user to such a page, or exclusively displays a link to such a page." *Id.* at 13,934. The Angelides homepage in question here was not specifically dedicated to the making of contributions, nor did it automatically redirect users to a donation solicitation page, nor did it exclusively display a link to such a page. Instead, it provided visitors with a variety of hyperlinks and information about the candidate, his campaign, and his stance on issues – facts which preclude a determination that the homepage constituted a solicitation.

As established by *Cantor* and *RGA*, the relevant inquiry is whether or not the publicity "constitutes a solicitation for donations in amounts exceeding the Act's limitations or from sources prohibited from contributing under the Act." *Id.* Because the Angelides homepage in question was not specifically dedicated to making donations, and did not automatically or exclusively direct viewers to such a page to donate, it is not a solicitation. The descriptive title of one hyperlink, "contribute," is insufficient to transform the Angelides homepage into a solicitation itself. Rather, the "contribute" hyperlink merely serves to inform readers that clicking on the link will take them to a separate webpage where a solicitation will occur.

The mere presence of a solicitation on a secondary webpage does not transform other connected campaign webpages into solicitations. Here, the homepage in question referenced the Respondents in their ceremonial role as campaign co-chairs of the Angelides campaign. The simple display of covered individuals' names or likenesses on the homepage of a campaign website that includes one "contribute" link does not constitute a solicitation by the covered individuals.

The separate contribution page of the Angelides website constituted a solicitation of non-federal funds, and had the federal officeholders approved, authorized, or agreed or consented to the use of their names or likenesses in that solicitation, *e g*, on the contribution page, we would be presented with a far different matter. Significantly, the federal officeholders' names or likenesses did not appear on the separate contribution webpage. Because they were only featured on the homepage of the Angelides website, and because that homepage is not a solicitation, there is no reason to believe a violation of 2 U.S.C. §§ 4411(e)(1)(A) and (B) and 11 C.F.R. § 300.62 has occurred.¹⁵

¹⁵ As to allegations that the Respondents violated 2 U.S.C. § 441a(a) and 11 C.F.R. § 300.61, the complaint does not contain any factual support for the allegation that they personally made any contributions in excess of the limits set forth in 2 U.S.C. § 441a(a) nor solicited, received, directed, transferred, spent, or disbursed funds in connection with an election for federal office, including funds for any federal election activity, as prohibited under 11 C.F.R. § 300.61

D. Angelides

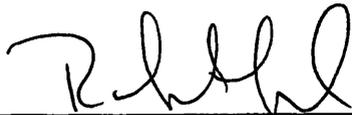
The complainant also alleged that Phil Angelides aided and abetted Senators Boxer and Feinstein and Representative Pelosi in violating the "soft money" prohibitions enacted in the BCRA, specifically, 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.62, which prohibit federal candidates and officeholders from, among other things, soliciting funds in connection with any non-federal election unless the funds are in amounts that do not exceed the Act's contribution limits and do not come from prohibited sources.

Because the federal officials did not violate BCRA, Angelides cannot be held liable for aiding and abetting any violation. *See In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000). Further, the Act does not impose liability for aiding and abetting another individual or entity in violating 2 U.S.C. § 441i(e). The Commission therefore dismisses the aspect of the complaint that contains the allegation that Phil Angelides violated the Act by aiding and abetting Senators Boxer and Feinstein and Representative Pelosi in raising donations in amounts exceeding the contribution limits of the Act.

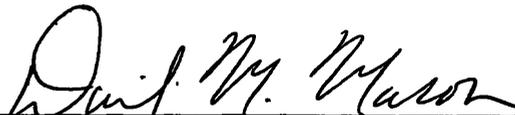
III. CONCLUSION

For the foregoing reasons, the Commission has determined to: (1) find no "reason to believe" Senator Boxer, Senator Feinstein, and Representative Pelosi violated 2 U.S.C. § 441a(a), 2 U.S.C. § 441i(e) and 11 C.F.R. § 300.61 and 11 C.F.R. § 300.62; (2) dismiss the allegation that Phil Angelides violated the Act by aiding and abetting Senator Boxer, Senator Feinstein, and Representative Pelosi's alleged violation of 2 U.S.C. § 441i(e); and (3) close the file.

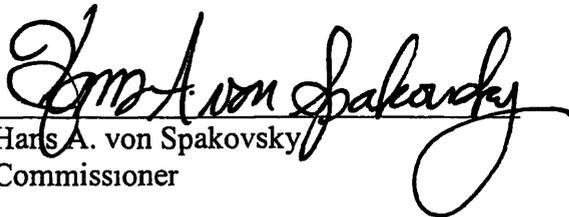
September 20, 2007



Robert D. Lenhard
Chairman



David M. Mason
Vice Chairman



Hans A. von Spakovsky
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Steven T. Walther
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