FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6348
David Schweikert for Congress and Joyce Schweikert,	)	
In her official capacity as treasurer	)	

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

This matter arises from a complaint alleging that David Schweikert for Congress ("the Committee") deliberately obscured the required disclaimer on a campaign mailer in violation of 2 U.S.C.§ 441d(c) and 11 C.F.R. § 110.11(c). We rejected the recommendation by the Office of General Counsel ("OGC") to find reason to believe that violations had occurred because the campaign mailer included a sufficient disclaimer.

I. BACKGROUND

The Committee distributed a mailer containing a disclaimer "Paid for by Schweikert for Congress" in plain, readable type. The disclaimer is printed vertically on the upper right side of the mailer in gold type over a photograph of San Francisco viewed from the Golden Gate Bridge. Though we do not have information about how many of the mailers were distributed, the Committee's disclosure reports include contemporaneous payments to printing vendors ranging from approximately $5,000 to $26,000. OGC based its reason-to-believe recommendation on the theory that the disclaimer's vertical placement, combined with its gold type over a varied background, make it easily overlooked and, therefore, not clear and conspicuous.

II. ANALYSIS

The Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations require a mass mailing (more than 500 pieces of substantially similar mail within any 30-day period) by a political committee to include a disclaimer.[1] Although the complaint and the response do not address the number of mailers distributed in this matter, for the purpose of this statement, we will assume that the Committee distributed over 500 mailers, thus triggering the disclaimer requirement.

[1] 2 U.S.C. § 441d; 11 C.F.R. § 110.11(a)(1); 11 C.F.R. § 100.26; 2 U.S.C. § 431(23); 11 C.F.R. § 100.27.

The mailer at issue states that it is paid for by Schweikert for Congress, in compliance with the requirement that a mass mailing paid for by a candidate or an authorized political committee of a candidate must clearly state that the communication has been paid for by the authorized political committee.[2] Moreover, it must "be of sufficient type size to be clearly readable" and located "in a printed box set apart from the other contents of the communication."[3] The Commission's regulations specify that a disclaimer must be "presented in a clear and conspicuous manner." A disclaimer is not "clear and conspicuous" if the print is "difficult to read" or if the placement is "easily overlooked."[4] Also, a disclaimer must be printed with a "reasonable degree of color contrast between the background and the printed statement."[5]

Here, the placement of the disclaimer does not make it unreasonably difficult to distinguish. It is not printed in small type, but rather is printed in what appears to be 12-point font.[6] It is also contained in a printed box set apart from the rest of the communication. The disclaimer overlaps no text and is printed vertically – perpendicular to all the other text in the mailer – on the upper right side of the mailer. No other text on the mailer is either enclosed in a box or printed vertically. Further, the disclaimer appears to be reasonably contrasted with the background. Though a few of the letters in the disclaimer might be seen to blend in with the background, the words are plainly readable, especially "Paid for by Schweikert" and "Congress." Moreover, the disclaimer text appears to be the same color as some of the surrounding text that is printed on top of part of the same background as the disclaimer. While the Commission has established voluntary "safe harbors" for required disclaimers, they are not the only way to satisfy the disclaimer requirement.[7] Even if the color contrast safe harbor is not met, it does not necessarily follow that the disclaimer is "difficult to read" in violation of Commission regulations.[8] As stated above, in terms of its content, placement, font size, and contrast, the disclaimer at issue was clearly readable and, moreover, was contained in a printed box set apart from the other contents of the communication.[9] Thus, the disclaimer plainly complies with the requirements for printed communications.

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[2] 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(b).

[3] 2 U.S.C. § 441d(c)(1), (2).

[4] 11 C.F.R. § 110.11(c)(1).

[5] *See* 2 U.S.C. § 441d(c)(3).

[6] Under Commission regulations, "[a] disclaimer in twelve (12)-point type size satisfies the size requirement ... when it is used for signs, posters, flyers, newspapers, magazines, or other printed materials that measure no more than twenty-four (24) inches by thirty-six (36) inches." 11 C.F.R. § 110.11(c)(2)(i). The size of the disclaimer text is larger than the footnote citation text included in the mailer and appears to be the same size as the mailer's return address.

[7] *See* Explanation and Justification for Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds; Final Rule, 67 Fed. Reg. 76962, 76966 (December 13, 2002).

[8] The color contrast safe harbor provides protection for disclaimers that have black text on a white background, or where the degree of color contrast between the background color and the disclaimer text color is at least as great as the degree of contrast between the background color and the color of the largest text in the communication. 11 C.F.R. § 110.11(c)(2)(iii).

[9] 2 U.S.C. § 441d(c); 11 C.F.R. § 110.11(c). *See* 2 U.S.C. § 441d(c)(2).

Finally, we note that the Commission routinely handles matters involving disclaimers through the agency's Enforcement Priority System ("EPS"), in which matters involving low-priority issues relative to other matters pending before the Commission are recommended for dismissal by OGC. In numerous EPS dismissals and other low-priority disclaimer matters, the Commission has not subjected respondents to findings and a potential civil penalty, even in instances where there was no indication of who paid for the campaign material in question. *See, e.g.*, MUR 6316 (Pridemore for Congress); MUR 6118 (Bob Roggio for Congress); MUR 6329 (Michael Grimm for Congress); MUR 6278 (Joyce B. Segers). While there are always distinctions to be made among the facts and circumstances of various matters, and a disclaimer can always be made more "clear and conspicuous," ultimately, the mailer at issue in this matter included a readily discernible disclaimer that states who paid for it.[10]

III. CONCLUSION

For the foregoing reasons, we voted against the recommendation to find reason to believe that that David Schweikert for Congress and Joyce Schweikert, in her official capacity as treasurer, violated 2 U.S.C. § 441d(c) and 11 C.F.R. § 110.11(c).

Caroline C. Hunter — 3/16/11
CAROLINE C. HUNTER — Date
Vice Chair

DONALD F. McGAHN II — 3/24/11
DONALD F. McGAHN II — Date
Commissioner

Matthew Petersen — 3/16/11
MATTHEW S. PETERSEN — Date
Commissioner

[10] Our colleagues appear to draw a distinction between other Commission dismissals and this matter in part because, in those other MURs, the committees in question took remedial action. Statement of Chair Bauerly and Commissioners Walther and Weintraub at 3. It is unclear, though, why remedial action in those cases makes enforcement more appropriate here. The result would be punishment of a committee that included a disclaimer on every one of its mailers yet no punishment for committees that actually failed to print any disclaimer on some of its mailers. Nor should we be determining whether the disclaimer could have been located in a "better" place on the mailer or whether some may have overlooked the disclaimer in its current location. Rather, all of these committees, both here and in prior MURs discussed above, appear to have attempted to follow the law, whether at the time of printing or soon after an error was discovered. Given the inherently subjective "clear and conspicuous" standard to be applied, it is proper, when encountering a close call, to give the benefit of the doubt to the committee making the decision in the first instance.