



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA E-MAIL AND FIRST CLASS MAIL

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November 1, 2012

RE: MUR 6552
Ohio State Medical Association

Dear Mr. Portman:

On April 11, 2012, the Federal Election Commission (the "Commission") notified your client, the Ohio State Medical Association, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. A copy of the complaint was forwarded to your client at that time.

Upon further review of the allegations contained in the complaint, and information supplied by you, your client, and others, the Commission, on October 25, 2012, voted to dismiss this matter with respect to your client. The Factual and Legal Analysis, which more fully explains the Commission's decision, is enclosed for your information.

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. 70426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009).

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

Emily M. Meyers
Attorney

Enclosure:
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Ohio State Medical Association

MUR 6552

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission by Mark R. Brown, alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by the Ohio State Medical Association ("OSMA"). The Complainant alleges that OSMA made impermissible corporate in-kind contributions in violation of 2 U.S.C. § 441b(a) and (b) when OSMA posted to the public area of its website links to a video recording of campaign related speeches that Brown and Mandel had delivered to OSMA's restricted class at OSMA's Annual Meeting. Compl. ¶¶ 1, 3, 22, 28 (Apr. 9, 2012). The Complainant also alleges that by broadcasting campaign related speeches to the public beyond its restricted class, OSMA violated the Act and its implementing regulations. *Id.* ¶¶ 2, 23, 26-27.

In its Response, OSMA "admits that it inadvertently violated the Act through the actions of its communications staff, who unwittingly posted on the public area of the OSMA website links to a video of the two candidate[s'] speeches that contained some campaign content." OSMA Resp. at 2 (Apr. 27, 2012). While OSMA does not identify a particular section of the Act or an implementing regulation that it believes it violated, it appears that by making a recording of Brown's and Mandel's campaign related speeches available to the public beyond OSMA's restricted class, OSMA made a prohibited corporate contribution or expenditure in violation of 2 U.S.C. § 441b and 11 C.F.R. § 114.2(a)-(b).

Despite the apparent violation of the Act, this matter does not warrant further expenditure of Commission resources: (1) OSMA's public posting of links to a recording of the candidates'

1 speeches was apparently inadvertent; (2) the links were publicly accessible for only ten days and
2 OSMA removed them immediately upon notification that the links were public; and (3) the video
3 recording of the campaign related speeches was accessed only nineteen times while publicly
4 available. Accordingly, the Commission exercises its prosecutorial discretion and dismisses the
5 allegations that OSMA violated the Act. *See Heckler v. Cheney*, 470 U.S. 821, 831 (1985).

6 **II. FACTUAL AND LEGAL ANALYSIS**

7 **A. Factual Summary**

8 OSMA is a 501(c)(6) tax-exempt “membership organization” under 11 C.F.R.
9 § 114.1(e)(1). OSMA Resp. at 1. OSMA holds an Annual Meeting, which only registered
10 members in good standing are permitted to attend. *See* OSMA Bylaws at 10-11 (amended Mar.
11 2012), *available at* [http://www.osma.org/files/documents/about-osma/governance/constitution-](http://www.osma.org/files/documents/about-osma/governance/constitution-and-bylaws/20120325-constitution-and-bylaws-officialversion.pdf)
12 [and-bylaws/20120325-constitution-and-bylaws-officialversion.pdf](http://www.osma.org/files/documents/about-osma/governance/constitution-and-bylaws/20120325-constitution-and-bylaws-officialversion.pdf).

13 At OSMA’s invitation, Brown and Mandel each delivered a campaign related speech to
14 OSMA’s restricted class at OSMA’s Annual Meeting on March 24, 2012.¹ Compl. ¶¶ 10-12.
15 According to a local news account of OSMA’s Annual Meeting, in his speech, Mandel
16 repeatedly referenced Brown by name, “criticized Brown for his support of the health-care law”
17 and “accused Brown of stalling medical-malpractice reforms because of Brown’s close ties to
18 lawyers.” Compl. at Ex. A. After Mandel delivered his speech, Mandel’s campaign staff
19 “passed out materials and collected names, phone numbers and email addresses.” *Id.* In
20 contrast, Brown delivered his speech a few minutes after Mandel’s, but “made no mention of
21 Mandel[.] . . . He stuck mainly to policies and initiatives he has worked on with doctors.” *Id.*;

¹ OSMA’s annual meeting took place eighteen days after Ohio’s primary in which Mandel won the Republican nomination to challenge Brown in the 2012 election for U.S. Senate. Compl. ¶ 8.

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1 OSMA Resp. at 2 n.1 (“Senator Brown’s video does not once mention his campaign and focused
2 on national health care issues. However, given that he spoke following Mr. Mandel’s speech, the
3 fact that the speeches occurred during an election season, and the overall context, OSMA does
4 not contest that both talks were campaign related.”).

5 OSMA subsequently posted links to a video recording of Brown’s and Mandel’s speeches
6 at the Annual Meeting on the public area of its website, along with other non-political news from
7 OSMA’s Annual Meeting. Compl. ¶ 19; OSMA Resp. at 2. The video recording included “the
8 entire 43-minute joint-presentation” of Brown’s and Mandel’s speeches, without any editing by
9 OSMA. Compl. ¶ 19. The video recording was hosted on an external site, <http://vimeo.com>.²
10 *See id.* at Ex. E; *see also* OSMA Resp. at 2 n.1, Ex. 2 ¶ 3 (Affidavit of Jason Koma, Director
11 Communications and Marketing for OSMA) (“Koma Aff.”). The links to the videos were
12 available on the public area of OSMA’s website through April 3, 2012, when OSMA removed
13 them after the Complainant brought the public links to OSMA’s attention. OSMA Resp. at 2;
14 Koma Aff. ¶ 3. During the approximately ten day period when the links to the videos were
15 available on the public portion of OSMA’s website, the videos were accessed nineteen times.
16 OSMA Resp. at 2; Koma Aff. ¶ 3; *see also* Compl. at Ex. E (indicating a total of eighteen plays
17 as of March 30, 2012).

18 The Complaint does not allege that OSMA violated the Act by inviting Brown and
19 Mandel to speak to its restricted class at its Annual Meeting. Indeed, the Complaint correctly
20 acknowledges that the Commission’s regulations permit a membership organization to invite

² As indicated in Exhibit E to the Complaint, OSMA is a “Plus” member of Vimeo, and therefore presumably paid either a nominal monthly membership fee of \$9.95, or annual membership fee of \$59.95 to host all of the videos that OSMA posted to the web. *See* <http://vimeo.com/help/guidelines>; http://vimeo.com/help/faq/vimeo_plus#/help/faq/vimeo_plus; <https://secure.vimeo.com/plus> (last accessed Oct. 11, 2012).

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1 candidates to address its restricted class. Compl. ¶ 15 (citing 11 C.F.R. § 114.3(c)(2)); *see also*
2 11 C.F.R. § 114.3(a)(2). OSMA also made this point in its Response. OSMA Resp. at 1 (“FEC
3 regulations permit a nonprofit organization like OSMA to invite any candidate of its choice to
4 make a campaign speech before its restricted class at a conference.”) (citing 11 C.F.R.
5 § 114.3(c)(2)).

6 The Complaint alleges instead that OSMA violated the Act and its implementing
7 regulations by posting to the public area of its website links to a video recording of speeches that
8 Brown and Mandel made to OSMA’s restricted class, thereby broadcasting campaign related
9 speech “to an unrestricted audience that included the general public.” Compl. ¶¶ 2, 11 n.3. The
10 Complaint contends that this broadcast amounts to OSMA’s donation of “something of value” in
11 violation of section 441b(a) of the Act. *Id.* ¶¶ 3, 26-28.

12 OSMA denies that its posting of links to a video of the speeches contributed something of
13 value to the candidates, since the videos were accessed only nineteen times during the ten day
14 period that the links were publicly available. OSMA Resp. at 2, 3.

15 **B. Legal Analysis**

16 The Act and Commission regulations prohibit corporations and other organizations,
17 including membership organizations, from making contributions from their general treasury
18 funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a);
19 11 C.F.R. § 114.2(a). The Act also prohibits any candidate from knowingly accepting or
20 receiving any prohibited contribution. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(d).

21 A “contribution” is “any gift, subscription, loan, advance, or deposit of money or
22 anything of value made by any person for the purpose of influencing any election for Federal
23 office.” 2 U.S.C. § 431(8)(A)(i). An “expenditure” is “any purchase, payment, distribution,

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1 loan, advance, deposit, or gift of money or anything of value, made by any person for the
2 purpose of influencing any election for Federal Office.” 2 U.S.C. § 431(9)(A)(i). “Anything of
3 value” includes all in-kind contributions and, unless specifically exempted, the provision of
4 goods and services without charge or at a charge that is less than the usual and normal charge.
5 11 C.F.R. §§ 100.52(d)(1); 100.111(e)(1).

6 Commission regulations include several exceptions permitting corporate activity that
7 would otherwise constitute an expenditure or in-kind contribution. *See* 11 C.F.R.
8 § 114.1(a)(2)(x) (excluding from the definition of “contribution” and “expenditure” any
9 corporate, union, or membership organization activity “specifically permitted by [11 C.F.R.] part
10 114”). For example, a membership organization may invite particular candidates to address
11 members, executive and administrative personnel (or all employees), and their families at a
12 meeting, convention, or other function without making a contribution to the candidate. 11 C.F.R.
13 §§ 114.3(a)(2), (c)(2)(i).³ Furthermore, a membership organization may allow a candidate to
14 address all of its employees, its members, and their families at a meeting, convention, or other
15 function, without making a contribution to the candidate, provided it meets certain conditions.
16 11 C.F.R. § 114.4(e). Similarly, under certain circumstances, a membership organization may
17 sponsor an election-related appearance by a candidate before the general public without making
18 a contribution to the candidate. *Advisory Op. 1996-11 at 5 (Nat’l Right to Life Conventions,*
19 *Inc.).*

³ *See also* Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,267 (Dec. 14, 1995) (explanation and justification) (“Prohibited contributions include in-kind contributions resulting from the coordination of election-related corporate . . . communications with candidates, except for certain activities described in [11 C.F.R. §§ 114.3 and 114.4], which may involve limited types of coordination with candidates.”).

1 Although Brown's and Mandel's speeches were campaign related, which OSMA
2 concedes, the speeches themselves do not constitute a prohibited corporate contribution because
3 they fall under the 11 C.F.R. § 114.3 exception for speeches delivered only to OSMA's restricted
4 class. However, once OSMA made a video recording of those speeches available to the public
5 beyond its restricted class, the exceptions to the definitions of "contribution" and "expenditure"
6 provided by 11 C.F.R. § 114 no longer apply. Accordingly, the costs associated with OSMA
7 making Brown's and Mandel's speeches available to a broader audience constitute something of
8 value to the candidates, an impermissible contribution or expenditure by OSMA in violation of
9 2 U.S.C. § 441b. 2 U.S.C. §§ 431(8)(A)(i), 431(9)(A)(i); *see also* Advisory Op. 1996-11 at 6
10 ("[T]he Commission cautions that an impermissible contribution would result if NRL were to
11 distribute the [candidates'] taped speeches [from NRL's convention] free of charge . . . to the
12 general public, since the taping and distribution of the candidates' views on the issues addressed
13 at the convention is something of value to the candidates.") (citing Advisory Op. 1980-90
14 (Atlantic Richfield Company) (taping and free distribution to television stations of candidates'
15 views on energy issues is a corporate contribution)).

16 Notwithstanding the potential violation by OSMA, under the circumstances presented
17 here, the Commission exercises its prosecutorial discretion to dismiss the allegations that OSMA
18 violated the Act because: (1) the public links to the video recording of Brown's and Mandel's
19 speeches were available for merely ten days; (2) the video recording was accessed only nineteen
20 times; and (3) OSMA prevented further public access of the video recorded speeches
21 immediately upon learning of it.⁴ OSMA Resp. 2; Koma Aff. ¶ 3.

⁴ Because posting the links to a video recording of Brown's and Mandel's speeches on OSMA's public website constituted an expenditure or contribution to Brown and Mandel of "something of value," and it is possible that the amount OSMA spent to host the event at which it recorded Brown's and Mandel's speeches exceeded \$250,

- 1 Accordingly, the Commission dismisses the allegations that Ohio State Medical
2 Association violated 2 U.S.C. § 441b(a) and (b) in an exercise of prosecutorial discretion as
3 outlined in *Heckler v. Chaney*, 470 U.S. 821 (1985).

OSMA may have triggered a reporting obligation. See 2 U.S.C. § 434(c). Nonetheless, the Commission exercises its prosecutorial discretion to dismiss an additional violation of the Act on this basis.

In addition, no disclaimer was required on the video because it is not a “public communication” under 11 C.F.R. § 100.26. See 2 U.S.C. § 441d(a); 11 C.F.R. § 110.11(a)(1), (2). The definition of “public communication” includes “general public political advertising” pursuant to 11 C.F.R. § 100.26. But all internet communications, except those posted for a fee on another’s website, are excluded from “general public political advertising” and consequently are not “public communications.” Here, the public links to the video recording of Brown’s and Mandel’s speeches were posted on OSMA’s own website for no fee, so the video is not general public political advertising, and therefore not a “public communication.” 11 C.F.R. § 100.26. Although OSMA paid a minimal amount to join Vimeo as a monthly or annual member, we have previously determined that payment of such a nominal fee does not disqualify the videos from exclusion from the definition of “public communication” that 11 C.F.R. § 100.26 grants to “communications over the Internet[.]” See *Internet Communications*, 71 Fed. Reg. 18,589, at 18,594-95, 18,603, 18,607 (Apr. 12, 2006) (explanation and justification) (exempting from definition of “contribution” a communication over the internet that requires payment of a “nominal fee” to a host site). Accordingly, OSMA did not violate the Act by failing to include a disclaimer on video that it posted on its website. See 2 U.S.C. § 441d(a); 11 C.F.R. § 100.11(a)(1), (2); see also Advisory Op. 2008-10 (*WideOrbit, Inc. d/b/a VoterVoter.com*) at 8 (stating that a disclaimer need not appear on an ad posted without a fee to a website).

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