sers@nictusa.com
11/14/2011 04:51 PM

To SERS@fec.gov, sersnotify
cc
bcc
Subject New comment on REG 2011-02 submitted by Gates, Keith

Please find attached the contents for the new comment submitted on Mon Nov 14 16:51:33 EST 2011.
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REG_2011_02_Gates_Keith_11_14_2011_16_51_33_Cause of Action Comment on NPRM re Internet Disclaimers.pdf

CAUSE of ACTION
Advocates for Government Accountability

A 501(C)(3) NONPROFIT CORPORATION

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November 14, 2011

Submitted via Electronic Submission System

Amy L. Rothstein,
Assistant General Counsel
Federal Elections Commission
999 E Street, NW
Washington, DC 20463

RE: Notice 2011–14 Internet Communication Disclaimers

Dear Ms. Rothstein:

Thank you for the opportunity to comment on the Federal Election Commission's ("FEC") Advance Notice of Proposed Rulemaking ("NPRM") on Internet Communication Disclaimers.[1] We write on behalf of Cause of Action, an independent 501(c)(3) public interest entity that uses public advocacy and legal reform strategies to ensure greater transparency in government, protect taxpayer interests, and promote economic freedom. We submit this comment from the perspective of the public interest, and have no direct interest in Internet Communication Disclaimers ("disclaimers") other than as private individuals.

The FEC's NPRM seeks comment on whether the FEC should revise its rules concerning disclaimers on Internet communications. Specifically, the FEC, in its NPRM, states, "[t]he Commission invites comments that address the ways that campaigns, political committees, voters, and others are using, or may soon use, the Internet and other technologies, including applications for mobile devices ('apps'), to disseminate and receive campaign and other electoral information" and "also invites commenters to address the ways in which the Internet and other technologies present challenges in complying with the disclaimer requirements under the existing rules."[2]

[1] INTERNET COMMUNICATION DISCLAIMERS, 76 Fed. Reg. 63567 (Fed. Elections Comm'n, Oct. 6, 2011).
[2] *Id.* at 63569.

The FEC seeks comment on the following ways disclaimer rules might be applied to Internet communications: (1) applying existing "small item" or "impracticable" exceptions, (2) creating a minimal disclosure system similar to that of California, (3) excepting disclaimers on a linked website, or (4) creating a new rule in some other manner.[3]

The FEC has sought to previously resolve tensions arising in the application of disclaimer rules to Internet communications. In both Advisory Opinion ("AO") Request 2010-19 (Google) and AO Request 2011-09 (Facebook), the FEC failed to reach a conclusion on how to apply the disclaimer rules to Internet communications. In its request, Google questioned "whether disclaimers are required on text ads generated when Internet users use Google's search engine to perform searches."[4] Because the advertisements ("ads") were only 95 characters long, Google believed that the ads (1) were either exempt from the disclaimer requirements under the small items exception, or (2) if the ads were not exempt, the disclaimer requirement was satisfied by displaying the full Uniform Resource Locator ("URL") of the ad sponsor's website in the text advertisement and requiring the sponsor's website to include a full 11 C.F.R. § 110.11 disclaimer.[5] While the FEC did not agree on the reason for its decision, it concluded that Google's "conduct" was not in violation of the Federal Election Campaign Act (the "Act").[6] Commissioners Bauerly, Walther, and Weintraub concluded that the disclaimer requirement was necessary but satisfied by displaying the URL of the advertisement sponsor's website in the advertisement and requiring the sponsor's website to include the applicable disclaimer.[7] Commissioners Hunter, McGahn and Peterson "supported the reasoning . . . which concluded that the text ads were exempt from the disclaimer requirements under the 'impracticable' exception set forth at 11 C.F.R. § 110.11(f)(1)(ii)."[8] In the Facebook AO, the FEC could not approve an answer by the required four affirmative votes and therefore was unable to render an advisory opinion to Facebook.[9]

The best solution to the question of Internet communications disclaimers is for the FEC to forego further rulemaking on this issue and instead apply current laws and regulations to specific questions as they arise. The small text communications at issue in the FEC's regulation of Internet communications fit within the "small items" or "impracticable" exceptions to the disclaimer requirements, therefore vitiating any alternative application of the law.

Small Items

The FEC has already recognized instances where placing a full disclaimer on a communication may not be possible due to the limited size, known as the "small item" exception.[10] Small items have included pins, bumper stickers, and other media where a

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[3] *Id.*
[4] ADVISORY OPINION REQUEST 2010–19 (Google), at 2 (Aug. 5, 2010) [hereinafter "GOOGLE AO"].
[5] *Id.*
[6] 2 U.S.C. § 431 *et seq.*, as amended.
[7] GOOGLE AO, *supra* (Concurring Statement of Vice Chair Bauerly and Commissioners Walther and Weintraub).
[8] *Id* (Concurring Statement of Chairman Matthew S. Peterson).
[9] ADVISORY OPINION REQUEST 2011-09 (Facebook), (June 15, 2011) [hereinafter "FACEBOOK AO"].
[10] 11 C.F.R. §110.11(f)(1)(i).

disclosure would not fit.[11] The regulation in question, 11 C.F.R. § 110.11, recognizes that some small items cannot easily or legibly display the disclosure required for larger communications.[12]

The Internet communications at issue before the FEC qualify, under existing Commission decisions, as small items. For instance, in an advisory opinion issued to Target Wireless ("Target"), the FEC held that character-limited Short Message Service ("SMS") text messages need not have a disclaimer.[13] Target noted that SMS text messages were limited to 160 characters per screen, and asked whether the small items exemption applied.[14] The FEC responded in the affirmative:

> By virtue of their size, the "small" items listed in 11 CFR 110.11(a)(6)(i), such as bumper stickers, pins, buttons, and pens are limited in the size and length of the messages that they are able to contain. Similarly, the wireless telephone screens that you have described have limits on both the size and the length of the information that can be conveyed. Indeed, the Commission notes that the SMS technology places similar limits on the length of a political advertisement as those that exist with bumper stickers.[15]

Typical Internet advertisements are small and contain a character length less than that of a text message. For example, while the SMS text message at issue in the Target AO had a maximum character length of 160 characters,[16] a Google advertisement is currently less than 100 characters[17] and current disclaimers can be 30 to 100 characters in length.[18] In many of these communications, the speaker intends to convey a short slogan or idea, much like a message on a bumper sticker or a pin.

There is no material difference between small or character-limited Internet communications and the SMS text messages at issue in the Target AO. Both communications are analogous to bumper stickers and should qualify for the small items exception. Thus, because the FEC has already passed upon this issue, there is no reason to engage in further rulemaking. Instead, the FEC should apply the reasoning behind the Target AO consistently and apply the small items exception to small Internet communications.

Impracticable

If the FEC determines not to apply the small items exception to small Internet communications, then the disclaimer requirements as applied to small Internet communications

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[11] *Id.*
[12] *INTERNET COMMUNICATION DISCLAIMERS, 76 Fed. Reg.* at 63568
[13] ADVISORY OPINION 2002-09 (Target Wireless) at 4 (Aug. 23, 2002) [hereinafter "TARGET AO"].
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] GOOGLE AO, *supra*, at 2.
[18] *Id.* at 2, 5.

should be deemed "impracticable."[19] As its name implies, the impracticable exception was designed for items where a disclosure would be impracticable, such as skywriting or t-shirts.[20]

In the case of small Internet communications, space is a crucial determining factor. As noted above, a Google advertisement is less than 100 characters[21] while current disclaimers can be 30 to 100 characters in length.[22] As Draft B of the Google AO noted, such a requirement would be decidedly impracticable:

> Take, for example, a communication not authorized by a candidate, whose disclaimer must clearly state, among other things, that the communication "is not authorized by any candidate or candidate's committee." 2 U.S.C. 441d(a); 11 CFR 110.11(b)(3). The phrase "Not authorized by any candidate or candidate's committee" is 57 characters long. That added to the full name of the political committee could exhaust nearly the entire character limit, leaving few, if any, characters remaining to express a political message. Similarly, a communication paid for by an authorized congressional candidate's committee must include a disclaimer that reads, "Paid for by X for Congress." 2 U.S.C. 441d(a)(l). Even if the candidate's name were very short, the disclaimer still would take up more than a quarter of the character limit. Accordingly, the Commission concludes that requiring a disclaimer to be appended to text ads on behalf of candidates or political committees generated through Google's AdWords program would be impracticable under to 11 CFR 7 110.11(f)(1)(ii).[23]

If applied, disclaimer requirements can fill a single Google advertisement without any room for the communication itself. At best, a simple "Paid for by Jones for Congress" disclaimer would take a significant portion of the communication space. With severely limited character-length communications, any disclaimer can be classified as impracticable.

The California System

In the NPRM, the FEC referenced state disclosure requirements such as the system recently adopted in California.[24] That system allows for the use of a registration number, such as "FPPC # 185734," for the purposes of disclosure.[25] Such a requirement, while minimal, still takes around 15% of a Google advertisement. Further, we question if such a requirement would

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[19] 11 C.F.R. § 110.11(f)(1)(ii).
[20] *Id. See also* note 1, *infra* at 63568.
[21] GOOGLE AO, *supra* at 2.
[22] GOOGLE AO, *supra* at 2;
[23] ADVISORY OPINION REQUEST 2010–19 (Google), Draft B, at 4-5.
[24] *Id.* CAL. CODE REGS. TIT. 2, §18450.4 (2010) states, "the candidate or committee sending the mass mailing may provide abbreviated advertisement disclosure containing at least the committee's FPPC number (i.e., 'FPPC # 185734') and when technologically possible a link to the webpage on the Secretary of State's website displaying the committee's campaign finance information, if applicable."
[25] *Id.*

comply with 2 U.S.C. § 441d(a), which seemingly requires the "communication" to contain the relevant disclaimer.[26]

URL Disclosure

As noted above, Google suggested in its AO Request that the disclaimer on the site linked to by the advertisement could be sufficient for disclaimer purposes.[27] Theoretically, an individual can see the advertisement, read the URL of the advertisement, and then choose to click the link to the website[28] which would have the required disclaimer.[29]

However, anyone may buy an advertisement on Google, Facebook, or many other forums to drive traffic to a campaign's website. Because the advertisement need not be purchased by the candidate or candidate's committee, the candidate's website's disclaimer would be inadequate to inform the general public as to the true identity of the purchaser. Simply put, the disclaimer on the linked-to campaign website may not be germane to the purchaser of the advertisement.

While this approach is preferable to new regulations, it is less than adequate to meet the FEC's stated goals. Such an approach is more problematic than simply excepting Internet communications from the disclosure rules, as discussed above.

Conclusion

The constantly changing nature of the Internet and communications technology makes the importance of clarity in the FEC's rulemaking process of the utmost necessity. Facebook alone has gone through several changes in design and presentation of information in the last congressional election cycle. Twitter, micro blogging, and smartphone applications are changing many of the ways individuals receive information, including election communications. If the FEC adopts a new Internet-specific rule, it will risk having to reinterpret or rewrite the rule each time a major advertiser or website changes its design. Thus, the FEC must work within the existing regulatory framework, specifically the small item and impracticable exceptions, to reach an ideal solution.

Counsel, campaigns, and advertisers already understand the existing law and exceptions therein. The small item and impracticable exceptions are well-known and established and could easily be extended to Internet communications, as the FEC has already done by recognizing SMS messages as small items. In contrast, even the minimal disclosure system of California would carry a high cost of character space, even to the point of overshadowing the communication itself. Furthermore, while using the disclosure on the linked-to website is not always sufficient

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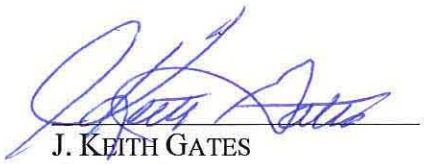
[26] Each of the relevant provisions of 2 U.S.C. § 441d(a) provides that "such communication" "shall clearly state" who paid for the communication. *See* 2 U.S.C. § 441d(a)(1), 441d(a)(2), and 441d(a)(3).
[27] INTERNET COMMUNICATION DISCLAIMERS, 76 Fed. Reg. 63567 at 63568; GOOGLE AO, *supra*, at 7.
[28] *See* GOOGLE AO ("[i]f a disclaimer is required, the Commission should consider the requirement satisfied if (1) the text ad displays the URL of the sponsoring committee's website and (2) the landing page contains a full § 110.11 disclaimer").
[29] *Id.*

for disclosing who paid for the advertisement, it is preferable to a new rule. Finally, the FEC will risk having to change or reinterpret any new rule in order to be consistent with the pace of technological development. Attempting to regulate the Internet would undoubtedly lead to more regulation as technology changes.

For these reasons, applying either the small item or impracticable exceptions will best resolve the issue of disclosures on small Internet communications and the FEC should forego any further rulemaking on this issue.

Thank you for considering these comments on Notice 2011–14 Internet Communication Disclaimers. Should you have any questions, comments, or concerns, please do not hesitate to contact Keith Gates, Keith.Gates@causeofaction.org, or Tyler Martinez, Tyler.Martinez@causeofaction.org, at (202) 507-5880.

Sincerely,



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