

December 19, 2016

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

Re: RR 16L-18
Workers' Voice

Dear Mr. Jordan:

We are responding on behalf of Workers' Voice to your letter and enclosure dated October 31, 2016 ("the Referral Letter") regarding the internal referral of this matter from the Reports Analysis Division ("RAD") to the Office of General Counsel ("OGC") for possible enforcement action under 52 U.S.C. § 30109 concerning Workers' Voice's compliance with 52 U.S.C. § 30104(g) during the 2014 general election period. Workers' Voice appreciates the opportunity to respond, as well as the additional time accorded for that response due to the recent national election and other intervening matters involving counsel and compliance personnel who provided services to Workers' Voice during and since 2014. Workers' Voice has undertaken a more complete review of the reporting that is at issue and respectfully suggests that this matter can and should be resolved by the Alternative Dispute Resolution Office ("ADR Office"). Alternatively, any matters not referred to ADR should be handled by OGC through pre-probable cause conciliation.

We acknowledge and explain below in detail the nature and reasons for the failure of Workers' Voice to timely file some 48-hour and 24-hour Schedule E independent-expenditure reports arising from monetarily paid independent expenditures during the 2014 general election period. As we explain, these failures were unintended and in many cases resulted from a design flaw in a vendor's generation of the Schedule E reports. With respect to the in-kind expenditures noted in the Referral Letter, we reiterate the legal analysis provided in our January 31, 2015, letter concerning RR 14L-34 – that during 2014 (and before and since) the Federal Election Commission ("Commission" or "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 2014 expenditures. We also explain why some of the monetarily paid independent expenditures cited in the Referral Letter in fact were timely reported.

Finally, we believe that the Commission should proceed only with respect to the monetary independent expenditures that are identified in the Referral Letter. The Commission should refer this matter to the ADR Office prior to making any reason-to-believe determination regarding this matter; Workers' Voice stands ready to agree to the Commission's customary terms for participation in the ADR process. Alternatively, insofar as the Commission declines to refer any aspect of this matter to ADR, we request that OGC enter into pre-probable cause conciliation under 11 C.F.R. § 111.18(d) prior to any such determination.

1. Workers' Voice Is an "Independent-Expenditure Only" Committee

Workers' Voice is a federal non-connected "independent-expenditure only" political committee ("IE PAC"), so it does not contribute to federal committees of any kind except for those that likewise eschew contributions to federal candidates, national political party committees, state and local political party committee federal accounts, and other federal committees whose incoming contributions are subject to the source prohibitions and amount limitations of the Federal Election Campaign Act ("the Act"). *See generally SpeechNow.org v. Federal Election Commission*, 599 F. 3d 686 (D.C. Cir.) (*en banc*), *cert. denied*, 562 U.S. 1003 (2010); FEC Advisory Opinion ("AO") 2010-11, *Commonsense Ten*. Workers' Voice has been controlled and administered by the AFL-CIO, the national labor federation, and as a non-connected committee Workers' Voice has made regular payments to the AFL-CIO for services performed by the latter's employed personnel and the value of AFL-CIO facilities and equipment that Workers' Voice has used. *See generally* AO 2010-09, *Club for Growth*.

2. Workers' Voice's In-Kind Expenditures During the 2014 General Election

A. Substantial Reliance Upon In-kind Resources

Workers' Voice was one of many IE PACs in 2014, but from our general review of available reports and public information we believe that Workers' Voice was then unique – among both IE PACs and regular, contributing political committees – because of the scale of how it amassed and deployed in-kind resources for its public communications. Workers' Voice relied extensively on in-kind contributions of hundreds of personnel from federal political committees, nonfederal political organizations and labor organizations for the resources to carry out its 2014 one-on-one voter contract program – primarily door-to-door canvassing, supplemented by some telephone banking. Workers' Voice reported those in-kind resources both as *receipts from* those contributors and as *in-kind independent expenditures to* those contributors. In total, Workers' Voice's in-kind independent expenditures during the 2014 general election amounted to \$607,298.19, and its total independent expenditures during that period were \$2,133,556.35. The Referral Letter concerns late reporting of 8.56% of those total independent expenditures.

B. How Workers' Voice Reported Its In-kind Transactions in 2014

During 2012, Workers' Voice set out to report its in-kind contributions received and independent expenditures made as best it understood how to do so given the limited and conflicting legal guidance available, as described below, and the novelty of the arrangements that characterized its voter contact program. Workers' Voice matched every in-kind contribution received with a corresponding Workers' Voice expenditure, which was often, but not always, an independent expenditure. In order that Workers' Voice's Forms 3X would balance, Workers' Voice attributed these in-kind expenditures *to its in-kind contributing source* although, of course, that source did not actually receive anything.

Every day during the general-election period, Workers' Voice timely reported every in-kind independent expenditure about which it then had information. Workers' Voice attributed to particular independent-expenditure communications the value of the in-kind personnel and other resources that were used for that expenditure, using the figures provided to Workers' Voice by its in-kind contributors. Workers' Voice then credited these in-kind values to the respective dates when they were deployed, according to its daily tracking, in order to disseminate Workers' Voice's independent-expenditure communications or other activities.

Workers' Voice devised a system to account for these in-kind receipts and to associate them with Workers' Voice independent expenditures and other activities, and Workers' Voice worked closely with each of its in-kind contributors to amass the requisite in-kind contribution information from them in a timely manner. This system, and Workers' Voice's overall method of operation, entailed the absorption of considerable in-kind resources in multiple states and elections, and sometimes accurate information was conveyed to Workers' Voice too late to register in the appropriate 48-hour or 24-hour report.

From September 17 until November 3, 2014, Workers' Voice filed at least one 48-hour report or 24-hour report *every single day*, and it sought to report all of its independent expenditures as quickly and simply as possible.

C. The Commission's Interpretive Rule That In-Kind Expenditures Must Be Reported As Operating Expenditures

The Referral Letter identifies \$182,561.70 of independent expenditures that Workers' Voice reported on its periodic Form 3X, Schedules E for 2014 but not on 48-hour and 24-hour independent-expenditure reports.¹ The sole basis for the Referral Letter's conclusion that

¹ In the Miscellaneous Electronic Submission ("Form 99") filed April 8, 2015, the Committee did not include the \$480 payment to CO AFL-CIO in the total in-kind independent expenditures. Upon further investigation, it is clear that it should have been reported (if at all) as an in-kind independent expenditure and was missing the proper code in the Committee's accounting system to reflect its nature as an off-setting expenditure to an in-kind contribution.

violations occurred is that discrepancy. However, the Referral Letter does *not* address the threshold legal question of whether or not these *had* to be reported as independent expenditures at all.

As Workers' Voice's reports reflect, \$18,008.50 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. These in-kind independent expenditures involved the following payees:

- AFSCME Florida Special Account
- AFSCME for Michigan
- AFSCME Special Account
- AFT Michigan General Fund
- AFT Solidarity 527
- CO AFL-CIO
- Committee on Letter Carriers Political Education
- Michigan Nurses Association General Account
- National Air Traffic Controllers Association Political Action Committee (aka NATCA PAC)
- Retail, Wholesale and Department Store Union International Treasury Account
- UFCW International Union Working Families Advocacy Project
- USW Works
- Voices of the American Federation of Government Employees

During 2014 (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 2014 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 2014 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.

Workers' Voice discussed the application of this interpretive rule to its reporting of in-kind expenditures in its January 31, 2015, letter to you concerning the referral letter in matter RR 14L-34. We incorporate the legal analysis and arguments of that correspondence here, as it applies directly to the in-kind expenditures that Workers' Voice reported on Schedule E during 2014. In addition, we note that when the Commission revised the Form 3X and Related Schedules and their filing instructions in May 2016, it *left unchanged* the instruction that "[e]ach contribution in-kind [that is received] 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 (Revised 5/2016). If the off-setting expenditures to in-kind contributions "must" be reported on Schedule B, then Workers' Voice had no obligation to report them on Schedule E within 24 or 48 hours of receipt.

3. Findings in the Referral Letter Relating to Monetary Independent Expenditures

A. The Reporting Omissions in Context of Workers' Voice's Total Independent Expenditure Reporting

Of the \$182,561.70 at issue here, \$162,811.26 comprises independent expenditures the Committee acknowledges were reported late. The late-reported independent expenditures amounted to 10.7% of Workers' Voice's total \$1,526,258.16 of *monetary* in-kind independent expenditures made during the 2014 election cycle. Assuming, arguendo, that the Commission were not to apply its interpretive rule requiring off-setting expenditures corresponding to in-kind contributions to be reported on Schedule B, Line 21(b) (which, as we have previously explained, the Commission cannot do), the late-reported independent expenditures represent an even smaller percentage of the Committee's total independent expenditure activity – only 8.6% of \$2,133,566.35.

B. The Monetary Independent Expenditures at Issue

Att. B reflects \$164,071.26 of monetary independent expenditures pertaining to eight vendors to Workers' Voice as not timely reported. The independent expenditures in Att. B fall into several categories according to the explanation for their untimely nature or, in the case of some expenditures, that they were in fact timely reported. We discuss each category below.

- **Timely Reported**

A total of \$1,260 of monetary independent expenditures for fliers printed by Mosaic listed on Att. B were in fact timely reported. Of these, one of the \$270 payments to Mosaic listed on October 19, 2014, in support of Joe Garcia was for fliers actually disseminated on October 16, 2014, and timely reported on October 17, 2014. The remaining \$990 in payments to Mosaic are listed on Att. B as missing from timely-filed 48-hour reports; however, these payments were timely reported but, due to a vendor system flaw, the Schedule E dates for "Date of Public Distribution/Dissemination" and "Date of Disbursement or Obligation" were reversed, which resulted in an entry that appeared to be late but in fact was not.

- **Late Reporting Due To Vendor Technical Error Regarding Threshold**
Workers' Voice's vendor's accounting entry system had a technical flaw in its

calculations for generating 48-hour reports for a particular election. Although reports were generated when the \$10,000 reporting threshold was attained, those reports did not include some expenditures that preceded the threshold; instead, the report listed only the expenditures that crossed the threshold.² The following independent expenditures were inadvertently reported late due to this technical error:

- \$226.20 total to payee AFL-CIO
 - Most of \$6,622.50 to payee Mosaic³
- **Misattribution Of Independent Expenditures To Incorrect Committee**
Workers' Voice inadvertently attributed some independent expenditures in support of U.S. Senate candidate Gary Peters to a federal committee established by Senator Peters that did not pertain to his Senate candidacy. The following independent expenditures should have been included on 48-hour reports, but were not:
 - \$1,580.97 to EGT Printing Solutions, LLC
 - Some portion of independent expenditures paid to Mosaic
 - **Untimely Provision Of Information By Digital Advertising Vendor**
Workers' Voice acknowledges that it untimely reported a total of \$571.39 in payments to New Partners Consulting, Inc. for independent expenditure digital advertisements disseminated between October 25 and October 31, 2014. As explained more fully in the Form 99 filed on May 20, 2015, Workers' Voice did not receive timely information from the vendor regarding the costs for these digital ads. Due to the nature of digital ad buys – specifically, that the daily cost calculation for a digital ad fluctuates significantly based on the number of viewers who click on the ad – the Committee was reliant on the vendor to supply cost information on a daily basis. The Committee reported these amounts promptly after the information became available.

² On the other hand, once either threshold was reached in a particular election for the first time, *it was not re-set again*, meaning that further expenditures in that election subject to that threshold were reported daily without regard to whether they yet aggregately reached that threshold again. That system resulted, then, in *more rapid* reporting to the public of many Workers' Voice independent expenditures than would have occurred if attaining these subsequent thresholds first triggered new reporting.

³ Our records show that some portion of the \$7,612.50 total late-reported independent expenditures for payments to Mosaic (of which \$990 is explained further below) was reported late due to an inadvertent misattribution of some expenditures to a committee of then-U.S. Senate candidate Gary Peters that did not pertain to his candidacy; other of the late-reported expenditures resulted from an inadvertent error of not internally registering the federal portion of a combined federal/non-federal flier. However, the accounting software Workers' Voice uses does not allow for tracking changes to a particular entry, and therefore we are unable to state with precision which late-reported independent expenditures for payments to Mosaic fall into the categories of misattribution and erroneous registration of an entire flier as non-federal. The Committee's records do indicate, however, that most of the late-reported Mosaic transactions were reported late due to the vendor technical flaw pertaining to independent expenditures made before the \$10,000 threshold was reached.

1804441357

18044441458

- **Untimely Provision Of Information By Mosaic**

A total of \$2,962.50 for payments to Mosaic and Mack-Sumner Communications, LLC are listed on Att. B as missing from timely-filed 24-hour reports. These late-reported entries were due to Mosaic inadvertently untimely invoicing the Committee for several fliers Mosaic produced for the Committee. Mosaic caught this oversight and informed the Committee of the missing fliers a few days before the Post-General Report was due. The late receipt of these flier costs from Mosaic also affected the entry for a payment to Mack-Sumner Communications, LLC in support of Joe Garcia. Had the Mosaic costs been timely received by the Committee, the Committee's expenditures in the 2014 General Election would have surpassed the \$1,000 threshold for filing a 24-hour report, and the Committee would have properly and timely reported these costs. However, since the Committee was not timely invoiced for the Garcia fliers by Mosaic, the Committee was unaware that the \$1,000 threshold had been reached.

- **Late Reporting Due To Internal Miscommunication**

Att. B lists three entries for untimely reported independent expenditures relating to vendors Wildfire Contact, LLC (\$37,537.64 and \$63,792.00) and Bynum Thompson Ryer (\$50,000.00). These expenditures were for telephone calls in support of candidate Bruce Braley. The Committee decided to pay for these calls just before the general election date, the Committee's busiest time of the election cycle. Due to an unfortunate internal miscommunication between the Committee's political staff and its compliance staff, this decision and the pertinent invoices for these expenditures were not timely communicated to the Committee's compliance staff, resulting in late reporting, as we acknowledge. This oversight was inadvertent and unintentional; it was not done purposely, knowingly, or with any intent to avoid the Committee's reporting obligations.

4. **This Matter Should be Referred to the Alternative Dispute Resolution Office**

For the following reasons, we respectfully request that this matter be referred to the ADR Office for resolution.

First, no investigation is warranted. Workers' Voice acknowledges that it failed to timely include on 48-hour and 24-hour reports most of the independent expenditures listed on Att. B. Indeed, Workers' Voice effectively acknowledged these omissions when it filed its 2014 October Quarterly and Post-Election reports, as well as in its ensuing correspondence with RAD during 2015 about those reports. We have fully explained the circumstances involving Workers' Voice's efforts to timely comply with its reporting obligations during the 2014 general election period, and the problems that caused it to fall short with respect to a small portion of its reporting. This matter concerns data, all of which the Commission has, and not behavior and documents that can only be unearthed in an investigation. If any further information is needed or

desired, Workers' Voice stands ready to provide it to the ADR Office during the negotiation of a settlement of this matter.

Second, the reporting errors were inadvertent and not knowing and willful. Workers' Voice devoted considerable effort during 2014 to tracking and reporting the complex information that characterized its primarily in-kind system of resource acquisition and deployment. Workers' Voice did not realize that a vendor system error failed fully to accommodate the statutory reporting thresholds – but even so, that flaw also produced more rapid reporting than the Act required once the initial reporting threshold for independent expenditures was reached in a particular election.

Finally, the Commission has used the ADR process to resolve similar kinds of Schedule E reporting violations, including where substantial spending was involved. For example, ADR recently settled with the Massachusetts Republican Party its failure to file 48-hour and 24-hour reports of \$629,026.10 of independent expenditures, see ADR 655 (April 22, 2014); with the National Republican Senatorial Committee its failure to file 48-hour reports to support independent expenditures totaling \$289,213.65, see ADR 694 (April 14, 2014); and with American Principles in Action for its failure to file 48-hour reports totaling \$74,496.50, see ADR 714 (July 18, 2014). *See also, e.g.*, ADR 729 (Oct. 20, 2014) (Liberty for All Action Fund's failure to file a 24-hour report totaling \$42,085 later disclosed on a Monthly Report); ADR 495 and ADR 502 (March 9, 2010) (failure by Ciro Rodriguez for Congress to file 48-hour reports totaling \$75,200); ADR 488 (June 30, 2009) (Mississippi Republican Party's failure to file 24-hour reports totaling \$29,413.66); ADR 409 (Nov. 30, 2007) (Blue America PAC's failure to file 24-hour reports totaling \$25,005.84); ADR 322 (Sept. 26, 2006) (failure of International Association of Firefighters Interested in Registration and Education PAC to file 48-hour reports of independent expenditures totaling \$102,993.20 and 24-hour reports of independent expenditures totaling \$35,584.50).

It is also common for the ADR Office in appropriate circumstances to resolve cases involving failures to timely report much greater sums of transactions other than independent expenditures than are at issue here. For example, the Massachusetts Republican Party case involved not only independent expenditures but failures to report receipts of \$60,279.50, disbursements of \$218,227.61 and debts of \$141,103.10. See ADR 655. The ADR Office also resolved the National Association of Realtors' failure to disclose receipts totaling \$1,065,000 and disbursements totaling \$134,854 during the 2012 election cycle. See ADR 671 (May 22, 2014). Similarly, the ADR Office resolved the failure of Maragos4NY to disclose receipts of \$794,086 and disbursements of \$800,000. See ADR 654 (Jan. 15, 2014). Other ADR cases have also dealt with substantial unreported transactions. *See, e.g.*, ADR 676 (June 19, 2014) (American Bridge 21st Century's failure to disclose additional debts of \$360,061); ADR 591 (Feb. 22, 2012) (Ohio Republican Party's failure to disclose debts totaling \$1,195,892).

Conclusion

Workers' Voice has sought to explain the circumstances of its 2014 reporting errors delineated in the Referral Letter, virtually all of which we acknowledge. For the reasons set forth above, we urge OGC to refer this matter to the ADR Office for an expeditious and appropriate resolution. Alternatively, we suggest initiation now of pre-probable cause conciliation.

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

Yours truly,



Renata Strause
815 16th St. NW
Washington, DC 20006
(202) 637-5143
RStrause@afcio.org

Counsel to Workers' Voice



Laurence E. Gold
Trister, Ross, Schadler & Gold, PLLC
1666 Connecticut Avenue, NW
Suite 500
Washington, DC 20009
(202) 464-0353
LGold@tristerross.com

Counsel to Workers' Voice

cc: Elizabeth H. Shuler, Treasurer