



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

FEB 03 2009

Barbara Mee  
Alaskans for Don Young  
4724 Kershner Avenue  
Anchorage, AK 99517

RE: MUR 6059

Dear Ms. Mee:

On January 16, 2009, the Federal Election Commission reviewed the allegations in your complaint dated August 25, 2008, and found that on the basis of the information provided in your complaint, information provided by the respondents, and information available to the public, there is no reason to believe Sean Parnell for Congress and Mary Elder Miller, in her official capacity as treasurer, violated 2 U.S.C. § 441a(f), and that Club for Growth PAC and Pat Toomey, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(f) and 441a(a)(2). Accordingly, on January 16, 2009, the Commission closed the file in this matter.

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). The Factual and Legal Analysis, which more fully explains the Commission's findings, is enclosed.

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).

Sincerely

Mark D. Shonkwiler  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION  
FACTUAL AND LEGAL ANALYSIS  
MUR 6059

**RESPONDENTS:** Sean Parnell for Congress and  
Mary Elder Miller, in her official capacity as Treasurer  
Club for Growth PAC and  
Pat Toomey, in his official capacity as treasurer,

**I. INTRODUCTION**

The complaint in this matter alleges that a television advertisement that first aired one week before Alaska's primary elections in August 2008 was a coordinated communication between Club for Growth PAC ("CFG PAC") and Sean Parnell for Congress and therefore qualifies as an excessive in-kind contribution under 11 C.F.R. § 109.21(b). *See* Complaint. Complainants likewise allege that the advertisement was an improper electioneering communication under 11 C.F.R. § 100.29. *See id.*

**II. FACTUAL BACKGROUND**

CFG PAC is the separate segregated fund of Club for Growth, a Washington, D.C.-based membership organization that supports an agenda of free markets, low taxes, and limited government. *See* <http://www.clubforgrowth.org>. Commission records reflect that as of November 24, 2008, CFG PAC reported receiving over \$3 million in contributions and making over \$3 million in expenditures for the current election cycle.

On August 19, 2008, CFG PAC broadcast a television advertisement in Alaska that advocated the Republication nomination of Sean Parnell to run for Alaska's at-large congressional district and opposed the incumbent, Republican Representative Don Young. *See*

1 [http://www.youtube.com/watch?v=fjjHZ\\_B27NU&feature=related](http://www.youtube.com/watch?v=fjjHZ_B27NU&feature=related). The advertisement criticized  
2 Representative Young, and then stated: "Governor Sarah Palin supports a change. She backs  
3 Sean Parnell for Congress."<sup>1</sup> Commission records reflect that on August 19, 2008, CFG PAC  
4 filed a Schedule E (24/48 Hour Notice of Independent/Coordinated Expenditure) to report  
5 \$12,142.20 in television advertisement production costs.

6 Complainants Barbara Mee and Alaskans for Don Young allege that the television  
7 advertisement is a coordinated communication and therefore qualifies as an excessive in-kind  
8 contribution under 11 C.F.R. § 109.21(b). *See* Complaint. Complainants likewise allege that the  
9 advertisement was an improper electioneering communication under 11 C.F.R. § 100.29. *See id.*

10 Complainants attach a news article about CFG PAC's endorsement of Parnell, an email  
11 from CFG PAC treasurer, Pat Toomey, to CFG members supporting Parnell's nomination and  
12 requesting contributions to his committee, and a press release about the television advertisement  
13 and CFG PAC's endorsement. *See id.* Complainants' allegations that Parnell and CFG PAC  
14 staff discussed campaign strategy in phone conversations and a meeting before the date the  
15 advertisement aired is supported only by the statement that, "[i]t can be assumed that he has  
16 discussed his campaign plans, projects, activities and needs, position on issues, poll results and  
17 other information concerning his campaign." *Id.*

18 CFG PAC maintains that the advertisement does not constitute a "coordinated  
19 communication" under 11 C.F.R. § 109.21. *See* Letter from Carol A. Laham, Wiley Rein LLP,  
20 to Thomasenia P. Duncan, General Counsel, Federal Election Commission (Sept. 15, 2008).  
21 Specifically, CFG PAC asserts that because it met with Parnell solely to discuss his views on  
22 legislative and policy issues, its actions do not meet the conduct standards under 11 C.F.R. §§

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<sup>1</sup> A transcript of the advertisement is attached as Attachment 1.

1 109.21(c)(1)-(6), and further, that the safe harbor provision of 11 C.F.R. § 109.21(f) exempts  
2 their discussions. *See id.* Accordingly, CFG PAC maintains that because the advertisement was  
3 not coordinated, it does not qualify as an in-kind contribution that would exceed the Act's  
4 contribution limits.

5 CFG PAC also responds that the advertisement is not an electioneering communication  
6 because it is exempt from the definition under 2 U.S.C. § 434(f)(3)(B)(ii) and 11 C.F.R. §  
7 100.29(c)(3), which relieves federal political committees like CFG PAC from the requirement to  
8 file separate electioneering communication reports. *See id.* CFG PAC further reported the  
9 advertisement as an independent expenditure in disclosure reports to the Commission. *See*  
10 Schedule E (24/48 Hour Notice of Independent/Coordinated Expenditure) *available at*  
11 <http://query.nictusa.com/cgi-bin/dcdev/forms/C00432260/358858/se>.

12 Sean Parnell also submitted a response. *See* Letter from Sean Parnell to General Counsel,  
13 Federal Election Commission (Sept. 15, 2008) ("Parnell letter"). Parnell similarly contends that  
14 because he discussed only his legislative and policy positions during the meeting and phone  
15 conversations with CFG PAC, the allegations meet neither the content nor conduct prongs of the  
16 regulations.

### 17 III. ANALYSIS

18 The central issue in this matter is whether CFG PAC's advertisement, advocating the  
19 Republican nomination of Sean Parnell to run for Alaska's at-large Congressional district, was  
20 coordinated with the Parnell committee. A payment for a coordinated communication is an in-  
21 kind contribution to the candidate, authorized committee, or political committee with whom or  
22 which it is coordinated. *See* 2 U.S.C. § 441a(a)(7)(B)(i); 11 C.F.R. § 109.21(b)(1).

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1           The Commission's regulations provide a three-prong test to determine whether a  
2 communication is coordinated.<sup>2</sup> All three prongs of the test must be satisfied to support a  
3 conclusion that a coordinated communication occurred. 11 C.F.R. § 109.21(a); *see also*  
4 Explanation and Justification for Regulations on Coordinated and Independent Expenditures, 68  
5 Fed. Reg. 772 (Jan. 3, 2003).

6           To satisfy the first prong of the test, someone other than a candidate, an authorized  
7 committee, or a political party committee must pay for the communication. *See* 11 C.F.R. §  
8 109.21(a)(1). In the present matter, CFG PAC clearly satisfies the payment prong as indicated  
9 by the independent expenditure report it filed with the Commission on August 19, 2008.

10           The second prong evaluates the content of the communication. *See* 11 C.F.R. §  
11 109.21(c). The content standard is satisfied, *inter alia*, by a public communication within 90  
12 days or fewer of an election that refers to a clearly identified candidate for federal office.<sup>3</sup> *See*  
13 11 C.F.R. § 109.21(c)(4)(i). Here, the advertisement meets the definition of "public  
14 communication" under 11 C.F.R. § 100.26, because it refers to candidate Sean Parnell, and  
15 appeared within 90 days of the primary election. CFG PAC's advertisement, in fact, aired

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<sup>2</sup> After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Court of Appeals affirmed the District Court's invalidation of the fourth, or "public communication," content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission's 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 vacate the regulations or enjoin the Commission from enforcing them. *See Shays v. FEC*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (granting in part and denying in part the respective parties' motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). This decision does not affect this matter, however, because the communication at issue meets other parts of the content standard that the appellate court did not criticize or invalidate.

<sup>3</sup> Although the Court in *Shays III* narrowed the time frame under 11 C.F.R. § 109.21(c)(4)(i) to 90 days from 120 days before an election, CFG's advertisement fell well within the shorter time frame when it aired one week before the primary election.

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1 August 19, 2008, one week before the primary election on August 26, 2008. Thus, the content  
2 standard is satisfied.<sup>4</sup>

3 The third prong of the coordination test, the conduct standard, requires analysis of  
4 affirmative acts taken by the parties who are alleged to have engaged in the coordinated activity.  
5 The conduct standard may be satisfied by affirmative acts that fall into any one of six general  
6 categories: request or suggestion; material involvement; substantial discussion; common vendor;  
7 former employee or independent contractor; and dissemination, distribution, or republication of  
8 campaign material. 11 C.F.R. § 109.21(d)(1)-(6). However, a safe harbor provision exempts  
9 responses to inquiries about legislative or policy issues. See 11 C.F.R. § 109.21(f). As discussed  
10 below, the available information does not suggest that Respondents satisfied any of the conduct  
11 standards required for there to have been coordination.

12 The complaint in the present matter does not contain specific allegations as to the conduct  
13 standards. Rather, it merely claims that based on press reports that Parnell had met with CFG,  
14 “[i]t can be assumed that [Parnell] has discussed his campaign plans, projects, activities and  
15 needs, position on issues, poll results and other information concerning his campaign.” See  
16 Complaint. Under similar circumstances in a previous matter, the Commission found no reason  
17 to believe that MoveON.org Voter Fund had coordinated its communications with John Kerry for  
18 President, Inc. because there was no specific information that suggested triggering of the conduct  
19 standards. See Factual and Legal Analysis in MUR 5754 (MoveON.org Voter Fund) at 3-4.  
20 That complaint also merely relied on the inference that the communication had been coordinated,

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<sup>4</sup> Alternatively, the content prong may be satisfied by a publication communication that expressly advocates the election or defeat of a clearly identified candidate for federal office. 11 C.F.R. § 109.21(c)(3). In the advertisement, CFG criticizes Don Young’s record and labels him “just another Washington politician.” The advertisement notes that “Governor Sarah Palin supports a change. She backs Sean Parnell for Congress.” See 11 C.F.R. 100.22(a) and *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976) (listing “magic words” that indicate “explicit words of advocacy of election or defeat.”).

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1 due to reported ongoing general discussions between Democratic leaders and MoveON, and  
2 because John Kerry and his wife attended a MoveON house party. *Id.* at 3. The complaint in the  
3 matter, like MUR 5754, fails to provide "probative information of coordination." *See also* First  
4 General Counsel's Report in MUR 5774 (Lamborn for Congress) and Factual and Legal  
5 Analysis in MUR 5750 (Laffey U.S. Senate) at 6 (finding no reason to believe that Respondents  
6 made prohibited in-kind contributions in the form of coordinated communications because  
7 complainant based the allegations on speculative inferences of coordination rather than specific  
8 facts).

9 Respondents provided a comprehensive response to the allegations that the advertisement  
10 was a coordinated communication. CFG PAC's Executive Director, David Keating, provided an  
11 affidavit that discussed each element under the conduct prong and maintained that CFG PAC  
12 discussed only Parnell's views on legislative and policy issues during their meetings and  
13 telephone conversations. Keating avers that CFG PAC did not air the advertisement at the  
14 request or suggestion of the Parnell committee, nor did it seek assent from the committee to run  
15 the advertisement. Keating Aff. ¶ 9. 11 C.F.R. § 109.21(d)(1). Keating stated that the Parnell  
16 committee was not involved in the development, creation, content, or dissemination of the  
17 advertisement. Keating Aff. ¶ 10. 11 C.F.R. § 109.21(d)(2), (6). Regarding the discussions  
18 between CFG and the Parnell committee, Keating stated that the topics covered only legislative  
19 and policy issues. Keating Aff. ¶ 6. Thus, Respondents did not engage in substantial discussion  
20 regarding the creation, production, or distribution of the advertisement as outlined in 11 C.F.R. §  
21 109.21(d)(3). Keating states that CFG PAC policy is to employ vendors unrelated to candidates

1 featured or mentioned in their advertisements.<sup>5</sup> Keating Aff. ¶ 14. 11 C.F.R. § 109.21(d)(4).  
2 Similarly, Keating stated that CFG PAC did not employ a former staffer or independent  
3 contractor associated with the Parnell committee, the Young committee, or a political party  
4 committee. Keating Aff. ¶ 13; 11 C.F.R. § 109.21(d)(5). As to the conduct prong's final  
5 affirmative act, Keating stated that CFG PAC did not disseminate, distribute, or republish  
6 campaign material. Keating Aff. ¶¶ 9, 10. 11 C.F.R. § 109.21(d)(6).

7 Lastly, a safe harbor provision in the regulations exempts candidate responses "to an  
8 inquiry about that candidate's . . . positions on legislative or policy issues, but not including a  
9 discussion of campaign plans, projects, activities, or needs." 11 C.F.R. § 109.21(f). Given that  
10 both CFG PAC and Parnell maintain that their meeting and telephone conversations covered  
11 only the candidate's legislative and policy positions, such discussions would seem to fall under  
12 the safe harbor. While the affidavit alone would not dispose of the coordination issue if there  
13 were contrary evidence or information, the complaint relied on speculative allegations based on  
14 media reports about a meeting between Respondents. Furthermore, the Commission has not  
15 received any information to dispute Respondents' explanations in the sworn affidavit.

16 As to complainants' allegation that the advertisement constitutes an improper  
17 electioneering communication, the expenditure and independent expenditure exemption in 2  
18 U.S.C. § 434(f)(3)(B)(ii) and 11 C.F.R. § 100.29(c)(3) relieves federal political committees like

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<sup>5</sup> See also MUR 5823 (Walberg for Congress) (finding no reason to believe that communications were coordinated in a manner that resulted in prohibited and/or excessive in-kind contributions in the form of coordinated communications). In MUR 5823, the complaint alleged that CFG PAC television and radio advertisements were coordinated with a campaign committee through the use of three common vendors. See Factual and Legal Analysis in MUR 5823 at 3-6. Ultimately, the Commission found no reason to believe that the advertisements were coordinated because Respondents provided comprehensive responses to otherwise "speculative allegations of common vendor coordination." *Id.* at 12. *But see* MUR 5415 (Club for Growth) (finding reason to believe that ads may have been coordinated ads through a common vendor during the 2004 Senate Primary in Pennsylvania).

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1 CFG PAC from the requirement to file separate electioneering communication reports when they  
2 disclose the comments as an independent expenditure. The Act and Commission regulations set  
3 forth four exceptions to the definition of "electioneering communication." 2 U.S.C. §  
4 434(f)(3)(B); 11 C.F.R. § 100.29(c). One of these statutory exceptions covers communications  
5 that are expenditures or independent expenditures under the Act. 2 U.S.C. § 434(f)(3)(B)(ii); 11  
6 C.F.R. § 100.29(c)(3). In the present matter, CFG PAC submitted a 24-hour notice that reflected  
7 \$12,142.20 in independent expenditures on August 19, 2008 for "TV ad production costs." See  
8 <http://query.nictusa.com/cgi-bin/dcddev/forms/C00432260/358858/se>.

9 Based on the above, sufficient information does not exist for the Commission to conclude  
10 that the advertisement was coordinated, because Respondents' activities do not appear to trigger  
11 the conduct prong of the coordinated communication test. Accordingly, the advertisement was  
12 not an in-kind contribution. Further, because the advertisement was reported as an independent  
13 expenditure, it is not, as Complainants allege, an electioneering communication.

14 Accordingly, the Commission finds no reason to believe that Club for Growth PAC and  
15 Pat Toomey, in his official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2) by making an in-  
16 kind contribution in the form of a coordinated expenditure. Moreover, the Commission finds no  
17 reason to believe that Sean Parnell for Congress and Mary Elder Miller, in her official capacity  
18 as treasurer, violated 2 U.S.C. § 441a(f) by knowingly accepting an in-kind contribution.  
19 Finally, the Commission finds no reason to believe that Club for Growth PAC and Pat Toomey,  
20 in his official capacity as treasurer, violated 2 U.S.C. § 434(f) by failing to report an  
21 electioneering communication.

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