

FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT

MUR 7478

DATE COMPLAINT FILED: August 15, 2018
DATE OF NOTIFICATION: August 21, 2018
DATE OF RESPONSE: September 10, 2018
DATE ACTIVATED: February 7, 2019

COMPLAINANT: Sarah Eskra

RESPONDENT: David Richardson for Congress and Brian Foucart
in his official capacity as treasurer

| | |
|---|---|
| RELEVANT STATUTES AND REGULATIONS: | 52 U.S.C. § 30104(b)(6)(B)(iii) 52 U.S.C. § 30120(a) 11 C.F.R. § 100.29 11 C.F.R. § 104.3(b)(3)(vii) 11 C.F.R. § 104.4(a) 11 C.F.R. § 110.11 |
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INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Complaint in this matter alleges that David Richardson for Congress and Brian

32 Foucart in his official capacity as treasurer (the “Committee”), violated 52 U.S.C. § 30120(a) and
33 11 C.F.R. § 110.11(a) by failing to include a disclaimer on a text message sent by the
34 Committee. The Committee denies creating or disseminating the text message.

35 Based on the available information, we recommend that the Commission find no reason
36 to believe that David Richardson for Congress and Brian Foucart in his official capacity as
37 treasurer, violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a) by failing to include a “paid
38 for by” disclaimer in the text message.

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1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Facts**

3 David Richardson for Congress is the authorized committee of David Richardson, who
 4 was a candidate in the primary election in Florida's 27th Congressional District on August 28,
 5 2018. Donna Shalala was another candidate in that election.¹

6 The Complaint alleges that on or about August 10, 2018, at 11:20 a.m., the Committee
 7 sent a text message containing 228 characters (the "Communication"). According to the
 8 Complaint, the Communication appears as a single message:

9 Donna Shalala sided with big business over starving janitorial workers
 10 while at UM. Since Shalala refused to stand with workers why should we
 11 ever stand with her? We deserve better! <https://nyti.ms/2LV120k>
 12 <https://bit.ly/2KHvk11>

13
 14 The Communication included links to a *New York Times* article² and a link to a Facebook page
 15 with the name "The Real Donna Shalala," but did not include any "paid for by" disclaimer
 16 statement. According to the Complaint, the Facebook page had only one follower, Sam Powers,
 17 who the Complaint alleges was the manager of the Richardson campaign at the time.³

18 Although "The Real Donna Shalala" Facebook page is no longer available, a review of
 19 the Facebook political ad archive shows that Defeat the Incumbent, an independent-expenditure-
 20 only political committee registered with the Commission,⁴ sponsored and paid for a Facebook ad

¹ Shalala won the Democratic primary and the general election.

² Abby Goodnough and Steven Greenhouse, *Anger Rises on Both Sides of Strike at University of Miami*, N. Y. TIMES, Apr. 18, 2006, at A18.

³ See Compl. at Ex. 2. A screenshot of the Facebook page is attached as Exhibit 2 of the Complaint.

⁴ See Defeat the Incumbent Super PAC Statement of Organization (May 26, 2018),
<http://docquery.fec.gov/pdf/241/201805269113618241/201805269113618241.pdf>.

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- 1 on “The Real Donna Shalala” Facebook page that contained the same language of the
- 2 Communication, and it also linked to the same New York Times article:



The Real Donna Shalala
 Sponsored • Paid for by Defeat the Incumbent

Donna Shalala sided with big business over starving janitorial workers, who were making less than \$20k a year, while at UM. The UM Chaplain said, "(Shalala)'s clearly been an enemy of the working poor." Some called Shalala a union buster! Since Shalala refused to stand with workers why should we ever stand with her? We deserve better! <https://nyti.ms/2LV120k>



Anger Rises on Both Sides of Strike at University of Miami
 Six janitors and five students are on a hunger strike, with several asserting that the university's president, Donna Shalala, was a union-buster.

NYTIMES.COM

- 3
- 4 Defeat the Incumbent spent approximately \$800 to \$2,500 to run six versions of this ad from
- 5 August 12-27, 2018,⁵ and reported that it spent a total of \$42,500 in August 2018 for “online
- 6 advertising” to oppose Shalala.⁶

⁵ Facebook Ad Library, https://www.facebook.com/ads/library/?active_status=inactive&ad_type=political_and_issue_ads&country=US&q=defeat%20the%20incumbent%20shalala%20.

⁶ Defeat the Incumbent 24-Hour Notice (Aug. 15, 2018).

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1 The Committee denies that it had any part in the creation or dissemination of the
 2 Communication.⁷ The Committee provides a sworn affidavit from Powers, the campaign
 3 manager, stating that neither the Committee nor anyone associated with the Committee had any
 4 part in the creation or dissemination of the Communication or knows who created or sent it.⁸
 5 Powers also attests that he was the only person empowered to authorize a message like the
 6 Communication.⁹

7 The Complaint further acknowledges that the current state of the law on disclaimers
 8 would likely apply the “small items” exception to text messages like the Communication, but
 9 argues that such an exemption should not apply because the current rules were made when the
 10 existing technology limited the number of characters in text messages.¹⁰ Respondents note that
 11 the Commission is considering those issues in a Rulemaking, and contend that even if the small
 12 items exception will no longer apply to future text messages, such a change should not apply
 13 retroactively to the Communication.¹¹

14 **B. Analysis**

15 A “disclaimer” is a statement that must appear on certain communications to identify
 16 who paid for the communication and whether a communication is authorized by a candidate.¹²

⁷ Resp. at 2.

⁸ Samuel Powers Affidavit (“Powers Aff.”) at ¶ 5 (Aug. 24, 2018).

⁹ *Id.*

¹⁰ Compl. at 2-3.

¹¹ Resp. at 3. The issue of what kind of disclaimers should be required for internet communications is currently the subject of an Advance Notice of Proposed Rulemaking (“ANPR”). *See* Agenda Doc. No. I6-50-4, Draft Federal Register Notice on Internet Communication Disclaimers (Sept. 28, 2016) (reopening the comment period and notice of hearing in the ANPR at 76 Fed. Reg. 63,567 (Oct. 13, 2011)).

¹² 52 U.S.C. § 30120(a); 11 C.F.R. § 110.11.

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1 The Act and Commission regulations require disclaimers identifying the person that paid for any
 2 public communication made that contains express advocacy, solicits a contribution, or qualifies
 3 as an “electioneering communication” under 11 C.F.R. § 100.29.¹³ The disclaimer must be
 4 “presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate
 5 notice of the identity of the person or political committee that paid for, and where required, that
 6 authorized the communication.¹⁴ If a candidate, an authorized committee of a candidate, or an
 7 agent of either pays for and authorizes the communication, then the disclaimer must state that the
 8 communication “has been paid for by the authorized political committee.”¹⁵ Commission
 9 regulations set forth limited exemptions to the disclaimer requirements, including the “small
 10 items exception” which exempts “[b]umper stickers, pins, buttons, pens, and similar items upon
 11 which the disclaimer cannot be conveniently printed,” or “an advertisement of such a nature that
 12 the inclusion of a disclaimer would be impracticable.”¹⁶

13 Regardless of whether the Communication required a disclaimer, there is no information
 14 to support the Complaint’s central allegation that the Committee or someone affiliated with it

¹³ 52 U.S.C. § 30104(b)(6)(B)(iii); 11 C.F.R. §§ 104.3(b)(3)(vii), 104.4(a).

¹⁴ 11 C.F.R. § 110.11(c)(1).

¹⁵ 52 U.S.C. § 30120(a)(1); 11 C.F.R. § 110.11(b)(1).

¹⁶ 11 C.F.R. § 110.11(f)(1)(i), (ii). In Advisory Opinion 2002-09 (Target Wireless), the Commission applied the small items disclaimer exception to “short message service” (“SMS”) communications limited to 160 characters and concluded that the technological limitations on both the size and the length of information that text messages could contain made them eligible for the “small items” exception. *See also* Advisory Op. 2013-13 (Freshmen Hold’em JFC) (affirming a political committee need not include any disclaimers (1) on items that are too small for the convenient printing of a disclaimer, such as bumper stickers, pins, buttons, or pens; or (2) on means of communication that by their nature make including a disclaimer impracticable). In more recent decisions, the Commission was not able to reach agreement by the required four affirmative votes on whether small, character-limited internet advertisements could be exempt from the disclaimer requirements under either the small items or the impracticable exceptions at 11 C.F.R. § 110.11(f)(1)(i)-(ii). *See* Advisory Op. (Facebook); Advisory Op. 2013-18 (Revolution Messaging, LLP); Advisory Op. 2010-19 (Google).

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1 created or disseminated the Communication.¹⁷ The Complaint relies solely on the fact that
 2 Powers, Richardson's campaign manager, "liked" the Facebook page linked to the
 3 Communication. The Committee, however, specifically denies creating, disseminating, or
 4 authorizing the Communication, or knowing who did, and submits Powers's sworn statement to
 5 that effect.¹⁸

6 Instead, the source of the Communication appears to be Defeat the Incumbent, which
 7 sponsored a longer version of the Communication on "The Real Donna Shalala" Facebook page
 8 and reported IEs in opposition to Shalala.¹⁹ Defeat the Incumbent sponsored a series of similar
 9 Facebook ads that opposed Shalala and were posted to "The Real Donna Shalala" Facebook
 10 page.²⁰ The Facebook ads that the Committee created differ in tone and content from the
 11 Communication and the other ads sponsored by Defeat the Incumbent,²¹ and we have no
 12 information to indicate any relationship between the Committee and the apparent source of the
 13 ad at issue in the Complaint. Accordingly, we recommend the Commission find no reason to
 14 believe that David Richardson for Congress and Brian Foucart in his official capacity as

¹⁷ See Factual and Legal Analysis at 7, MUR 6659 (Murray Energy Corp.) (finding No RTB for disclaimer violation as to Murray Energy Corp. PAC where there was no information that it had paid for the public communications at issue).

¹⁸ Powers Aff. at ¶5.

¹⁹ See note 3.

²⁰ See Defeat the Incumbent Facebook Ad Archives,
https://www.facebook.com/ads/library/?active_status=inactive&ad_type=political_and_issue_ads&country=US&q=defeat%20the%20incumbent%20shalala%20.

²¹ See Richardson for Congress Facebook Ad Archives,
https://www.facebook.com/ads/library/?active_status=inactive&ad_type=political_and_issue_ads&country=US&q=david%20richardson%20for%20congress.

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1 treasurer, violated 52 U.S.C. § 30120(a) and 11 C.F.R. § 110.11(a) by failing to include a
2 disclaimer in a text message communication.

3 **IV. RECOMMENDATIONS**

4 1. Find no reason to believe that David Richardson for Congress and Brian Foucart
5 in his official capacity as treasurer violated 52 U.S.C. § 30120(a) and 11 C.F.R.
6 § 110.11(a) by failing to include a proper disclaimer in a text message
7 communication;

8 2. Approve the attached Factual and Legal Analysis;

9 3. Approve the appropriate letters; and

10 4. Close the file.

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15 Lisa J. Stevenson
16 Acting General Counsel

17
18
19 Charles Kitcher
20 Acting Associate General Counsel

21
22
23 5.6.19
24 Date

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