

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 7109

DATE COMPLAINT FILED: July 21, 2016

DATE OF NOTIFICATION: July 27, 2016

RESPONSE RECEIVED: September 14, 2016

DATE OF ACTIVATION: November 29, 2016

ELECTION CYCLE: 2016

EXPIRATION OF SOL: Earliest: February 4, 2021

Latest: February 4, 2021

COMPLAINANT:

Ramon Miramontes

RESPONDENTS:

Anthony Portantino

Portantino for Senate 2016

Anthony Portantino Congressional Exploratory

Committee and David Gould in his official
capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30103(d)

52 U.S.C. § 30104

52 U.S.C. § 30125(e)

11 C.F.R. § 102.1(a)

11 C.F.R. § 102.3(b)

11 C.F.R. § 110.3(d)

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Complaint in this matter alleges that Anthony Portantino, Anthony Portantino for Senate 2016 ("State Committee"), and Anthony Portantino Congressional Exploratory Committee and David Gould in his official capacity as treasurer ("Federal Committee") violated the Federal Election Campaign Act of 1971, as amended (the "Act"), and the Commission's implementing regulations when the Federal Committee accepted the repayment of a \$275,000

1 loan it made to the State Committee 10 months prior. Complainant alleges that the State
2 Committee appears to have commingled the loan proceeds with non-federal funds, and that the
3 repayment violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 110.3(d).

4 Respondents provided information demonstrating that the funds used to repay the loan
5 were never commingled with the State Committee's other assets, and argued that the
6 Commission previously issued an Advisory Opinion interpreting the Act and its regulations to
7 permit such a transaction. Based on the available information, we recommend that the
8 Commission find no reason to believe that Anthony Portantino, the State Committee, and the
9 Federal Committee violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 110.3(d).

10 II. FACTS

11 In 2010, Anthony Portantino was an incumbent California State Senator, and the State
12 Committee was Portantino's state senate campaign committee. Portantino was also a candidate
13 in the 2012 election for the U.S. House of Representatives seat in California's 26th Congressional
14 District. Portantino filed his Statement of Candidacy on March 26, 2010, which designated the
15 Federal Committee as his principal campaign committee for the House election.¹ The Federal
16 Committee has filed quarterly disclosure reports since April 2010, and has never terminated.

17 On June 30, 2015, the Federal Committee transferred \$275,000 to the State Committee
18 and reported the transfer in the Federal Committee's disclosure reports as a "Loan."²

¹ See Anthony Portantino Statement of Candidacy (March 26, 2010). The Federal Committee had filed a Statement of Organization three days earlier, on March 23, 2010. See Anthony Portantino Congressional Exploratory Committee Statement of Organization (March 23, 2010). Notwithstanding the use of the term "exploratory" in the committee's moniker, it is unclear that Portantino ever tested the waters of a possible candidacy, as he filed a Statement of Candidacy only 3 days after registering the Federal Committee as his principal campaign committee; the Committee reported raising over \$5,000 in contributions by June 4, 2010. See Federal Committee July Quarterly Report (July 13, 2010) at Schedule A.

² See Federal Committee July Quarterly Report (July 14, 2015) at 6-8, Schedules B & C. The State Committee also reported the transfer as a loan in its disclosures. Resp. at 1-2 (Sept. 14, 2016).

1 Complainant asserts that the State Committee appears to have commingled these funds with its
2 other assets. Respondents, however, assert that the \$275,000 loan was not made in cash, but was
3 a transfer of securities held in an Edward Jones brokerage account in the name of the Federal
4 Committee, and which had been purchased using only federal funds.³ Respondents assert that
5 the securities were never sold or cashed.⁴ Rather, ownership of the securities at the Edward
6 Jones brokerage merely changed from the Federal Committee to the State Committee.⁵
7 Respondents contend that the \$275,000 in securities were at all times segregated from the cash
8 funds in the State Committee's bank account, and that the federal and state funds were never
9 commingled.

10 Respondents describe the transfers as "paper transactions" because the State Committee
11 did not use any of the \$275,000 that the Federal Committee loaned it. According to
12 Respondents, Portantino's principal primary opponent in his state election dropped out of the
13 race before any of the funds were used for the state primary election.⁶ On February 4, 2016, the
14 State Committee transferred ownership of the securities back to the Federal Committee, and the
15 Federal Committee reported the receipt as a loan repayment.⁷

16 III. ANALYSIS

17 Federal candidates and officeholders, or entities directly or indirectly established,
18 financed, maintained or controlled by them, are prohibited from soliciting, receiving, directing,
19 transferring, or spending funds that do not comply with the limitations and prohibitions of the

³ Resp. at 2.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See Federal Committee April Quarterly Report (Apr. 13, 2016) at 8, Schedule C.

1 Act.⁸ An individual who is a candidate for both a federal and state office must designate
2 separate committees and establish completely separate campaign organizations.⁹ In addition, a
3 Commission regulation provides, in material part, that transfers of funds or assets from a
4 candidate's campaign account for a non-federal election to his or her principal campaign
5 committee for a federal election are prohibited.¹⁰ If a candidate has an account for a non-federal
6 election, those funds must be kept separate from federal funds and may not be transferred to his
7 or her federal account or used to pay for expenditures related to his or her federal election
8 activities.¹¹ These provisions are designed to prevent the use of funds that are outside the
9 limitations and prohibitions of the Act in federal elections, and to ensure that all funds used in
10 federal elections are reported.

11 In Advisory Opinion 2002-08 (Vitter), the Commission concluded that funds that had
12 been loaned or transferred from a candidate's federal committee to his state committee could be
13 transferred back to the federal committee without violating 11 C.F.R. § 110.3(d), so long as those
14 funds had not been commingled with the state committee's funds.¹² The Commission reasoned
15 that because the funds were not commingled, there was no risk that the funds being repaid would

⁸ 52 U.S.C. § 30125(e)(1)(A).

⁹ See 11 C.F.R. § 110.3(d). See also Advisory Op. 1994-37 (Schumer) (Jan. 13, 1995).

¹⁰ 11 C.F.R. § 110.3(d); see also Transfer of Funds from State to Federal Campaigns, 58 Fed. Reg. 3474, 3475 (Jan. 8, 1993).

¹¹ *Id.* See, e.g., MUR 6267 (Paton) (finding reason to believe a state senator violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 110.3(d) when he used his state committee funds to pay for polling and other expenditures when he was testing the waters for his federal candidacy); MUR 5426 (Schultz) (finding reason to believe a state senator violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 110.3(d)) when he directed that funds and assets from his state committee be used to pay for expenses related to his federal election campaign); MUR 5480 (Levetan) (finding reason to believe that a state lawmaker and her state and federal committees violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 110.3(d) by using funds from the state committee's non-federal account to pay for polling expenditures that directly benefited the federal campaign).

¹² Advisory Op. 2002-08 (Vitter) at 2-3 (Aug. 1, 2002).

1 violate the Act's contribution limits and prohibitions.¹³ Accordingly, the Commission concluded
2 that the concerns underlying the regulation prohibiting transfers from state to federal committees
3 are absent, and such funds could be redeposited into the federal committee's account without
4 violating 11 C.F.R. § 110.3(d).¹⁴

5 The facts in this matter are materially indistinguishable from those presented in
6 AO 2002-08, in that the securities, originally purchased by the Federal Committee using funds
7 subject the Act's limitations, prohibitions and reporting requirements, were loaned to the State
8 Committee, which did not use or convert the securities to cash, or otherwise commingle the
9 assets with other state funds. The State Committee subsequently repaid the loan by transferring
10 the securities back to the Federal Committee on February 4, 2016. Both transactions were timely
11 disclosed by the Federal Committee to the Commission, as a loan and loan repayment,
12 respectively.¹⁵

13 As contemplated in AO 2002-08, because the funds received by the State Committee
14 were never commingled with state funds, and the Federal Committee properly reported the Loan
15 and Loan Repayment, there appears to be no threat that the funds used for the loan repayment
16 were impermissible under the Act. Therefore, we recommend that the Commission find no
17 reason to believe that Anthony Portantino, Anthony Portantino for Senate 2016, and Anthony
18 Portantino Congressional Exploratory Committee and David Gould in his official capacity as

¹³ *Id.*

¹⁴ *Id.*; see Transfers of Funds from State to Federal Campaigns, 58 Fed. Reg. 3474, 3475 (Jan. 8, 1993) ("E&J"). See also, Advisory Op. 1990-29 (Joseph E. Seagram & Sons, Inc.) (Feb. 15, 1991) (explaining that the "decision to allow the transfer of non-Federal election funds to a Federal account in specific situations is premised largely on the legality, under the Act, of the transferred funds"); Advisory Op. 2010-28 (Hoosiers for Hill) (Oct. 27, 2010) (concluding that a state committee may transfer back to a federal committee funds it had been loaned without making a contribution subject to the amount limitations of the Act, because the funds it had been loaned were never used for their intended purpose and were not commingled with state committee's funds).

¹⁵ See Federal Committee July Quarterly Report at 6-8, Schedules B & C; Federal Committee April Quarterly Report at 8, Schedule C.

1 treasurer violated 52 U.S.C. § 30125(e) and 11 C.F.R. § 110.3(d) by transferring or receiving
2 funds that were not subject to the limitations, prohibitions, and reporting requirements of the Act.

3 **IV. RECOMMENDATIONS**

- 4 (1) Find no reason to believe that Anthony Portantino, Anthony Portantino for Senate
5 2016, and Anthony Portantino Congressional Exploratory Committee and David
6 Gould in his official capacity as treasurer violated 52 U.S.C. § 30125(e) and
7 11 C.F.R. § 110.3(d);
8
9 (2) Approve the attached Factual and Legal Analysis;
10
11 (3) Approve the appropriate letters; and
12
13 (4) Close the file.
14

15 Lisa J. Stevenson
16 Acting General Counsel
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19
20 3/29/2017
21 Date

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23 BY: Kathleen M. Guith
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25 Associate General Counsel
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