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February 13, 2020

Sent by Email

Jeff S. Jordan, Esq.
Federal Election Commission
Office of Complaints Examination & Legal Administration
Attn: Christal Dennis, Paralegal
1050 First Street NE
Washington, DC 20463
cela@fec.gov

Re: MUR 7676 – Michelle Fischbach, Fischbach for Congress, Paul Kilgore

Dear Mr. Jordan:

I represent Ms. Fischbach, Fischbach for Congress, and Paul Kilgore, as Treasurer (collectively, the "Campaign"), in the above-captioned MUR. As detailed below, there is no reason to believe a violation occurred with respect to the allegations contained in the Complaint. And even if there were any arguable violation, given the *de minimis* nature of any violation, the Commission should exercise its prosecutorial discretion and dismiss the Complaint pursuant to *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

THE COMPLAINT

The Complaint appears to allege a violation in the requirements that the disclaimer on certain printed communications must be in a printed box. It attaches two email messages sent by the Campaign, acknowledges that the messages contain a disclaimer, but claims that the disclaimers are technically deficient because the emails "have a partial line above and below the disclaimer, but not the required box around the disclaimer as described in FEC Campaign Guide, 2014, page 66 (76 of 199)." (emphasis in original).

APPLICABLE LAW

Several categories of campaign communications are required to include disclaimers identifying who paid for the communication, including both "public communications, as defined in 11 C.F.R. § 100.26" and "electronic mail of more than 500 substantially similar communications." 11 C.F.R. § 110.11(a). If the communication is "paid for and authorized by a candidate," it "must clearly state that the communication is paid for by the authorized political committee." *Id.* § 110.11(b)(1).

A "public communication" is "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to

the general public, or any other form of general public political advertising," and does not include "communications over the Internet, except for communications placed for a fee on another person's Web site." 11 C.F.R. § 100.26.

When public communications are "printed," the disclaimer must be "contained in a printed box set apart from the other contents of the communication" and "must be printed with a reasonable degree of color contrast between the background and the printed statement." 11 C.F.R. § 110.11(c)(2). Although the Complaint does not itself cite the applicable statute or regulations, the referenced page in the *Campaign Guide for Congressional Candidates* cites the requirements of 11 C.F.R. § 110.11(c)(2).

DISCUSSION

I. There is no reason to believe the Campaign violated disclaimer requirements.

The Complaint acknowledges that the email messages contained the required disclaimer, and does not challenge either the content or the clarity of the disclaimer. The *only* alleged violation is that the two email messages in question failed to include the "required box around the disclaimer." But no such requirement exists because email messages are not "printed public communications," for two reasons.

First, it is clear from the regulations that email messages are not "public communications." In section 110.11(a)(1), mass "electronic mail" is discussed separately from "public communications." If the email messages like those referenced in the complaint were "printed public communications," there would be no need to specifically discuss them. And most "communications over the Internet" are specifically carved out of the definition of "public communications" in section 100.26.

Second, email messages are not "printed," as required to bring them within the "[s]pecific requirements for printed communication" set forth in section 110.11(c)(2). It is clear from this regulation that the term "printed" is used to refer to physically printed materials. For example, it lists the following examples of printed materials: "signs, posters, flyers, newspapers [and] magazines." 11 C.F.R. § 110.11(c)(2)(i).

In short, the applicable statutes and regulations contain no requirement that the disclaimer in an email message be within a printed box, and the requirement that the Complaint appears to reference applies only to printed public communications. Accordingly, there is no reason to believe the Campaign violated the Commission's disclaimer requirements.

II. Given the *de minimis nature* of any arguable violation, the Complaint should be dismissed based upon prosecutorial discretion.

Even if there is any arguable *de minimis* technical violation, under the factors set forth in *Heckler v. Chaney*, 470 U.S. 821, 831 (1985), the Commission should dismiss this Complaint as a matter of prosecutorial discretion.

CONCLUSION

For the reasons set forth above, the Commission should find no reason to believe that a violation occurred and should promptly dismiss the complaint.

Sincerely,

Harry N. Niska

HNN/cmm