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REG_2011_02_Ryan_Paul_11_14_2011_14_40_41_CLC & D21 Comments on ANPRM 2011-14 _Internet Communication Disclaimers 11.14.11.pdf

November 14, 2011

Submitted Electronically (<http://www.fec.gov/fosers>)

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

Re: Comments on Notice 2011-14: Internet Communication Disclaimers

Dear Ms. Rothstein:

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Commission's Advanced Notice of Proposed Rulemaking (ANPRM) 2011-14, published at 76 Fed. Reg. 63567 (Oct. 13, 2011), seeking comment on "whether to begin a rulemaking to revise its regulations concerning disclaimers on certain Internet communications and, if so, what changes should be made to those rules." *Id.*

The Commission explains in ANPRM 2011-14 that it has "recently considered two advisory opinion requests seeking to exempt from the disclaimer requirements, under the small items or impracticable exceptions, certain advertisements placed for a fee on another person's Web site." 76 Fed. Reg. at 63568. The Commission then goes on to summarize advisory opinion requests from Google (AOR 2010-19) and Facebook (AOR 2011-09) and notes that, "[i]n the course of considering these advisory opinion requests, the Commission received one comment from the public urging the Commission to undertake a rulemaking to address the disclaimer requirements in light of technological developments in Internet advertising[.]" and that the Commission is now considering whether to launch such a rulemaking. 76 Fed. Reg. at 63568.

Indeed, the Campaign Legal Center and Democracy 21 jointly filed comments in response to draft advisory opinions in the Facebook proceeding and wrote: "We urge the Commission to conduct a rulemaking to determine whether modified disclaimers are appropriate in the context of character-limited Internet communications and, if so, to establish specifications for such modified disclaimers."¹

¹ Campaign Legal Center and Democracy 21, Comments on Draft Advisory Opinions 2011-9 A and B at 2 (June 14, 2011), *available at* <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3250&START=1176178.pdf>.

We repeat here our support for the rulemaking contemplated in ANPRM 2011-14. We support the Commission's desire 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." 76 Fed. Reg. at 63568 (emphasis added). The Commission must not permit the free and robust use of new technologies to come at the expense of the public's right to know who is paying for a political advertisement on the Internet.

The Supreme Court has consistently upheld the Federal Election Campaign Act's disclaimer requirements because they "provid[e] the electorate with information" and "'insure that the voters are fully informed' about the person or group who is speaking." *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 196 (2003) and *Buckley v. Valeo*, 424 U.S. 1, 76 (1976)).

Neither the "small items" exception nor the "impracticable" exception to the disclaimer requirements apply to Internet ads. See 11 C.F.R. § 110.11(f)(1)(i)-(ii). The Internet's ability to facilitate communication—including not only political advertising, but also communication about who is paying for political advertising—is among its principle virtues. The Internet suffers none of the limitations of buttons, pens, skywriting or water towers. See 11 C.F.R. 110.11(f)(1)(i)-(ii).

Innovation, not exemption, is the answer. Exempting Internet communications from the disclaimer requirements would ignore not only the importance of the governmental interests recognized by the Supreme Court to "provid[e] the electorate with information" and "'insure that the voters are fully informed' about the person or group who is speaking," *Citizens United*, 130 S. Ct. at 915, but would also ignore the limitless potential of the Internet to provide this information to voters in a practical way. Moreover, the Commission has a legal obligation to implement and enforce the disclaimer requirements of 2 U.S.C. § 441d, which includes no exemption for Internet advertising.

Internet advertising is a major growth area in political campaigns and thus, questions regarding application of the disclaimer requirements of 2 U.S.C. § 441d will undoubtedly recur. Rather than continuing to address this issue on a piecemeal basis through the advisory opinion process, we urge the Commission to conduct a rulemaking to consider the matter more comprehensively. Specifically, we urge the Commission to conduct a rulemaking to determine whether some modifications of the disclaimer specifications at 11 C.F.R. § 110.11 are appropriate in the context of character-limited Internet communications and, if so, to establish modified specifications for such disclaimers.

A rulemaking on this matter would give all interested parties the opportunity to fully consider and comment on the importance of disclaimers on paid political advertising, as well as viable, practical options for implementing the Act's disclaimer requirements in the environment of character-limited Internet communications.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

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