

**From:** Yvonne Dolloff  
**To:** [Ana Pena-Wallace](#)  
**Cc:** [Joe Centrich](#)  
**Subject:** MURS 7011 and 7072 May 23, 2018  
**Date:** Wednesday, May 23, 2018 6:30:02 PM  
**Attachments:** [MUR 7011 Response.pdf](#)

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Dear Ms. Pena:

Attached is a letter from Mr. Centrich in response to Ms. Hunter's letter of May 8, 2018.

Thank you for your attention to this matter.

Yvonne

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May 23, 2018

Ms. Caroline C. Hunter, Chairman  
 Federal Election Commission  
 1050 First Street, NE  
 Washington, D.C. 20463

**Re: MURs 7011 and 7072**

Dear Ms. Hunter:

I am in receipt of your letter dated May 8, 2018 regarding the MURs 7011 and 7072 regarding the Federal Election Commission's (the "FEC" or "Commission") investigation regarding Socially Responsible Government, and Grace Rogers in her capacity as treasurer (hereinafter collectively "SRG"). Attached to your letter you enclose a Factual and Legal Analysis (the "Analysis") which you contend supports the FEC's basis for concluding that SRG fraudulently misrepresented its status as an unaffiliated political action committee ("PAC") during the 2016 primary campaign. For the reasons stated herein, we believe the legal and factual basis for your conclusion to be without merit.

In the Analysis, the FEC concludes that SRG violated 52 U.S.C. § 30124(b) (the "Act"). Analysis p. 8. This conclusion, and the factual and legal bases provided within the Analysis, are in direct conflict with the FEC's own guidance on analyzing claims under the Act.

On February 16, 2018, the FEC published guidance related to the interpretation and application of the Act, noting that the FEC's "historical approach to [applying the Act] has been long on ambiguity and short on discipline."<sup>1</sup> A review of the Commission's Analysis here illustrates an arbitrary and capricious application of the facts to the law and contrary to the guidance issued by the FEC just a few short months ago.

The Policy Statement notes that the FEC "cannot prohibit solicitations under a vague or overbroad concept of the language" nor "turn on the subjective perceptions of listeners." Policy Statement p. 2. That seems to be precisely what the FEC does here. It is worth quoting the stated rationale for the Policy Statement, as contained therein, at length:

"many solicitors feature the names, photographs, and biographies of the candidates they support. They often use red, white and blue logos that may vaguely resemble the red, white and blue logos of other campaigns. If every use of a candidate's photograph and name on a website were deemed to misrepresent

<sup>1</sup> A copy of this policy statement (the "Policy Statement") is attached hereto for the record and incorporated by reference.

Ms. Caroline Hunter  
 May 23, 2018  
 Page 2 of 6

the identity of the solicitor, otherwise identified accurately in a disclaimer, then many organizations websites would be at risk of violating the Act. At some level, **citizens must assume responsibility for reading and understanding FEC-compliant disclaimers and, for those donating on websites, performing rudimentary online searches to identify the sponsor of a website.** This is one of the purposes of the www.fec.gov website.

Policy Statement p. 2 (emphasis added). In short, the FEC notes that many political websites have similar looks, and that if a PAC publishes the required disclaimer and files the necessary disclosures, a donor has the responsibility to read those disclaimers and disclosures to know which organization is receiving their donation.

We will now examine how the FEC's application of the facts to the law here contrasts with the FEC's stated policy.

### **SRG Used A Valid Disclaimer**

The Policy Statement notes that "[b]ecause a disclaimer identifies the person paying for a communication and informs the reader whether or not a communication is authorized by a candidate, **no misrepresentation can be presumed when an adequate disclaimer is present.**" Policy Statement p. 3 (emphasis added). That SRG had compliant disclaimers is not an issue; the FEC admits that SRG had two disclaimers (one each at various times) on its website:

Paid for by Feel the Bern Committee (www.feelbern.org) and not authorized by any candidate or candidate's committee – feelbern.org © 2015 All Rights Reserved.

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Paid for by the Socially Responsible Government (formerly the Feel the Bern Committee) (www.feelbern.org) and not authorized by any candidate or candidates committee. – feelbern.org © 2015 All Rights Reserved. This private political organization is not to be confused with Bernie Sander's [sic] Official campaign. FEELBERN.ORG, www.feelbern.org

Analysis p. 6.<sup>2</sup> Each of these disclaimers were conspicuous on each webpage of the site, and unequivocally stated that SRG (and its predecessor) were "not authorized by any candidate or candidate's committee." This is precisely the language that the FEC (and courts, as discussed herein below) have held to put a potential donor on notice of the nature of the organization. There is no point in requiring such disclaimers if the FEC is going to engage in an ad hoc interpretation of websites.

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<sup>2</sup> The FEC further notes that "[i]t is unclear when SRG changed its disclaimer and how long it contained the last line concerning Sanders's official campaign." But such change is irrelevant – the earlier version states SRG is "not authorized by any candidate or candidate's committee." This obviously includes Sanders's official campaign, whether specifically named or not. Again, the FEC seems to be going out of its way to misinterpret a clear and unequivocal disclaimer.

Ms. Caroline Hunter  
 May 23, 2018  
 Page 3 of 6

### **SRG Did Not Make Any Explicit Misrepresentations**

The Policy Statement creates an exception for a misrepresentation despite an adequate disclaimer, which provides that the presumption against misrepresentation may “be defeated where an *explicit* misrepresentation in the text of a solicitation countermands an otherwise accurate disclaimer.” Policy Statement p. 4 (emphasis in original). Rather than show explicit misrepresentations as required by FEC policy, the FEC engages in a subjective analysis of features and syntax contained on SRG’s website it contends could confuse the public (it appears the FEC believes these features would render any donor incapable of understanding the explicit disclaimers noted above).

*First*, you contend that the fact that “SRG identifies itself as the ‘**Committee** to Elect Bernie Sanders’” creates “the impression that SRG is acting on behalf of the Sanders campaign.” Analysis p.7 (emphasis added). The FEC is suggesting that the use of the word “committee” is confusing to those who may view the website. This is nonsense. On a subpage of the FEC’s website titled “Committees,”<sup>3</sup> the FEC notes that “[t]he **term committee encompasses several different political groups that receive and spend money in federal elections.**”

One such category, which applies specifically to SRG<sup>4</sup>, provides rules for political action *committees*. As the FEC states in the Analysis, “SRG is an unauthorized political committee supporting Bernie Sanders.” Analysis p. 3. SRG is, by definition, a committee. For the FEC to find that SRG’s accurate portrayal of itself as a “committee” to the public to be the basis for its misrepresentation claim is meritless, especially in light of the explicit disclaimer stating that it is not a committee of any candidate.

*Second*, the FEC finds that SRG’s use of the phrase “Stand with Bernie and Donate to *our* Campaign” to similarly create the impression of acting on Bernie Sanders’s behalf. Analysis p. 7 (emphasis supplied by FEC). “Our” means “to denote oneself and another or others.” SRG’s stated purpose, like that of Bernie Sanders official campaign, was to get Bernie Sanders elected and to support those issues that were the basis for his candidacy. Had SRG ran a solicitation asking donors to support “**his**” campaign, and sought and then kept donations made to SRG, the FEC would have a strong argument of an intent to fraudulently misrepresent that SRG was acting on behalf of Bernie Sanders. The FEC is not only parsing words here, but it is doing so without regard to the actual definition of the words upon which it relies.

*Third*, the FEC claims that SRG’s filing of “all required disclosure reports” and “mere presence of disclaimers is not dispositive here.”<sup>5</sup> To support its position, the FEC relies on the same faulty rationale and factual bases discussed above, as well as the fact that a “thank you letter [was sent] from www.feelbern.org, signed by ‘Team Bern’” to SRG donors. As you know, feelbern.org was SRG’s website; Bernie Sanders’s official website was berniesanders.com. SRG sending its donors letters expressing gratitude for donations from **its own website** cannot be misrepresentation.

<sup>3</sup> <https://www.fec.gov/data/advanced/?tab=committees>

<sup>4</sup> See Statement of Organization (amended), SRG (March 7, 2016).

<sup>5</sup> To describe the statutorily required disclaimers by noting their “mere presence” seems to indicate a bias present in this case. The Congress and FEC determined through law and regulation what was to be required in the disclaimers. If there is any defect in the statutorily required disclaimers, it is not due to SRG’s error.

Ms. Caroline Hunter  
 May 23, 2018  
 Page 4 of 6

As far as the use of “Team Bern,” the FEC has provided no evidence that Bernie Sanders ever marketed or advertised using that phrase. Further, SRG is free to market using a candidate’s name, or variation thereof. *Pursuing America’s Greatness v. FEC*, 831 F.3d 500, 510 (DC. Cir. 2016) (noting that prohibition against using candidate’s name unless in opposition to that candidate “draws distinctions” based on content in clear violation of the First Amendment and is thus unconstitutional).

*Fourth*, the FEC notes a number of references to Bernie Sanders and various logos which it contends would confuse the public regarding the nature of SRG. The FEC includes the following logo as support:



Analysis p. 4. The first three words, prominently displayed in bold, capital letters, are the name of the PAC – “Socially Responsible Government.” As noted above, SRG is, by definition, a “committee,” whose stated purpose was “To Elect Bernie Sanders.” There is no misrepresentation here.

The FEC next notes the inclusion of a Bernie Sanders produced video within the “about us” portion of the website. As the FEC notes, the video contained Bernie Sanders official campaign website address, and indicated that the video was produced by his campaign. If users “clicked certain links from a drop-down menu on SRG’s homepage, they were taken directly to pages of Bernie Sanders’ [sic] campaign website.” Analysis p. 4. It is difficult to see what the FEC’s complaint is here; if a user wanted to donate directly to the Sanders campaign, a link was provided that took them off SRG’s site – and outside SRG’s donation receiving mechanisms – to Mr. Sanders’s official website. Rather than create an impression of unity with the official campaign, this clearly represents to a user that the two organizations are separate and distinct.<sup>6</sup>

The FEC also relies on a cease and desist letter allegedly written by attorneys for the Sanders campaign regarding the use of his name in promoting SRG’s website. As an initial matter, none of this information is verified (it was attached to Seth Gunning’s complaint with no explanation as to how he received the letter) and thus has no evidentiary value.

The Sanders campaign alleges that “close variations of official trademarks and logos” were used by SRG. This is irrelevant – as noted in the Policy Statement campaigns and PACs “often use red, white and blue logos that may vaguely resemble the red, white and blue logos of other campaigns.” Policy Statement p. 2. Nearly every campaign logo can be said to be a “close variation” of any other. A “close variation” is simply another way to say, “not the same.”

The allegation also states, generally and without specifics, that SRG embedded “content

<sup>6</sup> Again, the FEC position ignores the fact that the website contained a legally sufficient disclaimer explicitly stating that it was NOT affiliated with any candidate or candidate’s committee.

Ms. Caroline Hunter  
May 23, 2018  
Page 5 of 6

copied from the Bernie 2016 official website.” MUR 7092 Supp. p. 2. Again, even if true, this is irrelevant. Bernie Sanders is a public figure and was (and is) a sitting senator. A significant portion of his positions, pictures, speeches and appearances are in the public domain, or qualify for a fair use exemption. Much of the information on his website is free to use and not protected.

Lastly, and most importantly, the basis for Sanders complaint has been struck down as unconstitutional restraints on free speech. The Sanders campaign specifically cited in its letter 11 C.F.R. 102.14(a) as the basis for its complaints against SRG’s use of Sanders’s name and likeness. MUR 7092 Supp. p. 3. As noted, this has been struck down as unconstitutional. *Pursuing America’s Greatness* at 512. Unsubstantiated allegations made by the Sanders campaign to pursue enforcement of a statute that has since been ruled unconstitutional cannot be the legal or factual basis for the FEC’s misrepresentation conclusion here.<sup>7</sup>

### **Application of Similar Campaign Finance Laws Have Been Struck Down**

Federal appellate courts have ruled definitively on several regulations related to campaign identification at issue here and noted “FECA and its accompanying regulations do much to limit voter confusion over the source of a message.” *Id.* at 511-512. The Court continued, noting:

Communications from committees must disclose whether they are authorized or unauthorized and who paid for the communication, even in their websites. See 11 C.F.R. § 110.11. Those disclosures must also be “clear and conspicuous” to give readers “adequate notice.” *Id.* § 110.11(c)(1). The FEC’s website also contains a publicly searchable list of all political committees and their status as authorized or not.

*Id.* at 512. In granting the political action committee’s injunction against the FEC, the Court noted that “[g]iven these tools to avoid voter confusion, the public’s interest in protecting First Amendment rights and [the PAC’s] ability to exercise those rights outweigh any interest in continued enforcement of section 102.14.” *Id.* The FEC notes that SRG is in compliance with these same rules.

While not specifically relying on 11 C.F.R. 102.14(a), the FEC again seeks to regulate the speech of a political action committee for its use of a candidate’s name and imagery and similar types of layout and color scheme, despite acknowledging the existence of a disclaimer that specifically stated such website and materials is “not authorized by any candidate or candidate’s committee.” Analysis p. 6 fn. 16. Additionally, the FEC notes numerous disclosures made (as required) by SRG. The logic here is the same – SRG provided users clear and conspicuous notice of its status as an unaffiliated PAC and made the required disclosures to the FEC, and any user ignoring such disclaimers and concluding that SRG was part of the official campaign has him or herself to blame for any confusion. It is hard to imagine a federal court which found the FEC’s enforcement of §102.14 to violate the PAC’s first amendment rights would allow the same rights to be infringed under the guise of a “fraudulent misrepresentation” enforcement that violates the Commission’s own guidance.

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<sup>7</sup> Sanders campaign also raised Lanham Act claims in its letter. Since there is no government claim under the Lanham Act, this would be an issue between SRG and the Sanders campaign. To the extent any infringing materials inadvertently appeared on SRG’s website, they were removed promptly.

Ms. Caroline Hunter

May 23, 2018

Page 6 of 6

Based on the foregoing, Respondents believe this matter should be dismissed and the case closed immediately. The original complaint and supplement submitted by Mr. Gunning are full of salacious accusations with little to no evidentiary support. SRG's conduct is compliant with the law and cannot be the basis for a misrepresentation finding. Should the FEC continue to pursue this matter, my client believes it has a strong likelihood of prevailing in district court and protecting itself from bad faith prosecution contrary to the FEC's own guidance.

Sincerely,



JOSEPH F. CENTRICH

JFC/yd

cc: Federal Election Commission Office of General Counsel  
Ms. Ana Pena-Wallace – Via Email  
Mrs. Grace Rogers – Via Email