FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

Friends of Peter Teahen and Jeffrey Elgin, in his official capacity as treasurer;	)	
Peter Teahen; and	)	MUR 6013
Teahen Funeral Home, Inc.	)	

STATEMENT OF REASONS
Vice Chairman MATTHEW S. PETERSEN and
Commissioners CAROLINE C. HUNTER and DONALD F. McGAHN

I. INTRODUCTION

As explained in our joint Statement of Reasons with Chairman Steven T. Walther and Commissioner Cynthia L. Bauerly, this matter involved alleged violations stemming from a television ad for Teahen Funeral Home, Inc., which featured Mr. Peter Teahen. The ad was created in 2001 and was run at roughly the same time of year, each year, for six years, and again in March of 2008. This case arose before the Commission merely because, in early 2008, Mr. Teahen became a candidate for Congress in Iowa's Second Congressional District.

On March 11, 2009, we rejected the Office of General Counsel's ("OGC") recommendation that we find reason to believe the Respondents violated 2 U.S.C. § 441b by making and accepting a prohibited in-kind corporate contribution resulting from coordinated communications, and that Friends of Peter Teahen (Mr. Teahen's campaign committee) violated 2 U.S.C. § 434(b) by failing to report the alleged in-kind contribution.

For the reasons set forth in our joint Statement of Reasons, we joined with our colleagues in voting to dismiss this matter in an exercise of our prosecutorial discretion.[1] However, we write separately to explain why we believe the ads in question may not have run afoul of the coordinated communications regulations. Furthermore, without prejudging the Commission's revisions to the coordinated communications regulations pursuant to the *Shays III* ruling,[2] we may recommend that the Commission propose and seek public comment on a safe harbor addressing the types of activities at issue in this matter.

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[1] *See Heckler v. Chaney*, 470 U.S. 821, 831 (1995).
[2] *See infra* note 7.

II. DISCUSSION

The Federal Election Campaign Act of 1971, as amended (the "Act"), subjects contributions and expenditures to certain restrictions, limitations, and reporting requirements.[3] A contribution is defined, in relevant part, as "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.*"[4] An expenditure is defined, in relevant part, as "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.*"[5]

The Act defines in-kind contributions as, *inter alia,* "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committee, or their agents."[6] Pursuant to the Commission's coordinated communication regulations, a communication is coordinated under Section 441a(a)(7)(B) if it: (1) is paid for by a person other than the candidate or candidate's committee; (2) satisfies one or more of the four content standards set forth in 11 C.F.R. 109.21(c); and (3) satisfies one or more of the six conduct standards set forth in 11 C.F.R. 109.21(d).[7] All three prongs must be met for a communication to be considered coordinated.

A. The Conduct Prong

It is not at all clear to us that the Teahen Funeral Home ad
met the conduct prong of the coordinated communications regulations. OGC suggested that Respondents met the "material involvement" standard of the conduct prong because Mr. Teahen may have been involved in decisions about the timing and the placement of the ad in early 2008 during his candidacy.[8] The principal circumstantial evidence proffered for this theory was the fact that Teahen Funeral Home, Inc. ran the ad beginning around the end of March 2008 and removed it in April 2008. In previous years, the company had run the ad later in the year – closer to Memorial Day. However, Respondents had been advised by the cable television provider that running the ad in 2008 any closer to the primary election would have certain regulatory

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[3] *See generally* 2 U.S.C. §§ 441a, 434b.
[4] 2 U.S.C. § 431a(8)(A) (emphasis added).
[5] 2 U.S.C. § 431a(9)(A) (emphasis added).
[6] 2 U.S.C. § 441a(a)(7)(B).
[7] *See generally* 11 C.F.R. 109.21. In *Shays v. F.E.C.* ("*Shays III*"), the U.S. District Court for the District of Columbia held that the Commission's revisions of the content and conduct standards of the coordinated communications regulation at 11 C.F.R. 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not enjoin the Commission from enforcing the regulations. 508 F.Supp. 2d 10 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). The D.C. Circuit affirmed the district court with respect to, *inter alia*, the current content standard for public communications made before the time frames specified in the standard, and the conduct standard for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays III*, No. 07-5360, 2008 WL 2388661 (D.C. Cir. June 13, 2008).
[8] OGC also concluded that Mr. Teahen's appearance and participation in the creation of the ad in 2001 did not constitute material involvement because he was not a candidate at the time. We concur with this analysis.

implications. Additionally, OGC cited the fact that Respondents had other ads which did not feature Mr. Teahen that could have been aired.

We do not believe these facts lead to the conclusion that Mr. Teahen may have been involved in decisions about the timing and the placement of the ad because he supposedly believed the ad was valuable to his campaign. Although Respondents did not clearly and accurately articulate in their response the precise regulatory implications, they did correctly cite the Federal Communications Commission ("FCC") regulation at 47 C.F.R. 73.1942, which provides that media stations must charge federal candidates for the "lowest unit charge" within 45 days prior to a federal primary election.[9] Whether Respondents misunderstood the significance of what the cable provider told them, or perhaps because the provider did not wish to provide for any candidate advertising time under the rate cap, we believe Teahen Funeral Home's decision regarding the timing of its ad in 2008 was related to the FCC rule and/or the cable provider's policies, rather than to the election itself. In other words, the decision was not "for the purpose of influencing" Mr. Teahen's election and did not implicate or require Mr. Teahen's "material involvement." The fact that Teahen Funeral Home had other ads which did not feature Mr. Teahen also is irrelevant. The funeral home wanted to run the particular ad at issue in this matter because its years-long tradition of commemorating Memorial Day involved running this particular ad – not the other ads that OGC cited.

B. The Business Ad Exemption

The Commission's regulations for electioneering communications, which govern broadcast communications that reference a clearly identified candidate, and that air within a certain window prior to federal elections, contain a safe harbor for *bona fide* business ads.[10] The coordinated communications regulations currently do not.[11]

In this case, the coordinated communications content prong was satisfied because the Teahen Funeral Home ad featured Mr. Teahen, a Federal candidate (thus "referencing" him for the purposes of the regulation), and the ad was run within 90 days prior to the primary.[12] Since the Teahen Funeral Home ad was a *bona fide* commercial ad,[13] the ad illustrates a paradox under the Commission's coordinated and electioneering communications regulations. To wit, the electioneering communications safe harbor, which covers business ads referencing Federal candidates and airing within 30 days prior to primary elections, would be more permissive than the coordinated communications regulations, which cover ads referencing Federal candidates and airing within 90 days prior to primary elections.[14] In other words, the rules governing business

[9] Iowa's congressional primary was scheduled for June 3, 2008, and respondents decided to avoid the perceived regulatory issue by running the ad earlier that year. *See* Federal Election Commission, "2008 Congressional Primary Dates," *at* http://www.fec.gov/pubrec/2008pdates.pdf; Response, at 2.
[10] *See* 11 C.F.R. 100.29(a), 114.15(b)(3)(ii).
[11] *See* 11 C.F.R. 109.21(c)(4)(i).
[12] *See id.*
[13] Although OGC suggested the Teahen Funeral Home ad was not a *bona fide* business ad because it did not propose a commercial transaction, they also conceded that the funeral home industry may market itself in a way that is more respectful to the deceased. We are willing to concede to Teahen Funeral Home this benefit of the doubt.
[14] *See* 11 C.F.R. 100.29(a), 114.15(b)(3)(ii); *cf.* 11 C.F.R. 109.21(c)(4)(i).

ads running closer to the election are less restrictive than the rules governing business ads running further out from the election.

III. CONCLUSION

Regardless of whether Respondents in this matter met the conduct prong under the coordinated communications regulations, without prejudging the rulemaking, we may recommend that the Commission propose and seek comment on providing a safe harbor for *bona fide* business advertising to extend to the type of activity in this matter. Accordingly, and for the reasons set forth in our joint Statement of Reasons, we voted to dismiss this matter pursuant to *Heckler v. Chaney*.[15]

6/11/2009
Date

Matthew S. Petersen
Vice Chairman

6/11/09
Date

Caroline C. Hunter
Commissioner

6/11/09
Date

Donald F. McGahn II
Commissioner

[15] *See, e.g.*, MUR 5718, in which OGC recommended, and the Commission voted unanimously to approve, dismissing as a matter of prosecutorial discretion allegations that Rep. Jesse L. Jackson, Jr. violated the coordinated communications regulations for activity that, although not protected under the regulations at the time, subsequently was protected by the safe harbor at 11 C.F.R. 109.21(g). MUR 5718, First General Counsel's Report at 7 and Certification, Nov. 28, 2006.