FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6529
Gloria Negrete McLeod, et al.	)	
	)	

STATEMENT OF REASONS
OF CHAIR ELLEN L. WEINTRAUB
AND COMMISSIONER STEVEN T. WALTHER

The Complaint in this matter alleged that Gloria Negrete McLeod and her federal and non-federal campaign committees ("Respondents") violated the Federal Election Campaign Act ("the Act") and Commission regulations by, among other things, using non-federal funds to pay for a poll designed partly to test the visibility of McLeod's federal candidacy. Based on Respondents' representations, the Office of General Counsel ("OGC") recommended that the Commission find reason to believe that 54.5% of the poll was related to McLeod's federal candidacy, and thus was an impermissible in-kind contribution by her non-federal committees. OGC also concluded that Respondents' activities may have resulted in several other violations, but recommended dismissal of these allegations as a matter of prosecutorial discretion.[1] While we agreed with OGC that there was reason to believe that Respondents violated the Act and Commission regulations with respect to payment for the poll, in our opinion, the Commission should have conducted a limited investigation to determine the amount in violation,[2] and should

[1] *See Heckler v. Chaney*, 470 U.S. 821 (1985).

[2] We voted to find reason to believe that Respondents violated (1) section 441i(e)(1)(A) of the Act and 11 C.F.R. § 110.3(d) by paying for the poll entirely with non-federal funds and (2) section 434(b) of the Act and 11 C.F.R. § 100.72(a) by failing to report the cost of the federal portion of the poll as an in-kind contribution from the non-federal committees, and to authorize an investigation to determine the allocation percentages for the cost of the polling research. Vice Chairman McGahn and Commissioners Hunter and Petersen dissented. *See* Certification in MUR 6529, dated May 9, 2013 ("May 9 Cert.").

also have moved forward on three other clear-cut violations.[3] Accordingly, we could not support several of OGC's recommendations.[4]

Prior to her successful run for Congress in 2012, McLeod served as a California State Senator and had an authorized campaign committee for this office (the "State Senate Committee"). In 2011, while considering a run for the U.S. House of Representatives, McLeod also considered a run for the San Bernardino County Board of Supervisors, and formed a separate authorized campaign committee for this purpose (the "Supervisor Committee"). According to Respondents, in the summer of 2011, the State Senate and Supervisor Committees commissioned a poll to test McLeod's viability for *both* a run for Congress and a run for Supervisor, and split the $30,120 cost of the poll between the two non-federal committees. McLeod had not yet formed her principal campaign committee for the 2012 U.S. House race (the "Federal Committee").[5] Nevertheless Respondents' counsel acknowledged that six of the polls 11 questions (or 54.5%) pertained to McLeod's federal candidacy.[6] Respondents did not provide the Commission with a copy of the poll, which would have allowed the Commission to make its own determination as to the appropriate federal proportion.

A federal candidate may only spend funds subject to the limitations, prohibitions, and reporting requirements of the Act in connection with a federal election.[7] Commission regulations specifically prohibit a federal candidate from transferring funds from non-federal committees or accounts to pay for federal election-related activities.[8] These requirements also apply to activities that a prospective federal candidate undertakes to "test the waters" for a possible run.[9] Thus, where a prospective candidate undertakes activities, such as polling, designed to test her viability for both federal and non-federal office, the federal portion of these

[3] We voted to find reason to believe that Respondents violated (1) section 441d of the Act and 11 C.F.R. § 110.11 by failing to include a proper disclaimer on a fundraising solicitation; (2) section 441i(e)(1)(A) of the Act and 11 C.F.R. § 300.61 with respect to the solicitation of prohibited funds; and (3) section 441i(e)(1)(B) of the Act and 11 C.F.R. § 300.62 by disbursing non-federal funds to state and local candidates after McLeod became a federal candidate. Vice Chairman McGahn and Commissioners Hunter and Petersen dissented. *See* May 9 Cert.

[4] While there were insufficient votes to make any findings on the allegations discussed above, the Commission unanimously voted to find no reason to believe that Respondents violated 2 U.S.C. § 441a(a)(l) and 11 CF.R. §§ 110.1(b) and 104.7(b). *See* May 9 Cert.; Factual and Legal Analysis in MUR 6529.

[5] McLeod Response ("Response") at 5. Respondents were not obligated to form the Federal Committee before spending funds to test the waters for McLeod's U.S. House run; McLeod could have paid the cost of the federal portion of the poll herself, or allocated the cost to an exploratory entity. *See, e.g.*, MUR 6224 (Fiorina) (testing the waters activities permissibly funded by candidate and by exploratory 527 organization).

[6] Response at 6.

[7] 2 U.S.C. § 441i(e)(1)(A).

[8] 11 C.F.R. § 110.3(d).

[9] 11 C.F.R. § 100.72(a).

activities must be paid for with funds that comply with the Act's contribution limits and source requirements.[10]

Respondents acknowledge that funding the entire poll with funds from the State Senate and Supervisor Committees violated the Act and Commission regulations[11] – though even this seemingly non-controversial proposition could not gain four affirmative votes from the Commission. In any event, for us the only remaining issue pertained to the amount in violation. Although we appreciate Respondents' concession that some of the poll should have been paid for with federal funds, it was the Commission's responsibility to determine for itself the amount in violation. Of course, such a determination would have required review of the poll, which the Respondents chose not to provide. We voted to initiate a brief, limited investigation for this very purpose – to obtain the poll so the Commission could determine the amount in violation.

Apart from the issue of the poll, OGC also identified several other clear-cut violations from the period after McLeod became a federal candidate. OGC nevertheless recommended dismissing these allegations because they were *de minimis* in nature.[12] We agree with OGC's legal analysis,[13] but could not support dismissal. These violations were all fairly straightforward. Had the Commission moved forward with the poll-related violations, as we voted to do, moving forward on these other issues would not have required additional resources. On balance, we could not conclude that these violations were so minor that they did not at least warrant inclusion in any final conciliation agreement. Accordingly, we voted to find reason to believe with respect to these issues as well.

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[10] *See* MUR 5480 (Levetan) (prospective candidate's non-federal committees could not permissibly fund portion of poll related to possible federal candidacy).

[11] *See* Response at 6 ("The portion of the polling devoted to testing the waters for the Congressional race should not have been paid by the [State Committee] and [Supervisor Committee], and instead should have been paid by sources permissible under the testing-the-waters provision and later attributed to the [Federal Committee] if and when it was created.") The Federal Committee did eventually reimburse the non-federal committees for what, in Respondents' view, was the federal share of the poll, but not until April 2012 – approximately nine months after the poll was commissioned and seven months after McLeod declared her federal candidacy. *See id.* at 6 & Ex. C.

[12] *See* First General Counsel's Report ("FGCR") at 9-14.

[13] Of note, we agree that the invitation to the September 22 fundraiser discussed in the FGCR was a "printed communication" and subject to all the disclaimer requirements for such communications. *See* FGCR at 9-10 & n.7. Whether a communication is a printed communication turns on its format, not its mode of dissemination in any one instance. *See* MUR 5526 (Graf for Congress), Statement of Reasons of Chair Michael E. Toner, Vice Chairman Robert D. Lenhard and Commissioners David M. Mason, Hans A. von Spakovsky, Steven T. Walther and Ellen L. Weintraub (an internet webpage does not become a printed communication simply by virtue of the fact that it can be printed). Here, the communication was distributed electronically as a PDF. PDFs are used to electronically store and transmit hard copy documents in their original form so that they can be printed for use. The solicitation here was clearly designed to be printed – indeed, it could not be used without being printed, since it contained a space for the contributor to fill out his or her information by hand, and an address at which to return the printed document accompanied by a check. *See* Complaint, Ex. 2. The solicitation thus was plainly a "printed communication," notwithstanding that it happened to be disseminated electronically.

For these reasons, we could not support all of OGC's recommendations.

7/3/13
Date

Ellen L. Weintraub
Chair

7/3/13
Date

Steven T. Walther
Commissioner