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FEDERAL ELECTION  
COMMISSION

BEFORE THE FEDERAL ELECTION COMMISSION, 2010 OCT 14 PM 12: 51

**CELA**

In the Matter of )  
 )  
 Leonard Roberto; Roberto for Congress ) PRE-MUR 502  
 and Kenneth C. Scholz, in his official )  
 capacity as treasurer; Friends of Roberto )  
 and Robert W. Schmidt, Jr., in his official )  
 capacity as treasurer )

CERTIFICATION

I, Shawn Woodhead Werth, Secretary and Clerk of the Federal Election  
 Commission, do hereby certify that on October 13, 2010, the Commission  
 decided by a vote of 5-1 to take the following actions in Pre-MUR 502:

1. Open a MUR. ~~MUR #~~ 6395
2. Dismiss the matter based on prosecutorial discretion and send a cautionary letter to Leonard Roberto; Friends of Roberto and Robert W. Schmidt, Jr., in his official capacity as treasurer; and Roberto for Congress and Kenneth C. Scholz, in his official capacity as treasurer.
3. Find no reason to believe Primary Challenge violated the Act.
4. Approve the joint Factual and Legal Analysis, as recommended in the First General Counsel's Report dated September 28, 2010.
5. Approve the appropriate letters.
6. Close the file.


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Federal Election Commission  
Pre-MUR 502  
October 13, 2010

Commissioners Bauerly, Hunter, McGahn II, Petersen, and Weintraub  
voted affirmatively for the decision. Commissioner Walther dissented.

Attest:

October 14, 2010  
Date

  
Shawn Woodhead Werth  
Secretary and Clerk of the Commission

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

Kenneth C. Scholz, Treasurer  
Roberto for Congress  
18 Mill Valley Drive  
East Amherst, NY 14051

OCT 18 2010

RE: MUR 6395  
Leonard Roberto  
Friends of Roberto and Robert W. Schmidt, Jr.,  
in his official capacity as treasurer  
Roberto for Congress and Kenneth C. Scholz,  
in his official capacity as treasurer  
Primary Challenge

Dear Mr. Scholz:

On May 17 and June 28, 2010, you disclosed to the Federal Election Commission the possibility that Leonard Roberto, Roberto for Congress, Friends of Roberto, and Primary Challenge violated certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On October 13, 2010, the Commission, after considering all the evidence, determined that a Matter Under Review ("MUR") should be opened, and subsequently dismissed the matter based on prosecutorial discretion. Also on this date, the Commission found that there is no reason to believe Primary Challenge violated the Act. Accordingly, the Commission closed its file in this matter.

The Commission cautions Leonard Roberto; Friends of Roberto and Robert W. Schmidt, Jr., in his official capacity as treasurer; and Roberto for Congress and you, in your official capacity as treasurer, regarding apparent violations of 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d). Leonard Roberto; Friends of Roberto and Robert W. Schmidt, Jr. in his official capacity as treasurer; and Roberto for Congress and you, in your official capacity as treasurer, should take steps to ensure that this activity does not occur in the future.

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,

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Kenneth G. Scholz, Treasurer  
Roberto for Congress  
MUR 6395  
Page 2

68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66,132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Kamau Philbert, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Mark D. Shonkwiler  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS: Leonard Roberto MUR: 6395**

Roberto for Congress and Kenneth C. Scholz,  
in his official capacity as treasurer

Friends of Roberto and Robert W. Schmidt, Jr.,  
in his official capacity as treasurer

Primary Challenge

**I. INTRODUCTION**

Leonard Roberto; his 2010 federal campaign committee, Roberto for Congress; his 2010 state campaign committee, Friends of Roberto; and a pre-existing, nonconnected, state political committee founded and controlled by Mr. Roberto, Primary Challenge, joined in a submission self-disclosing that (1) Leonard Roberto improperly transferred \$7,226.02 in nonfederal funds from Friends of Roberto to Roberto for Congress, and (2) Primary Challenge paid the fundraising expenses for some of the money being transferred with nonfederal funds. *See Sua Sponte* Submission and Supplemental Submission. The submission reports that upon recognizing there was a prohibition on making and accepting such nonfederal transfers, Roberto for Congress took immediate corrective action by returning all of the nonfederal funds. *Id.*

**II. FACTUAL AND LEGAL ANALYSIS**

**A. Factual Background**

Leonard Roberto was a first-time federal candidate in the September 14, 2010, primary election for United States Congress in New York's 27<sup>th</sup> District. He also was a candidate for the New York State Senate during a brief period in early 2010. In addition

1 to his 2010 federal and state campaigns, Mr. Roberto previously ran unsuccessfully for  
2 seats in the New York State Assembly during the 2008 election cycle and the New York  
3 State Senate during the 2006 election cycle.

4 Mr. Roberto is also the founder and current president of Primary Challenge, a  
5 non-partisan state political organization. See Primary Challenge,  
6 <http://primarychallenge.org> (last visited Sept. 21, 2010). Primary Challenge, which  
7 Mr. Roberto founded in 2005, is registered as a New York State political committee. It  
8 raises funds from the public and accepts donations from corporations, unions, and trade  
9 organizations.<sup>1</sup> Primary Challenge's stated mission is "to draft, support and infuse new  
10 leadership to reduce the burden of government on the taxpayer." *Id.*

11 Friends of Roberto ("FOR") is Mr. Roberto's principal campaign committee for  
12 both his 2008 bid for a seat in the New York State Assembly and his 2010 New York  
13 State Senate bid. See Supplemental *Sua Sponte* Submission at 1. FOR was  
14 administratively terminated on October 23, 2008, and is currently listed as inactive on  
15 New York State's official election website. See New York State Board of Elections,  
16 <http://www.elections.state.ny.us> (last visited Sept. 21, 2010). Even so, on January 17,  
17 2010, Mr. Roberto opened an FOR campaign account to deposit his 2010 State Senate  
18 campaign receipts without formally re-registering FOR with New York state election  
19 authorities. See Supplemental Submission at 1. FOR's 2010 July Periodic Report shows  
20 receipts of \$10,230.09 in individual/partnership donations and \$1,000 in corporate  
21 donations between January and April 2010. See New York State Board of Elections,

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<sup>1</sup> New York State law permits political committees to accept contributions from corporations and labor organizations. See New York State Board of Elections, Contributions and Receipt Limitations, <http://www.elections.state.ny.us/Contributions.html> (last visited Sept. 21, 2010).

1 Campaign Financial Disclosure, <http://www.elections.state.ny.us>. Although the reports at  
2 the New York State Board of Elections' website do not show a treasurer's name, the  
3 submission identifies FOR's treasurer as Robert W. Schmidt. *See Supplemental*  
4 *Submission at 4.*

5 Roberto for Congress ("RFC") is Mr. Roberto's 2010 congressional campaign  
6 committee. After Mr. Roberto finally decided to run for Congress on or about April 15,  
7 2010, RFC opened a campaign account on April 21, 2010. RFC subsequently registered  
8 with the Commission on May 10, 2010. Its treasurer is Kenneth Scholz.

9 Meanwhile, as part of his 2010 New York State Senate campaign, Mr. Roberto  
10 had previously scheduled a barbecue fundraiser for FOR on April 18, 2010. Although  
11 Mr. Roberto decided to run for Congress after scheduling the state campaign fundraiser,  
12 he did not publicly announce his federal candidacy or that he had decided to abandon his  
13 state candidacy. The submission states that Mr. Roberto did not believe it was  
14 appropriate to publicly discuss his federal candidacy since he had not yet registered with  
15 the Commission. *See Supplemental Sua Sponte Submission at 2.* Instead, Mr. Roberto  
16 continued with the previously scheduled April 18 State Senate campaign fundraiser  
17 (without discussing his federal candidacy) and accepted \$3,800 in donations, which he  
18 deposited into the FOR account. *Id.* Mr. Roberto paid \$1,272.38 in fundraising expenses  
19 for this event with funds from Primary Challenge, which were reimbursed on May 3,  
20 2010 with funds from the FOR account.

21 On April 21, 2010, Mr. Roberto transferred the \$3,800 in donations received at  
22 the April 18 State Senate campaign fundraiser from the FOR nonfederal account to the  
23 newly opened RFC federal account. *See Sua Sponte Submission at 4.* The submission

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1 states that Mr. Roberto believed that the deposit of the FOR funds into the RFC account  
2 was lawful since the funds were from individuals eligible to contribute to a federal  
3 campaign. *Id.* On May 5, 2010, Mr. Roberto deposited an additional \$3,426.02 of his  
4 state campaign funds from the FOR account into the RFC account. *Id.* This deposit  
5 consisted of a \$3,082.02 transfer from the FOR account, 3 state donation checks totaling  
6 \$75, and \$269 in state cash donations. *Id.* Mr. Roberto used at least \$4,599 of the  
7 transferred FOR nonfederal funds to pay for various congressional campaign expenses  
8 between April 23, 2010 and May 4, 2010. *Id.*

9 On May 3, 2010, RFC's treasurer, Kenneth Scholz, mailed Mr. Roberto's  
10 Statement of Candidacy and Statement of Organization to the Commission, and the  
11 Commission received and filed them on May 10, 2010. On May 5, 2010, Mr. Roberto  
12 met with Mr. Scholz to give Mr. Scholz signature authority over the RFC campaign  
13 account and to discuss the transfers and other federal campaign activities Mr. Roberto  
14 had already undertaken. The day after the meeting, Mr. Scholz contacted the  
15 Commission's Information Division regarding the propriety of the transfers from  
16 Mr. Roberto's state committee to his federal committee. After being told that the  
17 transfers were impermissible under the Commission's regulations, Respondents  
18 voluntarily disclosed the transactions to the Commission.

19 On May 20, 2010, RFC repaid \$7,226.02 to FOR to account for all of the  
20 previously transferred funds. A total of \$4,000 of the repayment funds came from \$2,000  
21 loans that Mr. Scholz and his wife each made to RFC on May 20, 2010. *See*  
22 Supplemental *Sua Sponte* Submission at 3-4. FOR then refunded the state contributions

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1 to its prior donors and simultaneously solicited them for contributions to Mr. Roberto's  
2 congressional campaign.<sup>2</sup> *Id.*

3 On July 2, 2010, RFC filed its first disclosure report (2010 July Quarterly Report)  
4 with the Commission disclosing the financial activity described above. RFC disclosed  
5 the two transfers from FOR as separate receipts, and disclosed the RFC repayment to  
6 FOR as a disbursement. RFC disclosed the two Scholz loans as both contributions and  
7 unsecured interest-free loans.

8 **B. Analysis**

9 The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits a  
10 federal candidate, a candidate's agent, and entities established, financed, maintained or  
11 controlled by them from soliciting, receiving, directing, transferring, or spending funds in  
12 connection with a federal election, unless those funds are subject to the limitations,  
13 prohibitions, and reporting requirements of the Act. 2 U.S.C. § 441i(e)(1)(A).

14 The Commission's regulations also specifically prohibit transfers of funds or  
15 assets from a candidate's non-federal campaign committee or account to his or her  
16 federal principal campaign committee or other authorized committee. 11 C.F.R.  
17 § 110.3(d); *see also* Explanation and Justification, 57 Fed. Reg. 36,344 (August 12,  
18 1992).

19 An individual becomes a federal candidate by seeking election for federal office  
20 and by accepting \$5,000 in contributions or making \$5,000 in expenditures. 2 U.S.C.  
21 § 431(2); 11 C.F.R. § 100.3(a). Thus, Mr. Roberto became a federal candidate after he

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<sup>2</sup> FOR's 2010 July Periodic Report shows refunds of \$5,695 to 55 donors.

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1 decided to run for Congress and transferred a total of \$7,226.02 of FOR's funds into  
2 RFC's bank account. *See* 11 C.F.R. § 100.72(b). As a federal candidate, Mr. Roberto  
3 and FOR (his state campaign committee) were prohibited from transferring or spending  
4 nonfederal funds in connection with his candidacy. FOR's funds were solicited for  
5 Mr. Roberto's state campaign, included at least \$1,000 in corporate funds, and were not  
6 subject to the Act's reporting requirements. Therefore, by transferring a total of  
7 \$7,226.02 in nonfederal funds from FOR to RFC, Mr. Roberto, FOR and Robert W.  
8 Schmidt, Jr., in his official capacity as treasurer, violated 2 U.S.C. § 441i(e)(1)(A) and  
9 11 C.F.R. § 110.3(d). Similarly, by receiving the \$7,226.02 in nonfederal funds and  
10 spending at least \$4,599 of the funds, RFC and Kenneth C. Scholz, in his official capacity  
11 as treasurer, also violated 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d).

12 Although the transfers violated the Act and Commission regulations, the  
13 Commission decided that the violations in this matter do not warrant further use of  
14 Commission resources or the imposition of a civil penalty. In reaching this conclusion,  
15 the Commission considered that the violations do not appear to be knowing and willful,  
16 occurred over a very short period of time and the amount at issue is relatively small. The  
17 Commission's decision also was based on the fact that Respondents voluntarily disclosed  
18 the violations before they were discovered by an outside party, promptly ceased and  
19 corrected the violations after discovery, and fully cooperated with the Commission in  
20 ensuring that their *sua sponte* submission completely addressed the disclosed activity.<sup>3</sup>

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<sup>3</sup> Mr. Roberto also complied with the federal candidate and committee registration requirements set forth at 2 U.S.C. §§ 432(e) and 433(a); 11 C.F.R. §§ 101.1(a), 102.1(a). He timely filed his Statement of Candidacy and Statement of Organization with the Commission on May 10, 2010 (both forms were mailed on May 3, 2010). RFC further timely disclosed its campaign receipts and disbursements in its first disclosure report as required under 2 U.S.C. § 434.

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1 See Commission's Policy Statement Regarding *Sua Sponte* Submissions, 72 Fed. Reg.  
2 16,695 (Apr. 5, 2007).

3 Accordingly, the Commission exercises its prosecutorial discretion and dismisses  
4 this matter, and cautions Leonard Roberto; Friends of Roberto and Robert W. Schmidt,  
5 Jr., in his official capacity as treasurer; and Roberto for Congress and Kenneth C. Scholz,  
6 in his official capacity as treasurer, regarding noncompliance with the transfer and  
7 spending prohibitions of 2 U.S.C. § 441i(e)(1)(A) and 11 C.F.R. § 110.3(d).<sup>4</sup> See  
8 *Heckler v. Chaney*, 470 U.S. 821 (1985).

9 Finally, the submission suggested that Primary Challenge may have violated the  
10 Act by initially paying the expenses for the April 18, 2010 fundraiser. However, as it  
11 does not appear that the Primary Challenge payment was made in connection with a  
12 federal election, the payment did not violate the Act or Commission regulations.  
13 Therefore, the Commission finds no reason to believe Primary Challenge violated the Act  
14 in this matter.

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<sup>4</sup> A review of RFC's website on June 8, 2010 showed that for a period of time the website (created sometime around April 30, 2010) did not include the required disclaimer. See 2 U.S.C. § 441d(a); 11 C.F.R. §§ 110.11(a)-(c) (requiring all websites of a political committee that is available to the general public to contain a disclaimer clearly stating that the authorized committee paid for its public communications and solicitations). A disclaimer was placed on the website sometime prior to June 22, 2010, though RFC's treasurer orally explained that he took steps to correct the error sooner. Since the website failed to include the requisite disclaimer for a period of time (albeit brief), RFC and its treasurer appear to have violated 2 U.S.C. § 441d(a) and 11 C.F.R. §§ 110.11(a)-(c). However, based on its prior treatment of similar disclaimer violations, the Commission is also exercising its prosecutorial discretion regarding this violation and dismisses it. See MURs 6278 (Committee to Elect Joyce Segars for Congress) and 6265 (Gause for Congress) (dismissing allegations as to brief website disclaimer violations where remedial action was taken).

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