

AUG 12 2008

FEDERAL ELECTION COMMISSION

999 E Streets, N.W.
Washington, DC 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 5973

DATE COMPLAINT FILED: February 8, 2008

DATE OF NOTIFICATION: February 12, 2008

LAST RESPONSE RECEIVED: May 21, 2008

DATE ACTIVATED: May 13, 2008

EXPIRATION OF SOL: January 28, 2013

COMPLAINANT:

Harry E. Brown

RESPONDENTS:

Warren County Democratic Committee and
Martha Brady, in her official capacity as treasurer
Michael Sedita

RELEVANT STATUTES:

2 U.S.C. § 431(4)(C)
2 U.S.C. § 431(20)(A)
2 U.S.C. § 431(22)
2 U.S.C. § 433(a)
2 U.S.C. § 434(a)
2 U.S.C. § 441i(b)(1)
11 C.F.R. § 100.5(c)
11 C.F.R. § 100.24
11 C.F.R. § 100.26
11 C.F.R. § 102.1(d)
11 C.F.R. § 104.1

INTERNAL REPORTS CHECKED:

Federal Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter arises out of a complaint alleging that the Warren County Democratic Committee ("WCDC"), which is not registered as a political committee with the Federal Election Commission ("Commission" or "FEC") and does not maintain a separate federal account,

1 violated the Federal Election Campaign Act of 1971, as amended ("the Act"), by failing to
2 register as a federal political committee and by using non-federal funds to pay for a postcard and
3 a website that mention clearly identified federal candidates within 120 days of the New Jersey
4 presidential primary election. See 2 U.S.C. §§ 433(a), 434(a) and 441i(b)(1). The complaint
5 also names the WCDC's Chairman, Michael Sedita, as a respondent, although it does not allege
6 specific violations of the Act by him. The respondents deny that their activities were directed
7 towards influencing the outcome of the presidential primary or triggered federal political
8 committee status.

9 As discussed below, the WCDC does not appear to be a federal political committee under
10 the Act. It also appears that the WCDC paid for the subject postcard that clearly identified
11 federal candidates with federally permissible funds. Therefore, we recommend that the
12 Commission find no reason to believe that the Warren County Democratic Committee and
13 Martha Brady, in her official capacity as treasurer, violated 2 U.S.C. §§ 433(a), 434(a) or
14 441i(b)(1). We also recommend that the Commission find no reason to believe that Michael
15 Sedita violated the Act in connection with this matter.

16 **II. FACTUAL SUMMARY**

17 The WCDC is registered as a political party committee with the New Jersey Election Law
18 Enforcement Commission ("ELEC"). See State of New Jersey, Election Law Enforcement
19 Commission, Campaign Financing and Disclosure Database, available at [http://elec.state.nj/us](http://elec.state.nj.us).

20 On or about January of 2008, the WCDC mailed out "thousands of postcards to active,
21 unaffiliated voters in Warren County suggesting that they come to [the] polls and vote as

1 Democrats."¹ See <http://www.warrenctydem.org/blog> (last visited on May 28, 2008). A copy
2 of the two-sided postcard is attached to the complaint. Attachment 1. In addition to the
3 recipient's name and address, the front of the postcard includes a disclaimer stating that it was
4 "[p]aid for by the Warren County Democratic Committee, PO Box 415, Washington, NJ
5 07882." The front of the postcard also states:

6 Most likely, a Democrat will be elected President this November. On February
7 5, 2008, New Jersey Primary Voters will cast their ballots for the next President
8 of the United States. Don't be left out. Go to the polls on primary election day
9 and say "I want to vote as a Democrat!" (emphasis in original) Bring this card
10 with you as a reminder. For more information, e-mail info@wc Dems.org or call
11 908-752-5426. Attachment 1.

12 The back side of the postcard also urges the recipient to vote on February 5, 2008 in the
13 New Jersey Democratic presidential primary, stating, "Who Will Be Our Next President? Vote
14 February 5th, 2008 NJ Democratic Presidential Primary Don't Let Someone Else Choose For
15 You." To the left of the text, it lists the eight Democratic candidates. *Id.*

16 In response to the complaint, the respondents indicated that the total cost for preparing
17 and mailing the postcard at issue was "approximately \$1,500" and was funded entirely by
18 "contributions raised by the WCDC." Response at 2. We invited the respondents, if they chose,
19 to identify the specific source of the "contributions" used to fund the activity and provide
20 supporting information for their assertion as to the cost of preparing and distributing the subject
21 postcard. The respondents subsequently clarified this information, stating that the total cost of
22 preparing and distributing the postcard was \$813.41. The WCDC's 2007 Q4 (10/15/07 –
23 12/31/07) New Jersey state disclosure report indicates that the committee made disbursements

¹ Any New Jersey resident who was registered to vote as a Democrat or as a Republican was eligible to vote on February 5, 2008 in their respective party's primary election. Registered voters who were unaffiliated were eligible to vote in the primary election after declaring a party affiliation at the polls. *Fast Facts About New Jersey's Presidential Primary*, Associated Press (Feb. 3, 2008), www.phillyburbs.com/ph-dyn/news.

1 totaling \$388.44 for the printing and mailing of "affiliation drive postcards." The 2008 Q1
2 (1/1/08 – 3/31/08) report discloses a \$25.00 disbursement for design of the postcards and in-kind
3 contributions totaling \$399.97 in the form of labels, lists and mailing for "voter affiliation cards."
4 See State of New Jersey, Election Law Enforcement Commission, Campaign Financing and
5 Disclosure Database, available at <http://elec.state.nj/us> (hereinafter ELEC Database). A review
6 of the WCDC's ELEC reports for 2007 and 2008 indicates that the subject postcard was the only
7 activity the committee financed in connection with a federal election during those calendar years.
8 During this time period, the WCDC made contributions exclusively to local candidate
9 committees and, apart from the subject postcard, made expenditures only on behalf of local
10 candidates or for the purpose of participating in party events. *Id.*

11 The subject postcard does not actually direct the recipient to the WCDC's website, but
12 instead provides those seeking further information with the Committee's e-mail address and
13 telephone number. However, as alleged in the complaint, the WCDC does sponsor a website
14 through which it promotes several federal candidates. The WCDC's website announces the
15 committee's support for Kirsten Gillibrand in her 2006 race for the 20th Congressional District
16 and provides a list of what it termed "the Warren County Democratic ticket in the 2006 General
17 Election," which included local and state candidates as well as two federal candidates. See
18 <http://www.warrencountydemocrats.org> (last accessed May 28, 2008). In addition, the publicly available
19 portion of the WCDC's website includes a mission statement and a blog written by Sedita, as
20 well as subpages relating to voting and election related information, local party events, volunteer
21 opportunities, fundraising, and links to Democratic party news and blogs.² *Id.* A review of

² In order to access the full features of the WCDC's website, including opting-in to the committee's e-mail list, visitors were required to register with the website. See <http://www.warrencountydemocrats.org> (last accessed May 28, 2008).

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WCDC's ELEC reports indicates that, beyond paying nominal sums for server space and other online fees, the website's content was managed by volunteers. For instance, in calendar year 2008, the WCDC paid \$9.99 per month for website hosting. See ELEC Database.

III. LEGAL ANALYSIS

A. Political Committee Status

The complaint asserts that the subject postcard and those portions of its website that promote federal candidates were unlawful expenditures and, as a result, the WCDC is required to register and report to the Commission as a federal political committee. See 2 U.S.C. §§ 431(4), 433(a) and 434(a). The WCDC's response contends that the mailing at issue was a slate card sent to unaffiliated voters in Warren County in an effort to persuade those Warren County voters "to affiliate as Democrats." See Response at 1. The respondents contend that because the costs incurred by a local committee of a political party in the preparation and distribution of a printed slate card consisting of three or more candidates is not considered a contribution or expenditure it is not required to register and report as a federal political committee. See 2 U.S.C. §§ 431(8)(B)(v) and (9)(B)(iv).

Local party committees are not automatically required to register with the Commission as federal political committees.³ A local party committee becomes a political committee for purposes of the Act when its activity in connection with a federal election exceeds one of three registration thresholds. 2 U.S.C. § 431(4)(C), 11 C.F.R. § 100.5(c). First, registration as a

³ As a general matter, the Act defines a "political committee" as any committee, club, association or other group of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A), 11 C.F.R. § 100.5(a). The term "contribution" includes any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal Office. 2 U.S.C. § 431(8)(A)(1). The term "expenditure" includes any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for federal office. See 2 U.S.C. § 431(9)(A)(i).

1 federal political committee is required when a local party committee makes more than \$1,000 in
2 contributions or expenditures during a calendar year. 2 U.S.C. § 431(4)(C), 11 C.F.R.
3 § 100.5(c). Second, registration as a federal political committee is required if the local party
4 committee raises more than \$5,000 in contributions. Funds specifically solicited or donated to
5 the local party committee for the purpose of influencing federal elections count against this
6 threshold and are subject to federal limits and prohibitions. *Id.* Third, a local party committee
7 must register as a federal political committee if it spends more than \$5,000 on exempt party
8 activities. *Id.*; 2 U.S.C. §§ 431(4)(C), (8)(v) and (9)(iv). Exempt party activities include slate
9 cards, sample ballots, palm cards or other printed lists naming candidates for any public office,
10 including federal office. 2 U.S.C. §§ 431(8)(B)(v) and (9)(B)(iv); 11 C.F.R. §§ 100.80 and
11 100.140. Should a local party committee achieve federal political committee status by exceeding
12 any of these three thresholds, it has ten days to register with the FEC (FEC Form 1) and begin
13 disclosing its financial activities. 2 U.S.C. §§ 433(a) and 434(a); 11 C.F.R. §§ 102.1(d) and
14 104.1.

15 The WCDC did not trigger federal political committee status as a result of the activities at
16 issue in this matter. The available evidence indicates that, between December 12, 2007 and
17 January 25, 2008, the WCDC disbursed \$813.41 in the preparation and mailing of the subject
18 postcard, which is below the monetary registration thresholds required to achieve federal
19 political committee status for a local party committee. 2 U.S.C. § 431(4)(C), 11 C.F.R.
20 § 100.5(c). Given that we have determined that the WCDC is not federal political committee on
21 this basis, we need not specifically address the respondents' claim that the WCDC's postcard is
22 exempt from the definition of contribution and expenditure under the slate card exemption.
23 2 U.S.C. §§ 431(8)(v) and (9)(iv); 11 C.F.R. §§ 100.80 and 100.140.

1 Further, it does not appear that the WCDC's website activities triggered federal political
2 committee status. Permissible Internet activities include, but are not limited to, sending or
3 forwarding electronic mail, providing a hyperlink to a web site, creating, maintaining or hosting
4 a website and paying a nominal fee for the use of a website. 11 C.F.R. § 100.94(b). *See Internet*
5 *Communications*, 71 Fed. Reg. 18590 (April 12, 2006). In fact, local political party committees
6 and their agents are specifically permitted to post generic campaign messages and even refer to
7 or feature federal candidates on committee websites as part of an effort to promote party policies
8 and candidates without violating the Act. *Internet Communications*, 71 Fed. Reg. 18597, 18598.
9 (April 12, 2006) (a political party committee's website is not a form of "public communication"
10 under the Act, including within the context of federal election activity). *See* 2 U.S.C. § 431(22)
11 and 11 C.F.R. § 100.26. Therefore, the WCDC's promotion of congressional candidate Kirsten
12 Gillibrand and other federal candidates on its website did not result in violations of the Act.

13 Accordingly, we recommend that the Commission find no reason to believe that the
14 Warren County Democratic Committee and Martha Brady, in her official capacity as treasurer,
15 violated 2 U.S.C. §§ 433(a) and 434(a).

16 **B. Federal Election Activity**

17 Regardless of whether a local party committee exceeds one of the registration thresholds
18 making it a federal political committee, it must finance activities in connection with federal
19 elections with funds that comply with the federal contribution limits and prohibitions. 11 C.F.R.
20 § 102.5(b). The complaint alleges that the WCDC's use of federal candidates' names on the
21 subject postcard as well as its promotion of federal candidates on its website constituted federal
22 election activity within 120 days of an election, which should have been paid for with federal
23 dollars. *See* 2 U.S.C. § 431(20)(A), 11 C.F.R. § 100.24. The response states that what it termed

1 a slate card was not federal election activity directed at influencing the outcome of the New
2 Jersey presidential primary election. The respondents contend that the WCDC's slate card did
3 not impact the outcome of the primary election because it did not favor one Democratic
4 candidate over another as it listed all eight candidates equally. Additionally, the respondents
5 assert that, because only registered Democrats could vote in that party's primary, there was no
6 effort to favor Democratic candidates over Republican candidates.

7 Federal election activity ("FEA") includes: (1) voter registration activities conducted
8 during a period beginning 120 days before the date of a regularly scheduled federal election and
9 ending on the date of the election; (2) voter identification, get-out-the-vote or generic campaign
10 activity conducted in connection with an election where a federal candidate appears on the
11 ballot;⁴ (3) public communications referencing a clearly identified federal candidate which
12 promote, support, attack, or oppose the candidate; and (4) services provided by a state party
13 employee who devotes over 25% of his or her time during a given month to activities in
14 connection with a federal election. 2 U.S.C. § 431(20)(A), 11 C.F.R. § 100.24. Nonfederal
15 funds may not be used to pay for FEA. 2 U.S.C. § 441i(b)(1).

16 A public communication includes communications "by means of any broadcast, cable or
17 satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or
18 telephone bank to the general public, or any other form of general public political advertising,
19 but does not include communications over the Internet." 2 U.S.C. § 431(22), 11 C.F.R.
20 § 100.26.⁵ A mass mailing means a mailing by United States mail or facsimile of more than 500
21 pieces of mail matter of an identical or substantially similar nature within any 30-day period.

⁴ The subject postcard does not qualify as get out the vote ("GOTV") activity because it did not provide recipients of the postcard with information such as when polling places would be open, the location of particular polling places and offers of transportation to the polls. 11 C.F.R. § 100.24(a)(3)(i) and (ii).

⁵ Thus, as previously stated, the WCDC's website activities do not constitute FEA.

2 U.S.C. § 431(23), 11 C.F.R. § 100.27. A public communication must be funded solely with federal funds. 2 U.S.C. § 441i(b), 11 C.F.R. § 300.33(c).

A local party committee that is not a federal political committee engaging in FEA is required to maintain appropriate records for Commission review. These committees must demonstrate through a reasonable accounting method that whenever it makes a payment of federal funds for FEA that it has received sufficient funds subject to the limitations and prohibitions of the Act to make the payment. These committees are also required to keep records of the funds received and expended in this activity and shall make such records available for examination by the Commission. 11 C.F.R. § 300.36.

According to the evidence, the WCDC's postcard, which referenced eight clearly identified federal candidates, was mailed via United States mail to more than 500 residents of Warren County, New Jersey. Thus, the WCDC's postcard meets the definition of "public communication" under 11 C.F.R. § 100.26 and, therefore, constitutes FEA. The available evidence indicates that the WCDC financed the subject postcard with federally permissible funds. As stated *supra* at 3 and 4, the committee's 2007 Q4 and 2008 Q1 ELEC reports indicate that the subject postcard cost a total of \$813.41. See ELEC Database. Applying a standard FIFO (first in, first out) analysis based on the dates of receipts and disbursements disclosed on the WCDC's 2007 Q4 and 2008 Q1 ELEC reports, it appears that the subject postcard was paid for entirely with funds subject to the limitations and prohibitions of the Act.

Therefore, we recommend that the Commission find no reason to believe that the Warren County Democratic Committee and Martha Brady, in her official capacity as treasurer, violated 2 U.S.C. § 441i(b)(1) and 11 C.F.R. § 300.33(c).

C. Chairman Michael Sedita Did Not Violate the Act

The complaint made no specific allegations and failed to present any evidence that Michael Sedita personally violated any provision of the Act. Therefore, we recommend that the Commission find no reason to believe that Michael Sedita violated the Act in connection with this matter.

IV. RECOMMENDATIONS

1. Find no reason to believe that the Warren County Democratic Committee and Martha Brady, in her official capacity as treasurer violated 2 U.S.C. §§ 433(a), 434(a) or 441i(b)(1);
2. Find no reason to believe that Michael Sedita violated the Act in connection with this matter;
3. Approve the attached Factual and Legal Analyses;
4. Approve the appropriate letters; and
5. Close the file.

Thomasenia P. Duncan
General Counsel

8-11-08

Date

BY: Kathleen Guith
Kathleen Guith
Acting Deputy Associate General Counsel
for Enforcement

Audra L. Wassom
Audra L. Wassom
Acting Assistant General Counsel

MUR 5973
First General Counsel's Report

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Marianne Abely
Marianne Abely
Attorney

Attachments:

1. The WCDC's Postcard

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Most likely, a Democrat will be elected President this November.

On February 5th, New Jersey Primary voters will cast their ballots for the next President of the United States.

Don't be left out. Go to the polls on primary election day and say "I want to vote as a Democrat!" Bring this card with you as a reminder.

For more information, email info@wedelms.org or call 908-752-5618.



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Warren County
Democratic Committee
PO Box 415
Washington, NJ 07882

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HACKETTSTOWN
N.J.
PERMIT NO. 111



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Attachment

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of 2

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Joe
BIDEN ☒
Hillary
CLINTON ☒
Chris
DODD ☒
John
EDWARDS ☒
Mike
GRAVEL ☒
Dennis
KUCINICH ☒
Barack
OBAMA ☒
Bill
RICHARDSON ☒

**WHO WILL BE OUR
NEXT PRESIDENT?**

**VOTE
FEBRUARY 5th, 2008
NJ DEMOCRATIC
PRESIDENTIAL PRIMARY**

**DON'T LET
SOMEONE ELSE
CHOOSE FOR YOU!**

Attachment

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