



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Graf for Congress, and) **MUR 5526**
Thomas Linn, in his official capacity as treasurer)

STATEMENT OF REASONS OF CHAIRMAN MICHAEL E. TONER, VICE CHAIRMAN ROBERT D. LENHARD AND COMMISSIONERS DAVID M. MASON, HANS A. von SPAKOVSKY, STEVEN T. WALTHER AND ELLEN L. WEINTRAUB

Toni Holman filed the complaint in this matter alleging that Respondents Graf for Congress and Thomas Linn, in his official capacity as treasurer, violated the Federal Election Campaign Act (“FECA”), 2 U.S.C. § 431 *et seq.* The alleged violations include not having a printed box around the disclaimers on the campaign’s website in 2004.¹ The Commission unanimously² rejected recommendations of the Office of General Counsel (“OGC”) with respect to the website, and we write separately to explain our reasons for this decision.

I. BACKGROUND

Randy Graf ran for the United States House of Representatives in 2004, and Graf for Congress was his authorized campaign committee. Not surprisingly, his campaign website contained express advocacy and solicited contributions. The OGC analysis presumes that the committee paid for the website. There is no allegation of any alleged printed communication – such as a flier, brochure, or palmcard – in a file that can be downloaded from an Internet site. This matter involves only communication on Internet pages themselves.³

The OGC recommendations included finding reason to believe that Respondents violated FECA with respect to the website⁴ and seeking a civil penalty for this violation. *See* § 437g(a)(2).⁵

¹ First General Counsel’s Report (“GCR”) at 2-3 (Jan. 3, 2006).

² Voting affirmatively were Chairman Toner, Vice Chairman Lenhard, and Commissioners Mason, von Spakovsky, Walther, and Weintraub.

³ *See id.* at 2-3, 5-6.

⁴ *Id.* at 5-6.

⁵ *Id.* at 9.

OGC based these recommendations on its belief that communication on an Internet page itself is a “printed communication” under FECA. *See generally* § 441d(c).⁶ The Commission rejected these recommendations by voting to approve the factual and legal analysis in this matter with references to the website deleted.

II. DISCUSSION

FECA provides that when a political committee makes a disbursement for a “communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising,” § 441d(a), the communication “if paid for and authorized by a candidate [or] an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee” § 441d(a)(1). The disclaimer regulation in effect during the 2004 campaign applied the requirements of § 441d(a) to “Internet websites of political committees available to the general public” *See* 11 C.F.R. Section 110.11(a) (2002), *amended*, 71 FED. REG. 18589, 18613 (2006).⁷

FECA then establishes additional disclaimer requirements on a medium-by-medium basis for four categories of communications:

- A printed communication, *see* § 441d(c),
- Radio communications by candidates or authorized persons, *see* § 441d(d)(1)(A),
- Television communications by candidates or authorized persons, *see* § 441d(d)(1)(B), and
- Radio and television communications by others. § 441d(d)(2).

It does not follow, however, that every medium contemplated in Section 441d(a) fits into one of these four categories. Since neither radio nor television is involved in this matter, additional disclaimer requirements apply only if a communication on an Internet page is a “printed communication” under FECA. The additional disclaimer requirements for a printed communication are as follows:

Any printed communication described in [Section 441d(a)] shall –

- (1) be of sufficient type size to be clearly readable by the recipient of the communication;
- (2) be contained in a printed box set apart from the other contents of the communication; and
- (3) be printed with a reasonable degree of color contrast between the background and the printed statement.

§ 441d(c).

⁶ *Id.* at 5-6.

⁷ In 2006, the Commission amended the regulation and reorganized it to improve clarity. Internet Communications, 71 FED. REG. at 18601-02. It still requires disclaimers on “Internet websites of political committees available to the general public.” 11 C.F.R. § 110.11(a)(1) (2006).

Since Congress used the term “printed communication” without defining it, *see id.*, and the regulation in effect during the 2004 campaign does not define “printed communication,” *see* 11 C.F.R. 110.11 (2002),⁸ the Commission must determine the meaning of the term by other means. Two factors indicate that “printed communication” does not include communications on Internet pages.

First, the ordinary meaning of the word “print” does not include communication on Internet pages. *See, e.g.*, RANDOM HOUSE WEBSTER’S UNABRIDGED DICTIONARY 1539 (2d ed. 2001). While such information can be often printed out,⁹ neither the printing nor the existence of a printout transforms the Internet page itself into a printed communication. If it did, then one could just as well claim that transcribing a radio or television broadcast, or the existence of a transcript, transforms the broadcast itself into a printed communication.

Second, when FECA uses the words “Internet,” “web,” “website,” or “electronic,” or forms of these words, it does not mean something ordinarily understood as being in print or in printed form. This is true both in the FECA disclaimer section¹⁰ and elsewhere in FECA.¹¹

⁸ The 2006 regulation also does not define the term, *see* 11 C.F.R. § 110.11 (2006), but even if it did, the Commission would not apply such a regulation retroactively. *Cf. Robertson v. FEC*, 45 F.3d 486, 490 (D.C. Cir. 1995) (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, [274-76], 114 S. Ct. 1483, 1502 (1994)); *In re Missouri State Democratic Comm.*, Matters Under Review 4831 & 5274, Statement of Reasons of Comm’r Toner at 2 (F.E.C. Dec. 4, 2003), available at <http://eqs.sdrdc.com/eqsdocs/00000704.pdf> (all Internet sites visited Aug. 22, 2006). “[B]ecause rulemaking is prospective in operation and general in scope, rather than retroactive and condemnatory in effect, interested parties are given advance notice of the standards to which they will be expected to conform in the future, and uniformity of result is achieved.” *Shays v. FEC*, 424 F. Supp.2d 100, 113-14 (D.D.C. 2006) (quoting *Trans-Pacific Freight Conference of Japan/Korea v. Fed. Mar. Comm’n*, 650 F.2d 1235, 1244-45 (D.C. Cir. 1980)); *see also Shays v. FEC*, 337 F. Supp.2d 28, 93 (D.D.C. 2004) (noting that the Commission had concluded the Bipartisan Campaign Reform Act of 2002 (“BCRA”) “should not be interpreted in a manner that penalizes people for the way they ordered their affairs before the effective date of BCRA. This will help ensure that BCRA is not enforced in a retroactive manner with respect to activities that were legal when performed.” (quoting Prohibited and Excessive Contributions, 67 FED. REG. 49064, 49084 (2002))), *aff’d on other grounds*, 414 F.3d 76 (D.C. Cir. 2005).

⁹ Although the result the Commission reaches does not turn on technical computer or printer challenges, it is worth recalling that Internet pages can appear and print differently on different computers and printers. Thus, requiring printed boxes around particular text on the Internet would not work particularly well.

¹⁰ *See* § 441d(a)(3) (requiring the “World Wide Web address of the person who paid for the communication”); *cf.* § 441d(d)(1)(B)(ii) (referring to the “printed statement” in a television communication); § 441d(d)(2) (same).

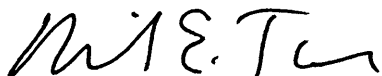
¹¹ *See* § 432(d) (2004) (“For any report filed in electronic format . . . , the treasurer shall retain a machine-readable copy of the report”); § 434(a)(11)(A), (B) (2004); § 434(a)(12)(A)(i)(III) (“post the information on the Internet immediately upon receipt”); § 434(a)(12)(A)(ii) (“a designation, statement, or report in electronic form”); § 434(a)(12)(B) (“any designation, statement, or report . . . in electronic form”); § 434(a)(12)(D) (“post on the Internet any information received”); § 434(d)(1) (“file the statement by facsimile device or electronic mail”); § 434(d)(2) (“The Commission shall make a document which is filed electronically . . . accessible to the public on the Internet”); § 434(h) (“The Federal Election Commission shall make any report . . . accessible [*i.e.*, in printed form] to the public at the offices of the Commission and on the Internet”); § 438a(a) (2002) (stating in a section entitled “Maintenance of website of election reports” that the “Commission shall maintain a central site on the Internet to make accessible to the public all publicly available election-related reports and information”); § 439(c) (1995) (referring to “any [s]tate that . . . has a system that permits electronic access to, and duplication of, reports and statements that are filed with the Commission”); *cf.* § 431(8)(B)(5) (2002) (“a printed slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office”); § 431(9)(B)(iv) (same).

Moreover, while Congress requires most political committees to file reports electronically with the Commission, *see* § 434(a)(11)(A), it has not required this of United States Senate campaign committees, the Republican Senate Campaign Committee, or the Democratic Senate Campaign Committee. Instead, these committees file paper copies, *i.e.*, printed copies, *compare* § 434(a)(11)(A) with § 432(g), with the Senate secretary, who sends them to the Commission within two working days. § 432(g)(1), (2). From many sources, including the Commission's priority legislative recommendations, Congress is aware of the distinction between electronic and paper filing.¹²

III. CONCLUSION

For the foregoing reasons, the term "printed communication" in 2 U.S.C. § 441d(c) does not include communication on Internet pages. Hence, the additional disclaimer requirements of § 441d(c) do not apply to Internet pages.

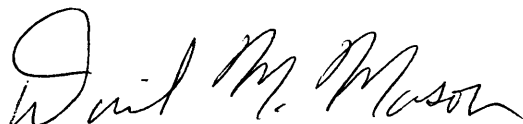
November 27, 2006



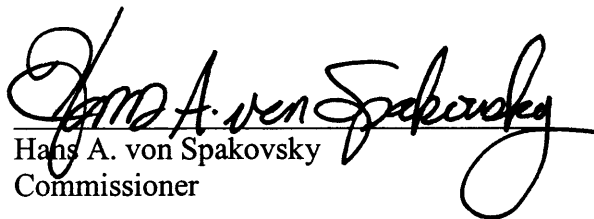
Michael E. Toner
Chairman



Robert D. Lenhard
Vice Chairman



David M. Mason
Commissioner



Hans A. von Spakovsky
Commissioner



Steven T. Walther
Commissioner



Ellen L. Weintraub
Commissioner

¹² *See, e.g.*, (Disclosure) Electronic Filing of Senate Reports (Revised 2005) (F.E.C. March 25, 2005), available at http://www.fec.gov/law/legislative_recommendations_2005.shtml; Electronic Filing of Senate Reports (Revised 2004) (F.E.C. _____, 2004), available at http://www.fec.gov/pages/legislative_recommendations_2004.htm#efiling; Legislative Recommendations 2003 at 8 (F.E.C. May 6, 2003), available at <http://www.fec.gov/pdf/legrec2003.pdf>.