December 19, 2016

Submitted Electronically

Mr. Neven F. Stipanovic
Acting Asst. General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

RE: Comments on Notice 2016-13, Internet Communications Disclaimers

Dear Mr. Stipanovic:

The undersigned national labor organizations ("Labor Organizations") support a rulemaking to modify and clarify the disclaimer requirements applicable to communications over the Internet. Our comments make some substantive suggestions for eventual new rules, including with respect to a disclaimer area that the ANPRM does not clearly address: solicitations to a restricted class to contribute to the connected organization's separate segregated fund. But our main focus is on general principles because a full rulemaking would enable us and other commenters to address specific proposals and language. We also request an opportunity to testify at the February 1 hearing.

The Labor Organizations, their affiliates, and other labor organizations increasingly communicate with their members and the general public via websites, email, social media outlets, and digital advertising. Insofar as these media entail general-public outreach, we have found it persistently challenging both to understand and to comply with the disclaimer requirements of the Federal Election Campaign Act ("the Act") and the Commission's regulations, particularly because advisory opinions and enforcement matters often produce inconclusive results that either reveal a lack of consensus among the Commissioners about these matters or rely upon technological facts that later prove to be ephemeral. While the Internet exemption in 11 C.F.R. § 100.26 simplifies compliance, much of what is conveyed through the Internet entails placement for payment in one form or another, from a "boost" of otherwise freely placed content in order to increase circulation to directed advertising of material that may not appear publicly otherwise.

The Commission's aim should be to achieve new rules in this area, including resolving issues as to which it has failed to achieve four votes in considering advisory opinion requests and complaints about Internet disclaimers. In general, we believe the applicable rules should be

clear, include sensible exceptions, and provide for alternative ways to comply other than inclusion of the full statutorily required disclaimer, such as a universal default of linking to landing pages or other sites that will clearly identify sponsorship. In no case should the disclaimer rules compel a diminution of the speaker's message itself in order to accommodate the disclaimer; and, that principle should determine whether or not an Internet advertisement is "small" and therefore may omit the full, statutorily required language, and instead link to a disclaimer as the routine solution, perhaps from minimally required text on the main message that simply identifies the speaker by either full name, acronym or logo.

The Labor Organizations believe that sources of public messages within the Commission's purview ought to be identifiable to viewers and listeners, and that expenditures for such messages should be disclosed in Commission reports. The Commission's rules for Internet disclaimers should serve these goals. However, the Internet does pose both different challenges and unique opportunities for source identification as compared with off-line media, and since the technology of the Internet is rapidly changing, and will likely continue to do so indefinitely, the Commission's rules in this area must be sufficiently flexible and principle-focused so they do not become obsolete in short order. The challenge is to achieve both public informational goals and provide sufficient clarity to speakers about the rules so there is both informed compliance and predictable enforcement.

In addition to abiding by the general principles outlined above in all revisions of the applicable rules, the Labor Organizations specifically recommend that a rulemaking on the disclaimer requirements applicable to Internet communications address two subjects: (1) the application of the "small items" and "impracticable" exceptions found at 11 C.F.R. § 110.11(f) to Internet communications posted on another person's site, including the proliferation of opportunities to pay to "boost" content on otherwise free social media platforms; and (2) the disclaimer requirements for text message solicitations to the restricted class of a labor organization's or corporation's separate segregated fund. We address each subject in turn.

Disclaimer Requirements for Internet Communications Placed for a Fee on Another Person's Website

The Labor Organizations urge the Commission to clarify the application of the disclaimer requirements found at 11 C.F.R. § 110.11 to Internet communications that are "placed for a fee on another person's Web site." 11 C.F.R. § 100.26. The Commission should consider the application of the disclaimer regulations to both "traditional" paid advertising on a website and to "promoted content" advertising on social media platforms.

By "traditional" paid advertising, we mean the type of paid Internet advertising that the Commission has considered previously in matters such as Advisory Opinions (AOs) 2010-19, 2011-09, and 2013-18. The nature of the advertisements varies by platform, as does their

capacity for text-based disclaimers. Much like the "[b]umper stickers, pins, buttons, [and] pens" that have been long considered "small items" not requiring a disclaimer, many Internet advertisements limit the available space for text, such that the full disclaimer presently required cannot be included without diminishing the speaker's message.

For example, a common form of Google advertisement is the search display advertisement, whereby an advertiser pays to have its website appear at the top of the results returned when certain pre-selected terms are searched. The advertisement may contain only a limited number of words and may not have images, although Google includes the word "Ad" inside a box of contrasting color so as to distinguish the paid-for search results from those that appear according to Google's regular algorithm. Other advertising platforms may limit the percentage of words that can appear on an image-based advertisement; for example, Facebook notes in its Advertising Help Center that advertising images that contain too much text as part of the image – according to an unstated standard – will be delivered less frequently by Facebook to its users than advertising images with no text. Moreover, even where text can be included on an image, such as on a display advertisement, the widespread use of cellular phones means that many of the advertisement's viewers will be unable to read the text due to the small size of the image. The Commission should examine the various common forms of online advertising and promulgate rules that will inform viewers of the speaker's identity without diminishing its message in the face of text-limited Internet advertising.

One possible solution the Commission should consider is the nearly universal practice of linking Internet advertisements to a landing page. To our knowledge, in all cases in which the Labor Organizations have paid for "traditional" online advertising, the advertisements have been linked to websites that can easily accommodate disclaimers that inform the advertisements' viewers of their origin and meet the requirements of 11 C.F.R. § 110.11(b)-(c). Indeed, the most common purpose of online advertising is to direct viewers to a separate website that either contains additional information on a subject or requests the viewer to take action such as signing a petition. The Commission should promulgate rules that require Internet advertisements to link to a page with more detailed disclaimer information, while either exempting the advertisement itself as a "small item" or limiting the information contained in the advertisement to a speaker's name, acronym, or image.

The other type of advertising that the Commission should address in a rulemaking is "promoted content" advertising on a social media platform. "Promoted content" advertising occurs when a social media platform user pays money to the platform to make certain content (that the user has otherwise posted on the platform at no cost) appear more frequently to targeted users of the platform. For example, a political committee that posts content for free on Twitter can pay Twitter to promote either the individual "tweets" or the entire account of the committee. In the former case, the committee would know in advance which "tweets" would receive paid support; however, in the latter case, Twitter might use an algorithm to determine which specific "tweets" would be promoted, so the committee would not know in advance which "tweets" constitute an advertisement subject to the disclaimer rules.

It would appear – though the Commission has never directly stated – that such advertisements would constitute communications "placed for a fee on another person's Web site" and therefore require disclaimers. However, posts on popular social media platforms such as Twitter and Instagram are character-limited. Indeed, one relative newcomer on the social media scene, Snapchat, does not allow paid promoted "filters" to contain any words. The Commission should exempt these "promoted posts" as covered by the exception to the disclaimer requirements where "the inclusion of a disclaimer would be impracticable." 11 C.F.R. § 110.11(f)(1)(ii).

Disclaimer Requirements for Text Message Solicitations of Restricted Class Contributions to SSFs of Labor Organizations and Corporations

The Commission should revise its disclaimer requirements at 11 C.F.R. § 114.5(a) for labor organization and corporate separate segregated fund ("SSF") solicitations so as to accommodate the use of modern technology in fundraising. In a number of advisory opinions, the Commission has approved the use of text messages, which currently have a limit of 160 characters, for the solicitation and processing of contributions to Federal political committees. See AOs 2012-35, 2012-30, 2012-26 and 2012-17. In doing so, the Commission has examined and approved various text message solicitations, along with methods of obtaining a contributor's confirmation that a particular contribution complies with Federal law. See AOs 2012-35, 2012-30, and 2012-17. These methods include the use of abbreviated language in notices, along with the inclusion of a link to, or a subsequent text (or series of texts) containing, the full language of notices required to comply with the best efforts requirement of 11 C.F.R. § 104.7, as well as the full language recommended (but not required, see AOs 2011-13 and 2009-35) by the Commission for inclusion in a solicitation as a safeguard against the receipt of unlawful contributions. See AOs 2012-35, 2012-30, and 2012-17. However, none of these advisory opinions regarding text message solicitations relate to a corporation's or labor organization's use of text messaging to solicit its restricted class for contributions to its SSF.

The SSFs of labor organizations and corporations are subject to numerous solicitation disclaimer and notice requirements that do not apply to other political committees. These include requirements to: (1) notify solicited restricted class members of the political purposes of the SSF; (2) inform solicited restricted class members of the right to refuse to contribute to the SSF without reprisal; (3) when a contribution guideline is used in a solicitation, state to solicited restricted class members that the guideline is only a suggestion and advise that they may contribute more or less than the suggested amount and that "the corporation or labor organization will not favor or disadvantage anyone by reason of the amount of their contribution or their decision not to contribute"; and via any of several language formulations, inform restricted class members that federal law requires the committee to use its "best efforts" to obtain and report the name, mailing address, occupation and name of employer of contributors of more than $200 in a calendar year. See 11 C.F.R. §§ 104.7(b)(1)(i)(A). Due to the 160-character limit for text

messages, it would be impossible for a labor organization or corporation to precisely comply with these (and other) disclaimer requirements in any text message solicitation for contributions to its SSF.

In order to ensure that corporate and labor organization SSFs are able to benefit from advancing technology in the way that other political committees are, the Commission should modernize the corporate and labor organization SSF solicitation regulations. The possibilities for doing so include, but are not limited to, adopting truncated disclaimers that may be used in character-limited media, permitting the abbreviation of disclaimer language, allowing the inclusion of a link to the full disclaimer language rather than requiring it to appear in the body of the text message, or some combination of those. In order to find a suitable manner of providing adequate notice to solicited individuals of the voluntary nature of all SSF contributions that allows labor organizations and corporations to make use of modern technology in their SSF solicitations, the Labor Organizations urge the Commission to include in any rulemaking on disclaimers an appropriate revision of 11 C.F.R. §§ 104.7(b)(1)(i)(A) and 114.5(a).

Conclusion

This prospective rulemaking is an apt opportunity for the Commission to demonstrate a renewed ability to prioritize reaching consensus rather than producing further uncertainty under the Act by making decisions that advance the application of the Act and foster political activity that is less fraught with compliance uncertainty. On behalf of the undersigned national labor organizations, we urge the Commission to modify and clarify the disclaimer requirements applicable to communications over the Internet through a rulemaking, and we request an opportunity to testify at the February 1 hearing. Thank you for your consideration.

Sincerely,

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