



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
Steve Fincher for Congress and Phyllis) MUR 6386
Patterson, in her official capacity as)
treasurer; Gates Banking and Trust)
Company)

**STATEMENT OF REASONS
CHAIR CYNTHIA L. BAUERLY AND
COMMISSIONERS STEVEN T. WALTHER AND
ELLEN L. WEINTRAUB**

The complaint in this matter alleged that Steve Fincher for Congress, the authorized committee of Steve Fincher, the 2010 Republican candidate for Congress in Tennessee’s Eighth Congressional District, and Phyllis Patterson, in her official capacity as treasurer, (collectively, “the Fincher Committee”) misreported the source of a loan as coming from Fincher’s personal funds, rather than from Gates Banking & Trust Company (“Gates Bank”), in violation of Section 434(b)(3)(E) of the Federal Election Campaign Act of 1971, as amended (“FECA” or “the Act”). We supported the recommendations of the Office of General Counsel (“OGC”) to find reason to believe that the Fincher Committee violated 2 U.S.C. 434(b)(3)(E) and 11 CFR 104.3(d)(4) and to seek a civil penalty for this misreporting.¹ A motion to find reason to believe that the Fincher Committee violated 2 U.S.C. 434(b)(3)(E) and 11 CFR 104.3(d)(4) and seek a civil penalty failed by a vote of 3-3.²

¹ The complaint also alleged that Gates Bank received no security interest in the collateral for the loan and therefore made an illegal corporate contribution, which the Fincher Committee knowingly accepted, in violation of Section 441b(a) of the Act. For the reasons contained in OGC’s report, we also supported the recommendations to find *no* reason to believe that Gates Bank made or the Fincher Committee knowingly accepted an illegal corporate contribution, in violation of 2 U.S.C. 441b(a). See First General Counsel’s Report in MUR 6386, at 7-10.

² First, Chair Bauerly and Commissioner Walther voted affirmatively to find reason to believe that the Fincher Committee violated 2 U.S.C. 434(b)(3)(E) and 11 CFR 104.3(d)(4) and to seek the civil penalty recommended by OGC. Vice Chair Hunter and Commissioners McGahn, Petersen and Weintraub dissented. Certification in MUR 6386, dated June 16, 2011. Second, Chair Bauerly and Commissioners Waither and Weintomb voted affirmatively to find reason to believe and to seek a *lower* civil penalty for this misconduct. Vice Chair Hunter and Commissioners McGahn and Petersen dissented. *Id.* Third and finally, Vice Chair Hunter and Commissioners McGahn and Petersen voted affirmatively to find reason to believe that the Fincher Committee violated 2 U.S.C. 434(b)(3)(E) and 11 CFR 104.3(d)(4) and to *send a letter of caution* to the Fincher Committee without any civil penalty. Chair Bauerly and Commissioners Walther and Weintraub dissented. *Id.*

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All six Commissioners voted to find reason to believe that the Fincher Committee violated 2 U.S.C. 434(b)(3)(E) and 11 CFR 104.3(d)(4). In this matter, the sole dispute with our colleagues is whether the Fincher Committee's misreporting of campaign information to the Commission warrants a civil penalty. We and our colleagues agree that the Fincher Committee misreported the source of its campaign funds, resulting in inaccurate public disclosure reports. The Act envisions a penalty in such circumstances and we believe a penalty is appropriate in this matter. Civil penalties provide an important incentive for campaigns to file accurate reports with the Commission. Public disclosure of political spending is at the heart of the Commission's mission, and we have a duty to ensure that the information provided to the public is complete and accurate.

The complaint, filed with the Commission on September 29, 2010, alleged that the Fincher Committee misreported the source of a \$250,000 loan as coming from Fincher's personal funds, rather than from Gates Bank, the actual source of the loan. Complaint at 1. The complaint noted that the Committee's 2010 Pre-Primary Report indicated that Fincher personally loaned his committee \$250,000 on July 8, 2010 from his own funds, providing no due date or interest rate. *Id.* The complaint attached a news article, dated August 27, 2010, which reported that the Chairman of Gates Bank, Warren Nunn, acknowledged that his bank was the source of the loan to Fincher. *See Id.*, Exhibit C. On October 18, 2010, the complainant filed a supplement to the complaint, alleging that the Fincher Committee also failed to accurately report the loan on its October 2010 Quarterly Report; since the Committee had received notice of the original complaint, which preceded the Committee's filing of the October 2010 Quarterly report, the supplement alleged that this violation was knowing and willful. Supplemental Complaint at 1.

In its response, dated November 26, 2010, the Fincher Committee stated that Fincher obtained the loan from Gates Bank and acknowledged "reporting errors and omissions that require amended reports to be filed with the Commission." Response at 1. However, the Fincher Committee maintained that "all required reports were filed in good faith." *Id.* Following notice of the complaint, the Fincher Committee amended its 2010 Pre-Primary Report and 2010 October Quarterly Report on December 2, 2010 by removing the words "personal funds" after the entry for the loan. The Fincher Committee also filed the necessary report with the Commission indicating the details of the loan.

In this case, we and our colleagues agree, based on the complaint and response, that the reporting violation occurred. The Act requires that political committees file reports of receipts and disbursements for each reporting period. 2 U.S.C. 434(a). The Act requires that each report identify the person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and date and amount or value of such loan. 2 U.S.C. 434(b)(3)(E). When a candidate obtains a bank loan for use in connection with the candidate's campaign, the candidate's principal campaign committee must disclose the loan in the report covering the period when the loan was obtained. 11 CFR 104.3(d)(4). This report must include: the date, amount, and interest rate of the loan; the name and address of the lending institution; and the types and value of collateral or other sources of repayment that secure the loan. *Id.*

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However, we supported OGC's recommendation to seek a civil penalty for this misreporting. The Act provides that if the Commission believes that a violation of the Act has been committed, the Commission, as part of a conciliation agreement, may require the person to pay a civil penalty, "which does not exceed the greater of \$5,000³ or an amount equal to any contribution or expenditure involved." 2 U.S.C. § 437g(a)(5)(A). The Commission uses the statutory guidelines and considers any mitigating and aggravating circumstances when determining the amount of a civil penalty. See *Guidebook for Complainants and Respondents on the FEC Enforcement Process*, at 15-16, December 2009, available at www.fec.gov/em/respondent_guide.pdf.

In an effort to gain consensus, we offered and supported a motion to approve OGC's recommendations, but with a significantly reduced penalty. Our colleagues rejected this motion, insisting that the offense in question warranted only a letter of caution to the Fincher Committee. We disagree, given the importance of accurate public disclosure of campaign spending and the Commission's authority to obtain penalties for committees that violate the Act's rules.

In opposing any civil penalty, our colleagues expressed concern that similarly situated cases should be treated the same. This is a sentiment that we embrace wholeheartedly. However, for their measure of comparison, our colleagues chose to focus on only one particular matter, MUR 5198 (Cantwell) (2004), rather than recognize several other similar matters where the facts, like those here, warranted a penalty and the Commission required one. One outlier should not direct Commission policy.

In MUR 5198, the Commission found no reason to believe that the Cantwell Committee accepted a prohibited contribution from the bank that extended the committee a line of credit, but found reason to believe that the Cantwell Committee did not timely report complete loan information. Certification in MUR 5198, dated January 13, 2004. However, the Commission assessed no civil penalty in MUR 5198 because the reporting violations appeared inadvertent and because the Committee took prompt corrective action before the complaint was filed. Instead, the Commission sent a letter of admonishment. First General Counsel's Report in MUR 5198, at 15-16. While the Fincher Committee's failure to correctly report the source of its campaign funds does appear similarly inadvertent, the Fincher Committee failed to take prompt corrective action. Not only did the Committee fail to correct its reports before the election, the Committee also failed to make these corrections after the complaint was filed on September 29, 2010 and after the supplement to the complaint was filed on October 18, 2010. The Fincher Committee finally corrected its reports on December 2, 2010 – 65 days from the date the complaint was filed, 46 days from the date the supplemental complaint was filed, and 31 days after the election. Our colleagues claim to be seeking consistency with the result in the Cantwell MUR, and yet would not send a letter of admonishment, as the Commission did in Cantwell.

In more recent matters, the Commission has assessed a civil penalty when a committee failed to properly disclose complete loan information in MUR 6134 (Cranley for Congress)

³ In 2009, the statutory penalty was adjusted for inflation to \$7,500. See 11 CFR § 111.24(a)(1) (2009).

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(2009), MUR 5496 (Huffman for Congress) (2007), and MUR 5422 (Texans for Henry Cuellar) (2007). In each of these cases, the Commission recognized the importance of accurate reporting of the source and details of bank loans and assessed an appropriate civil penalty. Ignoring all of these cases and focusing exclusively on the lack of penalty in MUR 5198 represents a "race to the bottom" and undermines effective enforcement of the law.

The civil penalties contemplated by the Act serve an important purpose – to provide an important incentive for campaigns to file accurate reports with the Commission. Historically, the Commission has emphasized the importance of accuracy and completeness in reporting the source of loan information by including civil penalties in conciliation agreements with those who have failed to report fully and accurately. Although each matter that comes before the Commission presents unique facts, we believe treating similarly situated committees similarly is important to overall fairness. However, in this matter, our colleagues have chosen to rely on an outdated outlier to dictate our civil penalty policy rather than following the statutory guidelines and looking at the particular circumstances of this case. The Commission has a duty to ensure the accurate and complete public disclosure of the source of campaign funds. Requiring civil penalties for reporting violations demonstrates that the Commission takes compliance with these core provisions of the FECA seriously and encourages compliance. The misreporting here warrants such a penalty and to find otherwise would eviscerate any deterrent effect with respect to future activity.

July 29, 2011
Date

Cynthia L. Bauerly
Cynthia L. Bauerly
Chair

2/21/11
Date

Steven T. Walther
Steven T. Walther
Commissioner

2/21/11
Date

Ellen L. Weintraub
Ellen L. Weintraub
Commissioner

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