



FEDERAL ELECTION COMMISSION
Washington, DC

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	
Friends of Chris McDaniel and Richard Conrad)	MUR 7354
in his official capacity as treasurer)	
Chris McDaniel)	
Remember Mississippi and Tommy Barnett)	
in his official capacity as treasurer)	
)	
)	

**STATEMENT OF REASONS OF VICE CHAIR ALLEN DICKERSON AND
COMMISSIONERS SEAN J. COOKSEY AND JAMES E. “TREY” TRAINOR III**

This Matter arose from a Complaint alleging that 2018 U.S. Senate candidate Chris McDaniel and his authorized committee, Friends of Chris McDaniel (the “McDaniel Committee”), and Remember Mississippi, an independent expenditure-only political committee, violated the Federal Election Campaign Act of 1971, as amended (the “Act”) in various ways. Specifically, the Complaint alleges (1) that McDaniel failed to timely file a Statement of Candidacy and the McDaniel Committee failed to timely file a Statement of Organization and 2017 Year-End Report; (2) that McDaniel violated the Act’s soft money provisions by establishing, financing, maintaining, or controlling Remember Mississippi; (3) that Remember Mississippi made, and the McDaniel Committee accepted, excessive, corporate, and unreported in-kind contributions by organizing and paying for events that should have been characterized as McDaniel campaign events, rather than fundraising events for Remember Mississippi; and (4) that, after making expenditures for those events, Remember Mississippi lost its independent expenditure-only status and violated the Act by continuing to accept contributions that did not comply with federal limits and source prohibitions.¹

Our Office of General Counsel (“OGC”) recommended that we find reason to believe a violation of the Act occurred with respect to the first, third, and fourth allegations detailed above.² OGC also recommended that we authorize an investigation into the relationship between Remember Mississippi, McDaniel, the McDaniel Committee, and other relevant parties to determine whether they had violated the Act’s soft money provisions.³ There are several reasons why we believe the current record did not warrant a reason to believe finding in this Matter.

¹ Compl. at 23–29, MUR 7354 (Friends of Chris McDaniel, *et al.*).

² First Gen. Counsel’s Rpt. at 27, MUR 7354.

³ *Id.*

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First, with respect to the allegations that McDaniel and his authorized committee failed to timely register with and report to the Commission, the Complainant engages in *post hoc* rationalization by using McDaniel’s eventual candidacy for federal office as a starting point and then attempting to bootstrap McDaniel into the mandates of the Act. Confining our analysis to the evidence actually before us, however, we do not believe there is sufficient support for the Complaint’s assertion that McDaniel had made the private determination to run for federal office or exceeded \$5,000 in “testing the waters” expenses prior to his formal declaration of candidacy for U.S. Senate.

Second, as OGC notes,⁴ the record before us does not support the reasonable inference that McDaniel was involved with establishing, financing, maintaining, or controlling Remember Mississippi, either at its outset or while McDaniel was a candidate for federal office.

Third, with respect to the allegation that the three Remember Mississippi events at issue in this Matter were McDaniel campaign events, rather than super PAC fundraising events, the Complaint fails to acknowledge language in the event invitations that clearly qualifies them as “solicitations” under our regulatory provisions relating to non-federal fundraising. Because Remember Mississippi solicited funds for itself in its publicity for the events, the events themselves qualified as non-federal fundraising events for Remember Mississippi within the meaning of the Act—not McDaniel campaign events. As such, McDaniel’s participation in those events is governed by 11 C.F.R. § 300.64, and Remember Mississippi’s expenses are properly characterized as expenditures in furtherance of its own fundraising efforts—not in-kind contributions to the McDaniel campaign.

I. FACTUAL BACKGROUND

At the time of the events at issue in this Matter, respondent Chris McDaniel was a sitting member of the Mississippi state senate. On February 28, 2018, he formally announced that he would challenge incumbent Senator Roger Wicker for the Republican nomination in the 2018 U.S. Senate election in Mississippi.⁵ Shortly after, on March 5, 2018, McDaniel filed a Statement of Candidacy with the Commission, and the McDaniel Committee filed a Statement of Organization.⁶ On that same day, Mississippi’s other sitting Senator at the time, the late Senator Thad Cochran, announced his resignation from office, effective April 1, 2018.⁷ On March 14, 2018, McDaniel announced that he planned on switching U.S. Senate races to run for Cochran’s seat in the November 2018 nonpartisan blanket primary, rather than Wicker’s seat.⁸ On March 21, 2018, then-Mississippi Governor Phil Bryant appointed Cindy Hyde-Smith to fill Cochran’s seat.⁹ In April 2018, the McDaniel Committee filed its

⁴ *Id.* at 26.

⁵ *Id.* at 6 (citing Remember Mississippi Resp. at 4).

⁶ *Id.* at 6–7.

⁷ *Senator Thad Cochran Announces Retirement, Opening Another G.O.P. Seat*, N.Y. TIMES (March 5, 2018), available at <https://www.nytimes.com/2018/03/05/us/politics/thad-cochran-retire-senate.html>.

⁸ First Gen. Counsel’s Rpt. at 9, MUR 7354 (citing Compl. at 11, MUR 7354).

⁹ *Cindy Hyde-Smith Gets Appointment to Mississippi Senate Seat*, ROLL CALL (March 21, 2018), available at <https://www.rollcall.com/2018/03/21/cindy-hyde-smith-gets-appointment-to-mississippi-senate-seat/>.

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initial quarterly disclosure, which did not include any disbursements for “testing the waters” activity.¹⁰ On November 6, 2018, McDaniel failed to advance in the nonpartisan blanket primary to replace Senator Hyde-Smith, and on February 28, 2019, he announced that he would run as an incumbent for the Mississippi state senate.¹¹ McDaniel ultimately won re-election to the Mississippi state senate on November 5, 2019.

Remember Mississippi filed a Statement of Organization with the Commission on May 24, 2017 and indicated that it would operate as an independent expenditure-only committee, or “super PAC.”¹² Susan Perkins, a legal assistant to McDaniel at his law firm, served as Remember Mississippi’s first treasurer,¹³ but according to Commission records and Perkins’ sworn statement, she departed her position on October 17, 2017 and was replaced by current treasurer Tommy Barnett.¹⁴ Additionally, Melanie Sojourner, McDaniel’s campaign manager during a previous run for U.S. Senate in 2014, served as Remember Mississippi’s founding director.¹⁵ Both Perkins and Sojourner provided the Commission with affidavits stating that “[a]t no point did [either person] receive direction from [State] Senator McDaniel about the foundation of [Remember Mississippi].”¹⁶ Perkins and Sojourner also affirmed that at no point during their respective tenures with Remember Mississippi “was Chris McDaniel a candidate for federal office,”¹⁷ and confirmed that they stopped performing services for Remember Mississippi on October 17, 2017.¹⁸

Several months later, in March 2018, Remember Mississippi held three events—in Tupelo, Ellisville, and Gulfport, Mississippi—at which McDaniel (by then, a declared candidate for U.S. Senate) was billed on the invitation as a “special guest.”¹⁹ All three invitations contained a disclaimer stating that the communication was “Paid for by Remember Mississippi PAC [and] not authorized by any candidate or candidate’s committee,” and were distributed through Eventbrite, an event management and ticketing website.²⁰ The Eventbrite invitation for all three events listed the cost of each event as “\$0–\$25,” and contained a “details” page titled “Help us Help Chris-Reserved Seating,” the phrase “\$25.00 + \$3.45 fee[.]” a paragraph regarding federal contributions, and a request to “[p]lease help ... defray the cost of this event and spread the word about Chris McDaniel. Your donation helps us spread the word about Chris McDaniel and his run for US Senate!”²¹ McDaniel’s official Mississippi State Senate Facebook page publicized his appearance at all three events in the

¹⁰ Friends of Chris McDaniel Amended 2018 April Quarterly Report at 6 (July 14, 2018); Friends of Chris McDaniel 2018 April Quarterly Report at 32 (Apr. 13, 2018).

¹¹ *McDaniel won’t seek statewide office in Mississippi in 2019*, AP (Feb. 28, 2019), *available at* <https://apnews.com/article/052492d88cfb4df5b169eadfc5b8e>.

¹² Remember Mississippi Statement of Organization (May 24, 2017).

¹³ *Id.*

¹⁴ Remember Mississippi Amended Statement of Organization (Oct. 17, 2017) (replacing Perkins as treasurer).

¹⁵ Remember Mississippi Resp.; Sojourner Decl. ¶ 1 (May 7, 2018).

¹⁶ Sojourner Decl. ¶ 5; Perkins Decl. ¶ 4.

¹⁷ Sojourner Decl. ¶ 7; Perkins Decl. ¶ 6.

¹⁸ Perkins Decl. ¶ 5; Sojourner Decl. ¶ 6.

¹⁹ First Gen. Counsel’s Rpt. at 7–9, MUR 7354.

²⁰ *Id.*

²¹ *Id.* at 6–7, 10 (citing Remember Mississippi Resp. Ex. G.).

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days before they occurred,²² but the record does not contain information showing that McDaniel personally solicited contributions either for his campaign or for Remember Mississippi in advance of the events, or at the events themselves.

II. APPLICABLE LAW

A. Candidate Status

Under the Act, an individual becomes a “candidate” if he or she receives contributions or makes expenditures exceeding \$5,000, or consents to another person receiving contributions or making expenditures exceeding \$5,000 on their behalf.²³ Under our regulations, although an individual may raise or spend more than \$5,000 on “testing the waters” activity without qualifying as a candidate, the testing-the-waters exemption does not apply “to individuals who have decided to become candidates.”²⁴

With respect to this last point, the Commission has advised that an individual who has raised or spent more than \$5,000 on testing-the-waters activities would become a candidate when he or she makes the private determination that he or she will run for federal office.²⁵ To determine whether an individual has made this private determination, Commission regulations set forth a non-exhaustive list of conduct and circumstances that may indicate that an individual has decided to become a candidate, including the individual making or authorizing statements referring to himself or herself as a candidate; engaging in political advertising to publicize his or her intention to run for office; taking action to qualify for the ballot; conducting activities in close proximity to an election or over a long period of time;²⁶ or engaging in activities aimed at “amassing” campaign funds.²⁷ Where those examples do not apply, we have distinguished between activities “directed to an evaluation of the feasibility of one’s candidacy” and activities “signifying that a private decision to become a candidate has been made” or conducted “as a means of seeking some affirmation or reinforcement of a private decision ... to be a candidate.”²⁸

B. Soft Money Prohibition

The Act prohibits an entity “directly or indirectly established, financed, maintained, or controlled [“EFMC’d”] by or acting on behalf of” a federal candidate, officeholder, or their

²² *Id.* at 10.

²³ 52 U.S.C. § 30101(2)(A); 11 C.F.R. § 100.3(a).

²⁴ 11 C.F.R. §§ 100.72(b), 100.131(b); *see also* Advisory Op. 1981-32 (Askew) at 4 (explaining that the regulation distinguishes “activities directed to an evaluation of the feasibility of one’s candidacy ... from conduct signifying that a private decision to become a candidate has been made”).

²⁵ Advisory Op. 2015-09 (Senate Majority PAC, *et al.*) at 5; *accord* Advisory Op. 1981-32 (Askew) at 4 (explaining that the regulation distinguishes “activities directed to an evaluation of the feasibility of one’s candidacy ... from conduct signifying that a private decision to become a candidate has been made”); Advisory Op. 1982-03 at 3 (Cranston).

²⁶ The Commission has advised that there is no specific time limit for such activities, and the length of time spent testing the waters is only one factor in determining whether an individual becomes a candidate. Advisory Op. 2015-09 at 6 (Senate Majority PAC, *et al.*).

²⁷ 11 C.F.R. §§ 100.72(b); 100.131(b).

²⁸ Advisory Op. 1981-32 (Askew) at 4.

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agent from soliciting, receiving, directing, transferring, or spending “soft money”—that is, funds raised outside the federal limits and source prohibitions—in connection with an election.²⁹ For the purposes of this analysis, an “agent” of a candidate or officeholder is “any person who has actual authority, either express or implied” “to solicit, receive, direct, transfer, or spend funds in connection with any election.”³⁰

To determine whether a candidate, federal officeholder, or their agent EFMC’d an entity, the Commission considers a non-exhaustive list of ten factors set forth in 11 C.F.R. § 300.2(c)(2)(i)-(x), which “must be examined in the context of the overall relationship between [the candidate or officeholder] and the entity.” Although “common or overlapping employees” between a candidate or officeholder and the entity are one factor that may indicate whether a candidate or officeholder controls a soft money entity, the Commission has previously found that “more than the mere fact of such informal, ongoing relationships ... is necessary,” and that “while former employers and colleagues may exercise influence, influence is not necessarily control.”³¹

C. Federal Candidates and Non-Federal Fundraising Events

The Act and Commission regulations prohibit federal candidates and officeholders from soliciting funds in connection with an election for federal office, including funds for any federal election activity, unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act.³² For the purposes of the Act’s provisions relating to non-federal fundraising and fundraising events, “solicitation” is defined by our regulations as “an oral or written communication that, construed as reasonably understood in the context in which it is made, contains a clear message asking, requesting, or recommending that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value.”³³

Federal candidates and officeholders may participate in fundraising events at which federally non-compliant funds are solicited and may allow their name and likeness to be used in connection with publicity for those events, but their participation is governed by Commission regulations at 11 C.F.R. § 300.64. Specifically, federal candidates and officeholders are permitted to attend, speak, or be a featured guest at fundraising events in connection with an election for federal office, but must limit any solicitations to amounts and sources permissible under the Act.³⁴ Further, a federal candidate or officeholder or his or her agent may approve, authorize, agree to, or consent to the use of the federal candidate’s or officeholder’s name in publicity for a fundraiser that contains a solicitation for funds outside the Act’s amount limitations and source prohibitions only if: (1) the candidate is identified,

²⁹ 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. §§ 300.60, 300.61.

³⁰ 111 C.F.R. § 300.2(b)(3).

³¹ First Gen. Counsel’s Rpt. at 18 & Certification (Apr. 3, 2003), MUR 5338 (The Leadership Forum, *et al.*) (emphasis added) (continuing, “In any given instance, these relationships may fall somewhere along a spectrum. At one end of the spectrum is a complete ‘firewall’ of no contacts whatsoever [A]t the other end of the spectrum[] is influence by one group upon the other that is so regular and pervasive that it amounts to control ...”).

³² 52 U.S.C. § 30125(e)(1)(A); 11 C.F.R. §§ 300.60, 300.61.

³³ 11 C.F.R. § 300.2(m).

³⁴ 11 C.F.R. § 300.64(b).

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inter alia, as a featured or special guest or in a manner not related to fundraising; and (2) the publicity includes a clear and conspicuous disclaimer that the solicitation is not being made by the federal candidate or officeholder.³⁵

III. LEGAL ANALYSIS

A. McDaniel's Status as a Candidate

To qualify as a candidate under the Act, an individual or their agent must receive contributions or make expenditures exceeding \$5,000, *or* the individual must make the private decision to run for federal office and spend more than \$5,000 on testing-the-waters activity.³⁶ Here, however, the record does not contain information satisfying either of these tests. The factual information in the Complaint relating to the timing of McDaniel's candidacy is limited to conclusory statements about McDaniel's intentions based on cobbled-together quotations and citations from news articles, unsupported allegations regarding McDaniel's connection with Remember Mississippi, and assertions based on a misreading of our regulations governing testing-the-waters activity. In short, we have not been presented with sufficient evidence that there is reason to believe McDaniel's conduct and activities indicated he had decided to become a candidate earlier than his formal announcement.

First, to support the contention that McDaniel became a candidate for U.S. Senate sometime in 2017 (prior to his formal declaration of candidacy in February 2018), the Complaint relies heavily upon a number of media reports recounting McDaniel's discussions with persons who purportedly advised him on whether to run for state or federal office.³⁷ But, even if these reports are accurate, the fact that a sitting state officeholder spoke or met with potential advisors and supporters about the possibility of running for state or federal office does not, standing alone, imply that he had decided to become a federal candidate, and can just as easily be explained by other motivations, including his exploration of a run for state office.³⁸ The Complaint also asserts that the existence of McDaniel's relationships with donors who contributed to Remember Mississippi (and, later, the McDaniel campaign)³⁹ means that McDaniel consented to the PAC raising or spending funds exceeding \$5,000 on his behalf.⁴⁰ However, the only information we have indicating that McDaniel was in a position to EFMC Remember Mississippi or direct its activities is circumstantial, and involves relationships that do not entail actual authority. As we detail in the next section of

³⁵ 11 C.F.R. § 300.64(c)(3)(i)(A) and (B); *see also* Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, 75 Fed. Reg. 24375, 24379 (May 5, 2010) (explaining that section 110.11(c) further informs the clear and conspicuous standard).

³⁶ 52 U.S.C. § 30101(2); 11 C.F.R. §§ 100.72(b), 100.131(b); Advisory Op. 2015-09 (Senate Majority PAC, *et al.*) at 5 (an individual who has raised or spent more than \$5000 on testing-the-waters activities becomes a candidate when he or she makes a private determination that he or she will run for federal office).

³⁷ Compl. at 3–4, MUR 7354.

³⁸ *See, e.g.*, Advisory Op. 1981-32 (Askew) at 4 (explaining that “speaking to political and non-political groups on a variety of public issues and meeting with opinion makers and others interested in public affairs for the purpose of determining whether potential political support exists for a national campaign” would qualify as exempt under 11 C.F.R. § 100.72(b)(1)).

³⁹ Compl. at 4, MUR 7354.

⁴⁰ *Id.* at 5.

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this Statement, this interpretation of our EFMC rules relies on a faulty theory of agency.⁴¹ Because we lack information supporting a finding of reason to believe that McDaniel established, financed, maintained, or controlled Remember Mississippi, McDaniel's purported awareness that wealthy individuals had pledged to support a potential state or federal candidacy is insufficient to infer that the PAC was raising or spending funds at his direction, or had "amassed" campaign funds within the meaning of our regulations governing testing-the-waters activity.⁴²

OGC argues that McDaniel's statement in November 2017 that he had "come to peace" with running for either a [state or federal] seat (without saying which seat) is clear evidence that he had made the private decision to run for federal office at that time, provided one contextualizes it with his months-later announcement that he would run for Senate.⁴³ This is a very thin evidentiary reed. First, we disagree with the supposed clarity of the statement. It is not clear what McDaniel meant, and the statement is perhaps best read as a politic non-answer, especially in context. After all, he referenced two separate offices, and "coming to peace" with something implies wistful surrender, not enthusiastic certainty.⁴⁴ Moreover, OGC's argument smacks of *post hoc* reasoning—McDaniel must have intended to run for the Senate because he eventually ran for the Senate. This says nothing about *when* he made that determination, which is the question here. Finally, our regulations governing testing-the-waters activity only state that a person's oral or written statements referring to "him or her as a candidate for a *particular* office" (emphasis added) are indicia that someone has decided to become a candidate.⁴⁵ A 50-50 chance, in other words, is not enough.⁴⁶

This Matter brings into sharp relief the problems that inevitably arise due to the lack of an objective test for candidate status. By shifting the weight of the candidacy analysis onto an untenably vague "private decision" determination, complainants in this Matter and other matters are empowered to cherry-pick quotations, news reports, and hearsay to support their position that an eventual candidate necessarily reached the private conclusion to run for federal office before making that determination public. However, even given the most unfavorable reading of the evidence before us in this Matter, we are still only able to conclude that there is—at best—a 50-50 chance that McDaniel had decided to run for federal office in 2017. That is insufficient under our governing regulation.

⁴¹ See *infra*. n.47–52 and accompanying text.

⁴² See *infra*. n.57.

⁴³ Compl. at 3, MUR 7354.

⁴⁴ The *Clarion Ledger*, which originally published this statement, does not appear to have understood it to mean McDaniel would run for the Senate. The relevant report is accompanied by a video entitled "State Senator McDaniel for Lieutenant Governor?" and concludes with a discussion of other potential candidates for that office. Geoff Pender, *Sen. Chris McDaniel 'at peace' with run for higher office, but he won't say which one yet*, MISS. CLARION LEDGER, available at <https://www.clarionledger.com/story/news/politics/2017/11/13/chris-mcdaniel-bannon-roger-wicker-trump-senate-gop-primary/859571001/>.

⁴⁵ 11 C.F.R. § 100.72(b)(3).

⁴⁶ See, e.g., Statement of Reasons of Vice Chair Peterson and Comm'rs Hunter, McGahn, and Weintraub, MUR 5934 (Fred D. Thompson, *et al.*) (a candidate's intentionally ambiguous statements regarding their decision-making process are not, on their own, sufficient to establish a decision to run for federal office).

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B. Remember Mississippi and EFMC

Although OGC recommended that the Commission take no action at this time with respect to the Complaint’s allegation that McDaniel EFMC’d Remember Mississippi, we were asked to authorize an investigation into “the relationship between Remember PAC, McDaniel, the McDaniel Committee, and employees or colleagues of McDaniel’s who also worked for Remember PAC.”⁴⁷ We declined to approve this wide-ranging investigation because the allegation that McDaniel EFMC’d Remember Mississippi appears to rest on a theory of apparent (as opposed to express or implied) authority—*e.g.*, that because McDaniel was connected to individuals who were affiliated with Remember Mississippi at its founding, and because he had relationships with wealthy individuals who later contributed to his campaign and Remember Mississippi, there is reason to believe that he consented to the PAC raising funds or making expenditures on his behalf.

As noted previously, our regulations define “agent” as “any person “who has *actual authority, either express or implied*” (emphasis added) to “solicit, receive, direct, transfer, or spend funds in connection with any election.”⁴⁸ The Commission has rejected calls to incorporate *apparent* authority into the definition of “agent,” stating that “apparent authority to do an act is created as to a third party by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third party to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.”⁴⁹ At the outset, there is no indication here that any of the individuals mentioned in the Complaint “purported to act” for McDaniel, and, as we explain below, several expressly disclaimed agency. More fundamentally, implied authority should not be confused with apparent authority; a principal “may not be held liable, under an implied actual authority theory, unless the principal’s own conduct reasonably causes the agent to believe that he or she had authority.”⁵⁰ Therefore, “agency” under actual authority can only be determined by the instructions (express or implied) given directly by the principal to the agent, and even where an individual is an agent, a principal is only liable for the agent’s actions when the agent acts on behalf of the principal.⁵¹ This definition of “agent” has withstood a challenge in federal court as well as subsequent re-examination in a 2005–2006 rulemaking.⁵²

The Complaint and OGC imply that because Perkins worked part-time at McDaniel’s law firm at the time of Remember Mississippi’s founding, and because Sojourner had served as his campaign treasurer in a previous race, either or both women served as McDaniel’s agents for the purpose of their work with Remember Mississippi.⁵³ But the affidavits provided to the Commission squarely counter the assertion that McDaniel directly or

⁴⁷ First Gen. Counsel’s Rpt. at 26, MUR 7354.

⁴⁸ 11 C.F.R. § 300.2(b).

⁴⁹ 67 Fed. Reg. at 49082 (quoting Restatement (Second) of Agency, 27).

⁵⁰ *Id.* at 49083.

⁵¹ *Id.*

⁵² *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005); Definitions of “Agent” for BCRA Regulations on Non-Federal Funds or Soft Money and Coordinated and Independent Expenditures, 71 Fed. Reg. 4975, 4979 (Jan. 31, 2006) (“BCRA does not prohibit individuals who are agents of candidates ... from also raising non-Federal funds for other political parties and outside groups.”).

⁵³ Compl. at 2–3 and 27, MUR 7354; First Gen. Counsel’s Rpt. at 26, MUR 7354.

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indirectly established the entity, or that he directed or controlled its activities at its outset.⁵⁴ And as OGC has noted in other Matters, the fact that a candidate has a relationship with a person who is involved with a soft money group does not itself imply that the candidate has control over the group, or that that person served as the candidate's agent with respect to the organization.⁵⁵ Absent evidence that McDaniel provided instruction to Perkins or Sojourner, and in the face of countervailing evidence, his statements to the press and to donors during the fall of 2017 indicating that he was considering a run for state or federal office are insufficient to indicate that he had actual authority, either express or implied, over either Perkins or Sojourner.

The Complaint also asserts that McDaniel's ongoing relationships and conversations with wealthy individuals (as reported by the press) support the contention that he had either solicited funds for Remember Mississippi or consented to Remember Mississippi making expenditures on his behalf.⁵⁶ This is, simply put, idle speculation. We do not know the specifics of McDaniel's conversations with wealthy individuals, and a lack of evidence in this regard does not itself constitute evidence supporting a finding of reason to believe.⁵⁷

We also note that even if McDaniel had been involved with Remember Mississippi in mid- to late-2017, under the plain language of the Act, the prohibition on EFMCing a soft money entity only applies while an individual is a federal candidate or officeholder. In other words, the Act does not prohibit an entity from engaging in political speech merely because it was, at some point in the past, EFMC'd by an individual who later became a federal candidate or officeholder.⁵⁸ McDaniel clearly served as inspiration for Remember Mississippi, but even if his sway over Perkins or Sojourner amounted to something more than mere influence, the record does not indicate that he qualified as a federal candidate prior to February 2018.

C. Non-Federal Fundraising Events and Solicitations

⁵⁴ Sojourner Decl. ¶ 5; Perkins Decl. ¶ 4.

⁵⁵ *See, e.g.*, First Gen. Counsel's Rpt. at 10, MUR 6907 (Mike Huckabee, *et al.*) (a candidate's mere association with employees of an outside group is not enough to support an inference that the group engaged in testing-the-waters activities on the candidate's behalf); *see also* First Gen. Counsel's Rpt. at 5, MUR 5467 (Michael Moore) ("[p]urely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find a reason to believe that a violation of the FECA has occurred").

⁵⁶ Compl. at 25, MUR 7354.

⁵⁷ Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule," 67 Fed. Reg. 49064, 49086–87 (July 29, 2002). ("The Commission does not believe it is appropriate to promulgate a regulation that would require examination of a private conversation to impute intent when the conversation is not clear on its face. The Commission is concerned that the ability to impute intent could lead to finding a violation when the individual who made the comment may have had no intention whatever of soliciting a contribution. Such a result is not dictated by BCRA's statutory language, and would raise constitutional concerns."). *See also* Advisory Op. 2003-03 (Cantor) at 4 and Advisory Op. 2003-36 (RGA) at 4 (affirming same).

⁵⁸ *See* Policy Statement of Comm'r Lee Goodman, *available at* https://www.fec.gov/resources/cms-content/documents/Commissioner_Lee_E._Goodman_Policy_Statement_-_EFMC.pdf.

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OGC contends that “the available information indicates that the three Remember Mississippi events were campaign-related events in connection with McDaniel’s campaign because they “primarily promoted McDaniel’s candidacy and expressly advocated his election” and that “the timing and financing of the events further support the conclusion that the Remember PAC’s events were effectively McDaniel campaign events.”⁵⁹ As the argument goes, because the only contributions solicited were via the invitation rather than at the event itself and were characterized as a “reserved seating” option, the event was not a Remember Mississippi fundraiser at all, but instead a McDaniel campaign event.⁶⁰ This contention is unsupported by Commission regulations and inconsistent with common sense.

To support its view that the Remember Mississippi events were actually McDaniel campaign events, the Complaint cites a number of Advisory Opinions relating to “campaign-related” events and activity that were issued in the 1980s and 1990s.⁶¹ But these Advisory Opinions are unavailing in this particular Matter, given the existence of Commission regulations governing non-federal fundraising issued pursuant to passage of the Bipartisan Campaign Reform Act more than a decade later. Taking those regulations into account, contrary to the Complaint’s assertions, there is no provision in the Act or regulations that converts a super PAC event where express advocacy supporting a “special guest” candidate occurs into a campaign event for that candidate.

Commission regulations addressing the raising and spending of non-federal funds explicitly govern events at which funds outside the amount limitations and source prohibitions of the Act are solicited, and advance publicity for those events.⁶² There is no requirement in the Act or regulations, however, that a solicitation must be made in *both* the publicity for an event *and* at the event itself for the event to qualify as a “non-federal fundraising event.” And anyone who has worked in or around political fundraising since the advent of the Internet knows that a significant portion of the funds raised for political fundraisers are contributed electronically, and often in advance of an event, rather than at the event itself.⁶³ These days, the physical presence of a petty cash box, credit card reader, or check collector is hardly necessary for fundraising, and accordingly cannot be dispositive in determining whether funds were raised in connection with a given event. Remember Mississippi’s response expressly acknowledges this fact, and notes various other reasons why the event was, in fact, intended to benefit the PAC.⁶⁴

⁵⁹ First Gen. Counsel’s Rpt. at 12–13, MUR 7354.

⁶⁰ *Id.* at 17–18.

⁶¹ Compl. at 12–14, MUR 7354.

⁶² 11 C.F.R. § 300.64.

⁶³ See, e.g., NGP VAN, *Guide: The Basics of Fundraising for a Political Campaign*, available at <https://blog.ngpvan.com/political-campaign-fundraising-basics> (“Typically, tickets [for political fundraising events] are sold in advance, often with several different pricing tiers to attract a variety of donors.”). NGP VAN is a prominent fundraising technology provider for Democratic and progressive campaigns and organizations.

⁶⁴ See Barnett Decl. ¶ 2 (“These events were intended to raise awareness of the PAC ... develop a base of support in the individual communities, and assist in the assembling of voter lists that could be used to aid future outreach efforts, including solicitation of contributions. We were not actively requiring donations to attend the event, but we did solicit donations prior to and after the events.”)

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It reasonably follows that if the publicity for an event includes a “solicitation,” that event itself would qualify as a “fundraising event” for the purposes of the non-federal fundraising regulations. A request for funds need not be framed as mandatory to qualify as a solicitation: under the pertinent regulation, “to solicit” is “to ask, request, or recommend, explicitly or implicitly, that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value.”⁶⁵ Under this definition, the Eventbrite invitations for the three events at issue in this Matter—which list a suggested price of \$25 for “reserved seating” and include the words “[p]lease help ... defray the cost of this event” and refer to “[y]our donation”—are clearly “solicitations,” and by extension, the events qualify as “non-federal fundraising events.”⁶⁶ Therefore, because the events were fundraising events for Remember Mississippi, the PAC’s expenditures were in furtherance of its own fundraising efforts—not in-kind contributions to the McDaniel campaign.

McDaniel’s participation in the three events and the use of his name in the publicity for those events thus falls under 11 C.F.R. § 300.64. Under that regulation, McDaniel was permitted to appear and speak at the events (provided he did not solicit funds that did not comply with the limits and source prohibitions) and allow his name to be used on the invitations (provided he was characterized as appearing in a non-fundraising capacity). Although Remember Mississippi’s publicity for the three events clearly listed McDaniel as a “special guest” on each invitation, the record does not indicate that the publicity for the events contained the “clear and conspicuous disclaimer” required by 11 C.F.R. § 300.64(c)(3)(B). However, given that the solicitation contained in the invitation was for an amount well below the federal limits,⁶⁷ in our view, this omission constitutes a *de minimis* oversight.⁶⁸ The mere mention of a covered individual in the text of a written solicitation does not, without more,

⁶⁵ 11 C.F.R. § 300.2(m).

⁶⁶ In 2006, the Commission revised the definition of “to solicit” following the D.C. Circuit’s decision in *Shays v. FEC*, holding that the Commission’s former regulation was too narrow and failed to include “implicit requests for money.” Explanation & Justification, 71 Fed. Reg. 13926, 13927 (quoting *Shays v. FEC*, 414 F.3d 76, 104–06 (D.C. Cir. 2005)). In promulgating the revised definition, the Commission explained that “[b]y covering implicit and indirect requests and recommendations, the new definition forecloses parties and candidates from using circumlocutions ‘that make their intentions clear without overtly “asking” for money.’” *Id.* at 13,928 (quoting *Shays*, 414 F.3d at 106).

It would be very surprising if the rule were to the contrary, and a finding that the facts of this Matter do not qualify would sow enormous confusion. We have difficulty imagining a situation where, for instance, OGC would not consider facts such as these a “solicitation” if the object were a foreign contribution. *See, e.g.*, General Counsel’s Br. at 13, MUR 7271 (Democratic National Committee, *et al.*) (characterizing an email informing Ukrainian President of “an opportunity” to answer a question about Paul Manafort so as to highlight “the problems [Manafort caused] Ukraine” as a solicitation under the Act, a position later rejected by the Commission). OGC has also implied that the definition of “solicit” covers situations where a candidate only implies that a certain soft money group is “approved” or “authorized,” but does not provide any additional information about how to contribute to the soft money group. First Gen. Counsel’s Rpt. at 23–29, MURs 7340 and 7609 (Great America Committee, *et al.*). That reading is also difficult to square with the recommendation here.

⁶⁷ The solicitations were limited to \$25 plus processing fees. Remember Mississippi Resp. Ex. G, MUR 7354.

⁶⁸ This view is consistent with our prior treatment of low-dollar non-federal fundraisers where a candidate appeared. *See, e.g.*, Factual & Legal Analysis at 7, MUR 5918 (Romney for President).

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constitute a solicitation or direction of non-federal funds by that covered individual⁶⁹—and, importantly, neither the Complainant nor OGC recommended the Commission pursue this particular argument.

Finally, although the Complaint cites an instance where an agent of Remember Mississippi who introduced McDaniel at the Ellisville event apparently solicited funds for McDaniel’s campaign, the Commission has previously cautioned that the scope of a covered person’s potential liability for purposes of the soft money regulations must be determined by his or her own speech and actions in asking for funds, or those of his or her agents, and not by the speech or actions of another person outside his or her control.⁷⁰ There is no information in the record indicating that McDaniel himself personally solicited any funds at all, either at or in advance of the events, or that the Remember Mississippi representative was his “agent” or did anything more than introduce him as a speaker at the Ellisville event. As a result, we chose not to pursue this allegation.

Accordingly, based on the above, we declined to find reason to believe that McDaniel, the McDaniel Committee, or Remember Mississippi violated the Act.

August 3, 2021

Date



Allen Dickerson
 Vice Chair

August 3, 2021

Date



Sean J. Cooksey
 Commissioner

August 3, 2021

Date



James E. “Trey” Trainor III
 Commissioner

⁶⁹ See generally Advisory Op. 2003-03 (Cantor); Advisory Op. 2003-36 (RGA) at 6.

⁷⁰ Explanation and Justification, 67 Fed. Reg. 49083 (“[I]t is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal.”).