FEDERAL ELECTION COMMISSION
Washington, DC 20463

Via E-Mail & U.S. Mail

Brad Deutsch, Esq.
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1000 Potomac St., N.W., Suite 200
Washington, D.C. 20007-3501

MAY 1 3 2019

RE: MUR 7022
Bernie 2016 and Susan Jackson in her official capacity as treasurer

Dear Mr. Deutsch:

On March 14, 2016, the Federal Election Commission notified your clients, Bernie 2016 and Susan Jackson in her official capacity as treasurer, of a complaint alleging violations of the Federal Election Campaign Act of 1971, as amended. On May 6, 2019, the Commission found, on the basis of the information in the complaint and responses provided by you and others, that there is no reason to believe that Bernie 2016 and Susan Jackson in her official capacity as treasurer violated 52 U.S.C. § 30102(c)(3) by making excessive in-kind contributions in the form of coordinated communications to Flores for Congress or 52 U.S.C. § 30120(a) by including improper disclaimers on certain broadcast advertisements. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50,702 (Aug. 2, 2016). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Dawn M. Odrowski, the attorney assigned to this matter, at (202) 694-1591

Sincerely,

Mark Allen
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Bernie 2016 and Susan Jackson in her official capacity as treasurer
Flores for Congress and Norberto J. Cisneros in his official capacity as treasurer

MUR 7022

I. INTRODUCTION

During the week leading up to the 2016 Democratic Presidential Primary Caucus in Nevada, Bernie 2016, the principal campaign committee of presidential candidate Bernie Sanders, paid for an advertisement that featured an endorsement of Sanders by Lucy Flores, a former state legislator running for Congress. The Complaint alleges that the advertisement is an excessive in-kind contribution in the form of a coordinated communication by Bernie 2016 to Flores for Congress (the "Flores Committee"), Flores's principal campaign committee. The Complaint also alleges that the advertisement fails to include an appropriate disclaimer because it does not include any statements that Flores, in addition to Sanders, paid for and/or approved the advertisement.

As discussed below, the Commission finds that there is no reason to believe that Bernie 2016 made, and Flores for Congress accepted, an excessive in-kind contribution because the advertisement at issue satisfies the safe harbor provision for coordinated communications that contain endorsements by federal candidates at 11 C.F.R. § 109.21(g). As further explained below, the Commission finds no reason to believe that Bernie 2016 or Flores for Congress violated the Act's disclaimer provisions by failing to include in the advertisement approval/authorization or "paid for by" statements as to Flores or the Flores Committee.

II. FACTS

Beginning on February 12, 2016, through February 20, 2016, the day of the Nevada's Democratic Presidential Primary Caucus, a television advertisement paid for by Bernie 2016 aired throughout the State of Nevada featuring former Nevada state legislator Lucy Flores ("the Sanders advertisement").[1] In the advertisement, Flores endorses Bernie Sanders for the Democratic presidential nomination. Flores was at that time a candidate in the June 14, 2016, primary election for Nevada's 4th Congressional District. Flores both narrates the advertisement in a voiceover and appears on camera directly addressing the viewer as she explains why she endorses Sanders. Below is a transcription of the advertisement contained in the Complaint together with a description of the accompanying video viewed at the link provided in the Complaint.

Video	Audio
Frames of two photos of Flores as a child, apparently with her father and brother	I was raised by my father. My mother left my family when I was 9 years old.
Flores speaking on camera Chyron over video: Lucy Flores Fmr. Assemblywoman	Things really went from bad to worse for me.
	Voiceover-Lucy Flores
Photo of Flores as a child standing in a field	This isn't just about numbers,
	Voiceover-Lucy Flores
Video clips of: a man in construction hard hat; a woman standing near a fence; a woman in a business suit; a man dressed as a chef	this is about real lives. This is a system that isn't working for the everyday person.
Flores speaking on camera	That's one of the reasons why I decided to endorse Bernie Sanders.
	Voiceover-Lucy Flores

[1] The advertisement may be viewed on YouTube at https://www.youtube.com/watch?v=HAojUkH0Z7k or at The Political TV Ad Archive at https://politicaladarchive.org/ad/polad_berniesanders_vf8xu/. The ad was aired 443 times on broadcast and cable television in both of Nevada's media markets. *See id.*

Video clips of Sanders with supporters, including frame of Sanders at a rally standing in front of www.BernieSanders.com sign Chyron: Read more at BernieSanders.com	Nevadans are looking for people who are willing to think big, to be bold and
Video clip of Sanders ending remarks at a rally in front of a crowd of supporters holding "Bernie for President" signs with "for President" out of focus	to fight for everyday people
Flores speaking on camera Chyron: Approved by Bernie Sanders Paid for by Bernie 2016	and that's exactly what Bernie Sanders is doing.
	Voiceover-Bernie Sanders
Still video frame of Bernie Sanders smiling at the camera surrounded by a crowd, some of whom are holding "A future to believe in" signs Chyron at left center: Bernie for President Caucus Sat. Feb 20 11 AM BernieSanders.com Chyron at bottom: Approved by Bernie Sanders Paid for by Bernie 2016	"I'm Bernie Sanders and I approved this message."

III. ANALYSIS

A. Alleged In-Kind Contribution in the Form of a Coordinated Communication

The Federal Election Campaign Act of 1971, as amended (the "Act") permits an authorized committee to contribute up to $2,000 to the authorized committee of another candidate.[2] Candidates and political committees are prohibited from accepting contributions in excess of the Act's contribution limits.[3] The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift of money or "anything of value" made by any person for the

[2] 52 U.S.C. § 30102(e)(3); Explanation & Justification for Final Rules on Increase in Limitation on Authorized Committees Supporting Other Authorized Candidates, 71 Fed. Reg. 54,899 (Sept. 20, 2006).

[3] 52 U.S.C. § 30116(f).

purpose of influencing a Federal election.[4] The term "anything of value" includes all "in-kind contributions."[5] An expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate, a candidate's authorized committees, or their agents is an in-kind contribution.[6]

A payment for a communication that is made "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate, a candidate's authorized committees, or their agents, also known as a "coordinated communication," is an in-kind contribution to the candidate or candidate's authorized committee with whom or which it is coordinated.[7] The Commission's regulations provide that a communication is coordinated with a candidate, a candidate's committee or their agents when the communication satisfies a three-pronged test set forth at 11 C.F.R. § 109.21: (1) it is paid for by a person other than the candidate or authorized committee pursuant to Section 109.21(a)(1); (2) it satisfies at least one of five content standards in Section 109.21(c); and (3) it satisfies at least one of six conduct standards in Section 109.21(d).

The Commission has promulgated certain exceptions to the definition of "coordinated communication," including, of particular relevance here, a safe harbor for endorsements by federal candidates.[8] That safe harbor provides that a public communication in which a federal candidate endorses another candidate for federal or non-federal office is not a coordinated communication with respect to the endorsing federal candidate unless the communication promotes, supports, attacks, or opposes ("PASOs") the endorsing candidate or another candidate who seeks election to the same

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4 52 U.S.C. § 30101(8)(A) and (9)(A); 11 C.F.R. §§ 100.52(a) and 100.111(a).

5 11 C.F.R. §§ 100.52(d)(1) and 100.111(e)(1).

6 52 U.S.C. § 30116(a)(7)(B)(i).

7 11 C.F.R. § 109.21(b).

8 11 C.F.R. § 109.21(g)(1); *see generally* 11 C.F.R. § 109.21(f)-(h).

office as the endorsing candidate.[9] In creating a safe harbor for endorsements that incorporated the PASO standard, which is used elsewhere in the Act, the Commission explained that the coordinated communications regulation identifies communications made for the purpose of influencing a federal election, whereas endorsements "are not made for the purpose of influencing the endorsing . . . candidate's own election."[10] It also concluded that when the safe harbor applies, the endorsing candidate may be involved in the development, content, timing, frequency, means or mode of the communication.[11]

The Complaint alleges that the Sanders advertisement is a coordinated communication that resulted in Bernie 2016 making an excessive in-kind contribution to Flores for Congress based on the "considerable" financial resources it believes the Sanders's campaign put into the ad.[12] The Complaint contends that the advertisement satisfies all three prongs of the coordinated communications regulation: (1) the payment prong because the ad was paid for by a third party, Bernie 2016; (2) the conduct prong because Flores appears directly in the advertisement;[13] and (3) the "functional equivalent of express advocacy" content prong because "more than half" of

9 11 C.F.R. § 109.21(g)(1).

10 Explanation & Justification for Final Rules on Coordinated Communications. 71 Fed. Reg. 33,190, 33,202 (June 8, 2006) ("2006 E&J for Coordinated Communications"). The PASO standard is used in various provisions of the Act. For example, 52 U.S.C. § 30125(f)(1) requires state and local candidates to pay for certain public communications described in 52 U.S.C. § 30101(20)(A)(iii) that PASO a clearly identified federal candidate with federally compliant funds. When promulgating the endorsement safe harbor provision, the Commission observed that it was consistent with the legislative history of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), citing to a floor statement made by Senator Feingold explaining that those statutory funding requirements would not prohibit state candidates from using non-federal funds to pay for endorsing communications "so long as those advertisements do not support, attack, promote, or oppose the [endorsing] Federal candidate." *Id.* (quoting statement of Sen. Feingold, 148 Cong. Rec. S2143 (March 20, 2002)).

11 *Id.*

12 Compl. at 1-2.

13 *Id.* The Complaint does not specify which conduct prong Flores's appearance in the ad satisfies. We assume it is the "material involvement" conduct prong at 11 C.F.R. § 109.21(d)(2).

the ad addresses Flores's personal background and it is allegedly therefore a "thinly veiled biographical advertisement" for Flores.[14] The Complaint does not reference the application of the safe harbor for endorsements to the Sanders advertisement.

Respondents dispute that the Sanders advertisement constitutes a coordinated communication. Respondents maintain that the advertisement is not a coordinated communication because it satisfies the endorsement safe harbor provision. Specifically, they argue that the advertisement does not contain any language promoting or supporting Flores's candidacy because it contains no mention of Flores's candidacy, and a viewer would not know from watching it that Flores is seeking federal office.[15] Setting aside the safe harbor provision for endorsements, Respondents also argue that the Sanders advertisement does not satisfy any of the content standards for coordinated communications.[16]

The Commission concludes that the Sanders advertisement, which was broadcast on television and therefore was a "public communication,"[17] satisfies the safe harbor provision for

[14] Compl. at 1. The "functional equivalent of express advocacy" is defined as a communication "susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified Federal candidate." 11 C.F.R. § 109.21(c)(5).

[15] Bernie 2016 Resp. at 1-2: Flores Committee Resp. at 3.

[16] Bernie 2016 Resp. at 2 (asserting that the ad satisfied neither of the content standards at 11 C.F.R. § 109.21(c)(4) and (5) since it last aired 115 days before Flores's election, and since it did not PASO Flores, it failed to satisfy the "more rigorous" "functional equivalent of express advocacy" standard); Flores Committee Resp. at 2 (page mis-numbered as page 3) (making the same point as to 11 C.F.R. § 109.21(c)(4) based on the timing of the ad's broadcast and asserting that the ad also failed to satisfy the "express advocacy" content standard at 11 C.F.R. § 109.21(c)(3) because Flores unquestionably endorses Sanders in the ad but the ad makes no mention of Flores's or her opponent's candidacies or even identifies Flores as a candidate.

[17] The term "public communication" includes a broadcast, cable or satellite communication. 52 U.S.C. § 30101(22).

endorsements because it does not appear to promote, support, attack or oppose Lucy Flores, the endorsing candidate, or any other candidate running for the congressional seat she sought.[18]

Although neither Congress nor the Commission has expressly defined PASO, the Commission has applied the PASO standard in a series of advisory opinions when considering whether a federal candidate's appearance in a public communication either satisfied the safe harbor provisions at Section 109.21(g) or in considering whether or not the public communication at issue constituted "federal election activity" at 52 U.S.C. § 30101(20)(A)(iii).[19] In particular, in two separate opinions involving public communications in which a federal candidate endorsed a state candidate, the Commission concluded that the mere identification of an individual who is a federal candidate does not, by itself, PASO that candidate. *See* Advisory Ops. 2007-34 (Jackson, Jr.) (federal candidate's photo used in a billboard supporting the election of a pictured local candidate that did not contain the federal candidate's name or office; 2003-25 (Weinzapfel) (federal candidate's appearance in ad discussing and endorsing mayoral candidate). *See also* 2007-21 (Holt) (use of a federal candidate's name and title of "Honorary Chairman" in state candidate's proposed communications in which federal candidate endorses them does not promote or support the federal candidate); 2006-10 (Echostar) (federal candidates' appearances in public service announcements where they identify themselves and promote and solicit donations for charitable causes does not PASO those candidates).[20]

[18] Even if the advertisement did not satisfy the safe harbor provision, we conclude that it would not satisfy any of the "content" standards for coordinated communications. As noted, the ad was last aired more than 90 days before Flores's primary election, *see* 11 C.F.R. § 109.21(c)(2), and as we conclude that the ad does not PASO Flores, it also does not satisfy the more rigorous "functional equivalent of express advocacy" standard in Section 109.21(c)(5).

[19] *See* 52 U.S.C. §§ 30125(f).

[20] The Commission identified as potentially promoting or supporting a federal candidate certain clauses in a health legislative update letter to be distributed by a state legislator running for Congress: "I have remained committed to making progress for the residents of this State," and "I will continue to look for innovative ideas to

The Commission's analysis in AO 2003-25 (Weinzapfel) is informative here, given its factual similarity with the Sanders advertisement. The advertisement featured U.S. Senator Evan Bayh who spoke of the accomplishments, character and qualifications of Jonathan Weinzapfel, a mayoral candidate and sitting state legislator, and then endorsed him.[21] The Commission concluded that the Weinzapfel advertisement could be financed with non-federal funds because it did not PASO Bayh and therefore did not constitute federal election activity.[22] Comparing the two advertisements, in both ads, the "endorsing" candidates -- Bayh and Flores, respectively -- are the sole speakers (with the exception of Sanders's approval statement), alternately speaking directly on camera and in voiceovers accompanying video clips of the endorsed candidates.[23] The chyrons in each ad identify Bayh as "Senator Bayh" and Flores as "Lucy Flores, Fmr. Assemblywoman" and neither ad mentions their respective federal candidacies or elections. Bayh speaks of Weinzapfel's state legislative efforts, opines on his character and qualifications noting he "knows how to get the job done," has a "bipartisan, common-sense way of solving problems" and "cares about what really matters to people," and endorses him as "the kind of mayor Evansville needs." Similarly, Flores speaks of Sanders's character and qualifications, stating she decided to endorse him because "[the election] is about real lives," the system "isn't working for the everyday person" (illustrated by video clips of "everyday people") and Sanders

help improve the healthcare system in Illinois, as well as help improve the lives of those who need our care." Advisory Op. 2009-26 (Coulson) at 9. The Commission ultimately concluded that Coulson could use non-federal funds to pay for the letter because, *inter alia*, the flagged clauses were used to "address [her] past and ongoing legislative actions as a state officeholder." *Id.* The Sanders advertisement contains no comparable statements by Flores beyond biographical information.

21 *See* AO 2003-25 at 2-3.

22 *Id.* at 4-5.

23 *See* Sanders ad *supra* at 2-3; AO 2003-25 at 2-3.

is "willing to think big, to be bold and to fight for everyday people," the type of person "Nevadans are looking for."

The Sanders advertisement differs from the Weinzapfel ad in one respect – it contains a narration of Flores's biographical background before she endorses Sanders. The first nine seconds of the 30-second Sanders ad feature Flores speaking of her difficult childhood – being raised by her father when her mother left the family amid a situation that "went from bad to worse" – accompanied by photos of her as a child alone and with family. Although the inclusion of more biographical information may incidentally benefit Flores by increasing her name recognition, in context, the statements about her difficult upbringing and the accompanying family photos align her and her family with the video clips of "everyday people" appearing on the screen for whom the ad contends the system isn't working and for whom Sanders would fight. On balance, the Sanders ad functions as an endorsement of Sanders by Flores and not as a communication promoting or supporting Flores. As such, the Sanders ad does not differ materially from the Weinzapfel ad, and similarly does not contain content that triggers the PASO standard. Because we conclude that the ad satisfies the endorsement safe harbor provision, it is not a coordinated communication and thus does not result in an in-kind contribution.[24] The Commission therefore finds no reason to believe that Sanders 2016 made, and Flores for Congress accepted, an excessive contribution.

B. Alleged Disclaimer Violation

The Sanders advertisement contains a written disclaimer appearing in the last frames of the ad, stating "Approved by Bernie Sanders Paid for by Bernie 2016" accompanied by a

[24] 11 C.F.R. § 109.21(g)(1).

voiceover of Sanders identifying himself and stating that he "approved this message." These approval and "paid for by" statements comply with both the general disclaimer provision at 52 U.S.C. § 30120(a)(1) and the Stand by Your Ad disclaimer provision at 52 U.S.C. § 30120(d)(1)(B) applicable to candidate-authorized broadcast advertisements.[25]

Even so, the Complaint alleges that the Sanders advertisement fails to comply with the Act's disclaimer requirements because it does not also contain "paid for and/or approved [by]" statements as to Flores and Flores for Congress, including the oral and written Stand by Your Ad statements that Flores approved the ad.[26] Respondents do not address this allegation.

Whether advertisements that satisfy the endorsement safe harbor require a disclaimer as to the endorsing candidate appears to be a matter of first impression following the Commission's adoption of the safe harbor. Such advertisements should not require such a disclaimer. First, as noted *supra*, when adopting the endorsement safe harbor provision, the Commission stated that endorsement communications that do not PASO the endorsing candidate are not for the purpose of influencing the election of the endorsing candidate, and the endorsing candidate may be involved in their development and content. The types of public communications covered by the

[25] 52 U.S.C.§ 30120(a)(1) requires communications financed by political committees through any broadcasting station, if paid for and authorized by a candidate, a candidate's authorized political committee, or their agents to clearly state that the communication has been paid for by such authorized political committee. *See also* 11 C.F.R. § 110.11(b)(1) and (c)(1).

52 U.S.C. § 30120(d)(1)(B), one of the Stand by Your Ad provisions, requires candidate-authorized communications transmitted through television to also include oral and written statements identifying the candidate and stating that he or she approved the communication. The oral statement must be conveyed through an unobscured, full screen view of the candidate making the statement or through a voiceover by the candidate accompanied by a clearly identified photo or image of the candidate. 52 U.S.C. § 30120(d)(1)(B)(i); *see also* 11 C.F.R. § 110.11(c)(3)(ii) and (iv). A similar written statement that satisfies certain readability requirements must appear at the end of the communication. 52 U.S.C. § 30120(d)(1)(B)(ii); 11 C.F.R. § 110.11(c)(3)(iii).

[26] Compl. at 2.

Section 30120(a) disclaimer provision are those made to influence a federal election[27] or, in the case of electioneering communications, are election-related.[28] As analyzed above, the Sanders advertisement is intended to influence the election of Sanders, not Flores, and it contains the appropriate disclaimers as to him.

Second, as reflected in BCRA's legislative history, the Stand By Your Ad provision was intended to "ensure that candidates take responsibility for the content of their ads and their campaign materials."[29] As Bernie 2016 paid for the Sanders ad, which advocates Sanders's election and does not PASO Flores, the purpose of the Stand by Your Ad provision is not furthered by requiring an approval or authorization statement from Flores since it is not her ad and she merely endorses Sanders.

Finally, requiring a disclaimer as to an endorsing candidate in an advertisement that satisfies the safe harbor, especially a statement that the endorsing candidate "approved this message" could confuse viewers by giving the impression that a communication is somehow related to the endorsing candidate's election when it otherwise contains no indication that the endorsing candidate is even seeking election.[30]

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[27] The disclaimer provisions apply to all public communications by political committees, organizations whose major purpose is Federal campaign activity, express advocacy public communications, and public communications that solicit contributions. *See* 11 C.F.R. § 110.11(a)(1), (2), and (3).

[28] *See* Explanation & Justification for Final Rules on Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 427 (Jan. 3, 2003) (explaining that the Commission included content standards in the coordinated communication rules, including, electioneering communications, to limit the rules to "communications whose subject matter is reasonably related to an election").

[29] 148 Cong. Rec. H426 (daily ed. February 13, 2002) (statement of Rep. Price).

[30] *See Citizens United v. FEC*, 558 U.S. 310, 368 (in addressing the constitutionality of the disclaimer provisions as applied to electioneering communications, stated that disclaimers "at the very least . . . avoid confusion by making clear that the ads are not funded by a candidate or political party.")

In the Complaint's allegation that a disclaimer as to Flores and the Flores Committee is necessary, it cites to Advisory Op. 2004-01 (Forgy Kerr/Bush Cheney '04).[31] That opinion involved proposed television advertisements paid for by and expressly advocating federal candidate Forgy Kerr, which featured clips and audio statements of President Bush; one of the four ads included a statement that Bush endorsed Forgy Kerr.[32] The Commission concluded, in pertinent part, that the advertisements, including those distributed outside the applicable coordinated communication pre-election time frame, required disclaimers as to both candidates because Bush's agents substantively reviewed and approved the scripts.[33] This 2004 opinion, however, pre-dated the Commission's creation of a safe harbor for endorsement advertisements. The material change in the regulatory framework casts doubt as to whether an endorsement advertisement would require a disclaimer as to the endorsing candidate, even if the endorsing candidate substantively reviewed or approved the ad.[34] For the reasons explained above, we believe a disclaimer is not required as to the endorsing candidate in advertisements satisfying the endorsement safe harbor. Accordingly, the Commission finds no reason to believe that Bernie

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31 Compl. at 2.

32 AO 2004-1 at 1-2, Appendix at 1. The other proposed advertisements linked Forgy Kerr to Bush's programs and favored legislation. *Id.*, Appendix 1 at 2-5.

33 *Id.* at 7.

34 When promulgating the safe harbor, the Commission noted that AOs 2004-01 and 2003-25 were superseded "to the extent they conclude the communications containing endorsements by Federal candidates are in-kind contributions to the endorsing Federal candidate if the communications otherwise satisfy the coordinated communications test, irrespective of whether the communications PASO the endorsing candidate." 2006 E&J for Coordinated Communications at 33,202. The rulemaking did not address the issue of disclaimers in such advertisements.

2016 or the Flores Committee violated 52 U.S.C. § 30120(a) by failing to include a disclaimer in the Sanders advertisement as to Flores or the Flores Committee.[35]

[35] Even if a disclaimer as to Flores was required, the person paying for the communication is responsible for including the appropriate disclaimer, so the Flores Committee would appear to bear no liability under the circumstances presented here.