
Coolidge-Reagan Foundation

To Defend, Protect and Advance Political Speech

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Mr. Nevan F. Stipanovic
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

OFFICE OF GENERAL
COUNSEL

RE: Public Comment of Coolidge-Reagan Foundation Concerning REG 2011-02

Dear Mr. Stipanovic:

The Coolidge-Reagan Foundation respectfully submits this comment in response to the Federal Election Commission's ("FEC" or "Commission") Advance Notice of Public Rulemaking ("ANPRM") concerning whether the Commission should "revise its regulations concerning disclaimers on certain Internet communications" or create new exceptions to them. FEC, *Internet Communications Disclaimers*, Notice 2011-14, 76 FED. REG. 63,567, 63,567 (Oct. 13, 2011). The Commission recently re-opened the comment period for this ANPRM to solicit further input. *See* FEC, *Internet Communications Disclaimers; Reopening of Comment Period*, Notice 2017-02, 82 FED. REG. 46,937, 46,937 (Oct. 10, 2017).

CURRENT LAW

The Federal Election Campaign Act ("FECA"), Pub. L. No. 92-225, 86 Stat. 3 (1972), as amended, requires certain types of communications to contain disclaimers to "[e]nsure that voters are fully informed about the person or group who is speaking." *Citizens United v. FEC*, 558 U.S. 310, 315 (2010) (internal quotations and alterations removed) (quoting *Buckley v. Valeo*, 424 U.S. 1, 76 (1976) (per curiam)). The FECA specifies the following four types of communications must contain disclaimers:

1. **Political Committee-Funded Communications**—communications financed by a political committee made through a broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of "general public political advertising," 52 U.S.C. § 30120(a);
2. **Paid Express Advocacy**—any paid communications "expressly advocating the election or defeat of a clearly identified candidate," *id.*;
3. **Solicitations**—any solicitations for contributions made through a broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of "general public political advertising," *id.*, and
4. **Paid Electioneering Communications**—any paid electioneering communication. *Id.* The term "electioneering communication" refers solely to certain

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communications made through “broadcast, cable, or satellite” and therefore excludes Internet-based communications. 52 U.S.C. § 30104(f)(3)(A)(i).

Federal regulations limit some of these categories and add others. Under the regulations, a Political Committee-Funded Communication, Paid Express Advocacy, or Solicitation must contain a disclaimer only if it constitutes a “public communication.” 11 C.F.R. § 110.11(a)(1)-(3). The term “public communication” excludes “communications over the Internet, except for communications placed for a fee on another person’s website.” *Id.* § 100.26. Under this regulation, when an individual, political committee, corporation, or labor union “pays a fee to place a banner, video, or pop up advertisement on another person’s Web site,” he makes a “public communication” requiring a disclaimer. FEC, *Explanation and Justification for Final Rules on Internet Communications*, 71 FED. REG. 18,589, 18,589 (Apr. 12, 2006) (hereafter, “2006 E&J”). The term encompasses “all potential forms of [paid] advertising,” including “directed search results.” *Id.*

Federal regulations further require the inclusion of disclaimers on:

1. **Large-Scale Political Committee E-mails**—“electronic mail of more than 500 substantially similar communications when sent by a political committee,” 11 C.F.R. § 110.11(a)(1); and
2. **Political Committee Public Websites**—political committees’ websites “available to the general public,” *id.*¹

Federal regulations also establish two exceptions to these disclaimer requirements. Disclaimers are not required on:

1. **Small Items**—“[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed,” *id.* § 110.11(f)(1)(i), and
2. **Impracticability**—displays for which including a disclaimer would be “impracticable,” such as “[s]kywriting, water towers, [and] wearing apparel,” *id.* § 110.11(f)(1)(ii).

RECOMMENDATIONS

The Coolidge-Reagan Foundation respectfully recommends the Commission promulgate regulations concerning disclaimers on Internet-based communications based on the following principles:

1. **The Internet must be left largely unregulated to preserve it as a convenient, inexpensive, easily accessible tool for the robust exercise of fundamental First Amendment rights**

¹ For all of these categories, “[t]he content of the disclaimer that must appear . . . depends on who authorized and paid for the communication.” 76 FED. REG. at 63,568.

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The FEC has recognized “the vital role of the Internet and electronic communications in election campaigns.” 76 FED. REG. at 63,568. It has explained, “Unlike media such as television and radio, where the constraints of the medium make access financially prohibitive for the general population, the Internet is by definition a bastion of free political speech, where any individual has access to almost limitless political expression with minimal cost.” FEC, *Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule*, 67 FED. REG. 49,064, 49,072 (July 29, 2002) (hereafter, “Prohibited Contribution E&J”); *see also Reno v. ACLU*, 521 U.S. 844, 870 (1997) (holding the Internet “provides relatively unlimited, low-cost capacity for communication of all kinds”).

The Commission elsewhere elaborated:

[T]he Internet [i]s a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach. The Internet’s accessibility, low cost, and interactive features make it a popular choice for sending and receiving information. Unlike other forms of mass communication, the Internet has minimal barriers to entry, including its low cost and widespread accessibility.

FEC, *Internet Communications*, Notice 2006-08, 71 FED. REG. 18,589, 18,589 (Apr. 12, 2006) (hereafter, “2006 Internet E&J”). As the Commission eloquently concluded, the Internet has led to “the most accessible marketplace of ideas in history.” *Id.* at 18,590.

An article funded by the U.S. Department of State explains:

“Everyone can watch television, but to go from receiving information to conveying information was a quantum leap, and the internet enabled that,” said Dan Backer, a Washington attorney who works on campaign finance and free speech cases. “Now everyone is, in essence, a media entity, and everyone is able to disseminate their ideas to the general public. I think that is a powerfully democratizing force.”

Mark Trainer, “1969: The First Whisper of the Internet,” SHARE AMERICA (Oct. 27, 2017), at <https://share.america.gov/1969-first-whisper-of-internet/>.

The Internet has evolved into a ubiquitous channel of political communication, radically democratized public discourse. Nearly nine out of ten (88%) American adults use the Internet;² almost 70% use at least one social media platform.³ In January 2016, approximately two-thirds of adults learned about the ongoing presidential election through the Internet,⁴ while over 40% did

² *Internet/Broadband Fact Sheet*, PEW RESEARCH CENTER INTERNET, SCIENCE & TECH (Jan. 12, 2017), available at <http://www.pewinternet.org/fact-sheet/internet-broadband/> (last visited Apr. 24, 2017).

³ *Social Media Fact Sheet*, PEW RESEARCH CENTER INTERNET, SCIENCE & TECH (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/social-media/> (last visited Apr. 24, 2017).

⁴ Michael Barthel, et al., *The 2016 Presidential Campaign—a News Event That’s Hard to Miss* (Feb. 4, 2016), <http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss/> (last visited Apr. 24, 2017) [hereafter, “The 2016 Presidential Campaign”].

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so specifically through social media.⁵ Almost one-fifth of Americans learned about the presidential election from the website, app, or emails of a candidate or issue-based group.⁶ Though these various channels, the Internet has played a substantial role in political education and participation for a substantial portion of the American public.

These compelling considerations have led the Commission to allow the “vast majority of Internet communications” to “remain free from campaign finance regulation.” 2006 E&J, 71 FED. REG. at 18,589. Any regulations the Commission adopts should maintain its commitment to ensuring “Internet activities by individuals and groups of individuals face almost no regulatory burdens.” 2006 Internet E&J, 71 FED. REG. at 18,860; *see, e.g.*, FEC, *Explanation and Justification for Final Rules on Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds*, 67 FED. REG. 76962, 76,964 (Dec. 13, 2002) (emphasizing the need to “avoid overreaching” with regard to Internet regulations by exempting that communications “paid for by an individual” from disclaimer requirements). Imposing greater regulation on Internet-based communications will chill political discourse, particularly from ordinary Americans and grassroots activists who cannot afford specialized campaign finance attorneys to advise them on disclosure and disclaimer requirements. Consequently, the FEC’s current regulatory scheme should be regarded as a ceiling, not a floor, on federal regulation of political discourse over the Internet.

2. FEC regulations should remain flexible, so speakers may satisfy disclaimer requirements through the latest advances in technology, rather than being strictly tied to particular technological mediums or assumptions.

Any Internet-related regulations should afford speakers maximum flexibility in satisfying any applicable disclaimer requirements, rather than being tied to specific forms of communication that may become superseded or outmoded. The Commission itself has expressed the “expectation that continued technological advances will further enhance the quantity of information available to voters online and through other technological means.” 76 FED. REG. at 63,568. In the past, it has sought to provide “much needed flexibility to ensure that the regulated community is able to take advantage of rapidly evolving technological innovations, while ensuring that ‘necessary precautions’ are in place.” Dodd, A.O. 2007–30, at 3 (Dec. 3, 2007); *see also* Bradley, A.O. 1999–09, at 6 (June 10, 1999) (explaining it is the Commission’s practice to “interpret[] the Act and its regulations in a manner consistent with contemporary technological innovations . . . where the use of the technology would not compromise the intent of the Act or regulations.”). It has likewise recognized the need to avoid “serial revisions” to its rules “in order to adapt to new or emerging Internet technology in the future.” 76 FED. REG. at 63,569; *accord* FEC, *Internet Communications Disclaimers; Reopening of Comment Period and Notice of Hearing*, Notice 2016-13, 81 FED. REG. 71,647, 71,647 (Oct. 18, 2016).

To promote flexibility, minimize burdens on political discourse, and avoid the need to continuously update federal regulations, the Commission should allow people and entities subject to disclaimer requirements to satisfy them through any reasonable technological means, rather than embedding particular technologies or channels of communications in the regulations themselves.

⁵ *Id.*

⁶ *Id.*

For example, a PAC’s disclaimers must “clearly state” the PAC’s “permanent street address, telephone number, or World Wide Web address.” 52 U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11(b)(3). There are numerous Internet-based channels of communication that are accessible through the Internet such as Twitter, facebook, Instagram, and many others, that provide unique identifiers through which political committees may wish to identify themselves, instead, and which provide equal or greater satisfaction of the purpose of the underlying requirement – an avenue of communication with the speaker. The Commission should promote greater regulatory flexibility to achieve regulatory goals rather than elevating form over substance. It should decline to construe federal statutes narrowly or embed particular, narrow, and dated communication concepts—such as a World Wide Web address as nothing more than a distinct URL—into its regulations. *See generally* Great America PAC, A.O. 2017-05, at 5 (Sept. 20, 2017) (refusing to allow political committee to use its Twitter handle in its disclaimers instead of a World Wide Web address, primarily due to an unreasonably narrow reading of the statutory text of § 30120(a)(3)).

3. Regulations should not hold speakers liable if disclaimers fail to appear on Internet-based communications under certain circumstances

The FEC’s current regulations concerning disclaimers for Internet-based communications completely fail to take into account the fact that a speaker cannot anticipate the complete range of hardware, software, and individualized settings people may use to view webpages, receive messages, or otherwise engage in political communications. In traditional print communications, the size and visibility of a disclaimer are primarily within the control of the speaker itself. A speaker may comply with statutory requirements simply by ensuring the required text is included, at an appropriate size, on an advertisement it submits to a newspaper or a mailer it has copied for distribution. With modern electronic communications, in contrast, the manner in which images, graphics, backgrounds, and even text are displayed is often beyond a speaker’s control.

The public may access websites, Twitter profile pages, and other forms of online communication through a virtually limitless range of hardware (ranging from computers, to tablets, to handheld smartphones and other mobile devices), and browsers (such as Internet Explorer, Safari, Firefox, and Chrome). A nearly infinite range exists of possible combinations of hardware, software, add-ons, screen sizes and resolutions, individualized settings, and other factors that can affect the display of a political communication. It is virtually impossible for a speaker to accurately predict how an electronic communication will appear on every such possible combination of hardware, software, and individualized settings.

Commission regulations should not hold an entity responsible when required disclaimers do not appear visible or legible on certain devices. The Commission should not enable “gotcha” claims, in which a speaker’s political adversaries file complaints because disclaimers are not sufficiently visible or legible on certain devices under certain circumstances. In light of the unique characteristics of electronic communications, the Commission should adopt regulations providing a speaker satisfies any applicable disclaimer requirements by taking reasonable steps to include the required disclaimer, rather than holding it strictly liable should a disclaimer be not visible or illegible on certain devices.

4. Broaden the scope of the Internet exemption from disclosure requirements

The Commission should promote free political discourse on the Internet by broadening the regulatory exemption from disclaimer requirements for Internet-based communications. Under the FEC's regulatory interpretation of the FECA, many disclaimer requirements apply only to "public communications." 11 C.F.R. § 110.11(a)(1)-(3). The term public communication, in turn, excludes "communications over the Internet, except for communications placed for a fee on another person's website." *Id.* § 100.26. Disclaimer requirements should not automatically be triggered simply because a speaker must pay some sum of money, however small, in order to publicize their message or include it on a more-trafficked webpage. Activists and other politicians should be able to devote limited amounts of funds to promoting their message without triggering complex disclaimer requirements. The Commission should amend § 100.26 to provide a "public communication" excludes "communications over the Internet, except for communications placed on another person's website for a fee, when the total expenditures a person makes to place all such communications on any other persons' websites over the course of a year exceeds \$1,000. Other expenditures incidental too and made in the preparation, creation, or development of such communications should not count toward this figure."

5. The Commission should continue to consistently apply the small items and impracticability exemptions to Internet and social media communications, and consider amending those exemptions to expressly mention communications through such channels.

It is also imperative the Commission continue to apply the Small Items and Impracticability exemptions to Internet-based communications. The limits inherent in various modes of online communication often preclude inclusion of standard disclaimers. For example, in *Target Wireless*, A.O. 2002-09, at 1 (Aug. 23, 2002), a service sent "Short Messaging Service" ("SMS") messages containing political, news, and sports information over telecommunications networks and through Internet service providers to its subscribers' PCS cellular phones. "[D]ue to technological limitations, SMS messages [we]re limited to 160 characters per screen." *Id.* at 2. Various candidates and political parties wished to pay the service to send political advertisements to its subscribers. *Id.* at 1. They noted even a short disclaimer would consume 30 characters, or 20% of a cell phone's screen. *Id.* at 2. The Commission recognized wireless telephone screens "have limits on both the size and the length of the information that can be conveyed." *Id.* at 4. Analogizing the length of SMS messages to bumper stickers, the Commission concluded § 110.11(f)(1)(i)'s small items exception applied, and political communications conveyed via SMS need not contain disclaimers. *Id.* The small items exemption should continue to apply to forms of communication where limited numbers of characters or screen space preclude realistic inclusion of a standard disclaimer.

The FEC has declined to impose disclaimer requirements to Internet-based communications where "technological limitations" render a disclaimer "impracticable." *Club for Growth*, A.O. 2007-33, at 3 (July 29, 2008). In *Google, Inc.*, A.O. 2010-19, at 1 (Oct. 8, 2010), for example, the Commission concluded the requestor search engine was not required to include disclaimers in political advertisements disseminated through its AdWords program. Each

AdWords advertisement was comprised of a 25-character headline, accompanied by two lines of text and a world wide web address that collectively could not exceed 70 characters. *Id.* Although the Commission could not agree on a rationale, *id.* at 2, Chairman Matthew S. Petersen and two other Commissioners concluded § 110.11(f)(1)(ii)'s impracticability exception applied, *see* Concurring Statement of Chairman Matthew S. Petersen, *Google, Inc.*, A.O. 2010-19, at 1 (Oct. 8, 2010); *see also* Statement for the Record by Commissioner Caroline C. Hunter, A.O. 2010-19, at 6 (Dec. 17, 2010). Applying existing exemptions is far preferable to imposing complicated, technically demanding, and potentially expensive new requirements, such as requiring the use of “rollover display[s], links to a Web page, or ‘other technological means’” of providing disclaimer information. 76 FED. REG. at 63,569.

6. The Commission should repeal the regulation requiring disclaimers on Large-Scale Political Committee E-mails because the FECA does not authorize it

Finally, the Commission should repeal the portion of 11 C.F.R. § 110.11(a)(1) requiring inclusion of disclaimers on “electronic mail of more than 500 substantially similar communications when sent by a political committee,” because it is not authorized by the FECA. The FECA provides, in relevant part, disclaimers are required whenever a political committee “makes a disbursement for the purpose of funding” any “mailing” or “other type of general public political advertising.” 52 U.S.C. § 30120(a). Electronic mail does not fall within either of these categories.

The FECA carefully distinguishes between traditional physical mail and e-mail. *Compare* 52 U.S.C. § 30120(a) (discussing “mailings”), *with id.* § 30104(d)(1) (discussing electronic mail). The Commission itself has recognized Congress’ conclusion that “e-mail is appropriately regulated differently than postal mail.” 71 FED. REG. at 18,597. Section 30120(a)’s reference to “mailing[s]” from political committees therefore neither includes e-mail, nor empowers the FEC to require the inclusion of disclaimers on e-mails from political committees.

E-mail also does not constitute “general public political advertising,” for at least four reasons 52 U.S.C. § 30120(a). First, e-mails from political committee cannot categorically and conclusively be designated as inherently “political,” without regard to content. Second, e-mails are not “public.” An e-mail is a communication from a sender to one or more specifically designated recipients. Only people with access to the recipients’ e-mailboxes, which are typically password-protected, may access any e-mails they receive. When a political committee sends more than 500 “substantially similar” e-mails, it is not engaged in a public communication, but rather a series of discrete private communications. Indeed, members of the general public generally are unable to access the contents of those private communications unless one or more recipients choose to share them.

Third, e-mails from political committees cannot be categorically and conclusively be characterized as “advertising,” regardless of content. Many e-mails from political committees may properly be regarded as pure First Amendment political communication, and do not “advertise”

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any candidate, service, or event in particular. Finally, and perhaps most significantly, the FEC itself has declared:

The Commission does not consider e-mail to be a form of “general public political advertising” because there is virtually no cost associated with sending e-mail communications, even thousands of e-mails to thousands of recipients, and there is nothing in the record that suggests a payment is normally required to do so.

71 FED. REG. at 18,596.

Consequently, the FECA neither requires, nor authorizes the FEC to require, political committees to include disclaimers on “electronic mail of more than 500 substantially similar communications.” 11 C.F.R. § 110.11(a)(1). That segment of § 110.11(a)(1) lacks statutory authorization, and is therefore invalid. The Commission should cease enforcing that requirement and engage in rulemaking proceedings to repeal it.

CONCLUSION

The Coolidge-Reagan Foundation wishes to present oral testimony at any hearing the Commission holds relating to this ANPRM or any draft regulations developed pursuant thereto.

Respectfully submitted,



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