LAW OFFICES
TRISTER, ROSS, SCHADLER & GOLD, PLLC
1666 CONNECTICUT AVENUE, N.W., FIFTH FLOOR
WASHINGTON, D.C. 20009
PHONE: (202) 328-1666
FAX: (202) 204-5946
www.tristerross.com

MICHAEL B. TRISTER
GAIL E. ROSS
B. HOLLY SCHADLER
LAURENCE E. GOLD
ALLEN H. MATTISON†
†ALSO ADMITTED IN MARYLAND

KAREN A. POST
Senior Counsel
NEIL C. WEARE
MEREDITH K. McCOY‡
‡ALSO ADMITTED IN VIRGINIA
Montana Office
LAURA L. HOEHN*
Of Counsel
*ALSO ADMITTED IN CALIFORNIA

January 31, 2015

Jeff S. Jordan
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: RR 14L-34
Workers' Voice

Dear Mr. Jordan:

We are submitting this supplement to our previous letter on behalf of Workers' Voice in response to your letter and enclosure dated October 7, 2014 ("Referral Letter"). Upon further analysis of the applicable law concerning the reporting of in-kind expenditures, which we addressed at pages 4 and 5 of our previous letter, Workers' Voice believes the Federal Election Commission ("FEC" or "Commission") is foreclosed from pursuing an enforcement action against Workers' Voice for failure to timely file 48-hour and 24-hour Schedule E independent-expenditure reports during the 2012 general election period with respect to its in-kind expenditures. We do so because the Commission has established an interpretative rule that a committee's in-kind expenditures "must" be reported as operating expenditures on Schedule B at Line 21(b)), not as independent expenditures on Schedule E, so Workers' Voice committed no violation in failing to report them other than on its periodic Form 3X reports.[1]

The Referral Letter identifies $528,976.23 of independent expenditures that Workers' Voice reported on its periodic Form 3X Schedules E for 2012 but not on 48-hour and 24-hour independent-expenditure reports. The sole basis for the Referral Letter's conclusion that violations occurred is that discrepancy. However, the Referral Letter does *not* address the

[1] Although this supplement is submitted past the date designated by your office for a response, we respectfully request that it be considered in light of the early stage of this matter and the issues of law that we raise. And, we have been apprised of no action by the Commission in this matter since our receipt of the Referral Letter.

threshold legal question of whether or not these *had* to be reported as independent expenditures at all.

As Workers' Voice's reports reflect, and as we described in our previous letter, $428,903.80 of those expenditures comprised corresponding in-kind expenditure entries on Workers' Voice's Form 3X in order to balance entries listing the same amount of in-kind contributions that Workers' Voice received. During 2012 (and before and since) the FEC had an interpretative rule that *required* all in-kind expenditures to be reported instead as operating expenditures on Line 21(b) of Schedule B. Accordingly, the Commission cannot enforce a *new and different* reporting standard with respect to Workers' Voice's 2012 expenditures. If the Commission wishes to change that interpretation it may do so, but only prospectively and with proper public notice. In sum, while Workers' Voice sought during 2012 to report some of its in-kind expenditures as independent expenditures, it had no obligation to do so and the Commission cannot now seek to penalize Workers' Voice for not doing so within 48 or 24 hours.

For that reason, the Commission should find no reason to believe that Workers' Voice violated 2 U.S.C. § 30104(g) (as we assume is at issue, although the Referral Letter does not identify any substantive provision of the Act). Rather, the Commission should proceed, if at all, only with respect to the monetary independent expenditures that are identified in the Referral Letter, and via its Alternative Disputes Resolution ("ADR") Office as we previously requested. And, consistent with the interpretative rule described more fully below, Workers' Voice stands ready to amend its 2012 reports to disclose its in-kind expenditures on Schedule B, Line 21(b).

The Commission Has Established an Interpretative Rule That In-Kind Expenditures Must Be Reported as Operating Expenditures

Interpretative rules are "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers...." *American Mining Congress v. Mine Safety and Health Administration*, 995 F.2d 1106, 1108 (D.C. Cir. 1993) (quoting *Attorney General's Manual on the Administrative Procedure Act* (1947)). They "allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings;" interpretative rules are statements as to what the agency "thinks the statute or regulation means." *American Hospital Association v. Bowen*, 834 F.2d 1037, 1044-45 (D.C. Cir. 1987) (internal quotation marks omitted).

A wide variety of agency pronouncements may constitute interpretative rules. The Administrative Procedure Act ("APA") broadly defines the term "rule" to encompass any "agency statement of general or particular applicability and future effect designed to . . . interpret, or prescribe law or policy." 5 U.S.C. § 551(4). Thus, an interpretative rule can be any "statement" by an agency that interprets law. *See also* Funk, *A Primer on Nonlegislative Rules*, 53 Admin. L. Rev. 1321, 1324 (2001). Unlike "legislative rules" that have the force of law and require notice and comment prior to implementation, interpretative rules "merely clarify or

explain existing law or regulations," and are "in the form of an explanation of particular terms." *American Hospital Association, supra*, 834 F.2d at 1045 (internal quotations omitted).

Examples of interpretative rules include staff manuals; Internal Revenue Service (IRS) published advice on IRS statutes and regulations; regulatory guidance by the Food and Drug Administration and the Federal Aviation Authority that detail courses of action the agencies determine will establish compliance with their respective regulations; manuals issued by the Occupational Safety and Health Administration instructing its inspectors on how to perform inspections; and guidelines for employers issued by the Equal Employment Opportunity Commission. *See* Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin. L. Rev. 803, 804 (2001); Funk, *supra*, at 1322. *See generally Funeral Consumer Alliance, Inc. v. Federal Trade Commission*, 481 F.3d 860 (D.C. Cir. 2007) (letter from agency to member of Texas legislature advising on term "cash advance items" in agency regulations held to be interpretative rule); *Alaska Professional Hunters Association, Inc. v. Federal Aviation Administration*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (agency advice consistently given over a number of years held to create "an authoritative departmental interpretation"); *Paralyzed Veterans of America v. D.C. Limited Partnership*, 117 F.3d 579, 581, 587 (D.C. Cir. 1997) (guidance within supplement to technical assistance manual statutorily required to be issued by Department of Justice is "formal agency action"); *American Mining Congress, supra* (agency program policy letters distributed to agency employees and interested members of the regulated community held to establish interpretative rule).

Under these authorities, the FEC's consistent statements in its *Campaign Guide for Nonconnected Committees* (2008), *Campaign Guide for Corporations and Labor Organizations* (2007), and its instructions for Form 3X also constitute interpretative rules. Moreover, the Federal Election Campaign Act ("the Act") states that the Commission shall "prepare, publish, and furnish to all persons required to file reports and statements under this Act a manual recommending uniform methods of bookkeeping and reporting." 52 U.S.C. § 30111(a)(2). The FEC's *Campaign Guides* are that and more: the Commission identifies them as "*compliance* manuals for committees registered with the FEC." http://www.fec.gov/info/publications.shtml (emphasis added). Similarly, the Act directs the Commission to "prescribe rules, regulations, and forms to carry out the provisions of this Act." 52 U.S.C. § 30111(a)(7.[2]

[2] The FEC does issue self-identified "Interpretive Rules" that it publishes in the Federal Reporter, but they do not define all that constitutes the Commission's interpretative rules, as the authorities cited in the text make clear. Whether an agency writing constitutes an interpretative rule is not in any event dependent on how the agency characterizes that writing. *Chamber of Commerce v. Occupational Safety and Health Administration*, 636 F.2d 464, 468 (D.C. Cir. 1980). For example, it appears that in Matters Under Review (MUR) 4831 and 5274, the Office of General Counsel, with the Commission's approval, treated the Commission's *Campaign Guide for Political Party Committees* as an interpretative rule that established an enforceable standard of conduct concerning the Commission's regulations about the assignment of party committee coordinated expenditure authority. See *id.*, Statement of Reasons of Commissioner Michael E. Toner, at 2 (December 4, 2003) (describing and quoting portion of First General Counsel's Report that is redacted from the Commission's publicly available version of that document).

Specifically here, the Campaign Guides and the Form 3X instructions provide a definitive interpretative rule concerning 11 C.F.R § 104.13(a)(2). That regulation broadly states: "Except for items noted in 11 CFR 104.13(b)" – ["[c]ontributions of stocks, bonds, art objects and other similar items to be liquidated" – "each in-kind contribution shall also be reported as an expenditure at the same usual or normal value and reported on the appropriate expenditure schedule, in accordance with 11 CFR 104.3(b)." Every time the Commission has addressed this regulation that we have found, it has unequivocally stated that in-kind contributions *must* be reported as operating expenditures on Form 3X's Schedule B at Line 21(b). The *Campaign Guide for Nonconnected Committees* instructs:

> [T]he value of the in-kind contribution [received] *must* be reported as *an operating expenditure* on Line 21(b) (in order to avoid inflating the cash-on-hand amount). 104.13(a)(2). If the in-kind contribution must be itemized on Schedule A, then it *must* also be itemized *as an operating expenditure* on Schedule B for operating expenditures. See the illustration at right.

Id. at 58 (footnote omitted) (emphases added). The *Campaign Guide for Corporations and Labor Organizations,* at p. 55, contains nearly identical instructional language, including the citation to § 104.13(a)(2).[3] These citations mean that the Commission is providing its interpretation of § 104.13(a)(2). The instructions for Form 3X also include almost identical unequivocal language regarding the reporting of in-kind expenditures: "Each contribution in-kind *must* also be reported in the same manner *as an operating expense* on Schedule B and included in the total for 'Operating Expenditures.'" Instructions for Form 3X and Related Schedules, p. 10 (emphasis added); *see also id.* at 13 ("Contributions in-kind received by the committee which are itemized on Schedule A *must* also be itemized *as an operating expenditure* on Schedule B.") (emphases added).

We have located no instance of the Commission instructing or even suggesting that in-kind contributions received should be correspondingly reported as any type of expenditure other than an operating expenditure. Accordingly, these consistent publications by the Commission comprise an interpretative rule that "the appropriate expenditure schedule" under 11 C.F.R. § 104.13(a)(2) for the matching entry to in-kind contributions received is Schedule B, at Line 21(b).

[3] The *Campaign Guides* state just the one purpose quoted in the text for requiring in-kind expenditure reporting: "to avoid inflating the cash-on-hand amount" that a political committee reports. Plainly, then, it is the Commission's view that in-kind expenditure reporting is simply a corrective accounting device to preserve the accuracy of a committee's Form 3X cash balances, and that Schedule B at Line 21(b) is the most neutral place on the form to list those corresponding entries. That purpose is distinct from the disclosure timeliness purpose that underlies the requirements of 48-hour and 24-hour reporting.

The Commission May Enforce a New and Different Interpretative Rule Only Prospectively and With Sufficient Public Notice

Again, the essential point of the Referral Letter is that during 2012 Workers' Voice failed to include on 48-hour and 24-hour Schedule E reports certain expenditures that Workers' Voice subsequently included on Schedule E of its periodic Form 3X reports. But in order to initiate an enforcement action over that discrepancy with respect to Workers' Voice's in-kind expenditures, the Commission would have to depart from its interpretative rule instructing that Schedule B rather than Schedule E is the required reporting schedule for such expenditures. The Commission could enforce a Schedule E reporting requirement only, if at all, after prospectively following sufficient public notice. The APA provides:

> A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--
>
> (i) it has been indexed and either made available or published as provided by this paragraph; or
>
> (ii) the party has actual and timely notice of the terms thereof.

5 U.S.C. § 552(a)(2)(E). It is well-established that an agency cannot enforce a *new* regulatory interpretation without making public the new interpretation and ensuring that the public has notice of the change. *See, e.g., Health Insurance Association of America. v. Shalala*, 23 F.3d 412, 423 (D.C. Cir. 1998). *See also Arkema, Inc. v. Environmental Protection* Agency, 618 F.3d 1, 7-9 (D.C. Cir. 2010).[4]

Accordingly, the Commission cannot initiate an enforcement action regarding Workers' Voice's reporting during 2012 on the basis of a *new and different* interpretation of 11 C.F.R. § 104.13(a)(2) that Workers' Voice allegedly failed to satisfy. That Workers' Voice did not actually rely upon the Commission's interpretative rule when it reported its in-kind expenditures in 2012 does not matter; the Commission cannot enforce compliance with a reporting standard that did not then – and still doesn't – exist. If the Commission believes that in-kind expenditures should be reported other than as operating expenditures in some circumstances, then it may change its interpretative rule prospectively following sufficient notice to the public.

---

[4] Additionally, the District of Columbia Circuit and other courts have long held that once an agency gives a statute or regulation a definitive interpretation, the agency cannot change that interpretation without undertaking the notice-and-comment procedure prescribed by the APA. *See, e.g., Paralyzed Veterans of America, supra; Alaska Professional Hunters Association, supra.* Whether or not that degree of administrative action is legally required for an agency to change an interpretative rule may be decided by the Supreme Court during its current Term. See *Perez v. Mortgage Bankers Association*, Nos. 13-1041, 13-1052 (U.S.), decision below, *Mortgage Bankers Association v. Harris*, 720 F.3d 966 (D.C. Cir. 2013). Workers' Voice does not contend that notice and comment rulemaking is necessary to change the Commission's interpretative rule about reporting in-kind expenditures; we contend simply that the Commission cannot change that rule retroactively or without any notice, a principle that is not at issue in *Mortgage Bankers Association.*

At the very least, the showing we have made warrants a Commission determination that the most appropriate exercise of its enforcement discretion under *Heckler v. Chaney*, 470 U.S. 821 (1985), is to decline to initiate an enforcement action with respect to Workers' Voice's reporting of in-kind expenditures during 2012. *See, e.g.*, MUR 5837, Statement of Reasons of Chairman Lenhard, Vice Chairman Mason and Commissioners von Spakovsky and Weintraub, at 5 n.4, 7 (December 20, 2007) (citing respondent's compliance with "the Commission's disclaimer guidance as set forth in the *Federal Election Commission Campaign Guide, Political Party Committees*," which was "inconsistent with Commission regulations," as a basis for exercising discretion to dismiss the matter).[5]

For these reasons, Workers' Voice respectfully submits that the Commission should find no reason to believe that Workers' Voice violated 2 U.S.C. § 30104(g) with respect to its in-kind expenditures during 2012. To the extent it proceeds in this matter at all, it should do so via the Commission's ADR Office with respect to the monetary independent expenditures that Workers' Voice acknowledges were not timely reported on 48-hour and 24-hour reports. Finally, in light of the interpretative rule described above, Workers' Voice stands ready to amend its 2012 reports to disclose its in-kind expenditures on Schedule B, Line 21(b).

Please let us know if we can provide any further information. Thank you again for your consideration.

Yours truly,

Laurence E. Gold
Neil C. Weare

Maneesh Sharma
815 16th Street, NW
Washington, DC 20006
(202) 637-5336

Counsel for Workers' Voice

cc: Elizabeth H. Shuler, Treasurer

[5] The Commission's interpretative rule regarding in-kind expenditure reporting *is* consistent with the pertinent regulation, so the Commission's adherence here to that interpretative rule counsels even more strongly in favor of forbearance from enforcement than did the circumstances in MUR 5837.