



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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Washington, DC 20036-5339

NOV 19 2010

RE: MUR 6268
Alan Grayson;
Committee to Elect Alan Grayson
and Paul Ashcraft, in his official
capacity as Treasurer

Dear Mr. Kappel:

On April 8, 2010, the Federal Election Commission (the "Commission") notified your clients, Alan Grayson and the Committee to Elect Alan Grayson and Paul Ashcraft, in his official capacity as Treasurer, of a complaint alleging that your clients violated the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was provided to your clients at that time.

After reviewing the allegations contained in the complaint, your clients' responses, and publicly available information, the Commission, on October 19, 2010, found reason to believe that Alan Grayson and the Committee to Elect Alan Grayson and Paul Ashcraft, in his official capacity as Treasurer, violated 2 U.S.C. § 441i(e), a provision of the Act. Further, on November 16, 2010, the Commission approved the attached Factual and Legal Analysis, which sets forth the basis for the Commission's determination, and conciliation agreement.

Please note that you have a legal obligation to preserve all documents, records and materials relating to this matter until such time as you are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

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In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. We look forward to your response.

On behalf of the Commission,



Matthew S. Petersen
Chairman

Enclosures
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Congressman Alan Grayson MUR: 6268
 Committee to Elect Alan Grayson and
 Paul Ashcraft, in his official capacity
 as treasurer

I. GENERATION OF MATTER

 This matter was generated by a complaint filed by Steve Gillespie. *See* 2 U.S.C.
§ 437(g)(a)(1).

II. FACTUAL AND LEGAL ANALYSIS

A. Factual Background

 Alan Grayson was first elected in 2008 to the U.S. House of Representatives from
Florida's 8th Congressional District and was a candidate for reelection in 2010. His authorized
committee is the Committee to Elect Alan Grayson and Paul Ashcraft, in his official capacity as
treasurer (the "Committee"). On March 21, 2010, the Committee sent an e-mail from the address
alangrayson@graysonforcongress.com to an unknown number of persons on a distribution list,
inviting them to a March 25, 2010 fundraising reception benefitting Scott Maddox, a candidate
for Florida Commissioner of Agriculture & Consumer Services. *See* Attachment 1.

 The e-mail invited recipients to "Please Join Congressman Alan Grayson" at the
reception, but also noted that he might not be in attendance if there were votes scheduled in the
U.S. House of Representatives that day. Complaint at 3. The invitation suggested a \$500
contribution, noting that "[c]ontributions are limited to \$500 per person or *corporate entity*. The
maximum contribution for an individual, *corporation*, PAC or trust is \$500 for the primary and
\$500 for the general (\$1,000 for the entire cycle) [emphasis added]." *Id* at 1. It also provided
instructions on how to send contributions and identified a web page specifically dedicated to

1 making contributions. The invitation included a disclaimer stating that it was a political
2 advertisement paid for and approved by Scott Maddox, and that the purchase of a ticket for, or
3 contribution to, the event would constitute a contribution to Maddox. *Id.* Following the
4 invitation, there is an additional disclaimer on the e-mail reading, "Political Advertisement Paid
5 for and Approved by Alan Grayson, Democrat, for U.S. Congress, Florida District 8."

6 Attachment 1. Complainant alleges that by emailing this invitation, Congressman Grayson and
7 the Committee solicited prohibited contributions on behalf of a non-federal candidate, in
8 violation of 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 300.62.

9 While Respondents acknowledge that the invitation constituted a solicitation, they
10 dispute any liability under the Act. Response at 7. Respondents assert that Congressman
11 Grayson gave the host committee permission to use his name subject to his final approval of the
12 invitation, but that he never gave such final approval. Instead, they maintain that when a
13 Committee volunteer forwarded a draft of the invitation to Congressman Grayson on March 20,
14 2010, the Congressman asked whether the invitation required a disclaimer regarding his
15 participation in the event. On March 21, 2010, the Committee volunteer forwarded a revised
16 invitation to the campaign vendor for distribution without first inquiring about the need for a
17 disclaimer or obtaining Congressman Grayson's final approval. Response at 4-5. Respondents
18 acknowledge, however, that the Congressman saw the revised invitation on March 24, 2010, the
19 day before the event. Congressman Grayson, who did not attend the event due to a vote in
20 Congress, did not attempt to retract the invitation, and the Committee posted the invitation on its
21 website, without modification, for several months following the event.

22 Respondents assert that application of the law in effect at the time of the activity
23 demonstrates that Congressman Grayson "may not be held responsible for any violation of

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2 U.S.C. § 441i(e)(1) that may have occurred in connection with the Maddox fundraising event.”
Response at 6. Further, Respondents maintain that “given the confused state of the law prior to the Commission’s recent adoption of a new rule governing a Federal officeholder’s participation in a non-federal fundraising event, any attempt to hold [Respondents] responsible for any violation of 2 U.S.C § 441i(e)(1) that may have occurred prior to the issuance of the new final rule,” would raise constitutional concerns. *Id.* See also Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 75 Fed. Reg. 24375 (May 5, 2010) (“E&J”). Respondents accordingly request that the Commission either find no reason to believe that such violation occurred or, alternatively, exercise its prosecutorial discretion and dismiss this matter.

B. Legal Analysis

Under the Federal Election Campaign Act of 1971, as amended (“the Act”), candidates or individuals holding federal office, or their agents (collectively, “covered persons”) may not solicit funds in connection with a non-federal election unless the funds comply with the source restrictions for contributions in connection with a federal election. 2 U.S.C. § 441i(e)(1)(B). Accordingly, covered persons may not solicit corporate contributions in connection with a non-federal election. See 2 U.S.C. § 441b(a). Congressman Grayson and the Committee are “covered persons.”

The Commission defines “solicitation” as an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value. 11 C.F.R. § 300.2(m). Commission regulations provide specific examples of solicitations, including communications that provide

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1 instructions on how or where to send contributions or that identify a website specifically
2 dedicated to facilitating the making of contributions. 11 C.F.R. § 300.2(m)(1)(ii)-(iii).

3 The Committee's March 21, 2010 e-mail communication constitutes a solicitation. In
4 addition to suggesting a specific contribution amount per person or corporate entity, it informs
5 recipients to make checks payable to the "Scott Maddox Campaign" and provides the website
6 address www.scottmaddox.com/contribute to contribute online. Because the e-mail was sent
7 from alangrayson@graysonforcongress.com and contains a disclaimer that the communication is
8 a "[p]olitical advertisement Paid for and Approved by Alan Grayson, Democrat, for U.S.
9 Congress," the communication is a solicitation for prohibited contributions by Congressman
10 Grayson and his Committee. Indeed, Respondents concede that the invitation "clearly did
11 constitute a solicitation because it expressly requested corporate contributions prohibited by 2
12 U.S.C. § 441b(a)." Response at 7.

13 Both 2 U.S.C. § 441i(e)(1) and 11 C.F.R. § 300.62 plainly prohibit solicitations of
14 prohibited contributions by covered persons. Likewise, in Advisory Opinion 2003-36
15 (Republican Governors Association), the Commission stated that it "wishes to make clear that
16 the covered individual may not approve, authorize, agree, or consent to appear in publicity that
17 would constitute a solicitation by the covered person of funds that are in excess of the limits or
18 prohibitions of the Act, regardless of the appearance" of a disclaimer limiting the solicitation to
19 federally-compliant funds. AO 2003-36 at 6, fn 9.¹ Since the pre-event publicity in this matter
20 was disseminated by a covered person, it violated both the statute and the regulation, and a

¹ See also Advisory Opinion 2007-11 (California State Party Committees); Notice of Proposed Rulemaking, Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 74 Fed. Reg. 64016, 64018 (December 7, 2009) ("NPRM") (Federal candidates and officeholders may not solicit funds in excess of the amount limitations and source prohibitions of the Act and then qualify that impermissible solicitation with a limiting disclaimer.)

1 disclaimer limiting the solicitation to federally-compliant funds would not have cured the
2 violation.²

3 Furthermore, Respondents' assertion that the Congressman never gave his final
4 authorization for the invitation does not resolve the issue. While conceding that section 441i(e)
5 applies to "agents" of federal officeholders, Respondents maintain that the campaign volunteer
6 who gave the invitation to the e-mail vendor acted in contravention of Congressman Grayson's
7 instructions, and therefore was not the Congressman's "agent." Response at 8-9.

8 Commission regulations, however, define "agent" as any person who has actual authority,
9 either express or implied, to solicit, receive, direct, transfer, or spend funds in connection with
10 any election on behalf of a federal candidate or officeholder. 11 C.F.R. § 300.2(b)(3). In its
11 Revised Explanation and Justification for "Definitions of 'Agent' for BCRA Regulations on
12 Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures," 71 Fed.
13 Reg. 4975. (January 31, 2006) ("2006 E&J"), the Commission pointed out that the definition
14 applies to the solicitation of funds generally, and therefore campaign volunteers often fall within
15 this definition.³ *Id.* at 4977. Moreover, the Commission indicated that if an act is within the
16 agent's scope of actual authority, the principal could be liable for an activity undertaken by the
17 agent despite contrary specific instructions by the principal. *Id.* at 4978.

² Respondents' argument as to "the confused state of the law" prior to the issuance of the Commission's new rules, *see* E&J, is not persuasive in this matter. The Commission's previous guidance on federal officeholder participation in non-federal fundraising events – which Respondents argue is "vague" and "muddled," and which the Commission superseded in its new rules – addressed fact patterns that are fundamentally different from the facts presented in this matter. Unlike this previous guidance, which applied to situations in which non-covered persons disseminated publicity containing a covered person's name, this matter involves a covered person actually disseminating the publicity.

³ The Commission's 2006 E&J also specifically recants its previous reliance on the notion that a "rogue or misguided volunteer" might potentially create liability for candidates or party committees, as the U.S. District Court for the District of Columbia in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), found that this reliance was "not supported by the law of agency." 71 Fed. Reg. 4976, 4980 (quoting *Shays v. FEC* at 37).

1 Notwithstanding Respondents' assertions, it appears that the campaign volunteer was an
2 agent of the Congressman and the Committee. Based on the facts presented in the response, it
3 appears that the Committee designated the volunteer as the point of contact to the campaign
4 vendor, and gave unrestricted access to its e-mail and computer systems. Additionally, it appears
5 Respondents gave the volunteer express actual authority to negotiate the invitation with the host
6 committee. This express actual authority, combined with access to the campaign vendor,
7 provides a sufficient basis to conclude that the volunteer had authority to approve the invitation
8 and send it to the campaign vendor.⁴

9 Even if the volunteer lacked actual authority to approve the invitation's dissemination on
10 May 21, 2010, this dissemination was not an isolated incident. According to Respondents,
11 Congressman Grayson reviewed the invitation the day before the event, when a reporter
12 presented him with the complaint in this matter. However, despite the fact that the event had not
13 yet occurred, it does not appear that he attempted to retract or correct the invitation. Moreover,
14 the Committee posted the invitation, without modification, on the Committee's website for an
15 extended period of time, at least until July 1, 2010. Therefore, the Congressman and the
16 Committee, covered persons, bear responsibility for the dissemination of the invitation soliciting
17 prohibited contributions in connection with a non-federal election.

18 Based on the information provided in the complaint and response, it appears that the
19 Congressman and the Committee solicited corporate contributions in connection with a non-
20 federal election. Accordingly, the Commission finds reason to believe that Alan Grayson and the

⁴ Actual authority can be implied from words or conduct between the principal and the agent outside of an express agreement, and can arise from custom or usage or as incidental to express authority. That is, implied authority can arise as a natural and general consequence of the express authority granted. See Restatement (Second) of Agency, § 35.

- 1 Committee to Elect Alan Grayson and Paul Ashcraft, in his official capacity as treasurer, violated
- 2 2 U.S.C. § 441i(e)(1).

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