



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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APR 11 2017

RE: MUR 6985
Lee Zeldin
Zeldin for Senate

Dear Messrs. Spies and Tyrrell:

On November 24, 2015, the Federal Election Commission (the "Commission") notified your clients, Lee Zeldin and Zeldin for Senate, of a complaint alleging that your clients violated the Federal Election Campaign Act of 1971, as amended (the "Act") and provided your clients with a copy of the complaint.

After reviewing the allegations contained in the complaint, your response, and publicly available information, the Commission on March 23, 2017, found reason to believe that Lee Zeldin and Zeldin for Senate violated 52 U.S.C. § 30125(e)(1)(B), a provision of the Act, in connection with receiving impermissible transfers and making impermissible transfers to state and local political committees. The Commission also found no reason to believe that your clients violated 52 U.S.C. § 30125(e)(1) in connection with alleged reciprocal contributions and journal advertisements or that Zeldin for Senate violated 52 U.S.C. §§ 30103 and 30104 by failing to register and report as a federal political committee. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's findings.

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.

In order to expedite the resolution of this matter, the Commission has authorized the Office of the General Counsel to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Probable cause conciliation is not mandated by the Act or the Commission's regulations, but is a voluntary step in the enforcement process that the Commission is offering to your clients as a

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way to resolve this matter at an early stage and without the need for briefing the issue of whether or not the Commission should find probable cause to believe that your clients violated the law. Enclosed is a conciliation agreement for your consideration

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If your clients are interested in engaging in pre-probable cause conciliation, please contact Elena Paoli, the attorney assigned to this matter, at (202) 694-1548 or epaoli@fec.gov, within seven days of receipt of this letter. During conciliation, you may submit any factual or legal materials that you believe are relevant to the resolution of this matter. Because the Commission only enters into pre-probable cause conciliation in matters that it believes have a reasonable opportunity for settlement, we may proceed to the next step in the enforcement process if a mutually acceptable conciliation agreement cannot be reached within 60 days. See 52 U.S.C. § 30109(a), 11 C.F.R. Part 111 (Subpart A). Conversely, if your clients are not interested in pre-probable cause conciliation, the Commission may conduct formal discovery in this matter or proceed to the next step in the enforcement process. Please note that once the Commission enters the next step in the enforcement process, it may decline to engage in further settlement discussions until after making a probable cause finding. Pre-probable cause conciliation, extensions of time, and other enforcement procedures and options are discussed more comprehensively in the Commission's "Guidebook for Complainants and Respondents on the FEC Enforcement Process," which is available on the Commission's website at http://www.fec.gov/em/respondent_guide.pdf.

In the meantime, this matter will remain confidential in accordance with 52 U.S.C. § 30109(a)(4)(B) and 30109(a)(12)(A) unless you notify the Commission in writing that you

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wish the matter to be made public. Please be advised that, although the Commission cannot disclose information regarding an investigation to the public, it may share information on a confidential basis with other law enforcement agencies.¹

We look forward to your response.

On behalf of the Commission,



Steven T. Walther
Chairman

Enclosures
Factual and Legal Analysis

¹ The Commission has the statutory authority to refer knowing and willful violations of the Act to the Department of Justice for potential criminal prosecution, 52 U.S.C. § 30109(a)(5)(C), and to report information regarding violations of law not within its jurisdiction to appropriate law enforcement authorities. *Id.* § 30107(a)(9).

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENTS:**

4 Lee Zeldin
5 Zeldin for Senate

6 **MUR 6975**

7 **I. INTRODUCTION**

8
9 This matter was generated by a complaint filed with the Federal Election Commission
10 alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by
11 Lee Zeldin and Zeldin for Senate.

12 **II. FACTUAL AND LEGAL ANALYSIS**

13 This matter relates to U.S. Representative Lee Zeldin, a former New York state senator,
14 and transactions involving his federal and state political committees after Zeldin announced his
15 federal candidacy in October 2013. The Complaint alleges that Zeldin for Senate ("State
16 Committee") raised and spent funds outside of the limits and source prohibitions of the Federal
17 Election Campaign Act of 1971, as amended (the "Act"), including improper transfers to Zeldin
18 for Congress ("Federal Committee") via reciprocal contributions from state and local political
19 committees and candidates, and coordinated advertisements. The Complaint also alleges that the
20 Federal Committee accepted illegal contributions from the State Committee's transfer of
21 nonfederal funds, and that the Federal Committee failed to report those contributions. Finally,
22 the Complaint alleges that the State Committee may have failed to register and report with the
23 Commission as a federal political committee based on its spending and other activities. In a joint
24 response, Lee Zeldin, the State Committee, and the Federal Committee ("Zeldin Response")
25 deny that they improperly caused State Committee funds to be transferred to the Federal
26 Committee or coordinated the ads.

1 **A. Factual Background**

2 In 2013, Lee Zeldin was a state senator in Suffolk County, New York. On October 7,
3 2013, Zeldin announced that he would seek the U.S. House seat in New York's First
4 Congressional District in 2014. The Commission received Zeldin's Statement of Candidacy on
5 October 21, 2013.¹

6 The State Committee remained active while Zeldin completed his state senate term and
7 campaigning for the U.S. House.² New York State allows state candidates to receive
8 contributions that would be impermissible under the Act; for example, a corporation can
9 contribute \$5,000 to a candidate per year.³ During the 2012 and 2014 election cycles, the
10 contribution limit for a state senate candidate was \$6,500 for the primary election and \$10,300
11 for the general election.⁴ Zeldin's State Committee accepted such contributions.⁵ In addition,
12 political committees in New York cannot terminate if funds remain in their accounts.⁶ Under
13 New York law, state officeholders who wish to terminate their committees may spend down their
14 accounts through donations to other political committees.⁷

¹ The Federal Committee's 2013 Year-End Report shows that Zeldin had accepted more than \$5,000 in contributions by October 7, 2013.

² The State Committee terminated on April 28, 2016. *See* New York State Board of Elections campaign finance disclosure website (http://www.elections.ny.gov:8080/plsql_browser/getfiler2_loaddates). It does not appear that Zeldin ever sought to be a candidate for the state senate seat in 2014.

³ *See* N.Y. ELEC. LAW § 14-116(2) (McKinney 2016).

⁴ *See id.* § 14-114(b); N.Y. COMP. CODES R. & REGS. tit. 9, § 6214.0 (2016). A candidate's family members have a separate, higher limit. *See* N.Y. ELEC. LAW § 14-114(b).

⁵ *See, e.g.*, State Committee 2014 January Periodic Report, Schedules A and B.

⁶ *See* N.Y. Comp. Codes R. & Regs. tit. 9, § 6200.2(b) (2016).

⁷ *See* New York State Board of Elections Campaign Finance Handbook at 46 (2014).

1 **B. There is Reason to Believe Zeldin and the State Committee Raised and Spent**
2 **Nonfederal Funds After Zeldin Became a Federal Candidate**

3
4 The Complaint alleges that the State Committee raised and spent funds outside the
5 federal limits and source prohibitions after Zeldin became a federal candidate on October 7,
6 2013.⁸ The State Committee's disclosure reports reveal that after that date, it received \$1,000
7 from corporate entities and contributed or transferred \$99,655 to 39 state and local political
8 committees through December 23, 2015, the date the State Committee spent its last funds.⁹

9 Pursuant to 52 U.S.C. § 30125(e)(1)(B), the Act prohibits federal candidates, federal
10 officeholders, their agents, and entities established, financed, maintained, or controlled
11 ("EFMC'd") by federal candidates or officeholders from soliciting, receiving, directing,
12 transferring, or spending funds in connection with any election other than an election for Federal
13 office unless the funds are in amounts and from sources permitted by the Act.¹⁰ Further,
14 Commission regulations prohibit the transfer of funds or assets from a candidate's campaign
15 committee for a nonfederal election to his or her principal campaign committee.¹¹

⁸ Compl. at 3, 5, 7.

⁹ The Complaint generally alleges that the State Committee accepted nonfederal funds after Zeldin became a federal candidate. Compl. at 1-2. In addition, the Complaint only identifies State Committee contributions to state and local political committees through October 28, 2014. See Compl. Att. A. The State Committee's publicly available reports provide more specific information about contributions received, and those reports revealed that the State Committee made state and local political contributions until late 2015. See State Committee 2014 and 2015 January and July Periodic Reports. When Zeldin became a federal candidate, the State Committee had at least \$130,379 cash on hand. See State Committee 2014 January Periodic Report (showing range of cash on hand between \$205,580 and \$130,379 in the July 2013-December 2013 reporting period). Roughly 48% of the State Committee's available funds as of July 1, 2013, were spent on state and local political contributions (\$99,655 divided by \$206,000 = .4837 x 100 = 48.37%).

¹⁰ 52 U.S.C. § 30125(e)(1)(B); 11 C.F.R. § 300.62. The law does not require that all four factors be present in order to support a finding of reason to believe that a violation occurred. Any one of the four factors will suffice if it provides the basis for four or more Commissioners to find reason to believe, even though some Commissioners may believe that other factors are also present.

¹¹ 11 C.F.R. § 110.3(d).

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1 Here, the State Committee—which is an entity subject to 52 U.S.C. § 30125(e)(1)(B) —
2 donated to state and local candidates and parties, while Zeldin was a federal candidate
3 (beginning in October 2013) and subsequently while he was a federal officeholder,¹² thus
4 transferring, spending, or disbursing funds in connection with a nonfederal election. Therefore,
5 any funds the State Committee transferred, spent, or disbursed after Zeldin became a federal
6 candidate or officeholder were required to be federally permissible.¹³

7 The State Committee's disclosure reports reveal that it accepted contributions from
8 corporations and from individuals in amounts greater than permitted by the Act.¹⁴ Thus, some
9 portion of the \$99,655 disbursed to state and local political committees after Zeldin became a
10 federal candidate and officeholder were funds that did not comply with the Act's amount
11 limitations and source prohibitions.

12 Notwithstanding the prohibitions of section 30125(e), the Commission has allowed a
13 state officeholder and federal candidate to donate federally permissible funds in a state account
14 to other state and local political committees if the state committee uses a "reasonable accounting

¹² See Advisory Op. 2009-26 (Coulson) at 5 ("AO 2009-26"); Advisory Op. 2007-01 (McCaskill) at 3 ("AO 2007-01"); Factual & Legal Analysis at 9, MUR 6601 (Oelrich).

¹³ Although the Act prohibits a federal candidate from spending an EFMC'd entity's funds in connection with nonfederal elections, the Act allows a simultaneous federal and state candidate to spend nonfederal funds "solely in connection with such election for State or local office." See 52 U.S.C. § 30125(e)(2). Thus, a simultaneous state candidate and federal candidate may spend otherwise impermissible funds in connection with his or her own state election. See Advisory Op. 2005-02 (Corzine) at 2, 4; Advisory Op. 2003-32 (Tenenbaum) at 5. Zeldin, however, did not appear to be a state candidate at the time the State Committee made the contributions. See note 2. Thus, he cannot take advantage of this state candidate exception.

¹⁴ See, e.g., State Committee's July 2013 and January 2014 reports showing that the State Committee received \$255,219 in total donations. Of that, approximately \$96,929 were facially permissible individual donations, and another \$14,300 came from state and local political committees with adequate permissible funds, for a total of \$111,229. The State Committee also received \$77,675 in corporate and labor union donations and \$10,700 in facially excessive individual donations, for a total of \$88,375. An additional \$11,350 came from state and local committees without adequate permissible funds; thus, the total of impermissible funds is \$99,725. Also, \$29,715 was donated by LLCs, PCs, PLLCs, and LLPs, for which information about funds used is not available. And we could not locate information regarding another \$14,550 in donations. Thus, at least 39% of the State Committee's available funds in this time period consisted of demonstrably impermissible federal funds (\$99,725 divided by \$255,219 = .3907 x 100 = 39%).

1 method” to separate permissible from impermissible funds, and it makes the contributions with
2 the permissible funds.¹⁵ We do not have information that the State Committee used such an
3 accounting method and thus only used federally permissible funds to make the contributions.

4 The State Committee also accepted \$3,150 in contributions after Zeldin became a federal
5 candidate and was no longer a state candidate.¹⁶ Of that, \$1,000 appears to be from corporations.
6 Therefore, Zeldin and the State Committee appear to have accepted \$1,000 in impermissible
7 contributions.¹⁷

8 Thus, the Commission finds reason to believe that Zeldin and the State Committee
9 violated 52 U.S.C. § 30125(e)(1)(B) by receiving and spending funds in connection with a
10 nonfederal election in amounts and from sources prohibited by the Act.

11 **C. There is no Reason to Believe Respondents Illegally Transferred Funds to the**
12 **Federal Committee Through Reciprocal Contributions**

13
14 The Complaint identifies a dozen instances after Zeldin announced his federal candidacy
15 when the State Committee made a contribution to a state or local political organization that was
16 preceded or followed by a contribution to the Federal Committee by that same organization.¹⁸
17 The Complaint alleges that the Federal Committee received \$16,651 of these reciprocal

¹⁵ Advisory Op. 2007-26 (Schock) at 3-5; Advisory Op. 2006-38 (Casey) at 4.

¹⁶ As stated above, the “state candidate” exception to 52 U.S.C. § 30125(e)(1)(B) that permits concurrent state and federal candidates to receive and spend nonfederal funds “solely in connection with *such* election for State or local office,” does not apply by its terms to a non-state candidate. *See* 52 U.S.C. § 30125(e)(2); 11 C.F.R. § 300.63 (emphasis added).

¹⁷ *Cf.* Factual & Legal Analysis at 12, MUR 6820 (Carter) (Based on prosecutorial discretion, Commission dismissed allegation that Carter’s state committee accepted \$3,250 in corporate contributions after Carter became a federal candidate; Carter was a concurrent state candidate at the time, which would have necessitated investigating whether contributions were in connection with his state election.).

¹⁸ *See* Compl. at 6-7 and Attachs. A, B.

1 contributions as part of a scheme to impermissibly transfer State Committee funds to the Federal
2 Committee.¹⁹

3 The Zeldin Respondents argue that none of the State Committee contributions were
4 earmarked or contained any “designations, instructions and encumbrances,” and that the State
5 Committee made no other express or implied instruction to the recipient committees.²⁰

6 The Commission has considered arrangements to transfer a state committee’s funds into a
7 federal committee’s account through intermediaries. In MUR 5278, candidate Gingrey admitted
8 in a state proceeding to having arranged “reciprocal contributions” for the purpose of funneling
9 state funds into his federal account.²¹ Similarly, in an advisory opinion, the Commission found
10 impermissible the requestor’s plan to use surplus state funds to make indirect transfers to the
11 requestor’s federal committee.²²

12 In contrast, the Zeldin Respondents deny that such indirect transfers occurred, and a
13 review of the available information reveals that most of the alleged reciprocal contributions do
14 not match up closely in amounts or time.²³ For example, in the first transaction identified in the
15 Complaint, the State Committee contributed \$500 to the Committee to Elect a Republican
16 Majority (“CERM”) on October 25, 2013, and CERM contributed \$1,000 to the Federal

¹⁹ Compl. at 3.

²⁰ Zeldin Resp. at 5.

²¹ Factual & Legal Analysis at 3-4, MUR 5278 (Gingrey). Gingrey acknowledged four reciprocal transfers, three of which involved the same amount of money on the same day or a few days apart. The fourth involved contributions of \$1,000 and \$500 about five months apart. *See id.* The Commission entered into a conciliation agreement with the Gingrey Committee for this violation and others, and the Committee paid a \$1,800 civil penalty.

²² Advisory Op. 1996-33 (Colantuono) (Requester sought to contribute surplus state funds to fellow state legislators who would then make “roughly equivalent” contributions to Colantuono’s federal committee).

²³ In fact, the Commission has information indicating that two organizations received no donations from the State Committee.

1 Committee on March 20, 2014, about five months later.²⁴ Similarly, the second such identified
2 transaction involves a \$100 transfer from the State Committee to the Smithtown Women's
3 Republican Club in early December 2013 and a \$500 contribution from that group to the Federal
4 Committee over seven months later.²⁵ Further, the Federal Committee, in response to requests
5 sent by the Reports Analysis Division regarding contributions from unregistered organizations,
6 including state and local political committees, has responded that the contributions were made
7 using permissible funds.

8 Thus, although the State Committee donated funds to state and local political
9 organizations that contributed to the Federal Committee, there does not appear to be a sufficient
10 factual nexus between the transactions to conclude that the State Committee was impermissibly
11 funneling its funds to the Federal Committee. Thus, the Commission finds no reason to believe
12 the State Committee improperly transferred funds to the Federal Committee through reciprocal
13 contributions.

14 **D. Journal Advertisements**

15 The Complaint alleges that the State Committee paid \$3,765 for "journal" advertisements
16 featuring Zeldin from January through October 2014 that constitute coordinated communications
17 and prohibited in-kind transfers to the Federal Committee.²⁶

18 The Zeldin Respondents state that the ads at issue are sponsored pages in booklets and
19 journals printed by various local civic, religious, and charitable organizations that typically honor
20 individuals or groups for their achievements.²⁷ They assert that the ads were placed solely in

²⁴ See Compl. at 6.

²⁵ *Id.*

²⁶ Compl. at 2-4.

²⁷ Zeldin Resp. at 2.

1 Zeldin's capacity as state senator and contain no electoral advocacy, and they deny that the ads
2 constitute coordinated communications.²⁸ The Zeldin Respondents supplied examples of such
3 ads; they contain a headline reading "Senator Lee M. Zeldin," Zeldin's photograph, his
4 congratulations or "best wishes," and his contact information. They make no reference to
5 Zeldin's status as a federal candidate and do not describe him in any manner.²⁹ One of the ads is
6 reproduced below.

²⁸ *Id.*

²⁹ *See id.* at 7-11.

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Senator Lee M. Zeldin



Congratulations to the
James V. Kavanaugh Columbiettes
and
Honorees
Rose Marie Oliveri, Barabara Kruk, Bill
Guiducci, and Lynda Zachon
~ Senator Lee Zeldin

Third Senate District
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4155 Veterans Memorial Hwy.
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Email: Zeldin@nysenate.gov
Website: www.zeldin.nysenate.gov

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2 Under Commission regulations, a communication is coordinated with a candidate, an
3 authorized committee, or agent thereof if it meets a three-pronged test: (1) payment for the
4 communication by a third party; (2) satisfaction of one of the "content" standards,³⁰ and (3)
5 satisfaction of one of the "conduct" standards.³¹

³⁰ 11 C.F.R. § 109.21(c)(1)-(5).

³¹ 11 C.F.R. § 109.21(d)(1)-(6).

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1 The ads here do not appear to be coordinated communications because they do not satisfy
2 the payment prong. The Commission has determined that an advertisement paid for by a federal
3 candidate's state committee does not constitute payment by a third party.³² Therefore, the
4 Commission finds no reason to believe that Zeldin or the State Committee violated the Act by
5 making or accepting prohibited contributions in the form of coordinated communications.

6 Also applicable here is the Act's prohibition on entities subject to section 30125(e), such
7 as Zeldin's State Committee, spending funds in connection with a federal election, including
8 funds for "federal election activity" ("FEA"), unless the funds are subject to the limitations,
9 prohibitions, and reporting requirements of the Act.³³ Section 30125(e) would thus prohibit the
10 disbursements for the journal ads by the State Committee if they qualify as FEA.³⁴ The Act
11 defines FEA to include public communications that refer to a clearly identified candidate for
12 federal office and that promote, attack, support, or oppose ("PASO") a candidate for that office,
13 regardless of whether the communication expressly advocates a vote for or against a candidate.³⁵

14 The journal ads, which ran after Zeldin declared his candidacy, clearly identify Zeldin by
15 name and photograph.³⁶ Even if they are public communications,³⁷ they do not fall within the
16 prohibitions of section 30125(e) because they do not "PASO" Zeldin.³⁸ Merely identifying a

³² See AO 2009-26 at 10; AO 2007-01 at 5; F&LA, MUR 6601 (Oelrich for Congress) at 9 n.10.

³³ See 52 U.S.C. § 30125(e)(1)(A).

³⁴ See *id.*

³⁵ 52 U.S.C. § 30101(20)(A)(iii); 11 C.F.R. § 100.24(b)(3).

³⁶ See 52 U.S.C. § 30101(18); 11 C.F.R. § 100.17; AO 2009-26 at 7.

³⁷ See 52 U.S.C. § 30101(22); 11 C.F.R. § 100.26 ("public communication" includes newspapers, magazines, and mass mailings).

³⁸ See 52 U.S.C. § 30125(e)(1)(A).

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1 Federal candidate by name and photograph does not PASO that candidate.³⁹ The journal ads do
2 not otherwise promote, attack, support, or oppose any candidate. Thus, the journal ads do not
3 appear to be in connection with a federal election and did not have to be paid for with federally
4 permissible funds.⁴⁰ Therefore, the Commission finds no reason to believe that Zeldin or the
5 State Committee violated section 30125(e) by spending nonfederal funds on journal ads.

6 Finally, the Complaint alleges that the State Committee's federal expenditures require
7 that it register and report as a federal political committee.⁴¹ This allegation appears to
8 correspond to the State Committee's purchase of journal ads. Based on the analysis above, the
9 Commission finds no reason to believe that the State Committee violated 52 U.S.C. §§ 30103
10 and 30104 by failing to register and report as a federal political committee.

³⁹ See AO 2009-26 at 7.

⁴⁰ Contrary to the Response's assertion and as noted previously, the exception at section 30125(f)(2) does not apply to Zeldin because he was not a state candidate. See AO 2007-1 at 5.

⁴¹ See Compl. at 5.