



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 )  
 ) MUR 6434  
Indiana Democratic Party )  
 )

**STATEMENT OF REASONS  
OF CHAIR CYNTHIA L. BAUERLY AND  
COMMISSIONER ELLEN L. WEINTRAUB**

At the heart of this matter are approximately 20,000 mailers distributed by the Indiana Democratic Party ("IDP") that appeared – inaccurately – to have been authorized by the campaign of the Libertarian candidate, Mark Vogel. The complainant alleges that the mailing violated the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations because the IDP failed to include a disclaimer stating that it was not authorized by the Vogel campaign. In response, the IDP contends such a disclaimer was unnecessary because its mailing qualified for the statutory "volunteer materials" exemption. *See* 2 U.S.C. §§ 431(8)(B)(ix) and 431(9)(B)(viii). Because the record does not show the substantial volunteer involvement necessary for the mailing in question to qualify for the exemption, we could not support OGC's recommendation that the Commission should not find reason to believe that the IDP violated the Act.<sup>1</sup>

**Background**

Complainant, a representative of Vogel for Congress, the principal campaign committee of Libertarian candidate for Indiana's 2<sup>nd</sup> Congressional District Mark Vogel, alleges that the IDP distributed up to 20,000 mailers in the days before the election that could have inaccurately led readers to believe that the mailers were authorized by the Vogel campaign. Complaint at 1. On one side, the mailer states "VETERAN MARK VOGEL. THE TRUE CONSERVATIVE FOR CONGRESS," and "ON TUESDAY, NOV. 2, SUPPORT THE TRUE CONSERVATIVE. VOTE MARK VOGEL FOR CONGRESS." *See* Complaint, Attachment unnumbered 1. There is a picture of Mark Vogel with an American flag in the background. The other side of the mailer contains text describing Mark Vogel's position on several public issues, including his desire to "[e]nd government-run health care," "[c]ut government spending by 50%," and

<sup>1</sup> Commissioners Hunter, McGahn, and Petersen voted to find no reason to believe that the IDP violated the Act. Commissioners Bauerly and Weintraub dissented. Commissioner Walther did not vote. Thereafter, the Commission voted 5-0 to close the file. Certification in MUR 6434, dated October 20, 2011.

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“[a]bolish the IRS.” *Id.* Mark Vogel is again characterized as the “true Conservative” and the reader is twice asked to “[v]ote Mark Vogel for Congress.” While the top corner of the first page of the mailer includes a “Paid for by the Indiana Democratic Party” disclaimer, the bottom of each page displays the URL “www.Vogel4Congress.com,” which appears to be the Vogel campaign’s official website. *Id.*

As explained below, the mailing does not appear to comply with the disclaimer requirements in the Act and Commission regulations. Nevertheless, the IDP asserts that these requirements are inapplicable because the mailing included substantial volunteer involvement due to volunteers having “sorted, bundled, and stacked the mail into trays.” In signed declarations by an employee and a volunteer, IDP also asserts that “although volunteers wished to transport the mail pieces to the post office, representatives of the mailing house utilized by the IDP informed the IDP that volunteers would be prohibited from doing so for insurance and legal reasons.” Response, Declaration of Cameron Raulford ¶ 3, dated January 20, 2011; Response, Declaration of Rohan Patel ¶ 3, dated January 20, 2011. The IDP’s response also included black and white copies of eight photographs that appear to show four individuals handling mailers.

#### Legal Analysis

The Act and Commission regulations require that all public communications<sup>2</sup> made by a political committee contain disclaimers. 2 U.S.C. § 441d; 11 C.F.R. § 110.11. Public communications that are not authorized by a candidate or the authorized committee of a candidate must include a disclaimer that “clearly state[s] ... that the communication is not authorized by any candidate or candidate’s committee.” 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11(b)(3). However, several categories of communications are exempt from the requirement. 11 CFR § 110.11(c).

The IDP asserts that its mailing falls under the volunteer materials exemption, which provides that a payment for campaign materials by State or local party committees is not a contribution or expenditure provided that those materials are “used in connection with volunteer activities on behalf of any nominee(s) of such party” (and that certain other conditions are met). 2 U.S.C. §§ 431(8)(B)(ix) and 431(9)(B)(viii); 11 C.F.R. §§ 100.87 and 100.147. Thus, in addition to being exempt from the disclaimer requirement, such payments are not subject to contribution or expenditure limits, and a state committee may donate an unlimited amount of qualifying materials to a Federal candidate.<sup>3</sup> For the exemption to apply, such materials must be “distributed by volunteers and not by commercial or for-profit operations.” 11 C.F.R. § 100.87(d); 11 C.F.R. § 100.147(d). In prior enforcement matters, the Commission has applied the volunteer materials exemption where there was “substantial volunteer involvement”<sup>4</sup> in the distribution of the mailing.

<sup>2</sup> A “public communication” is defined as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 2 U.S.C. § 431(22); 11 C.F.R. § 100.26.

<sup>3</sup> For the purpose of § 100.147(a), direct mail is defined as “any mailing(s) by a commercial vendor or any mailing(s) made from commercial lists.” In this case, an invoice provided by the respondent indicates that the 23,813 piece mailing was designed and sent by a commercial vendor.

<sup>4</sup> See Factual and Legal Analysis in MUR 5841 (Arizona Democratic Party) (describing past enforcement matters as examining whether there was “substantial volunteer involvement” in the distribution of the materials); Statement of

The statute and regulations explicitly state that the volunteer materials exemption does not apply to direct mail. 2 U.S.C. § 431(9)(B)(viii)(1); 11 C.F.R. § 100.147(a). However, procedures for production, preparation and distribution of mailings have changed over the last thirty years and therefore the Commission has expanded its application of the exemption to include mailings bearing commercially printed labels and commercial postage stamps so long as the name and address information for the mailing labels were not obtained from commercial mailing lists, and provided that volunteer involvement in distributing the mailings remains substantial.<sup>5</sup> This interpretation of the exemption is long-standing and relied upon by the regulated community.

Even under the Commission's current interpretation of the volunteer materials exemption, we do not believe that the IDP's mailer falls within the exemption based on the facts provided. "Substantial volunteer involvement" in the distribution of the materials may be demonstrated by a combination of activities, such as: bundling and sorting mailers, affixing address labels, placing bundled mail into mail bags, and loading mailers into trucks for delivery, provided that these activities are necessary for the mailing to be distributed. OGC has stated (and we agree) that "the touching of each mailer by an individual volunteer" is insufficient to transform a commercial operation into exempt activity, and that such an approach would be "squarely at odds with the legislative intent envisioning significant volunteer participation." MUR 2288, General Counsel's Report dated May 2, 1989, at 10-11. The IDP states that volunteers "sorted, bundled, and stacked the mail into trays." Based on the documents and photos submitted by the IDP, these activities would not have required volunteers even to handle separately each piece, which would be the case if volunteers were affixing postage, address labels or bulk mail permits. Instead, the documents provided indicate that at least four volunteers were involved in taking mailers from machines and placing them into postal bins in stacks. The activities in this matter are insufficient to turn an otherwise commercial mailer into one that includes substantial volunteer involvement in the distribution of the material and thus qualify for the exemption.<sup>6</sup>

In MUR 2288 (Utah Republican Party), volunteers stamped the non-profit mail seal on each mailer, bundled, and delivered mailers to a direct mail firm. These activities were insufficient to "convert an essentially commercial operation into the type of exempt activity

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Reasons of Chairman Robert D. Lenhard, Vice Chairman David M. Mason and Commissioners Hans A. von Spakovsky and Ellen L. Weintraub in MUR 5837 at 4 (Missouri Democratic State Committee) (observing that in past matters the Commission has emphasized that "substantial volunteer involvement" is required for the exemption to apply); Statement of Reasons of Chairman Robert D. Lenhard, Vice Chairman David M. Mason, and Commissioner Ellen L. Weintraub in MURs 5824/5825 at 5-6 (Pennsylvania Democratic State Committee) (observing that the exemption applied where there was "substantial amount of volunteer involvement").

<sup>5</sup> See Statement of Reasons of Chairman Robert D. Lenhard, Vice Chairman David M. Mason, and Commissioner Ellen L. Weintraub in MURs 5824 and 5825 (Pennsylvania Democratic State Committee) and Statement of Reasons of Chairman Robert D. Lenhard, Vice Chairman David M. Mason and Commissioners Hans A. von Spakovsky and Ellen L. Weintraub in MUR 5837 (Missouri Democratic State Committee).

<sup>6</sup> IDP states that "volunteers wished to transport the mail pieces to the post office" but were "prohibited from doing so for insurance and legal reasons." The Commission has never provided the benefit of the volunteer materials activity exemption to a party committee on the basis of work that volunteers were willing to but did not perform.

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envisioned by the Act.”<sup>7</sup> The Utah Republican Party ultimately entered into a conciliation agreement and agreed to pay a civil penalty.<sup>8</sup> In this matter, the volunteers did not stamp each mailer or deliver the mailers, and therefore the volunteer activity is even less substantial than in MUR 2288. Accordingly, we do not believe that the volunteer activity in connection with IDP’s mailers was substantial enough to qualify for the volunteer materials exemption.<sup>9</sup>

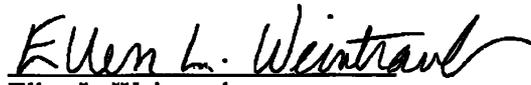
Disclaimers are an important part of our system of disclosure. They “insure that the voters are fully informed’ about the person or group who is speaking.” *Citizens United v. FEC*, — U.S.—, 130 S.Ct. 876, 915 (2010) (quoting *Buckley v. Valeo*, 424 U.S. 1, 76 (1976)). Additionally, the “authorized by” portion of the disclaimer requirement protects candidates by making it clear which messages they are responsible for and which messages they have not authorized. In this case in particular, where the mailer may have misleadingly suggested that Mark Vogel was responsible for its contents, the disclaimer would have helped to alleviate possible confusion as to who actually paid for it.

For these reasons, we voted against the recommendation not to find reason to believe that the IDP violated the Act. Congress intended the volunteer materials exemption to encourage volunteers to work with state and local political parties,<sup>10</sup> but explicitly limited the exemption to exclude direct mail. To balance these two congressional directives in light of changing methods for producing mailers, the Commission established the substantial volunteer involvement threshold for applying the exemption. Based on these facts, we do not believe that the IDP has met the required threshold here and shown that its activity falls within the volunteer materials exemption to the disclaimer requirements.

11/21/2011  
Date

  
Cynthia L. Bauerly  
Chair

11/21/11  
Date

  
Ellen L. Weintraub  
Commissioner

<sup>7</sup> MUR 2288, General Counsel’s Report dated May 2, 1989, at 10-11.

<sup>8</sup> See MUR 2288, Certification dated February 2, 1990; Conciliation Agreement, dated February 7, 1990.

<sup>9</sup> We also question whether the mailers were “on behalf of” the Democratic nominee, Representative Joe Donnelly. See 2 U.S.C. § 431(9)(B)(viii); 11 C.F.R. § 100.147. The Commission has not previously considered whether a mailing that ostensibly supports an opponent of a party’s nominee can still be “on behalf” of that nominee. IDP relies on Advisory Opinion 2008-06 (Democratic Party of Virginia), which states that “the content of campaign material is not restricted under this exemption.” AO 2008-06 at 5. However, that statement merely sought to distinguish the volunteer materials exemption from the “slate card exemption,” which provides specific criteria for what content can be included on qualifying material. See *id* at 3. The question of whether the mailers were on behalf of the party was not before the Commission in AO 2008-06.

<sup>10</sup> See H.R. Rep. No. 422, 96th Cong., 1st Sess. at 9.

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