FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
Steve Fincher for Congress, *et al.*	)	MUR 6386
	)	

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

This matter concerns an accurate but incomplete report of a candidate's loan to his campaign committee. Congressional candidate Steven Fincher obtained a commercially reasonable bank loan, secured by his personal assets, and in turn loaned those funds to his authorized campaign committee. The committee properly reported that it had received a loan, but that was not enough. Commission regulations also required the committee to report the bank as the source of that loan as well as the loan terms. There was no other informational injury or prohibited campaign finance activity at issue.[1] The Office of General Counsel recommended that we find reason to believe the respondents violated the Federal Election Campaign Act of 1971, as amended ("the Act"), and impose a significant civil penalty for the technical misreporting of the loan. In similar matters in the past, however, absent other harm, the Commission has not demanded civil penalties for this type of reporting error. Therefore, although we had reason to believe the reporting of the loan at issue did not meet all the technical requirements of Commission regulations, we did not seek a civil penalty, consistent with Commission precedent and the Commission's prosecutorial discretion.[2]

I. Background

Steve Fincher was a candidate for the Eighth Congressional District of Tennessee in 2010. His authorized committee was Steve Fincher for Congress (the "Committee"). Fincher

[1] The complaint in this matter alleged that the loan was uncollateralized and therefore Gates Bank made, and the Fincher Committee, accepted a prohibited corporate contribution in violation of 2 U.S.C. § 441b(a). However, we agreed with the Office of General Counsel's recommendation that we find no reason to believe the respondents made or accepted a prohibited contribution. Our colleagues also supported that recommendation. For purposes of 2 U.S.C. § 437g(a)(8), the First General Counsel's Report (the "FGCR" or "Report") is incorporated by reference.

[2] *See Heckler v. Chaney*, 470 U.S. 821 (1985).

obtained a $250,000 loan from Gates Bank in the ordinary course of business, secured by Fincher's own assets. Fincher, in turn, loaned his funds to the Committee. The Committee reported the loan on its disclosure reports as a loan from the "personal funds" of Fincher.

Fincher's opponent, Herron for Congress, filed a complaint alleging that the Committee misreported the source of a loan by not listing the source of the loan as Gates Bank and by not reporting the terms of the loan.[3] Moreover, the complaint alleged that Fincher's personal financial disclosure report filed with the United States House of Representatives reported no assets, and therefore, Fincher could not have had "$250,000 in cash available to loan to his campaign."[4] Finally, the complaint asserted that if Gates Bank had no security interest in the collateral for the loan, then Gates Bank made and the Committee accepted a prohibited $250,000 contribution.[5]

In response, the Committee asserted that the bank loan was obtained by Mr. Fincher in the ordinary course of business.[6] The Committee also argued that the receipt of the loan was no secret to the public because the Committee disclosed the loan on its FEC reports and that news reports had covered the existence of the loan.[7]

The Office of General Counsel ("OGC") recommended that the Commission find reason to believe that the Committee and Phyllis Patterson, in her official capacity as treasurer, violated the Act and Commission regulations by failing to disclose that the source of the loan was Gates Bank and by failing to disclose the terms of the loan.[8] OGC further recommended that the Commission authorize conciliation with the Committee and seek a five-figure monetary civil penalty.[9]

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[3] The complainant attached a news article which reported that Gates Bank was the source of the loan. *See* Complaint at 1, Exhibit C.

[4] MUR 6386 (Steve Fincher for Congress), Complaint at 2.

[5] Herron for Congress also filed a supplemental complaint alleging that the violations were knowing and willful because the Committee should have known that it was misreporting the source of the loan on its October Quarterly Report. *See* MUR 6386 (Steve Fincher for Congress), Supplemental Complaint at 2.

[6] MUR 6386 (Steve Fincher for Congress), Response at 3-4. According to the Committee, the loan was obtained by Fincher in the ordinary course of business as the loan (1) bore the bank's usual and customary interest rate (which at the time was 6.5%), (2) the loan was made on a basis that assured repayment as it was "a signature loan that was cross-collateralized with other bank debt owed and accounts held by Mr. Fincher," including a 2010 crop production note and a 2009 home mortgage loan, (3) the loan was evidenced by a written instrument, and (4) the loan was subject to a due date of November 30, 2010.

[7] The Committee filed amendments correcting the public record on December 2, 2010. The Committee included a Schedule C-1 with the required information about the bank loan. The Committee also filed an amendment to its Schedule C for both the Pre-Primary and October Quarterly Reports.

[8] MUR 6386 (Steve Fincher for Congress), FGCR at 5. OGC did not recommend that the Commission find that the reporting violations were knowing and willful. In addition, OGC recommended that the Commission find no reason to believe Gates Bank made and Steve Fincher for Congress accepted a prohibited contribution because "it appears Gates Bank made the loan in the ordinary course of business." *Id.* at 10.

[9] In order not to waive certain Commission privileges, we are precluded from discussing the amount recommended by OGC. However, we note that the Commission, acting on OGC recommendations, has sought civil penalties that

Because the Committee acknowledged a violation of 11 C.F.R. § 104.3(d)(4),[10] all six Commissioners supported OGC's recommendation to find reason to believe the Committee had violated the reporting provision.[11] However, we declined to impose a civil penalty, and voted to send a letter of caution to the Committee instead. A motion to this effect failed 3-3.[12] As is generally the case when the Commission is unable to agree by the required four votes on how or whether to proceed on enforcement matters, the Commission then approved a pro-forma vote to close the file.[13]

We believe this matter is materially indistinguishable from MUR 5198 (Cantwell), another matter where the Commission found reason to believe a respondent violated the Act but declined to impose a monetary penalty. Moreover, we believe not imposing a monetary penalty in this matter was an appropriate exercise of prosecutorial discretion pursuant to *Heckler v. Chaney*, as the harm this reporting requirement seeks to avoid – preventing a candidate from obtaining a loan under dubious terms or from a prohibited source – was absent here.

II. Analysis

Candidates for Federal office may make unlimited expenditures and contribute unlimited amounts from their personal funds in connection with their own campaigns.[14] In addition, a candidate may also obtain loans and lines of credit from financial institutions so long as those transactions are made in the ordinary course of business.[15] The Act and Commission regulations require that the reports filed by a candidate's principal campaign committee disclose, among other transactions, contributions from the candidate, as well as all loans made by or guaranteed by the candidate.[16] In the past, the Commission has not demanded penalties for technical violations related to reporting such loans.

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courts have found to be inappropriate. *See e.g., FEC v. Kalogianis*, No. 8:06-cv-68-T-23EAJ, 2007 WL 4247795 (M.D. Fla. 2007); *FEC v. Friends of Jane Harman*, 59 F.Supp.2d 1046 (1999).

[10] *See* MUR 6386 (Steve Fincher for Congress), Response at 1, 4.

[11] MUR 6386 (Steve Fincher for Congress), Certification dated June 14, 2011. Commissioners Bauerly and Walther voted to find reason to believe and to approve OGC's recommendation to seek a five-figure civil penalty from the Committee; Commissioners Hunter, McGahn, Petersen, and Weintraub dissented. Commissioners Bauerly, Walther, and Weintraub then voted to find reason to believe and to seek a lower five-figure civil penalty from the Committee; Commissioners Hunter, McGahn, and Petersen dissented. Commissioners Hunter, McGahn, and Petersen then voted to find reason to believe and to send a letter of caution to the Committee; Commissioners Bauerly, Walther, and Weintraub dissented.

[12] *Id.*

[13] Among other reasons, if the Commission had not voted to close the file, the matter would continue to remain open until expiration of the statute of limitations leaving the complainant and respondents with no information regarding the status of the matter.

[14] *See Buckley v. Valeo*, 424 U.S. 1, 54 (1976); *see also Davis v. FEC*, 128 S. Ct. 2759 (2008).

[15] 2 U.S.C. §§ 431(8)(B)(vii) and (xiv).

[16] 2 U.S.C. §§ 434(b)(2)(B), (G) and 434(b)(8); 11 CFR §§ 104.3(a)(3)(ii) and 104.3(d). Commission regulations require that the committee report the loan from the candidate as a receipt on Schedule A and repayment of the loan to the candidate as a disbursement on Schedule B. Moreover, a committee must report the source of the loan, the

A. In MUR 5198 (Cantwell), the Commission Imposed No Monetary Civil Penalty

In MUR 5198 (Cantwell), Senator Cantwell obtained a $600,000 line of credit and a $4,000,000 line of credit from U.S. Bank, and in turn, loaned those funds to her authorized committee, Friends of Maria ("Cantwell Committee"), prior to the 2000 General Election.[17] The Cantwell Committee reported the lines of credit as being from the personal funds of Senator Cantwell rather than from U.S. Bank. The complaint alleged that the Cantwell Committee intentionally misreported the lines of credit because they were "under-collateralized" and "secured at rates below those available to the general public."[18]

The Cantwell Committee admitted they misreported the loans, but argued that the failure was inadvertent and resulted from a failure by the preparer of the Committee's FEC reports "to fully understand the guidance and requirements of the Commission and inadvertently omitted the schedule C information from the original reports." The Cantwell Committee further argued that the loans were disclosed prior to the election but were "mistakenly shown as loans from the candidate and lacked complete information pertaining to the bank," and promptly amended its reports upon discovering the error.[19]

OGC recommended that the Commission find reason to believe that Cantwell 2006 and Keith Grinstein, as treasurer, violated 2 U.S.C § 434(b) because "the Cantwell Committee did not timely report complete loan information regarding the loans from U.S. Bank."[20] Yet, OGC recommended that the Commission send an admonishment letter to the Cantwell Committee rather than impose a monetary penalty.[21] The Commission agreed and unanimously approved OGC's recommendations.[22]

Other than office sought (Senate vs. House) and partisan affiliation (Democrat vs. Republican), the Cantwell matter and the Fincher matter are indistinguishable. Both received loans from a bank, in the ordinary course of business and secured by their own collateral. Both, in turn, loaned the funds to their campaign committees. Their committees both reported the receipt of the loan without initially disclosing the information pertaining to the bank. Finally,

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type of loan, e.g., "personal funds" or "bank loan," as well as any payments to reduce principal on Schedule C each reporting period. Finally, the committee is required to file Schedule C-1 disclosing the terms of the bank loan obtained by the candidate. The Fincher Committee reported the receipt of the loan on Schedule A, and filed a Schedule C. The main issue in this matter was the failure by the Fincher Committee to file Schedule C-1 disclosing the terms of the bank loan.

[17] MUR 5198 (Cantwell), FGCR at 1-2.

[18] MUR 5198 (Cantwell), Complaint at 2.

[19] MUR 5198 (Cantwell) Response at 8. The Cantwell Committee amended its reports prior to the filing of the complaint but more than five months after the 2010 General Election and after receiving two Requests for Additional Information from the Reports Analysis Division.

[20] MUR 5198 (Cantwell), FGCR at 15.

[21] *Id.*

[22] MUR 5198 (Cantwell), Certification dated Jan. 13, 2004.

both amended their reports to include this information.[23] Thus, if no monetary penalty was warranted in the Cantwell matter, then no monetary penalty is warranted here.

Yet, OGC and our colleagues would treat the Fincher Committee differently from the Cantwell Committee. Our colleagues criticize us for relying only on the Cantwell matter, stating they "wholeheartedly embrace" our "concern that similarly situated cases should be treated the same," but that we should consider other, more recent, matters where the facts were supposedly similar and the Commission chose to impose a monetary penalty.[24] However, those matters involve other issues in addition to the misreporting of a candidate loan. And any civil penalties imposed are related to those issues as well. Thus, a comparison between Fincher and these other matters is strained; the Cantwell matter, however, is materially indistinguishable.

B. Prior MURs Where the Commission Imposed a Monetary Penalty are Distinguishable

Our colleagues cite to MUR 6134 (Cranley for Congress), where the respondent paid a civil penalty of $5,000 for numerous violations of the Act, including the misreporting of bank loans. However, that matter is clearly distinguishable. In Cranley, the Commission made a number of findings, including (1) acceptance of excessive contributions, (2) misstatement of cash on hand, receipts and disbursements, (3) failure to report or properly disclose earmarked contributions, (4) failure to identify adequately the occupation and/or employer of individuals who made contributions, (5) failure to adequately disclose required information regarding disbursements, (6) failure to itemize debts and obligations on Schedule D, and (7) failure to disclose adequately its line of credit on Schedules C and C-1.[25] The Commission found reason to believe the respondents violated all of these provisions of the Act, and ultimately approved a conciliation agreement providing for the Committee to pay a civil penalty of $5,000.[26] Thus, the Cranley for Congress Committee had more serious problems than simply the details of a line of credit and, thus, involved different considerations than the matter at hand.

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[23] The Fincher Committee amended its reports after receipt of the complaint (which was filed in the heat of the election season) but only one month after the General Election, as opposed to the five months it took the Cantwell Committee. In our view, these matters are almost identical (except that it took the Cantwell Committee longer to amend its reports).

[24] *See* MUR 6386 (Fincher for Congress), Statement of Reasons of Chair Bauerly, and Commissioners Walther and Weintraub at 3.

[25] MUR 6134 (Cranley for Congress), Conciliation Agreement at 6-7 (citing violations of 2 U.S.C. § 441a(f) (accepting excessive contributions), 2 U.S.C. § 434(b) (misstating cash on hand, receipts, and disbursements), 2 U.S.C. § 441a(a)(8) (failing to properly disclose earmarked contributions) and 2 U.S.C. § 434(b) (failing to identify adequately the occupation and/or name of employer of contributors, failing to adequately disclose required information regarding disbursements, failing to itemize debts and obligations, and failing to adequately disclose a line of credit).

[26] *Id.* at 7, Conciliation Agreement at 7. According to the conciliation agreement, "[i]n ordinary circumstances, the Commission would seek a civil penalty of $299,000" for the violations at issue in this matter. Id. The Commission approved the reduced civil penalty based on "the fact that CFC has no cash on hand and limited ability to raise any additional funds," as well as other contingencies such as using funds refunded by the treasurer to pay for correcting and amending its reports. *Id.*

Other matters involving misreported loans where the Commission obtained civil penalties are similarly distinguishable. In MUR 5496 (Huffman for Congress), the Commission also imposed a civil penalty for misreporting of a candidate bank loan. However, in addition to finding the campaign misreported a $100,000 loan and $150,000 line of credit the candidate obtained from BB&T bank,[27] the Commission also found reason to believe the campaign knowingly accepted a $100,000 excessive contribution in the name of another by accepting a $100,000 "loan" from the Huffman for Congress Committee's finance director in violation of both 2 U.S.C. §§ 441a(f) and 441f.[28] Ultimately, the Respondents agreed to pay a $30,000 civil penalty for these violations.

In MUR 5422 (Cuellar), the Texans for Henry Cuellar Congressional Campaign disclosed a $200,000 bank loan the candidate had obtained from the International Bank of Laredo, but failed to disclose the terms of the bank loan. However, in addition to incomplete reporting of the bank loan, the Cuellar Campaign completely failed to report a $100,000 operating expenditure to a vendor for media services on its 2004 Pre-Primary Report, an election-sensitive report.[29] The $100,000 expenditure represented 56% of the Cuellar Campaign's disbursements for the reporting period prior to the Primary Election. While the public was aware of the existence of the bank loan and the source, with respect to the $100,000 expenditure, the failure to report it inflated the candidate's cash on hand and left the public and his opponents completely unaware of the transaction. The Cuellar Campaign agreed to pay a civil penalty of $28,500 for these violations.

All of these other matters are distinguishable from the Fincher matter in that the Commission found reason to believe the committees had violated multiple provisions of the Act. Thus, we assume civil penalties were warranted in these other matters because of, *inter alia*, the number and types of violations, including the underlying *illegal* activities. Here, the Fincher Committee reported the loan from Fincher but, like the Cantwell committee, inadvertently did not supply additional detail regarding the terms of the bank loan – a loan that was obtained in the ordinary course of business and secured by the candidate's assets. Thus, consistent with MUR 5198 (Cantwell), a monetary penalty was not warranted.

C. Our Decision Was an Appropriate Exercise of Prosecutorial Discretion

Finally, the decision not to impose a civil penalty in this matter was an appropriate exercise of agency discretion.[30] The harm this technical reporting requirement seeks to avoid—

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[27] The Committee ultimately corrected the reporting errors by filing amended reports; however, the amendments were filed more than nine months after the November 2004 General Election.

[28] *See* MUR 5496 (Huffman for Congress), Factual and Legal Analysis at 12.

[29] MURs 5422 and 5680 (Texans for Henry Cuellar), Conciliation Agreement at 2. The Cuellar Campaign did not file an amendment to its 2004 Pre-Primary Report disclosing the expenditures until three months after the Primary Election leaving the public and his opponents completely unaware of the $100,000 expenditure, and worse, inflating his cash on hand.

[30] *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion").

the the receipt of a loan by the candidate on dubious terms or from a prohibited source—was not present here.

As noted above, the Fincher Committee was not the first to make the mistake of reasonably reporting the source of such loans as the "personal funds" of a candidate. As Counsel in the Cantwell matter noted, "the preparer [of the Cantwell Committee's reports] held a perfectly logical belief – and one supported by generally accepted accounting principles – that if the funds were obtained by the candidate personally, using the candidate's own assets, then the source of the funds should be disclosed as the candidate."[31]

As the MURs discussed above demonstrate, this is an issue that trips up many candidates, especially novice candidates who may have nonprofessional staff or volunteers assisting with their administrative obligations, and it is not surprising because this regulation is counter-intuitive. In cases such as this and Cantwell, the underlying activity was wholly legal and any harm resulting from the way the Committee reported the loan was minimal and subsequently clarified. Thus, because of our disagreement with our colleagues over what was the appropriate penalty, we voted to close the file.

III. Conclusion

For the foregoing reasons, we exercised our prosecutorial discretion and declined to support a monetary civil penalty in this matter, and voted to close the file.

[31] MUR 5198 (Cantwell), Response at 7-8. Senator Cantwell secured the lines of credits using a second deed of trust on her personal residence, as well as her liquid assets (stocks).

CAROLINE C. HUNTER
Vice-Chair

9/15/2011
Date

DONALD F. McGAHN II
Commissioner

9/15/2011
Date

MATTHEW S. PETERSEN
Commissioner

9/15/2011
Date