



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

POLICY STATEMENT OF COMMISSIONER LEE E. GOODMAN

Section 30124(b) of the Federal Election Campaign Act of 1971, as amended (the “Act”), and 11 C.F.R. § 110.16, prohibit any person from fraudulently misrepresenting that the person is acting for, or on behalf of, a federal candidate or political party under certain circumstances. The Commission’s historical approach to this prohibition has been long on ambiguity and short on discipline. Likewise, the Commission has not acknowledged the level of First Amendment sensitivity appropriate for the core right of political solicitation. Commercial fraud regulations are not appropriate templates for regulation of political solicitations. Yet, Commission precedents have relied upon case law involving the federal mail fraud statute—which does not contain the word “misrepresentation”—for guidance on interpreting the Act.

I believe a clearer, more disciplined legal test is needed to implement this speech prohibition. This statement of policy sets forth what I believe should be the proper analytical framework, based on the text of the Act, its legislative history, federal court cases, and Commission enforcement action in prior MURs, for determining when fraudulent misrepresentation occurs.

The Fraudulent Misrepresentation Doctrine

The Act and Commission regulations set forth two prohibitions with respect to fraudulent misrepresentation. The first prohibits *a candidate* or his or her employees or agents from speaking, writing or otherwise acting on behalf of *another candidate* or political party committee on a matter which is damaging to such other candidate or political party.¹ The second prohibits *other persons* from misrepresenting themselves as speaking, writing, or otherwise acting for or on behalf of *any candidate* or political party for the purpose of soliciting contributions.² The Act further provides that no person shall willfully and knowingly participate in or conspire to participate in any plan or scheme to engage in such behavior.³ The prohibition against other persons misrepresenting candidates to solicit contributions is at issue in this matter.

Of course, because an individual’s or group’s solicitation of contributions constitutes core First Amendment protected activity, the Commission must implement the Act’s prohibition

¹ 52 U.S.C. § 30124(a); 11 C.F.R. § 110.16(a)(1).

² 52 U.S.C. § 30124(b); 11 C.F.R. § 110.16(b).

³ 52 U.S.C. § 30124 (a)(2), (b)(2); *see also* 11 C.F.R. § 110.16 (a)(2), (b)(2).

against “fraudulent misrepresentation” with clarity and precision.⁴ The Commission cannot prohibit solicitations under a vague or overbroad concept of the language that constitutes a “fraudulent misrepresentation.”⁵ Nor can the definition of “misrepresentation” turn on the subjective perceptions of listeners.⁶ The public must have objective standards delineating what constitutes a prohibited “misrepresentation” under the Act in order to avoid chilling political solicitations at the core of the First Amendment protection.

Ambiguous or even confusing solicitations must be judged with First Amendment sensitivity so as not to chill vast realms of legitimate solicitation. Many solicitors feature the names, photographs, and biographies of the candidates they support. They often use red, white and blue logos that may vaguely resemble the red, white and blue logos of other campaigns. If every use of a candidate’s photograph and name on a website were deemed to misrepresent the identity of the solicitor, otherwise identified accurately in a disclaimer, then many organizations’ websites would be at risk of violating the Act. At some level, citizens must assume responsibility for reading and understanding FEC-compliant disclaimers and, for those donating on websites, performing rudimentary online searches to identify the sponsor of a website. This is one of the purposes of the www.fec.gov website.

With these principles in mind, below I set forth what appear to be the essential elements of the violation known as “Fraudulent Misrepresentation.”

⁴ *Van Hollen v. FEC*, 811 F.3d 486, 499 (D.C. Cir. 2016) (noting FEC’s unique constitutional prerogative “to safeguard the First Amendment when implementing its congressional directives”) (citing *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003); see also *Arizona v. Inter. Tribal Council of Ariz., Inc.*, 570 U.S. 1, 18-19 (2013) (“[B]y analogy to the rule of statutory interpretation that avoids questionable constitutionality— validly conferred discretionary executive authority is properly exercised . . . to avoid serious constitutional doubt.”).

⁵ *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (“The First Amendment does not permit laws that force speakers to retain a campaign finance attorney . . . before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People ‘of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.’”); *id.* at 329 (“We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned”) (internal quotations omitted); *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) (“[L]aws . . . must give fair notice of conduct that is forbidden or required . . . [T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.” (citations omitted)); *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (“[V]ague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.”) (internal quotations omitted); *id.* at 41 (requiring “precision . . . in an area so closely touching our most precious freedoms.”) (internal quotations omitted).

⁶ In *Buckley*, the Supreme Court observed that restrictions placing a speaker “wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning . . . ‘offers no security for free discussion.’” 424 U.S. at 43 (1976) (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). The Court again emphasized this principle in *FEC v. Wisconsin Right to Life, Inc.*, holding that “the proper standard for [evaluating political speech] must be objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect.” 551 U.S. 449, 469 (2007).

A. “Misrepresentation”

1. *Presence of An Adequate Disclaimer*

The Act requires solicitations by federal political committees made through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising to include disclaimers identifying the person responsible for the communication.⁷ For communications that are not authorized by a candidate, the candidate’s authorized committee, or an agent of either, the disclaimers must clearly state: (1) the name and permanent street address, telephone number, or website of the committee and (2) that the communication is not authorized by a candidate or candidate’s committee.⁸ Disclaimers “must be presented in a clear and conspicuous manner.”⁹ Internet websites of political committees that are available to the general public must include disclaimers.¹⁰

Because a disclaimer identifies the person paying for a communication and informs the reader whether or not a communication is authorized by a candidate, no misrepresentation can be presumed when an adequate disclaimer is present.¹¹ The Commission has a long history of finding no misrepresentation where communications contain disclaimers accurately identifying the true sponsor.¹² The Commission has even concluded that disclaimers with technical deficiencies nonetheless controvert allegations of misrepresentation so long as they accurately

⁷ 52 U.S.C. § 30120(a)(3).

⁸ *Id.*; 11 C.F.R. § 110.11(b)(3).

⁹ 11 C.F.R. § 110.11(c)(1). A disclaimer is not considered “clear and conspicuous” if it is difficult to read or if the placement is easily overlooked. *Id.*; *see also* Communications Disclaimer Requirements, 60 Fed. Reg. 52,069, 52,070-71 (Oct. 5, 1995).

¹⁰ 11 C.F.R. § 110(a)(1); *see* U.S.C. § 30120(a).

¹¹ *See* F&LA at 9, MUR 6645 (Conservative Strikeforce, *et al.*) (finding website statements were not made on candidate’s behalf despite use of candidate’s image and name because disclaimers “give the reader . . . adequate notice of the identity of the person or political committee that paid for and, where required, authorized the communication”).

¹² *See, e.g.*, F&LA at 9, MUR 6645 (Conservative Strikeforce); F&LA at 3, MUR 3690 (National Republican Congressional Committee) (determining satirical representation by respondent as speaking on behalf of their opponents coupled with disclaimer identifying the speaker was not a prohibited misrepresentation under Section 30124(a)); Certification (Sept. 12, 1986), MUR 2205 (Foglietta) (agreeing with OGC’s recommendation in the First General Counsel’s Report to find no reason to believe a violation of Section 30124 occurred when advertising material at issue was “clearly printed” as respondent’s material, containing the committee’s name, address and picture).

identify of the solicitor.¹³ By contrast, a disclaimer that explicitly misrepresents the identity of the actual sponsor as the candidate is almost always a misrepresentation under the Act.¹⁴

2. *Misrepresentation Despite Adequate Disclaimer*

A proper disclaimer clearly and accurately identifies the person responsible for the solicitation. Therefore, it affords a strong presumption against finding misrepresentation. That presumption may nonetheless be defeated where an *explicit* misrepresentation in the text of a solicitation countermands an otherwise accurate disclaimer.¹⁵

Pictures of candidates, biographical information and similar logos, however, are not inherently misleading. Nor are general statements of advocacy or common slogans indicating support for particular candidates. Indeed, such images and statements can be expected on websites of individuals and groups soliciting contributions to support candidates for federal office.

3. *Absence of Adequate Disclaimer*

In the absence of an adequate disclaimer or other sufficiently identifying information, however, the Commission has not required the misrepresentation to be explicit to violate the Act's prohibition. The Commission has, in those cases, considered less explicit misrepresentations sufficient to satisfy the misrepresentation element.¹⁶

4. *False Disclaimer Constitutes Misrepresentation*

A disclaimer that falsely claims the solicitation is paid for and/or authorized by a candidate or political party constitutes *per se* misrepresentation under section 30124(b). For

¹³ See F&LA at 7, MUR 7004 (*The 2016 Committee, et al.*) (dismissing, in part, because deficient email disclaimer contained "sufficient information for recipients to understand that the Committee paid for the emails and was not authorized by any candidate or candidate's committee"); F&LA at 11, MUR 6633 (*Republican Majority Campaign PAC, et al.*) (disclaimers, although technically deficient, "nonetheless contained sufficient information for [] recipients to identify Republican Majority as the sender or webhost and payor"); F&LA at 4-5, MUR 3690 (*National Republican Congressional Committee*) (concluding that a small, inconspicuous disclaimer that violated the Act's requirements for disclaimers nonetheless accurately identified the true sponsor of a postcard sufficient to avoid violation of section 30124); *id.* at n.1 (noting the post cards at issue "display the NRCC post mark and the return address on their face" and that such information "dispel[s] any theory of fraudulent misrepresentation . . . because they notify the readers of the true identity of the senders").

¹⁴ See F&LA at 5, MUR 5443 (www.johnfkerry-2004.com); F&LA at 3, MUR 5505 (<http://testhost.yahoogle.biz>); F&LA at 4, MUR 5495 (www.johnkerry-edwards.org).

¹⁵ See Statement of Reasons of Commissioners Weintraub, McDonald, Thomas and Toner at 1-2, MUR 5089 (*Matta Tuchman for Congress*) (fictitious letterhead, return address, and letter purporting to speak for the Orange County Democrats countermanded a small disclaimer inconspicuously placed on the flap of an envelope in small letters).

¹⁶ See F&LA at 10, MUR 5951 (*Californians for Change*) (finding that, in the absence of appropriate disclaimers, a series of implicit misrepresentations "when taken together . . . likely led reasonable people to believe [respondent] was acting on behalf of Sen. Obama").

example, in a series of matters involving a website that mimicked presidential candidate John Kerry's official website, the Commission found that the use of the disclaimer "Paid for and authorized by John Kerry for President, Inc. 2004" on the website and in solicitation emails patently misrepresented the identity of the website's sponsor in violation of section 30124(b).¹⁷

B. "For Or On Behalf Of"

Section 30124(b) prohibits misrepresentations about one subject: the identity of the solicitor. The solicitor cannot misrepresent himself "as speaking, writing, or otherwise acting for or on behalf of any candidate or political party or employee or agent thereof."¹⁸ The focus of the fraudulent misrepresentation inquiry must be the representation of *identity* of the person soliciting the funds, not the use to which the funds are put.

This prohibition was enacted as Section 309 of the Bipartisan Campaign Reform Act of 2002.¹⁹ The amendment's sponsor, Senator Bill Nelson, stated that the provision "makes it illegal to fraudulently misrepresent any candidate or political party employee or party employee in soliciting contributions" in response to complaints that people had "fraudulently raised donations by posing as political committees or candidates."²⁰

The Commission has enforced section 30124(b) consistent with its legislative focus on posing as a candidate.²¹ For example, in MUR 6641 (CAPE PAC), the Commission found that the third-person statement "Help CAPE PAC re-election Allen West to Congress" did not pretend to be Allen West.²² Therefore, the Commission found no violation of the Act.

Thus, the subject of a misrepresentation prohibited under section 30124(b)(1) must be the identity of the solicitor as the candidate or agent of the candidate or political party and the proper focus of the Commission's misrepresentation inquiry must be the misrepresentation of *identity* of the person soliciting the funds, not the use to which the funds are put.²³

¹⁷ See F&LA at 5, MUR 5543 (www.johnfkerry-2004.com) (determining there is a "prima facie case for reason to believe" when unauthorized website claimed it was "[p]aid for and authorized by John Kerry for President, Inc." and copies multiple pages from the campaign's legitimate website); see also F&LA at 4, MUR 5495 (www.johnkerry-edwards.org) (finding reason to believe where email stated it was "[p]aid for by John Kerry for President, Inc."); F&LA at 3, MUR 5505 (<http://testhost.yahoogoogle.biz>) (explicit misrepresentation in email solicitation "[p]aid for by John Kerry for President, Inc." presented "prima facie case for reason to believe").

¹⁸ 52 U.S.C. § 30124(b)(1).

¹⁹ Pub. L. No. 107-155, § 309(b), 116 Stat. 81, 104 (2002).

²⁰ 148 CONG. REC. S3122 (daily ed. March 29, 2001) (statement of Sen. Nelson) (offering amendment to the Bipartisan Campaign Reform Act).

²¹ See generally, Matthew S. Raymer, *Fraudulent Political Fundraising in The Age of Super PACs*, 66 SYRACUSE L. REV. 239, 257-58 (2016).

²² F&LA at 9, MUR 6641 (CAPE PAC).

²³ The Commission has unanimously recommended that Congress consider amending Section 30124 to cover fraudulent misrepresentations regarding the ultimate use to which the solicitor will put the funds. See *Legislative*

C. “For The Purpose of Soliciting Contributions”

The object of a misrepresentation under section 30124(b)(1) targets one purpose of the misrepresentation: soliciting contributions or donations. The solicitor must misrepresent his identity for the purpose of soliciting contributions or donations. Misrepresentations for other purposes are not prohibited by Section 30124(b).²⁴

By the same token, Section 30124(b) does not encompass other transactions that may cause injury or otherwise result in unfairness to contributors.²⁵ In certain instances, a respondent’s alleged injury may be more appropriately addressed through other federal or state anti-fraud statutes.²⁶

D. “Fraudulent” Intent

The Act also requires that the misrepresentation of identity be “fraudulent.” As the Commission observed in MUR 3690,

A violation of Section [30124] requires *fraudulent* misrepresentation. Key elements of fraud are the maker’s intent that the misrepresentation be relied on by the person and in a manner reasonably contemplated, the person’s ignorance of the falsity of the representation, and the person’s rightful or justified reliance. More significantly, a fraudulent misrepresentation requires intent to deceive.²⁷

Recommendations of the Federal Election Commission 2016 at 7, (Dec. 1, 2016), available at <https://transition.fec.gov/pdf/legrec2016.pdf>.

²⁴ Compare 52 U.S.C. § 30124(a)(1) (prohibiting misrepresentations for the purpose of damaging an opposing candidate or political party in any way).

²⁵ Cf. *Schmuck v. United States*, 489 U.S. 705, 710 (1989) (“The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud.”) (internal quotations omitted); *id.* at 723 (“It is mail fraud, not mail and fraud, that incurs liability . . . [t]he mailing must be in furtherance of the fraud.”) (Scalia, J., dissenting).

²⁶ See, e.g. 18 U.S.C. § 1341 (prohibiting use of mails to further a “scheme or artifice to defraud”); 18 U.S.C. § 1343 (prohibiting use of interstate wire communications to further a “scheme or artifice to defraud”). In *Friends of Phil Gramm v. Americans for Phil Gramm In '84*, the U.S. District Court for the Eastern District of Virginia concluded the pre-BCRA Act does not “categorically preclude a state law cause of action for fraud.” 587 F. Supp. 769, 776 (E.D. Va. 1984) (denying injunction where defendant’s fundraising efforts were “circular”); see also *Galliano v. U.S. Postal Service*, 836 F.2d 1362, 1371 (D.C. Cir. 1988) (Bader Ginsburg, J.) (citing *Friends of Phil Gramm*, 587 F. Supp. 769).

²⁷ F&LA at 3-4, MUR 3690 (National Republican Congressional Committee) (emphasis in original).

According to one federal court interpreting Section 30124, a misrepresentation can be deemed fraudulent “if it was reasonably calculated to deceive persons of ordinary prudence and comprehension.”²⁸

Proving a respondent’s subjective intent can be difficult to prove with direct evidence. At the reason to believe stage, the Commission has been willing, on appropriate facts, to make an inference that a respondent acted with the requisite intent to deceive. However, in making the determination, the Commission considers whether some facts that could lead to an inference of fraudulent intent may be negated by other reasonable inferences. In other words, the facts supporting an inference of fraudulent intent must be *more reasonable* than competing reasonable inferences that could be drawn.

Since section 30124(b)’s passage, the Commission has considered certain evidence that can, in proper circumstances, evince the fraudulent nature of a misrepresentation. Such evidence includes (1) whether the respondent was properly registered and reporting to the Commission, if required;²⁹ (2) whether respondent had knowledge that contributors believed they were contributing to a candidate or party;³⁰ (3) the solicitor’s acceptance of contributions clearly intended for a candidate or party;³¹ (4) false statements that contributions to the respondent would go directly to the represented candidate or party;³² (5) the presence of a false disclaimer;³³

²⁸ See *FEC v. Novacek*, 739 F. Supp. 2d 957, 961 (N.D. Texas Apr. 14, 2010) (“*Novacek*”). The court in *Novacek* and prior Commission legal analyses have defined “fraudulent” by looking to decisions interpreting the federal mail fraud statute, which does not require a misrepresentation of identity. *Id.* (citing *Silverman v. United States*, 213 F.2d 405, 407 (5th Cir. 1954) (“[T]he fact that there is no misrepresentation of a single existing fact makes no difference in the fraudulent nature of the [mail fraud] scheme.”); see also F&LA at 8, MUR 6645 (Conservative Strikeforce, *et al.*); F&LA at 9, MUR 6643 (Patriot Super PAC, *et al.*); F&LA at 9, MUR 6641 (CAPE PAC, *et al.*); F&LA at 9, MUR 6633 (Republican Majority Campaign PAC, *et al.*). A *misrepresentation of identity* is the required *actus reus* under 52 U.S.C. § 30124 and that misrepresentation must be made with *fraudulent* intent. By comparison, the *actus reus* targeted by the federal mail fraud statute, 18 U.S.C. § 1341, is any use of the mails, and that use must be fraudulent, regardless whether there is an actual misrepresentation. This distinction is significant to applying Section 30124(b): the statute prohibits specific types of misrepresentations that are fraudulent.

²⁹ F&LA at 10, MUR 6633 (Republican Majority Campaign) (“Weighing against a finding of reason to believe that the Respondent violated [52 U.S.C. § 30124(b)] is the fact that [the Respondent] is registered with the Commission and complies with its reporting requirements . . .”).

³⁰ See *Novacek*, 739 F. Supp. 2d at 962 (“*Novacek* admits that she knew solicitees were confused as to the entities calling, because they would ask for information about the RNC or the Bush-Cheney ’04 campaign, or would send checks made out to those entities.”).

³¹ F&LA at 5, MUR 5444 (National Democratic Congressional Committee) (solicitor endorsed and deposited a check made payable to a party committee and diverted the funds to his personal use).

³² Compare, e.g., Gen. Counsel’s Brief at 8, MUR 5472 (RVC) (recommending probable cause in part on the basis of the statement “Contributions or gifts to the *Republican Party* are not deductible as charitable contributions”) (emphasis in original), with F&LA at 10, MUR 6641 (CAPE PAC) (finding no reason to believe statements such as “Help CAPE PAC re-elect Allen West to Congress” indicated fraudulent intent).

³³ See F&LA at 5, MUR 5443 (www.johnkerry-2004.com); F&LA at 3, MUR 5505 (<http://testhost.yahoogoogle.biz>); F&LA at 4, MUR 5495 (www.johnkerry-edwards.org).

and (6) whether the solicitor made other false statements regarding its identity.³⁴ Such evidence is probative of whether a respondent's conduct was reasonably calculated to deceive people into believing they were giving to a candidate or party.

The Commission has found that the inclusion of an adequate disclaimer, absent a countermanding explicit misrepresentation of identity, can negate any inference arising from other evidence indicating a respondent maintained the requisite intent to deceive for purposes of a section 30124 violation.³⁵

Significantly, however, not all misrepresentations are fraudulent. In MUR 3690, the Commission found that a flyer sponsored by a national political party committee purporting (falsely) to be written by a candidate informing constituents of his profligate spending ways in Washington, D.C. – although a misrepresentation – was satire and lacked the requisite fraudulent intent to violate Section 30124.³⁶

Conclusion

I believe this policy statement accurately synthesizes prior cases and sets forth a workable and Constitutional framework for approaching this important speech prohibition in the Act. In the future, a rulemaking or policy statement on this subject may be appropriate. In the absence of a clear Commission policy, I have committed my view to paper for reference by the Commission and the public.

February 16, 2018

³⁴ See F&LA at 8, MUR 5385 (Groundswell Voters PAC) (finding “circumstances present a classic case of fraud because respondents claimed to be a PAC, used a false address, and false IRS registration number).

³⁵ F&LA at 10, MUR 6641 (CAPE PAC, *et al.*) (“The Commission has previously held that the presence of an adequate disclaimer identifying the person or entity that paid for and authorized a communication can defeat an inference that a respondent maintained the requisite intent to deceive for purposes of a section [30124] violation.”) (*citing* MUR 2205 (Foglietta) and MURs 3690, 3700 (National Republican Congressional Committee)).

³⁶ F&LA at 3-4, MUR 3690 (National Republican Congressional Committee) (applying the “fraudulent misrepresentation” prohibition under 52 U.S.C. § 30124(a)(1)).