

SEP 25 2007

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FEDERAL ELECTION
COMMISSION
SECRETARIAT
BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

George Soros

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2007 SEP 25 P 4: 36

MUR 5642

SENSITIVE

GENERAL COUNSEL'S REPORT #3

I. ACTIONS RECOMMENDED

Find probable cause to believe that George Soros violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10 by failing to report mailing list expenses as an independent expenditure;

II. BACKGROUND

The Commission previously found reason to believe that George Soros violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10 by failing to report as an independent expenditure the cost of a mailing list he used to send two million brochures expressly advocating the defeat of President Bush in the 2004 General Election. The ensuing investigation confirmed that Mr. Soros paid approximately \$272,000 for a mailing list to distribute the communication at issue and that he failed to report the expenditure.

we served the General Counsel's Brief, which is incorporated herein by reference. The General Counsel's Brief sets forth our position on the factual and legal issues of the matter and our recommendation that the Commission find probable cause to believe that Mr. Soros violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10.

In response, Respondent reiterates the same legal argument that he made in his responses to the complaint and to the Commission's reason to believe findings,

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1 _____ namely, that he was entitled to rely on a 1979 advisory opinion that
2 characterized a political committee's mailing list rental costs as operating expenses rather than
3 independent expenditures. See Response Brief filed May 31, 2007 ("Soros Brief"). Respondent
4 also argues that the amount of express advocacy in the brochure at issue is legally *de minimis*,
5 that the press exemption applies because the brochure was book publicity intended to encourage
6 readers to purchase his book, and that requiring him to report expenses associated with the
7 brochure violates his First Amendment rights.

8 The Commission considered and rejected the argument that the advisory opinion applies
9 here. See MUR 5642, Factual and Legal Analysis at 4; _____
10 _____

11 _____ Mr. Soros is an individual, not a political committee, and his purchase of a mailing
12 list materially differs from the list rental transaction discussed in the advisory opinion.
13 Moreover, Respondent's express advocacy argument is unavailing, as the brochure was entitled
14 "Why We Must Not Re-Elect President Bush" and the whole communication was dedicated to
15 setting forth reasons the electorate should not do so, and the Commission historically has
16 evaluated communications as a whole rather than parsing them line-by-line to determine whether
17 they contain a certain minimum percentage of express advocacy. Finally, Respondent's
18 constitutional arguments ignore two basic facts: Mr. Soros, who paid for the brochures, was not
19 a press entity, and he reported other costs associated with the brochures as independent
20 expenditures.

21 Accordingly, for the reasons set forth in the General Counsel's Brief and discussed
22 below, we recommend that the Commission find probable cause to believe that George Soros

violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10, and approve the attached conciliation agreement.

III. ANALYSIS

A. Advisory Opinion 1979-80 Does Not Apply

Respondent argues that, pursuant to 2 U.S.C. § 437f(c), he has established good faith reliance on Advisory Opinion 1979-80 and, therefore, should not be subject to any sanction for failing to report as an independent expenditure the mailing list expenses at issue. See Soros Brief at 6-9. Section 437f(c) sets forth who is entitled to rely upon advisory opinions and the scope of protection for good faith reliance. Under Section 437f(c), an advisory opinion rendered by the Commission may be relied upon by: (1) any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered, and (2) by any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered. 2 U.S.C. § 437f(c)(1). If either of these criteria is satisfied, and the respondent acted in good faith in accordance with the provisions and findings of the advisory opinion, then the person shall not, as a result of any such act, be subject to any sanction under the Federal Election Campaign Act of 1971, as amended ("the Act"). 2 U.S.C. § 437f(c)(2). Respondent does not meet either of these criteria, and, in any case, the Advisory Opinion has been effectively superceded.

In Advisory Opinion 1979-80, a multi-candidate committee, the National Conservative Political Action Committee ("NCPAC"), sought to make an independent expenditure but was concerned that renting mailing lists from a party who also rented lists to the opposing candidate would constitute impermissible "common vendor" coordination. AO 1979-80. The Commission concluded that, regardless of whether or not the list broker was an agent of the opposing

1 candidate, the list rental was an operating expense because NCPAC was "neither making any
2 communication by renting the list nor [was] it making an independent expenditure through the
3 broker." *Id.* Thus, the Commission concluded the use of a common list broker would not make
4 the broker a common vendor or constitute prohibited coordination. *Id.*

5 As set forth at length in the General Counsel's Brief, in this case, Respondent was not
6 entitled to rely on AO 1979-80 because the facts underlying this matter are materially
7 distinguishable from the factual scenario presented in the advisory opinion: specifically, Mr.
8 Soros is an individual and not a political committee, and there are significant results that flow
9 from this distinction. In particular, for political committees, characterizing mailing list costs as
10 operating expenses affects where the disbursements are reported, but for an individual, it changes
11 whether the disbursement must be disclosed to the public at all.¹ See General Counsel's Brief at
12 4-5.

13 Moreover, as discussed in the General Counsel's Brief, the analysis in Advisory Opinion
14 1979-80 pertaining to political committees has been effectively superseded. The Explanation and
15 Justification of the most recent amendments to 11 C.F.R. § 104.4(f), published in the Federal
16 Register on January 3, 2003, makes clear that both production *and distribution* costs associated
17 with an independent expenditure made by a political committee are reportable on Schedule E as
18 independent expenditures. See Explanation & Justification, Bipartisan Campaign Reform Act of
19 2002 Reporting, 68 Fed. Reg. 404, 407 (Jan. 3, 2003). Under the regulations in force at the time

¹ Respondent argues that the focus of Section 437f(c) is not on who is conducting the activity, but rather whether the activity or transaction itself is materially indistinguishable from that in the advisory opinion. In this regard, Respondent asserts that he conducted exactly the same transaction and activity as the political committee involved in Advisory Opinion 1979-80: the renting of mail lists. Section 437f(c), however, specifies that the transaction or activity must be indistinguishable in *all* its material aspects.

1 Mr. Soros purchased the mailing list, the only time such disbursements are reportable on
2 Schedule B as "operating expenses" is when the production and distribution costs are incurred in
3 one reporting period, and the public distribution of the independent expenditure occurs in a later
4 reporting period, and even then the costs must still be reported a second time, on Schedule E of
5 the subsequent report, as part of the independent expenditure.² *See id.*

6 **B. Express Advocacy Pertains To A Communication As A Whole And Renders**
7 **All Associated Costs Expenditures**

8 The Respondent argues that the Commission should conclude that any violation in this
9 matter is *de minimis* because only four sentences, or approximately 1% of the sentences,
10 contained in the brochure at issue could be characterized as express advocacy, citing *FEC v.*
11 *Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 192-93 (D.C. Cir. 2001) (\$1,000 held to be *de minimis*
12 acceptance of corporate contributions by non-profit membership organization) and Advisory
13 Opinions 1984-23 (distribution of electoral communication to 1% of individuals outside of
14 corporation was *de minimis*) and 1999-6 (distribution of magazine containing contribution
15 solicitation to less than 1% of individuals outside of corporation's solicitable class was *de*
16 *minimis*). However, Respondent's reliance upon these authorities is misplaced as each of the
17 cases involved violations held to be *de minimis* because the amount in violation was either small
18 or a small percentage of the overall activity. Here, the amount in violation is equal to the total

² Notably, it is not clear if the Respondent is claiming that he relied on Advisory Opinion 1979-80 at the time he made the independent expenditure or if this is simply a *post hoc* justification for failing to report the costs in 2004. At one point, counsel for Respondent stated he would ask whether the associate working for him in 2004 actually considered the advisory opinion, but counsel apparently failed to do so and then refused to share this information.

1 amount of the unreported expenditures, \$272,000, which is clearly not de minimis either as a
2 total amount or as a percentage of the overall activity.³

3 Further, in determining the amount of an expenditure, the Commission does not parse out
4 sentences within a communication as the Respondent urges. The Act and Commission
5 regulations define an independent expenditure in terms of a communication as a whole.
6 Specifically, an independent expenditure is defined as "an expenditure by a person for a
7 communication expressly advocating the election or defeat of a clearly identified candidate."
8 2 U.S.C. § 431(17); 11 C.F.R. § 100.16. "Expressly advocating" includes any communication
9 that uses phrases which in context can have no other meaning than to urge the election or defeat
10 of a clearly identified candidate. 11 C.F.R. § 100.22(a). Thus, a finding of express advocacy
11 pertains to the entire communication and renders all associated costs expenditures.

12 The brochure at issue contains express advocacy under 11 C.F.R. § 100.22(a) because it
13 uses phrases which in context can have no other reasonable meaning than to urge the defeat of
14 President Bush. In particular, the brochure stated numerous times that President Bush should not
15 be re-elected, including the headline, "Why We Must Not Re-elect President Bush." In fact, the
16 whole brochure explained the reasons why Bush should not be re-elected. The fact that the
17 brochure did not state "defeat Bush" in every sentence does not change the electoral nature of the
18 communication. The Respondent, obviously aware that costs associated with this
19 communication were required to be disclosed, disclosed disbursements to several vendors
20 totaling \$758,112.50 in connection with the mailing, but failed to disclose any independent

³ The Respondent's undisclosed expenditures of \$272,000 constitute over 25% of the total amount of expenditures (\$1,030,113) the Respondent made in connection with the brochure at issue.

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1 expenditures related to the costs of renting or purchasing a mailing list. Thus, the real issue is
2 simply the Respondent's failure to disclose the cost of the mailing list, not the degree to which
3 the communication contained express advocacy.

4 C. The Press Exemption Does Not Apply Because The Brochure At Issue Was
5 Paid For And Distributed By The Respondent. An Individual, Not A Press
6 Entity

7 Respondent argues that the Commission's enforcement of this action would violate the
8 Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because
9 it would treat expenditures related to the sale of books differently than expenditures related to the
10 sale of magazines, newspapers, broadcasts, or other periodical publications. In this vein, the
11 Respondent points out that Congress exempted from the definition of "expenditure" costs
12 associated with "any news story, commentary, or editorial distributed through the facilities of any
13 broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities
14 are owned or controlled by any political party, political committee or candidate" ("the media
15 exemption"), but argues that while the Commission's implementing regulations exclude such
16 costs from the definition of "independent expenditure," they, for no "unique reason," do not
17 exclude costs associated with the production of books. See 2 U.S.C. § 431(9)(B)(i); 11 C.F.R.
18 § 100.132. Therefore, Respondent argues that enforcing 2 U.S.C. § 434(c) and 11 C.F.R.
19 § 109.10, which require the disclosure of expenditures, including those related to the sale of
20 books, would violate the Equal Protection Clause. In addition, Respondent affirmatively argues
21 that the press exemption applies to the brochures at issue, which attempted to publicize his book
22 and generate readership and sales, citing *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308,
23 1313 (D.D.C. 1981) and *Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y.
24 1981).

Respondent overlooks a central element of the press exemption. The press exemption excludes from the definition of expenditure "any news story, commentary, or editorial *distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication.*" See 2 U.S.C. § 431(9)(B)(i); 11 C.F.R. § 100.132 (emphasis added). While in *Phillips Publishing and Reader's Digest* the court held that the press exemption applies to communications publicizing a newspaper, magazine, or broadcast or other periodical, the publicity must be paid for by a media or press entity acting in its capacity as a media or press entity to qualify for the press exemption. See *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308 (D.D.C. 1981) and *Reader's Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981). Here, because the brochures at issue were paid for and distributed by the Respondent, an individual, and not through a media or press entity, the press exemption does not apply, irrespective of the fact that the expenses may have been related to the sale of a book. Consequently, the question of whether the press exemption's exclusion of books violates the Equal Protection Clause need not be reached.

D. The Act's Disclosure Requirement Does Not Violate The Respondent's First Amendment Rights

Respondent argues that disclosure of mailing list expenses associated with the distribution of a book is an unconstitutionally overbroad application of 2 U.S.C. § 434(c) in violation of the First Amendment right to freedom of speech. Specifically, Respondent argues that as applied to him, Section 434(c) is not narrowly tailored to serve a compelling governmental interest because it requires him to report the cost of producing and distributing an overwhelming amount of political expression that is unrelated to the express advocacy of an electoral campaign. In this vein, Respondent asserts that the overwhelming majority of

1 expression contained in his book and brochure does not advocate the election or defeat of a
2 candidate.

3 We note that the Respondent's book is not at issue; the cost of a mailing list used to send
4 two million brochures containing express advocacy is. It is well settled that independent
5 expenditures for speech that expressly advocates the election or defeat of a clearly identified
6 candidate may be subjected to disclosure requirements. In its landmark decision in *Buckley v.*
7 *Valoe*, 424 U.S. 1 (1976), the Supreme Court stated that "exacting scrutiny" is necessary when
8 compelled disclosure of campaign-related payments is at issue, but nevertheless upheld, as
9 substantially related to important government interests, the requirement to disclose independent
10 expenditures. *See Buckley*, 424 U.S. at 80-82. "The important state interests that prompted the
11 *Buckley* Court to uphold [federal disclosure requirements]," still "apply in full" to current
12 disclosure requirements. *See McConnell v. FEC*, 540 U.S. 93, 196 (2003) (noting that disclosure
13 requirements that BCRA added to the FECA are less intrusive than comparable requirements that
14 have long applied to persons making independent expenditures).

15 In addition, as noted, the Respondent disclosed other costs associated with the brochure
16 (i.e., independent expenditures of \$747,680.00 to EU Services, Inc., a direct mail production
17 company, for printing, postage, and handling; \$7,932.50 to Ann Wixon for managing the mailing
18 production; and \$2,500.00 to Karol Keane for brochure design). Having disclosed other costs
19 associated with the brochure, it is hard to see how requiring disclosure of the mailing list costs
20 results in constitutional harm.

21 **E. Conclusion**

22 It is undisputed that the Respondent failed to report as an independent expenditure the
23 cost of a mailing list (\$272,000) he used to send two million brochures expressly advocating the
24

1 defeat of President Bush in the 2004 General Election. Thus, we recommend that the
2 Commission find that there is probable cause to believe that the Respondent violated 2 U.S.C.
3 § 434(c) and 11 C.F.R. § 109.10.

4 IV. _____

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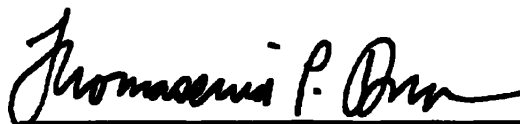
V. RECOMMENDATIONS

1. Find probable cause to believe that George Soros violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10.

2. _____

3. Approve the appropriate letters.

Date 9/25/2007



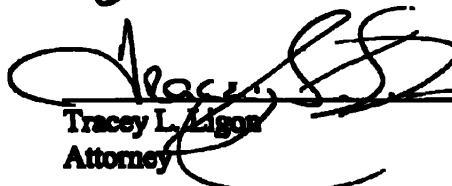
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