FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6801
DATE COMPLAINT FILED: March 27, 2014
DATE OF NOTIFICATION: April 2, 2014
LAST RESPONSE RECEIVED: May 27, 2014
DATE ACTIVATED: August 11, 2014

ELECTION CYCLE: 2014
EXPIRATION OF SOL:
January 30, 2019 (earliest)
January 30, 2019 (latest)

COMPLAINANT:	Campaign Legal Center
	Democracy 21
RESPONDENTS:	Senate Majority PAC and Rebecca Lambe in her official capacity as treasurer
RELEVANT STATUTES AND REGULATIONS:	52 U.S.C. § 30104(b)[1] 52 U.S.C. § 30116(a)(7)(B)(iii) 52 U.S.C. § 30118(a) 11 C.F.R. § 109.21 11 C.F.R. § 109.23
INTERNAL REPORTS CHECKED:	FEC Disclosure Reports
FEDERAL AGENCIES CHECKED:	None

I. INTRODUCTION

This matter involves an allegation that Senate Majority PAC and Rebecca Lambe in her official capacity as treasurer ("SMP") violated the Federal Election Campaign Act, as amended (the "Act"), by making an in-kind contribution to Braley for Iowa in 2014. Specifically, the

[1] On September 1, 2014, the Federal Election Campaign Act of 1971, as amended (the "Act"), was transferred from Title 2 to new Title 52 of the United States Code.

Complaint alleges that SMP financed the dissemination, distribution, or republication of campaign materials prepared by Braley for Iowa, and in doing so made a contribution pursuant to 11 C.F.R. § 109.23(a). According to the Complaint, the contribution to Braley for Iowa resulted in a violation of SMP's $2,600 limit on contributions by a non-multicandidate political committee to a candidate under 52 U.S.C. § 30116(a)(1) (formerly 2 U.S.C. § 441a(a)(1)), a violation on the prohibition on contributions to a candidate using corporate funds under 52 U.S.C. § 30118(a) and (b)(2) (formerly 2 U.S.C. § 441b(a) and (b)(2)), and a violation of SMP's obligation to report contributions pursuant to 52 U.S.C. § 30104(b) (formerly 2 U.S.C. § 434(b)). The Complaint also alleges that SMP's contribution to Braley for Iowa renders its status as an independent expenditure-only committee inapplicable, and thus any contributions that SMP accepted from corporations or labor unions, or in excess of $5,000, were prohibited under 52 U.S.C. §§ 30118(a) and 30116(a)(1)(C) (formerly 2 U.S.C. §§ 441b(a) and 441a(a)(1)(C)), respectively. The Complaint does not name Braley for Iowa as a respondent, nor does it allege any violation of the law by Braley for Iowa.

The available information demonstrates that SMP aired an advertisement that used materials created by Braley for Iowa, and its use of those materials, even "in part," constitutes an in-kind contribution to Braley for Iowa. Accordingly, we recommend that the Commission find reason to believe that Senate Majority PAC violated 52 U.S.C. §§ 30116(a), 30118(a), and 30104(b) (formerly 2 U.S.C. §§ 441a(a), 441b(a), and 434(b)). We also recommend that the Commission enter into pre-probable cause conciliation with SMP.

II. FACTS

Senate Majority PAC was organized on June 11, 2010.[2] From its inception, it has operated as an independent expenditure-only committee that solicits and accepts contributions from corporations and labor organizations, as well as from individuals and other federal political committees in excess of the Act's limits.[3] Bruce Braley is a candidate in the 2014 U.S. Senate election in Iowa, and Braley for Iowa is his principal campaign committee.[4]

SMP reported making independent expenditures supporting the election of Bruce Braley on January 28, 2014, and February 1, 2014.[5] The advertisement supported by those independent expenditures, "Oil Billionaires,"[6] contains footage that was originally part of a two-minute web video entitled "Meet Bruce Braley" that was created by the Braley campaign and made publicly available on the campaign's website and YouTube channel.[7] SMP states that it downloaded the video from the campaign's website on January 14, 2014, and used some of the footage in "Oil Billionaires." The video footage taken from "Meet Bruce Braley" runs for 16 of the ad's 30

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2 Statement of Organization (June 11, 2010). Senate Majority PAC was formed as Commonsense Ten. The group later changed its name to Majority PAC, then Senate Majority PAC. *See* Statement of Organization (Amended) (Mar. 9, 2011); Statement of Organization (Amended) (Mar. 8, 2013). So far as we know, SMP has not established a separate account for contributions subject to the limitations and prohibitions of the Federal Election Campaign Act of 1971, as amended. *See* Stipulated Order and Consent Judgment in *Carey v. FEC*, No. 11-259-RMC (Aug. 19, 2011); *see also* FEC Statement on *Carey v. FEC*: Reporting Guidance for Political Committees that Maintain a Non-Contribution Account (Oct. 5, 2011), http://www.fec.gov/press/Press2011/20111006postcarey.shtml.

3 Advisory Op. 2010-11 (Commonsense Ten); Compl. at 3 n.1.

4 Statement of Organization (Feb. 8, 2013).

5 Schedule E, 24/48 Hour Report of Independent Expenditures (Jan. 30, 2014); Schedule E, 24/48 Report of Independent Expenditures (Feb. 3, 2014). The reports indicate that Senate Majority PAC spent a total of $316,115 on the advertisement, including $16,739 in production costs and $299,376 for television placement.

6 https://www.youtube.com/watch?v=Qvp4jEMwK7w.

7 Resp. at 3; Compl. at 4.

seconds — from :06 to :12 and from :20 to :30.[8] The remaining video footage in "Oil Billionaires" was either stock footage or original footage incorporating an Americans for Prosperity advertisement.[9] SMP states that it "drafted the script and on-screen chryons from scratch, without incorporating any candidate materials."[10] We are aware of no information to the contrary.

III. ANALYSIS

A. There Is Reason to Believe that Senate Majority PAC Republished Candidate Campaign Materials

Under the Act, "the financing by any person of the dissemination, distribution, or republication, in whole or in part, of any broadcast or any written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered to be an expenditure."[11] The republication of campaign materials prepared by a candidate's authorized committee is also "considered a[n in-kind] contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure,"[12] because the person financing the communication has "has provided something of value to the candidate [or] authorized committee."[13]

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8 https://www.youtube.com/watch?v=Qvp4jEMwK7w. The Response states that the second clip runs from :21 to the end of the advertisement, but the version available on YouTube shows the second clip beginning at :20.

9 Compl. at 1-2.

10 Resp. at 1.

11 52 U.S.C. § 30116(a)(7)(B)(iii) (formerly 2 U.S.C. § 441a(a)(7)(B)(iii)). For republication, the Commission has concluded that "campaign materials" include any material belonging to or emanating from a campaign. *See, e.g.*, MUR 5743 (Betty Sutton) (candidate photo obtained from campaign website); MUR 5672 (Save American Jobs) (video produced and used by candidate's campaign subsequently hosted on association's website).

12 11 C.F.R. § 109.23.

13 *See* Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 442 (Jan. 3, 2003) (explanation and justification) ("Coordinated and Independent Expenditures E&J"). As the Commission there explained, "Congress

The Commission created an exemption for grassroots activity on the internet that allows individuals to republish campaign materials available on the internet without making a contribution or expenditure.[14] The exception, however, does not exempt from the definition of "contribution" any "public communication" that involves the republication of such materials.[15] For example, a contribution would result "if an individual downloaded a campaign poster from the Internet and then paid to have the poster appear as an advertisement in the New York Times."[16]

Here, SMP republished campaign materials produced by the Braley campaign when it aired the "Oil Billionaire" advertisement, a public communication. SMP's 30-second communication contains 16 seconds of video images obtained from the Braley campaign's website. By republishing this footage, SMP made an in-kind contribution to Braley for Iowa.[17]

Nonetheless, the Respondents contend that SMP's use of the Braley committee's footage does not constitute republication because "the incidental use of publicly available video excerpts does not constitute 'republication,' particularly where, as here, the excerpts do not contain any

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has addressed republication of campaign material through [52 U.S.C. § 30116(a)(7)(B)(iii) (formerly 2 U.S.C. § 441a(a)(7)(B)(iii))] in a context where the candidate/author generally views the republication of his or her campaign materials, *even in part*, as a benefit" and "can be reasonably construed only as for the purpose of influencing an election." *Id.* at 443 (emphasis added); *see also* Coordinated Communications, 71 Fed. Reg. 33,190, 33,191 (Jun. 8, 2006) (explanation and justification), ("Coordination E&J") (communications "that disseminate, distribute, or republish campaign materials, no matter when such communications are made, can be reasonably construed only as for the purpose of influencing an election.").

[14] *See* 11 C.F.R. §§ 100.94. 100.155 (uncompensated internet activity does not result in a contribution or expenditure); Internet Communications, 71 Fed. Reg. 18,589, 18,604 (Apr. 12, 2006) (explanation and justification).

[15] A "public communication" is defined as a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank, or any other form of general political advertising. 11 C.F.R. § 100.26.

[16] *See* 71 Fed. Reg. at 18,604.

[17] *See* 11 C.F.R. § 109.23(a).

discernible message of their own, are used solely to provide background imagery, and make up less than half of the independent advertisement."[18]

As to the assertion that the materials were obtained from public sources, that argument misses the mark: the republication regulation focuses on the further dissemination of campaign materials, wherever obtained.[19] Moreover, in its 2003 rulemaking, the Commission specifically rejected a request to adopt a "public domain" exception to republication, explaining that "virtually all campaign material that could be republished" may be considered in the public domain, and therefore such an exception could "swallow the rule."[20]

Similarly, the Commission has previously determined that materials are republished under the Act even when the value of the republication is *de minimis* or the republished portion is an incidental part of the communication.[21] In such cases, the *de minimis* or incidental nature of the republication is considered in determining the appropriate Commission response to the violation, not whether a violation has occurred.

As to the argument that there is no republication here because the excerpts are "background images, 'incorporated into a communication in which [the respondent] add[ed] its

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18 Resp. at 3.

19 *See, e.g.*, MUR 5743 (Betty Sutton) (candidate photo obtained from publicly available campaign website); MUR 5672 (Save American Jobs) (video produced and used by candidate's campaign subsequently hosted on association's website); MUR 5996 (Tim Bee) (candidate photo obtained from candidate's publicly available website). Further, the "publicly available source" safe harbor applies to whether republished campaign materials constitutes a coordinated communication, *see* 11 C.F.R. § 109.21(d)(2), (d)(3), not whether campaign material was republished under 11 C.F.R. § 109.23.

20 Coordination and Independent Expenditures E&J, 68 Fed. Reg. at 442-43.

21 *See* MUR 5743 (Betty Sutton) (Commission admonished a committee after determining that a republished candidate photo was incidental and likely *de minimis* value); MUR 5996 (Tim Bee) (Commission exercised prosecutorial discretion to dismiss the allegation that a group republished photo of a candidate that comprised two seconds of a 30 second ad, and was downloaded at no charge from candidate's publicly available website).

own text, graphics, audio, and narration to create its own message,"[22] virtually *any* subsequent republication of campaign material by a third party may arguably constitute that republisher's "own message." Thus, to construe the Act and regulations so narrowly would render republication a nullity. Indeed, the Commission rejected an analogous "fair use" proposal that would permit republication of "limited portions of campaign materials *for analysis and other uses*" — again, reasoning that such an approach "could swallow the rule."[23]

Nor do the facts presented here satisfy the regulatory exception for briefly quoted materials. SMP used 16 seconds of Braley's own campaign footage in an advertisement that was only 30 seconds long, slightly more than half the duration of the advertisement, and all of the video footage of Braley, a core component of the presentation, came entirely from Braley for Iowa's previously existing campaign materials. In this case, the Commission must read the exception for briefly quoted material in a manner consistent with the Act's mandate that circulating a candidate's "written, graphic, or other form of campaign materials" — even "in part" — constitutes a benefit to the campaign and thus an actionable republication of campaign materials.[24]

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[22] Resp. at 5 (quoting Statement of Reasons, Comm'rs. Hunter and Petersen at 1, MURs 6617, 6667 (Christie Vilsack for Iowa, *et al.*)). SMP relies for its argument on the Commission's treatment of republication in MURs 5879 (Democratic Congressional Campaign Comm.) and 6357 (American Crossroads). *See* Resp. at 4-5. The Commission was equally divided whether to conciliate in MUR 5879 or to find reason to believe in MUR 6357 on a republication theory. *See* Statement of Reasons, Comm'rs. Weintraub, Bauerly and Walther, MUR 6357 (American Crossroads), Statement of Reasons, Comm'rs. Hunter, McGahn and Petersen, MUR 6357 (American Crossroads).

[23] Coordination and Independent Expenditures E&J, 68 Fed. Reg. at 443 (emphasis added).

[24] 52 U.S.C. § 30116(a)(7)(B)(iii) (formerly 2 U.S.C. § 441a(a)(7)(B)(iii)); Coordination and Independent Expenditures E&J, 68 Fed. Reg. at 442-43 (acknowledging that Congress concluded that republication even in part provides a benefit to the candidate).

For these reasons, we recommend that the Commission find reason to believe that Senate Majority PAC violated 52 U.S.C. §§ 30116(a), 30118(a),[25] and 30104(b) (formerly 2 U.S.C. §§ 441a(a), 441b(a), and 434(b)) by making an in-kind contribution as a result of republishing campaign materials and by failing to properly disclose the cost of the communication as a contribution.[26]

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[25] While section 30118(a) (formerly section 441b(a)) does not expressly prohibit a political committee from making a corporate contribution, the provision was originally enacted on the premise that committees could not accept corporate contributions at all. In enforcing the ban on corporate contributions in the context of party committees using non-federal funds for federal activities, the Commission has concluded that a political committee may violate section 30118(a) by spending or disbursing corporate funds. *See* MUR 3774 (National Republican Senatorial Committee) (finding probable cause to believe that party committee violated 2 U.S.C. §§ 441b and 441a(f) (recodified at 52 U.S.C. §§ 30118(a) and 30116(f)) and 11 C.F.R. § 102.5(a) by using prohibited and excessive funds for Get Out the Vote activities that benefited federal candidates); Conciliation Agreement ¶ V, MUR 1625 (Passaic County Democratic Party) (state party committee, which used non-federal funds to make coordinated party expenditures, admitted that it violated section 441b(a) (now section 30118) "by using funds prohibited in connection with federal elections"). Moreover, in MUR 4788 (California Democratic Party), the Commission found reason to believe that the California Democratic Party and the Democratic State Central Committee of California violated 2 U.S.C. § 441b (now 52 U.S.C. § 30118) and 11 C.F.R. § 102.5(a)(1)(i) by disbursing non-federal funds for communications expressly advocating the election of a federal candidate that would have either resulted in independent expenditures or in-kind contributions if coordinated with the candidate. The Commission ultimately filed suit against the respondents, obtained summary judgment that the state party committees violated section 441b (now section 30118) and 11 C.F.R. § 102.5 by using non-federal funds to make disbursements for advertisements constituting independent expenditures. *See FEC v. California Democratic Party*, 2004 WL 865833, Civ. No. 03-0547 (E.D. Cal. Feb. 13, 2004).

[26] The Respondent asserts that finding reason to believe in this case "would raise serious due process concerns" because the Commission has previously voted to dismiss other matters where it lacked four votes to find reason to believe a violation occurred. Resp. at 5 (citing *FCC v. Fox Television Stations, Inc.* 132 S. Ct. 2307 (2012)). We disagree. In *Fox*, the FCC deviated from its agency-adopted policy statement on indecency standards when it applied a new stricter standard, *ex post facto*, to the Fox defendants, and when it relied on a single "isolated and ambiguous statement" from a 50-year old administrative decision to support its finding of indecency against the ABC defendants. *Id.* at 13-17. Here, a finding of reason to believe would not constitute the adoption of a new standard *ex post facto*, because the Commission has not adopted by the required four affirmative votes an initial standard to be applied in similar republication cases. *See* 52 U.S.C. § 30109(a)(2) (formerly 2 U.S.C. § 437g(a)(2)); 11 C.F.R. § 111.9 (finding of reason to believe requires four affirmative votes). Furthermore, unlike the administrative penalty order that the FCC sought to enforce in *Fox* — and setting aside the Commission's administrative fines program with its attendant safeguards — the Commission does not adjudicate legal rights in enforcement matters; rather, it may conduct fact-finding proceedings and can resolve those matters only where a party voluntarily agrees to conciliate or through trial on the merits before a federal court *de novo*. *See* 5 U.S.C. § 554(a)(1) (excluding from definition of "formal adjudication" agency actions that are "subject to a subsequent trial of the law and facts *de novo* in a court" — a category that includes all Commission enforcement matters). Thus, unlike the FCC's legal adjudication of the parties' rights in *Fox*, the Commission's interpretive process and the proposed voluntary conciliation at issue here would not offend due process principles regardless of the Commission's dismissals in prior republication matters where no four-vote majority position was established. *See, e.g.*, *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 742 (1984) ("An administrative investigation adjudicates no legal rights."); *Hannah v. Larche*, 363 U.S. 420, 440-43 (1960) (recognizing that "when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not

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necessary that the full panoply of judicial procedures be used"); *Gold v. SEC*, 48 F.3d 987, 991 (7th Cir. 1995) ("Due process does not require notice, either actual or constructive, of an administrative investigation into possible violations of the securities laws."); *Jones v. Nev. Comm'n on Jud. Discipline*, 318 P.3d 1078, 1082 (Nev. 2014) (due process not required during confidential investigatory proceedings when "at each step, the Commission is required to determine whether there exists sufficient cause to proceed to the next stage or whether the complaint should be dismissed"); *Hernandez v. Bennett-Haron*, 287 P.3d 305, 310-11 (Nev. 2012) (recognizing post-*Fox* that judicial due process protections "need not be made available in proceedings that merely involve fact-finding or investigatory exercises by the government agency"); *Bartlow v. Costigan*, 974 N.E.2d 937, 947 (Ill. Ct. App. 2012) (recognizing post-*Fox* that "[due process] safeguards are not triggered unless and until an agency is adjudicating legal rights").

[27] *See* First Gen. Counsel's Rpt. at 12, MUR 6617 (Vilsack for Iowa) (recommending statutory penalty for partial republication of publicly available footage); First Gen. Counsel's Rpt. at 10-11, MUR 6667 (Friends of Cheri Bustos) (same). *But see, e.g.*, Second Gen. Counsel's Rpt. at 20, MUR 5879 (DCCC) (recommending the Commission apply formula for excessive contributions to cost of advertisement at issue, along with 50% reduction, and adding statutory penalty for the reporting violations, where the respondent obtained footage directly from campaign committee's vendor, republished footage comprising half of the 30-second ad, ad concerned same topic (a newspaper endorsement) as campaign's own ad, and both the respondent's and the campaign's ads aired simultaneously using same footage of the candidate).

IV. RECOMMENDATIONS

1. Find reason to believe that Senate Majority PAC and Rebecca Lambe in her official capacity as treasurer violated 52 U.S.C. § 30118(a) (formerly 2 U.S.C. § 441b(a)); 52 U.S.C. § 30116(a) (formerly 2 U.S.C. § 441a(a)); and 52 U.S.C. § 30104(b) (formerly 2 U.S.C. § 434(b)).

2. Approve the attached Factual and Legal Analysis.

3.

4. Approve the appropriate letters.

10/31/14
Date

BY: Daniel A. Petalas
Associate General Counsel for Enforcement

William A. Powers
Assistant General Counsel

Peter Reynolds by MP
Peter Reynolds
Attorney