



FEDERAL ELECTION COMMISSION
Washington, DC 20463

JUL 14 2010

Charles H. Bell, Jr., Esq.
Bell, McAndrews & Hiltachk, LLP
455 Capitol Mall, Suite 801
Sacramento, CA 95814

RE: MUR 6224
Cara Carleton "Carly" Sneed Fiorina

Dear Mr. Bell:

On November 3, 2009, the Federal Election Commission notified your client, Cara Carleton "Carly" Sneed Fiorina of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On June 29, 2010, the Commission found, on the basis of the information in the complaint, information provided by you, and publicly available information, that there is no reason to believe Ms. Fiorina violated 2 U.S.C. § 432(e)(1). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Dawn M. Odrowski, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink that reads "Susan L. Lebeaux". The signature is written in a cursive, flowing style.

Susan L. Lebeaux
Acting Deputy Associate General Counsel
for Enforcement

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Carly Fiorina

MUR: 6224

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission ("Commission") by Alberto Ramirez. It involves the "testing the waters" exemptions to the definitions of "contribution" and "expenditure." The exemptions permit an individual to raise and spend funds to test the feasibility of a Federal candidacy without becoming a "candidate," a determination that triggers registration and reporting requirements under the Federal Election Campaign Act of 1971, as amended ("the Act").

The complaint alleges that Cara Carleton "Carly" Sneed Fiorina ("Fiorina" or "Respondent") became a "candidate" for the U.S. Senate in California on or before September 25, 2009, and consequently failed to timely register and, through a designated political committee, file financial disclosure reports with the Commission.

Specifically, the complaint alleges that, by September 25, 2009, Fiorina had spent more than \$5,000, the dollar threshold that triggers "candidate" status under the Act and obligatory registration and reporting requirements, and had conducted activities indicating that she had decided to become a candidate. The specific activities alleged were that Fiorina had (1) spent more money than reasonably needed to "test the waters" and attempted to amass funds to be used after she became a candidate; (2) used general public political advertising to publicize her intention to campaign; (3) allowed and authorized statements by media sources that referred to her as a U.S. Senate candidate and authorized statements on her website that "implied" she was a

1 candidate; and (4) conducted activities over a protracted period of time and made no effort “to
2 disclaim her efforts or intentions to run for U.S. Senate.”

3 In response to the complaint, Respondent asserts that the complaint provides no evidence
4 or facts to support claims that she exceeded the scope of the “testing the waters” exemption. *See*
5 Response at 2. She states that she announced on August 17, 2009, that she would explore the
6 viability of a possible candidacy for the Republican nomination for U.S. Senate but would not
7 reach a decision until she completed treatment and follow-up care for breast cancer, which she
8 expected to complete by October 1, 2009. *See id.* at 1. Between August 17 and November 4,
9 2009, when she formally announced her candidacy, she maintains that she engaged in permissible
10 “testing the waters” activity by meeting people, sharing her views on public policy issues, and
11 getting feedback on a potential candidacy. *See id.* at 1-2. She contends that she made clear during
12 numerous public and private appearances that she had not made a decision about her candidacy.
13 *See id.*

14 Neither the limited information provided in the complaint nor publicly available
15 information supports the complaint’s allegations. Although the post-complaint disclosure report
16 filed by Fiorina’s principal campaign committee, Carly for California, confirms that Fiorina both
17 raised and spent more than \$5,000 before September 25, 2009, information about Ms. Fiorina’s
18 activities and statements provided in the complaint and from publicly available sources do not
19 support a conclusion that she had decided to become a candidate before she formally announced
20 her candidacy on November 4, 2009. Accordingly, the Commission finds no reason to believe
21 that Fiorina violated the Act.

II. FACTUAL SUMMARY

On August 18, 2009, Carly Fiorina announced that that she had filed the name “Carly for California” with the Internal Revenue Service to obtain an employer tax identification number, an action she described as “a logical next step in the process of evaluating running” for the U.S.

Senate in California in 2010. Press Release, *Carly Fiorina Begins Formal Process of Exploring Bid for U.S. Senate*, Aug. 18, 2009, available at <http://carlyforca.com/2009/08/fiorina-exploring>.

On October 2, 2009, Carly for California filed an initial Political Organization Notice of Section 527 Status Form with the Internal Revenue Service (“IRS”) and described its purpose as “testing the waters-possible federal candidacy.”

Ms. Fiorina formally announced her candidacy on November 4, 2009, after the complaint was filed but before she received it from the Commission on November 10, 2009. *See* Response at 1. She filed a Statement of Candidacy on November 5, 2009, designating Carly for California, Inc. (“the Committee”) as her principal campaign committee. The Committee filed a Statement of Organization the same day. The Committee’s initial disclosure report, filed on January 27, 2010, reflects total receipts of \$3,584,133.68 and total disbursements of \$830,517.56 for the period of August 18, 2009, through December 31, 2009.

III. ANALYSIS

An individual becomes a candidate for federal office – and thus triggers registration and reporting under the Act – when he or she has received or made in excess of \$5,000 in contributions or expenditures. 2 U.S.C. § 431(2). The Commission created a limited exemption to the definitions of “contribution” and “expenditure” for “testing the waters” activity, allowing individuals to conduct certain activities designed to evaluate a potential candidacy. *See* 11 C.F.R. §§ 100.72 and 100.131; *see also* Explanation and Justification for Final Rules on Payments

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Received for Testing the Waters Activities, 50 Fed. Reg. 9592 (Mar. 13, 1985) (“*Testing the Waters E&J*”); Explanation and Justification to the Disclosure Regulations, House Doc. No. 95-44, Communication from the Chairman, FEC, Transmitting the Commission’s Proposed Regulations Governing Federal Elections, at 40 (Jan. 12, 1977). An individual who is “testing the waters” may conduct polls, make telephone calls, and travel to determine the viability of the potential candidacy, *see* 11 C.F.R. § 100.72(a); 11 C.F.R. §100.131(a), but need not register or file disclosure reports with the Commission unless and until the individual subsequently decides to run for Federal office or conducts activities that indicate he or she has decided to become a candidate. All funds raised and spent for “testing the waters” activities are, however, subject to the Act’s limitations and prohibitions. *See id.*

Commission regulations set out five non-exhaustive factors to be considered in determining whether an individual has decided to become a candidate. An individual can indicate that she has gone beyond “testing the waters” and has decided to become a candidate by (1) using general public political advertising to publicize her intention to campaign for Federal office; (2) raising funds in excess of what could reasonably be expected to be used for exploratory activities or undertaking activity designed to amass campaign funds that would be spent after she becomes a candidate; (3) making or authorizing written or oral statements that refer to her as a candidate for a particular office, (4) conducting activities in close proximity to the election or over a protracted period of time; and (5) taking action to qualify for the ballot under state law. 11 C.F.R. § 100.72(b); 11 C.F.R. § 100.131(b).

Once an individual meets the \$5,000 threshold and has decided to become a candidate, she has 15 days to designate a principal campaign committee by filing a Statement of Candidacy with

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1 the Commission. *See* 2 U.S.C. § 432(e)(1); 11 C.F.R. § 101.1(a). The principal campaign
2 committee must then file a Statement of Organization within ten days of its designation, *see*
3 2 U.S.C. § 433(a), and must file disclosure reports with the Commission in accordance with
4 2 U.S.C. §§ 434(a) and (b).

5 1. **Fiorina's Pre-Announcement Fundraising and Spending**

6
7 The complaint alleges that on or before September 25, 2009, Fiorina spent more money
8 than was reasonably needed to "test the waters" and was attempting to amass funds to be used
9 after she became a candidate. *See* 11 C.F.R. § 100.72(b)(2); 11 C.F.R. § 100.131(b)(2). In
10 support, the complainant points to her hiring of "notable political consultants" and "retail level
11 staffers" to "recruit" at the September 2009 California GOP convention by selling t-shirts and
12 baseball caps and/or collecting donations on-line. Complainant provides no factual basis for the
13 amount of money Fiorina raised or spent except to allege that it was more than \$5,000.

14 The Committee's reports suggest that Fiorina's pre-announcement spending and
15 fundraising were consistent with "testing the waters" activity. The Committee's initial disclosure
16 report, the 2009 Year End Report, confirms that it had raised \$41,513 in itemized contributions
17 and made \$5,806 in disbursements on Fiorina's behalf as of September 25, 2009. Because the
18 disbursement dates may not accurately reflect all expenses incurred prior to this date, a broader
19 examination of the Year End Report shows that the Committee had raised a total of \$611,799.25
20 in itemized receipts and made \$329,176.15 in disbursements before Fiorina made her November
21 4th announcement.¹ All but \$108,463 of the pre-announcement itemized receipts were comprised
22 of a loan and small in-kind contributions for travel from Fiorina. The largest categories of

¹ The Committee reports receiving another \$116,033.81 in unitemized receipts, but there is no way to determine how much of that was raised before either September 25 or November 4.

1 disbursements included \$91,066 for political strategy consulting; \$70,408 for payroll and payroll
2 insurance and taxes; \$54,935 for media/travel; \$37,072 for polling/travel; \$32,176.75 for legal and
3 compliance consulting; \$31,036 for finance consulting/travel; and \$21,906 for web services. All
4 disbursements for political strategy consulting, finance consulting, media consulting, and legal
5 consulting were made in mid-October or later.

6 In determining whether an individual has gone beyond "testing the waters," the
7 Commission is guided by a regulation citing examples of activities that indicate that an individual
8 has decided to become a candidate. One of those examples is the amount of money raised, but no
9 one factor is necessarily determinative. *See* 11 C.F.R. § 100.72(b); *see also* MUR 5934
10 (Thompson); MUR 5930 (Schuring); MUR 5703 (Rainville); MUR 2710 (Judge Harvey Sloane).
11 Here, excluding Fiorina's personal funds, the Committee raised at most \$224,496 from others
12 during the pre-announcement period (\$108,462 in itemized contributions and all unitemized
13 contributions), an amount insufficient by itself to conclude that she had decided to become a
14 candidate. Even the total \$611,799.25 in funds raised that included Fiorina's own funds does not
15 appear to exceed what could reasonably be expected to be used for exploratory activities based on
16 the Commission's decisions, particularly for a U.S. Senate race in California, which can be
17 expensive given the state's size and extensive voting age population.²

18 Nor do Fiorina's activities suggest that she was attempting to amass funds for an eventual
19 candidacy. Complainant alleges that Fiorina's hiring of political consultants and low-level
20 staffers, who apparently sold t-shirts and hats at a "recruitment and information table" at the state
21 party convention and/or collected on-line donations, evidence an attempt to amass funds to be

² In the last three U.S. Senate elections held in California in 2000, 2004, and 2006, the incumbents spent \$11.8 million, \$15.13 million and \$9.4 million, respectively. Opponents in the 2000, 2004 and 2006 elections spent \$6.67 million, \$5.35 million and \$195,000, respectively.

1 used after she became a candidate. The Commission, however, has advised previously that hiring
2 political consultants and soliciting contributions may be permissible “testing the water activities”
3 if they are undertaken to explore the feasibility of becoming a candidate. See Advisory Opinion
4 1981-32 (concluding that hiring political consultants to assist with advice on the potential and
5 mechanics of constructing a national campaign organization and soliciting contributions to engage
6 in “testing the waters” activities were within the scope of the testing the waters exemption so long
7 as the prospective candidate conducted the activities while continuing to deliberate his decision to
8 become a candidate).

9 The complaint provides no information that indicates Fiorina staffers were selling hats and
10 t-shirts or collecting on-line donations for purposes other than financing “testing the waters
11 activities.” It does not describe the hats, t-shirts, or other materials or the activity conducted at
12 what it describes as a recruitment table, and the Commission has found no publicly available
13 information about such convention activities. Similarly, there is no available information to
14 suggest that the consultants hired by Fiorina engaged in activities other than to assist her in
15 exploring her viability as a candidate for U.S. Senate. Indeed, the limited information available
16 about Ms. Fiorina’s activities during this period suggests that her activities were within the
17 “testing the waters” exemption – a barebones website, carlyforcalifornia.com, unveiled just before
18 the convention, included a mechanism to donate on-line with a disclaimer that “contributions are
19 raised for testing the waters purpose only at this time.” Kevin Yamamura, *Fiorina Launches New*
20 *Website: Twitter Account*, SACRAMENTO BEE, Sept. 22, 2009. While a “testing the waters”
21 disclaimer alone does not assure that contributions solicited are within the exemption, this
22 disclaimer, taken together with the facts that Ms. Fiorina raised only about a third of the
23 Committee’s pre-announcement contributions from others and spent in excess of that amount,

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1 suggest that the level of contributions was not significant enough to indicate that Fiorina had
2 decided to become a candidate before November 4, 2009.

3 **2. General Public Political Advertising**

4 The complaint alleges that Fiorina used general public political advertising to publicize her
5 intention to campaign, citing the use of Google ads that apparently included a declaration of
6 endorsement by former five former state Republican Party chairs. *See* 11 C.F.R. § 100.72(b)(1);
7 11 C.F.R. §100.131(b)(1). Although the Committee's disclosure reports state that she spent
8 \$54,935 for media/travel during this period, no Google ads featuring Fiorina or her candidacy,
9 including cached ads, were found in a search of publicly available information. A press release at
10 the time of the alleged ads announced that five former California Republican Party Chairmen
11 supported Fiorina "should she run for the U.S. Senate," but included a disclaimer stating that Ms.
12 Fiorina was "in the 'testing the waters' phase of a possible candidacy." *See* Press Release, *Former*
13 *California Republican Party Chairmen Call Carly the Best Candidate to Take on Boxer*, available
14 at <http://carlyforca.com/2009/09/former-crp-chairmen> (Sept. 25, 2009).

15 The complaint also refers to public television and panel commentary appearances by
16 Fiorina, as well as Fiorina's "promotion" of a gathering of activists she hosted on or about
17 September 28, 2009, in Fresno, in which Fiorina allegedly publicized her intention to campaign for
18 U.S. Senate. The Fresno gathering appears to have been a cocktail reception that Fiorina attended
19 at the Fresno home of a businessman on September 28, 2009, the day after the Republican state
20 convention. *See* John Ellis, *Fiorina Actions at Issue: GOP Candidate Skips Convention But Then*
21 *Campaigns in Fresno*, FRESNO BEE, Sept. 30, 2009.³ Fiorina also met with farmers and ranchers
22 on September 28 at a ranch near Coalinga, California. *See id.* According to a Fiorina

³ Fiorina reportedly did not attend the state convention, apparently because she was undergoing radiation treatments.

1 spokeswoman, these appearances were examples of day trips during which Fiorina met with
2 donors and “policy people” and learned about the issues. *See id.*; *see also* Response at 2.

3 The complaint provides no information about what Fiorina may have said at either event.
4 Moreover, these events do not qualify as “general public political advertising,” which includes
5 communications by broadcast, satellite or cable, newspaper, magazine, outdoor advertising
6 facility, mass mailings, phone banks, and Internet communications placed for a fee on another
7 website, all generally requiring payment to a third-party intermediary to reach the public.⁴ Nor
8 has the Commission located information that either event was publicized through general public
9 political advertising, such as mass mailings or newspaper ads in which Fiorina stated she intended
10 to campaign for U.S. Senate. In the absence of specific information about any statements made by
11 Fiorina at or in connection with those events, the Commission cannot conclude that she had
12 decided to become a candidate and was no longer testing the waters at that time.

13 **3. Statements Referring to Fiorina as a Candidate**

14 The complaint alleges that Fiorina allowed and authorized statements by media sources
15 that referred to her as a U.S. Senate candidate and authorized statements on her
16 website, carlyforcalifornia.com, that “implied” she was a candidate. *See* 11 C.F.R. § 100.72(b)(3);
17 11 C.F.R. § 100.131(b)(3). The complaint also generally refers to statements made on
18 twitter.com/carlyforcalifornia and facebook.com/carlyfiorina.

19 Again, the complaint cites no specific oral or written statements made by Fiorina or
20 authorized by her that refer to her as a candidate for U.S. Senate before she announced her

⁴ Cf. 2 U.S.C. § 431(22) and 11 C.F.R. § 100.26 (defining “public communication”); Internet Communications, 71 Fed. Reg. 18,589, 18,592, 18,594-595 (Apr. 12, 2006) (explaining that “any other form of general public political advertising” is a catch-all provision within the definition of “public communication” and that the common characteristics of the media enumerated as “public communications” were distribution of content through an entity owned or controlled by another person and payment through an intermediary to access the public through that medium).

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1 candidacy on November 4, 2009. The Commission found no written statements made or
2 authorized by Fiorina that referred to her as a candidate, including on the Twitter and Facebook
3 accounts complainant references.⁵ To the extent that complainant implies that statements by
4 media sources such as reporters or bloggers that refer to Fiorina as a candidate should be
5 considered dispositive, the Commission has no information that Fiorina was involved in or
6 authorized how any media source referred to her.

7 The complaint alleges that the phrase "It's Carly vs. Boxer," part of a flash sequence that
8 appeared on Fiorina's website when it was launched on or about September 22, 2009, implied that
9 Fiorina was a Senate candidate. At that point, the website was comprised of a "teaser" flash
10 sequence that read as follows: (screen 1) "It's day and night;" (screen 2) "It's cats and dogs;"
11 (screen 3) "It's Good and Bad;" (screen 4) "It's Carly vs. Boxer;" (screen 5) "Coming Soon?" and
12 (screen 6) "Carlyforniadreamin'!!!" The site offered visitors the option to "get involved" by
13 signing up for email and/or text updates and to donate. See YouTube: Worst Political Website
14 Ever #Carlyfornia by Carly Fiorina (video), and Kevin Yamura, *Fiorina Launches New Website;*
15 *Twitter Account*, SACRAMENTO BEE, Sept. 22, 2009. The website also apparently solicited
16 donations of up to \$2,400 from individuals and, as noted *supra* at p. 7, a bolded statement on the
17 site stated that "contributions are raised for testing the waters purposes only at this time." Yamura,
18 *supra*. This content, particularly the use of the question mark in the phrase "Coming Soon?",
19 appears consistent with Fiorina's professed intent to test the waters. The complaint makes no
20 other mention of statements on the website that refer to Fiorina as a candidate for U.S. Senate.

21

⁵ Accessible entries on the Twitter account and Facebook page cited begin on or after Fiorina formally announced her candidacy. As complainant does not identify the specific statements that he may have seen, there is no available information to support this allegation.

1 Respondent acknowledges that Ms. Fiorina made numerous public and private appearances
2 in connection with exploring a possible Senate candidacy but states that she clearly indicated she
3 had made no decision to run and “conditioned her statements about [a] possible candidacy.”⁶
4 Response at 1-2. Two documented Fiorina appearances found in Internet searches support
5 Respondent’s statements. At an appearance at the Web 2.0 Summit Dinner in San Francisco on
6 October 20, 2009, Fiorina discussed government technology policy and a possible bid for the U.S.
7 Senate but “said she was exploring the idea.” Dean Takahashi, *Web 2.0: Carly Fiorina Talks*
8 *Potential Senate Run, Breast Cancer Battle, and Government Tech Policy*, available at
9 [http://venturebeat.com/2009/10/20/web-20-carly-fiorina-talks-potential-senate-run-breast-cancer-](http://venturebeat.com/2009/10/20/web-20-carly-fiorina-talks-potential-senate-run-breast-cancer-battle-and-government-tech-policy)
10 [battle-and-government-tech-policy](http://venturebeat.com/2009/10/20/web-20-carly-fiorina-talks-potential-senate-run-breast-cancer-battle-and-government-tech-policy) (Oct. 20, 2009). In an appearance on the cable news show
11 “Your World” in October 2009, Fiorina discussed the effectiveness of federal economic stimulus
12 legislation with the show’s host as well as a possible U.S. Senate challenge against incumbent
13 Barbara Boxer. Fiorina stated that she was “exploring a run against Barbara Boxer,” and as a
14 follow-up to the host’s earlier comment about her cancer treatment and earlier polling about
15 possible candidates in the race, she noted that she had been “quiet for almost nine months while I
16 was dealing with an important health issue.” She ended her comments by stating that “if I move
17 forward, I will move forward because I believe it’s important to achieve a change in the U.S.
18 Senate and that I have a chance of beating her, but we’ll see.” She did not refer to herself as a
19 candidate in this television appearance. See Carly Fiorina with Fox News’ Neil Cavuto, *available*
20 *at* <http://videos.apnicommunity.com/Video.Item,2609026500.html> (last visited Mar. 20, 2010).

⁶ See, e.g., MUR 5930 (Kirk Schuring) Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter, Donald F. McGahn, and Ellen L. Weintraub at 2 (stating where the individual conditioned his candidacy upon the incumbent’s decision to run, “the individual cannot be said to have decided to run until the condition precedent occurs.”).

1 **4. Length of Fiorina's Exploratory Activity**

2 Finally, the complaint alleges that Fiorina conducted activities over a protracted period of
3 time and made no effort "to disclaim her efforts or intentions to run for U.S. Senate . . . and has
4 in fact made commitments that she will be running and announcing." Again, however, the
5 complaint does not provide specific instances where Fiorina made commitments that she would
6 run or announce her candidacy, and the available information does not support that statement.

7 The complaint alleges that Fiorina became a candidate on or before September 25. The
8 complaint has provided no specific statement or activities either before or after this date to support
9 a conclusion that Fiorina had decided to become a candidate. The few examples of general
10 activities provided, such as the Fresno meeting and the website discussed above, occurred in the
11 41-day period between September 25 and Fiorina's formal announcement on November 4, 2009,
12 which does not constitute a protracted time period. *Cf.* Advisory Opinion 1981-32 (engaging in
13 proposed "testing the waters" activities beyond a period of several months may affect the
14 applicability of the exemption).

15 As for the complaint's claim that Fiorina failed to disclaim her "efforts or intentions" to
16 run for U.S. Senate, the Act and Commission regulations do not require an individual to disclaim
17 intentions to become a candidate for federal office to qualify for the "testing the waters"
18 exemption. Commission regulations state only that publicizing one's intentions to run for a
19 specific office through general public political advertising may indicate that a person has decided
20 to become a candidate. Implicit in the concept of "testing the waters" is that a candidate will make
21 known that she is exploring the possibility of running to "gauge the level of support that may be
22 achieved and determine the viability of a candidacy." *See* MUR 5934 (Thompson), Statement of
23 Reasons of Vice Chairman Petersen and Commissioners Hunter, McGahn and Weintraub at 2.

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1 **5. Conclusion**

2 Based on available information, it does not appear that Fiorina made or authorized any
3 statements or engaged in any activity described in the “testing the waters” regulations to support a
4 conclusion that she had decided to become a candidate for U.S. Senate and was no longer “testing
5 the waters” before her formal announcement on November 4. Accordingly, the Commission finds
6 no reason to believe that Fiorina violated 2 U.S.C. § 432(e)(1) based on the allegations in the
7 complaint.

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