

February 5, 2020

Sent via Email

Federal Election Commission
 Office of General Counsel
 Attn: Amanda Andrade
 1052 First Street NE
 Washington, DC 20463

RE: MUR 7280

Dear Ms. Andrade:

On behalf of Derek Utley, please accept this response in regard to MUR 7280. The Office of General Counsel (“OGC”) has falsely alleged Mr. Utley is the “unknown respondent” and owner of a Facebook Page that it alleges violated the Federal Election Campaign Act of 1971, as amended (“the Act”), by failing to report independent expenditures to the Commission and include disclaimers on these paid advertisements.¹ Mr. Utley requests the Federal Election Commission (“Commission”) refrain from taking any further action as he is not, in fact, the unknown respondent, a fact the Commission could have easily ascertained, but did not.

Background

The complaint filed in this matter provides and relies on limited and speculative information about an unknown respondent who is allegedly the owner of the “Trump 2020” Facebook page (“the Page”). The complaint specifically relies on a news report published in September of 2017, which claims the Page has a single “owner” and to the extent any identifiable information is provided about the unknown respondent, it is that they are “a Wisconsin businessman.”² The complaint alleges this anonymous owner is responsible for at least \$34,100 to promote various pro-Trump Facebook pages.

Subsequent to receiving the complaint, on July 25, 2019, the Commission found reason to believe the unknown respondent violated the Act, without having considered any contrary evidence or argumentation, and directed the OGC to further investigate these violations.

The Commission authorized the OGC “to conduct an investigation concerning the source and cost of the Facebook advertisements in question.” The OGC has now provided notice to Mr. Utley that he may have violated the Act. The notice stated that during this investigation, “[OGC] obtained information indicating that [Mr. Utley] made payments on behalf of the “Trump 2020” Facebook Page to place advertisements, and that [Mr. Utley] may be the Unknown Respondent to which the Commission made findings.”³

Discussion*Investigation of the Unknown Respondent*

The Commission may authorize an investigation “in any case in which the Commission finds reason to believe that a violation of a statute or regulation over which the Commission has jurisdiction has occurred

¹ 52 U.S.C. §§ 30104(b)(4)(H)(iii) and (c), 30120(a).

² Alex Thompson and Noah Kulwin, *No one is tracking the illegal political ads in your Facebook feed*, VICE NEWS (Sept. 25, 2017), https://www.vice.com/en_us/article/595k78/facebook-political-ads.

³ FEC Notice to Derek Utley, Jan. 6, 2020.

or is about to occur.”⁴ “The investigation may include, but is not limited to, field investigations, audits, and other methods of information gathering.”⁵ Among the other methods of information gathering, “the Commission may authorize the Chair or Vice Chair to issue subpoenas duces tecum for the production of documentary or other tangible evidence in connection with a case.”⁶ The Commission is empowered “to conduct investigations and hearings expeditiously . . .”⁷

The OGC’s investigation to determine the identity of the unknown respondent should have included issuing a subpoena to Facebook. Had it done so, the Commission would have complete and absolute knowledge of the identity of the unknown respondent. Instead, the OGC appears to have pursued other, informal and inaccurate, methods of investigation and acted upon what presumably amounts to hearsay or otherwise incorrect evidence. This resulted in the OGC falsely accusing an American citizen—one exercising their right to engage in political speech—of violating campaign finance laws to the tune of over thirty-four thousand dollars.

Mr. Utley is not the “unknown respondent,” nor is he the owner of the Page. To the best of Mr. Utley’s knowledge, the owner of the Page is [REDACTED] who resides at Louisville, Kentucky 40216. Mr. Utley was invited to be an administrator on the Page by [REDACTED] on or about May or June of 2017 and remained an administrator until June 29, 2019. While acting as a page administrator, Mr. Utley boosted shared posts that mostly promoted other Facebook group pages and their content, different events, posts about candidates other than President Donald J. Trump running for office, and very few posts containing original content. In 2017, Mr. Utley spent approximately \$433.00 on boosting such posts. In 2018, Mr. Utley spent \$50.00 on boosting one such post. In all, during his time as a page administrator, Mr. Utley spent a total of \$483.00 on boosting posts.

The Act requires every person who “makes independent expenditures in an aggregate amount or value in excess of \$250.00 during a calendar year” shall file a statement with the Commission containing information about the expenditure.⁸ If the posts Mr. Utley paid to promote were independent expenditures, at worst, Mr. Utley failed to report such expenditures in 2017 when the amount expended was \$433.00. This is 1.3% of the amount alleged in the complaint that was spent by the Unknown Respondent.

Moreover, to the extent the complaint alleges the Page may be an unregistered political committee failing to report independent expenditures and include proper disclaimers, or that the Page would be a political committee because it consists of more than one person participating and engaging in expenditures, only that entity and its Treasurer would be responsible for any reporting obligations related to any contributions or disbursements and potential independent expenditures, not Mr. Utley.⁹

The Facebook Page Posts

A communication expressly advocates when it uses phrases like those contained in 11 C.F.R. § 100.22(a), including those accompanied by a listing or photos of clearly identified candidates, or communications of campaign slogans or individual words, “which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, advertisements, etc. which say ‘Nixon’s the One,’ ‘Carter ’76,’ ‘Reagan/Bush,’ or ‘Mondale!’”¹⁰

⁴ 11 C.F.R. § 111.10(a); 52 U.S.C. § 30109(a)(2).

⁵ 11 C.F.R. §111.10(b); 52 U.S.C. § 30109(a)(2).

⁶ 11 C.F.R. § 111.12(a); 52 U.S.C. § 30107(a)(3), (4).

⁷ 52 U.S.C. § 30107.

⁸ *Id.* § 30104(c)(1).

⁹ *Id.* § 30104(a).

¹⁰ 11 C.F.R. § 100.22(a).

The Commission has determined each post by the Page contains express advocacy because, as shown below, each post includes a “message header,” which is the Page name and a picture of Trump, and therefore each post “has no other reasonable meaning in this context than to urge the election of Trump.”¹¹



This is not the full context of which the communication should be evaluated. This “message header” is not content an individual with access and permission to publish content on behalf of the Page is choosing to include as part of their intended message or communication to disseminate. It is a function of having a Facebook Page and Facebook requiring a name. As for any Facebook Page, the Page name and image automatically generate and associate with each post made by the Page, whether the Page is posting original content or a shared post or link, so other users can identify the source a communication or any action on the page. “In context,”¹² the full content of the communication to evaluate on Facebook should be inclusive of the entire post, which includes the actual message and content generated by the user and intended to be disseminated in the post.

The Commission concluded that because all the Page’s posts expressly advocate Trump’s re-election, the costs for promoting all of Trump 2020’s posts on Facebook are independent expenditures.¹³ This would require the following posts shared by the Page, if boosted, to be reportable independent expenditures at the point a monetary threshold is met, because these posts have no other reasonable meaning than to urge the re-election of Trump.



¹¹ FEC Factual and Legal Analysis, at 4.

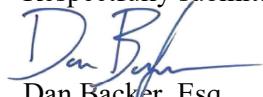
¹² 11 C.F.R. § 100.22(a).

¹³ FEC Factual and Legal Analysis, at 5.

Conclusion

The Commission, through its Office of General Counsel, should have exercised due diligence in this process and conducted this investigation in a responsible and timely manner. The Commission could have easily used its investigative power to ascertain the identity of the unknown respondent. It chose not to in this matter. Worse, the Commission engaged in baseless harassment of at least one American citizen engaged in political speech when it clearly could have avoided doing so through even the least bit of diligence. Mr. Utley, like any reasonable person not steeped in the deep nuance of campaign finance law, was unaware that his activities on Facebook, which included nominal small dollar spending to boost posts over the course of two years, would require him to report any information to the Commission. Mr. Utley has provided the Commission with the name of the individual who is the Trump 2020 Facebook Page owner. The Commission should dismiss this matter as it relates to Mr. Utley and apologize for the cost he incurred due to the Commissions lack of diligence.

Respectfully submitted,



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