



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

| | | |
|---------------------------------------------|---|----------|
| In the Matter of |) | |
| |) | |
| Ed Fallon; Ed Fallon for Congress and |) | MUR 5993 |
| John Schmacker, in his official capacity as |) | |
| Treasurer; I'm for Iowa |) | |

STATEMENT OF REASONS
 Chairman Steven T. Walther
 Commissioner Cynthia L. Bauerly
 Commissioner Ellen L. Weintraub

On March 10, 2009 the Commission failed by a vote of 3-3 to approve the Office of General Counsel's recommendations to find reason to believe that Ed Fallon and I'm for Iowa violated 2 U.S.C. §§ 441i(e)(1), I'm for Iowa violated 2 U.S.C. § 441a(a), and that Fallon for Congress and John Schmacker in his official capacity as treasurer violated 2 U.S.C. §§ 434(b) and 441a(f). In sum, the Office of General Counsel recommended the Commission find reason to believe these violations occurred in connection with allegations that I'm for Iowa violated the Federal Election Campaign Act ("Act") by: raising and spending soft money; and by making direct expenditures in support of Fallon for Congress and paying Mr. Fallon a salary.¹ The Office of General Counsel recommended a limited investigation in order to determine the full extent of the possible violations.

The Federal Election Campaign Act of 1971, as amended ("the Act") requires that the Commission find "reason to believe that a person has committed, or is about to commit, a violation" of the Act as a predicate to opening an investigation into the alleged violation. 2 U.S.C. § 437g(a)(2). "Reason to believe" is a threshold determination that by itself does not establish that the law has been violated. In fact, "reason to believe" determinations indicate only that the Commission found sufficient legal justification to open an investigation

¹ Chairman Walther, Commissioners Bauerly and Weintraub voted to approve the recommendations while Vice-Chairman Petersen, Commissioners Hunter and McGahn dissented. The Commission subsequently voted to close the file.

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to determine whether there is probable cause to believe that a violation of the Act has occurred.²

It was alleged in this matter that a federal candidate was using a state campaign organization that he established, financed, maintained, or controlled to raise and spend soft money on both federal and state candidates and his own campaign, as well as paying himself a salary. If true, such actions would violate the Act. Mr. Fallon declined to respond directly to these allegations. In order to authorize a limited investigation into the facts, we supported the recommendations of the Office of the General Counsel to find reason to believe that one or more violations of the Act occurred. Unfortunately, the Commission failed to approve the recommendation and the facts in this matter will remain unknown. Because our decision relied in major part on the Factual and Legal Analysis presented to the Commission by the Office of General Counsel, we believe it is important to place this analysis on the public record.³

5/14/09
Date

Steven T. Walther
Steven T. Walther
Chairman

5/13/2009
Date

Cynthia L. Bauert
Cynthia L. Bauert
Commissioner

5/13/09
Date

Ellen L. Weintraub
Ellen L. Weintraub
Commissioner

² See 72 F.R. 12545, Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process (March 16, 2007).

³ See Attachment A.

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ATTACHMENT A

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MUR 5993

RESPONDENTS: Ed Fallon
Fallon for Congress and John Schmacker, in his official
capacity as treasurer
I'm for Iowa

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by Dick Deardon. See 2 U.S.C. § 437g(a)(1).

II. FACTUAL SUMMARY

Complainant Dick Dearden, an Iowa State Senator, alleged that Ed Fallon, former Congressional candidate for Iowa's 3rd Congressional district in the 2008 election cycle, violated the Federal Election Campaign Act of 1971, as amended ("the Act") because Fallon controls the activities of an organization called I'm For Iowa ("IFI") and IFI raised and spent soft money in violation of the Act. Complaint at 1. The complainant also alleges that IFI violated the Act because it made direct expenditures in support of Fallon's Congressional campaign, Fallon for Congress ("FFC"), and paid Fallon a salary. *Id.*

Ed Fallon is a former Iowa State Representative who also previously unsuccessfully ran for governor of Iowa. After losing the Iowa Democratic Party gubernatorial primary in 2006, Fallon and three of his gubernatorial campaign staffers continued to use his campaign organization to advocate on issues such as eminent domain, local control, criminal justice reform, human services and

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renewable energy. See www.imforiowa.com. Fallon claims that in 2006 he and his staff “helped many candidates, including Governor Culver, all five Democratic Congressional candidates and 20 Iowa House and Senate candidates.” *Id.* Fallon stated that he worked about 30 hours per week from June through November 2006, earning \$13,750 from his former gubernatorial campaign. *Id.*

In a January 11, 2007 statement posted on the IFI website, Fallon announced the creation of I'm for Iowa (short for “Independence Movement for Iowa”). *Id.* Fallon wrote, “Building on the resources that assembled during my campaign for governor, I'M for Iowa provides a new vehicle for me, my co-workers and YOU to continue to build a progressive majority in Iowa.” *Id.* IFI's stated goals included to “[c]ontinue to build the organizational base necessary for progressive candidates to succeed at running for office, and recruit and help elect candidates across the state[.]” *Id.* In Fallon's announcement of his creation of IFI, he also solicited the readers for their “financial support.” *Id.* Moreover, in a March 31, 2008 press release, Fallon stated that IFI is a business partnership that “consults and organizes primarily on state-level issues” and also consults “with progressive Democratic candidates wanting to run for office.” *Desmoinesdem, Boswell Campaign Questions Fallon's Ethics (Part 1), BLEEDING HEARTLAND (April 3, 2008)* found at www.bleedingheartland.com. Fallon stated that in 2007 it allowed him to draw income of \$1,250 and that he hoped to earn \$3,000 per month in 2008. *Id.* Fallon also stated in an April 2, 2008 press release that IFI was a business that he formed to earn a “modest” living by consulting, organizing, and working on issues he cared about. *Id.* Fallon stated that IFI is not a non-profit. *Id.*

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IFI is organized as a general partnership between Ed Fallon and Lynn Heuss, his Congressional campaign manager. Martyn, Chase, *Fallon Faces Campaign Finance Questions*, THE IOWA INDEPENDENT (March 29, 2008) found at <http://iowaindependent.com/2121/fallon-faces-campaign-finance-questions>. The IFI phone number provided in Fallon's January 11, 2007 announcement of IFI's creation and displayed elsewhere on the IFI website was also the phone number for Lynn Heuss as Fallon's Congressional campaign manager and the phone number listed for the custodian of records for FFC on its FEC Form 1. IFI lists no street address on its website and those wishing to make donations are invited to contact IFI by email. See www.imforiowa.com. IFI is not registered with the IRS as a political organization.

On the IFI website, Fallon also referred to an "electronic update list" that IFI used to maintain weekly contact with its supporters and he noted that IFI increased the number of recipients from 5,000 to 6,700. *Id.* According to a recent article, the list has grown to 9,000 recipients. Hancock, Jason, *With Campaign Behind Him, Fallon Looks Ahead*, THE IOWA INDEPENDENT (July 23, 2008) found at <http://iowaindependent.com/2649/with-campaign-behind-him-fallon-looks-toward-the-future>.

IFI's activities also appear to have included advocacy on behalf of federal candidates. For example, in IFI's January 11, 2007 announcement, Ed Fallon stated that "Lynn Heuss and I have been talking with Senator John Edwards and his staff about working with the Senator's campaign for President." See <http://www.imforiowa.com/ht/display/ReleaseDetails/i/1003485/pid/858936>. In

several subsequent updates throughout early 2007, IFI praised Sen. Edwards and advertised Sen. Edwards's campaign events in postings on the IFI website and in emails to those on the IFI email distribution list. See, e.g., January 19, January 25, February 15, February 23, March 6, March 30, and May 24, 2007 Updates at <http://www.imforiowa.com/ht/d/Releases/pid/858936>.

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Additionally, in several communications to the IFI distribution list, Fallon sought support for his own Congressional campaign. For example, on January 12, 2008, Fallon, who filed his Statement of Candidacy and registered FFC as his principal campaign committee on January 7, 2008, announced his Congressional candidacy in a letter emailed to IFI's members and posted on the IFI website. *Id.* In that letter to the IFI distribution list, Fallon also indicated that his Congressional campaign would use the IFI distribution list: "Through my congressional campaign organization, I'll share with you once each week an update on how the campaign is unfolding." *Id.* In that letter, Fallon also attacked his opponent in the primary election. *Id.* He concluded the letter (now posted on the IFI website) by listing the website, phone number, and address for FFC. *Id.*

In another example of FFC using the IFI distribution list to benefit Fallon's Congressional campaign, Fallon's update to IFI members on February 29, 2008 invited them to a campaign event planned around his 50th birthday: "Ed Fallon (writing on the eve of my 50th birthday . . . see www.fallonforcongress.com for details on all the fun I'm planning to have tomorrow . . . come join me!)." *Id.*

Throughout this time, Fallon also continued to solicit donations directly for IFI. On March 7, 2008, he sent an email to the IFI distribution list soliciting members for

"donations" to IFI, noting that IFI was able to assist five city council candidates during 2007. *Id.*

Fallon asserted in a March 31, 2008 press release that he kept IFI separate from FFC but that it was important to tell IFI's "supporters" that he was running for Congress and why. Desmoinesdem, *Boswell Campaign Questions Fallon's Ethics (Part 1)*, BLEEDING HEARTLAND (April 3, 2008) found at www.bleedingheartland.com. In the April 2, 2008 press release, Fallon compared himself to a candidate that owns an auto repair garage and puts campaign literature in the window and by the cash register, and talked to customers about why he was running for office. *Id.* In an apparent reference to the campaign letters sent to the IFI email distribution list, Fallon stated, "This is . . . no different than me sending 2 emails to my investors and customers." *Id.*

On June 9, 2008, Fallon lost the Democratic Party primary election.

The complainant alleges that Ed Fallon solicits money for and controls IFI, which appeared to be raising and spending soft money in violation of the Act, and making direct expenditures in support of Fallon's Congressional campaign. Complaint at 1. Allegedly, IFI was advocating and supporting Fallon's campaign and paying Fallon a salary. *Id.* The complainant noted that Fallon has described IFI as an organization that intends to recruit and assist progressive candidates as well as a for-profit business. *Id.* IFI also published a letter by Fallon advocating for his Congressional campaign and providing his campaign website address. *Id.*

The complainant asserts that this activity may have violated 2 U.S.C. § 441i(e)(1)(A), which prohibits a candidate or an entity directly or indirectly

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established, financed, maintained, controlled by, or acting on behalf of a candidate from soliciting, receiving, directing, transferring, or spending funds in connection with a federal election unless the funds are subject to the Act's limits, prohibitions, and reporting requirements. Complaint at 1. To the extent that IFI's activity supports non-federal candidates, complainant asserts that this too is prohibited by 2 U.S.C. 441i(e)(1)(B), which similarly prohibits federal candidates or the organizations they control from soliciting, receiving, directing, transferring, or spending funds in connection with non-federal elections unless they are subject to the limits and source restrictions of the Act. *Id.* at 1-2.

The only Response received was submitted by FFC and was signed by its treasurer, John Schmacker. No separate response to the complaint was received from Ed Fallon or IFI. In its Response, FFC denied violating the Act. Response at 1. FFC stated that IFI is "a legal general partnership" and a "small business dependent upon" lowan "supporters" for its "financial support." *Id.* Although IFI was organized "to encourage potential candidates to run in local elections," its "mission and practices have never included funding political campaigns." *Id.* FFC stated that no "fundraising solicitation" of IFI ever solicited funds for use in either local or federal campaigns. *Id.* According to FFC, a letter in which Ed Fallon announced his intention to run for Congress (distributed by email to IFI members and posted on the IFI website) does not contain a solicitation of funds or advocacy for Fallon's campaign. *Id.*

FFC also stated that IFI's income tax return for 2007 reported income of only \$18,106 and income "after business deductions" of only \$4,602. Response at 2.

IFI's expenditures included \$1,250 paid to Ed Fallon for his services to the partnership and all other expenditures were overhead. *Id.* FFC denied that FFI spent any funds on "federal or local" political campaigns. *Id.*

After noting that Ed Fallon contributed \$200 of his personal funds directly to his own campaign and that this was permissible under the Act, FFC stated that Ed Fallon, as a partner of IFI, also made two in-kind contributions to his campaign comprising 10 hours of his time (valued at \$375) that he spent creating "two communications to the [IFI] e-mail list that mentioned Ed's candidacy." *Id.* FFC believes that treatment of these transactions as in-kind contributions complies with the Act and, therefore, that the Commission should take no further action in this matter. *Id.* at 2.⁴

III. LEGAL ANALYSIS

The gravamen of the complaint is that Fallon's activities through IFI violated the Act. Accordingly, the Commission analyzes three aspects of Fallon's relationship and use of IFI and the ways in which they may violate the Act.

⁴ FFC issued press releases on March 31 and April 2, 2008 regarding the allegation that Fallon's relationship with IFI violated the Act or was unethical. *Desmoinesdem, Boswell Campaign Questions Fallon's Ethics (Part I)*, BLEEDING HEARTLAND (April 3, 2008) found at www.bleedingheartland.com (the press releases are reprinted at the conclusion of the article). In the April 2, 2008 press release, IFI partner and FFC campaign manager Lynn Heuss asserted that the Commission's Information Division "confirmed that Ed Fallon has done nothing illegal or unethical." *Id.* The press release cited the Commission's rules on partnership contributions and contributions by candidates to their own campaigns using personal funds, and asserted that the only contribution made by IFI to FFC was sending out two email messages, which constituted in-kind donations that are not in violation of Commission regulations. *Id.* Another article reported on April 3, 2008 that the Commission denied making "any determination relative to the specific circumstances of any campaign." Chase Martyn, *FEC Disputes Fallon Campaign Statement*, IOWA INDEPENDENT (April 3, 2008) found at <http://iowaindependent.com/2170/fec-disputes-fallon-campaign-statement>. The article quoted a Commission spokesperson for stating that it would have been against Commission policy for an employee to answer such a question as it related to any specific campaign, that Commission employees may not make any determinations relative to the specific circumstances of any campaign, and that only the Commission can make such a determination. *Id.*

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1. Fallon and IFI's Alleged Violation of 2 U.S.C. § 441i(e)

The Act prohibits a candidate or an entity directly or indirectly established, financed, maintained, or controlled by or acting on behalf of a candidate from soliciting, receiving, directing, transferring, or spending funds in connection with an election for federal or non-federal office (including funds for any federal election activity), unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act. 2 U.S.C. § 441i(e)(1)(A)-(B). Ed Fallon and IFI may have violated this provision because Fallon established, financed, maintained and/or controlled IFI and IFI claims to have supported other state and federal candidates while apparently not fundraising within the limits of the Act.

IFI claims on its website to have "supported" non-federal candidates in the past and Ed Fallon has solicited IFI's members for additional donations to continue IFI's efforts. Although FFC's response to the Complaint asserts that IFI has not funded political campaigns, even if IFI has not done so, the Act also prohibits a candidate-established and candidate-controlled organization from soliciting, receiving, directing or transferring funds in connection with elections outside of the limits and prohibitions of the Act. See 2 U.S.C. § 441i(e)(1)(A)-(B). As noted above, IFI was established by Fallon using the staff and resources he accumulated during his previous gubernatorial campaign, is a partnership between Fallon and his Congressional campaign manager, and claims to have used its resources to support (though not directly fund) state and federal candidates.

Accordingly, Fallon appears to have established, financed, maintained, and/or controlled IFI, an organization that supports federal and non-federal candidates, and there is no claim or indication that IFI's fundraising activities were subject to the

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limitations, prohibitions, or reporting requirements of the Act. Thus, there is reason to believe that I'm for Iowa and Ed Fallon violated 2 U.S.C. § 441i(e)(1) by soliciting, receiving, and spending funds in connection with federal and non-federal elections that were not subject to the limitations of the Act. See AO 2005-2 (Corzine) (funds raised by Senator for other state and local candidates must comply with federal limits).

2. FFC's Use of IFI's Email List as an In-Kind Contribution

The complainant alleged that IFI made expenditures to support Ed Fallon's Congressional candidacy, including posting a letter from Fallon dated January 12, 2008 on the IFI website titled "Running for Congress!" in which Fallon discussed his candidacy, appealed for support, and provided the contact information and website address for FFC. Complaint at 1. The January 12 letter the complainant cited was one of many updates sent to the recipients (approximately 9,000) of the IFI email distribution list and posted on the IFI website. In that letter, Fallon claimed that each week FFC would distribute campaign communications to the recipients of the IFI email distribution list. See

<http://www.imforiowa.com/ht/display/ReleaseDetails/i/1126988/pid/858936>.

Political committees are required to disclose the receipt of contributions. See 2 U.S.C. § 434(b)(2)(A). A contribution includes a gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing a Federal election. 2 U.S.C. § 431(8)(A)(i). Payment for the purchase or rental of an email address list made at the direction of a political committee or any payment for an email address list that is transferred to a political committee is a

contribution or expenditure. See 11 C.F.R. §§ 100.94(e)(2)-(3) and 100.155(2)-(3).

The term "anything of value" also includes in-kind contributions, such as providing membership lists and mailing lists without charge. See 11 C.F.R. § 100.52(d)(1).

The Commission has affirmed that a transfer by any organization of a tangible asset, including an email list, to a political committee without charge is an in-kind contribution. See Internet Communications Final Rules, 71 Fed. Reg. 18589, 18599 (April 12, 2006).

FFC's use, without charge, of IFI's email address list -- first developed by Fallon's previous gubernatorial campaign and expanded by IFI through the efforts of its (presumably) paid employees -- to distribute campaign materials is a potential unreported in-kind contribution from IFI to FFC. When Fallon used IFI's email distribution list to disseminate campaign communications, FFC received something of value that it otherwise would have had to expend funds to purchase or rent. Therefore, FFC's use of IFI's email list was an unreported in-kind contribution from IFI to FFC.

The available information does not indicate the value of this apparent unreported contribution from IFI to FFC. In light of the possibility that it was in excess of the contribution limit, the Commission finds reason to believe that I'm for Iowa violated 2 U.S.C. § 441a(a).⁵ Further, the Commission finds reason to believe that Fallon for Congress and John Schmaker, in his official capacity as treasurer,

⁵ A partnership such as IFI is a "person" within the meaning of the Act, *see* 2 U.S.C. § 431(11), and a contribution by a partnership must be attributed both to the partnership and to each partner (in direct proportion to the shares of partnership profits or by agreement of the partners). 11 C.F.R. § 110.1(e). A contribution by a partnership, as with any other "person," may not exceed \$2,300 in the current election cycle. 11 C.F.R. § 110.1(b)(1)(i) & (e). Moreover, in-kind contributions must be reported by the committee as the usual and normal value of the contribution on the date received. 11 C.F.R. § 104.13(a)(1).

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violated 2 U.S.C §§ 434(b) and 441a(f) by failing to report a possibly excessive contribution from IFI resulting from FFC's use of IFI's email list.

3. Payment from IFI to Fallon

The complainant alleges that another potential (unreported) contribution by IFI to Fallon's campaign was IFI's alleged payment of a salary to Fallon. Salary payments to a candidate are not *per se* prohibited. A candidate may receive income for *bona fide* employment that is unconnected to his campaign and may receive a salary from his campaign. See 2 U.S.C. § 439a(a); 11 C.F.R. § 100.33(b)(1); 11 C.F.R. § 113.1(g)(1)(i)(I). Payments that are compensation shall be considered contributions unless the compensation results from *bona fide* employment that is genuinely independent of the candidacy, the compensation is exclusively in consideration of services provided by the employee as part of this employment, and the compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time. See 11 C.F.R. § 113.1(g)(6)(iii).

In its Response, FFC states that in 2007 IFI paid Fallon \$1,250 for his work on behalf of IFI, but does not specify the nature of that work or whether that work was done on behalf of Fallon's campaign. Given that IFI arose from Fallon's gubernatorial campaign, including its use of the gubernatorial campaign's staff and email distribution list, as well as IFI's stated purpose -- to provide a vehicle for Fallon and his campaign staff to continue their activities -- and IFI's reliance on "contributions" from its supporters, there is reason to believe that payments from IFI

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to Fallon may not have been for *bona fide* employment independent of his candidacy.

As for wages paid from IFI to Fallon in 2008, the Response only mentions that Fallon spent 10 hours preparing two campaign letters which were reported by FFC as \$375 worth of in-kind contributions from IFI to FFC.⁶ The Commission has no information on any payments from IFI to Fallon after the date of the Response, April 23, 2008. Arguably, the incentive to use IFI's resources to support the Fallon campaign would have increased as the June 9, 2008 primary approached.⁷ Therefore, there may be additional and significant wages paid to Fallon by IFI that occurred after the Response was filed that constitute contributions. In this regard, Fallon stated in one publicly-available article that he hoped to draw \$3,000 per month from IFI during 2008. *Desmoinesdem, Boswell Campaign Questions Fallon's Ethics (Part 1)*, BLEEDING HEARTLAND (April 3, 2008) found at www.bleedingheartland.com.

Because it appears that IFI made payments to Fallon in 2007 and 2008 that may not have been for *bona fide* employment independent of Fallon's candidacy,

⁶ FFC may not have correctly disclosed the contributions. A contribution by a partnership must be reported both as a contribution attributed to the partnership and as a contribution from each partner (in direct proportion to their shares of partnership profits or by agreement of the partners). 11 C.F.R. § 110.1(e). Also, in-kind contributions must be reported as both contributions and operating expenditures. 11 C.F.R. § 104.13(a)(2). FFC's Amended April 2008 Quarterly Report disclosed two contributions (as "partnership attributions") from Fallon to FFC, each for \$187.50, as well as one contribution from IFI to FFC for \$187.50 (as an "in kind consulting fee"). Thus, FFC attributed 100% of the \$375 of in-kind contributions to Fallon and none to Lynn Heuss, his sole partner in IFI. Although Fallon's contribution totaled \$375, FFC disclosed only one \$187.50 in-kind contribution from IFI. Furthermore, FFC's disbursements only included a single disbursement for \$187.50.

⁷ FFC reported in its July 2008 Quarterly Report that it had \$281,996.61 in receipts during the election cycle, had \$2,719.63 on hand at the close of the second quarter, and was \$23,341 in debt, including \$18,537.12 in state and federal payroll and unemployment taxes. There is, accordingly, an ongoing incentive for Fallon to use the income and assets of IFI to benefit FFC.

those payments may have constituted undisclosed and excessive contributions from IFI to FFC. Consequently, the Commission finds reason to believe that I'm for Iowa violated 2 U.S.C. § 441a(a), and that Fallon for Congress and John Schmaker, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441a(f).

IV. CONCLUSION

Therefore, there is reason to believe that Ed Fallon and I'm for Iowa violated 2 U.S.C. § 441i(e)(1), that I'm for Iowa violated 2 U.S.C. § 441a(a), and that Fallon for Congress and John Schmaker, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441a(f).

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