

Federal Election Commission Advisory Opinion Number 2002-9A

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CONCURRING OPINION IN ADVISORY OPINION 2002-09

of

COMMISSIONER BRADLEY A. SMITH and
COMMISSIONER MICHAEL E. TONER

We joined today's Commission opinion because we agree that if the advertising in question is covered by the disclaimer provisions of 2 U.S.C. 441d and 11 CFR 110.11, it is also excepted from the disclaimer requirements pursuant to 11 CFR 110.11(a)(6)(i). We add this concurrence only to note that it is not obvious to us that the activity described by the requestor is subject to the limits of 2 U.S.C. 441d at all.

Counsel for the requestor did not specifically ask whether the Act requires a disclaimer at all for this type of advertising. Rather, the requestor appears to have assumed that it did and sought an exception. See Letter of Diana Hartstein, May 14, 2002 ("Specifically, we are requesting an opinion that advertising on wireless digital telephones is analogous to advertising on the types of items (bumper stickers, pins, watertowers, etc.) that are exempt [sic] from the disclaimer requirement on grounds of impracticability."). Understandably, therefore, neither the General Counsel nor the Commission addressed the threshold question of whether the disclaimer requirements apply at all to the activity at issue.

The disclaimer provisions at 2 U.S.C. 441d, both now and after the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), apply to communications made through any "broadcast station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising." 1 SMS technology is a particular mode of delivering "content . through wireless telecommunications networks and Internet service providers to subscribers of wireless PCS digital phones." Advisory Opinion 2002-09 at 1. The disclaimer statute does not mention SMS technology directly, but more importantly, it

does not mention communications made over telecommunications networks or the Internet. In the recently enacted BCRA, Congress made no mention of any intention to cover Internet and electronic mail communications within the definitions of "public communication" or "communication" that are subject to regulation under the Act. Congress is aware of the terms "telecommunications" and "Internet", yet did not include communications over these media among those requiring disclaimers in section 441d(a). See Communications Decency Act of 1996, 47 U.S.C. 230(f)(1) (defining "Internet") and 231(e)(4) (including "electronic mail" and excluding "telecommunications services" from the definition of "Internet access service"). Accordingly, the Commission's recently enacted BCRA regulations do not include communications made by electronic mail or over the Internet within the definitions of "public communication", "mass mailing" and "telephone bank." See Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed Reg.49064 at 49071-73 (July 29, 2002).²

Section 441d(a) also contains a catchall provision, "or any other form of general public political advertising." Such catchall language, however, would not generally be sufficient to sweep in SMS technology. See Sutherland Statutes and Statutory Construction, section 47; 17 Ejusdem generis, Vol. 2A (6th ed. 2000) (general language following a listing of specific terms does not indicate congressional intent to include separate and distinct terms that are not listed). When applied to section 441d(a), this rule of construction teaches that fliers or church circulars might be examples of a "newspaper" or a "magazine." A park bench or billboard may be a form of "outdoor advertising facility." But well-settled, congressionally recognized terms that are not listed in the statute, such as "Internet" or "telecommunications networks", are, as a general rule, not to be included within the ambit of the catchall provision.

We have joined the Commission's opinion because we agree that these advertisements, if subject to the general provisions of the Act, are excepted from the disclaimer provisions under 11 CFR 110.11(a)(6)(i). Furthermore, we believe it to be sound policy to allow political advertisers to explore the benefits of this evolving and exciting communications technology without being hamstrung by a rigid and sterile application of the Commission's disclaimer rules, which were promulgated years before this technology was ever developed. However, in light of the requestor's failure to raise the issue, and voicing no opinion on the matter here, we reserve for future rulemakings the broader

question of whether this kind of activity is subject at all to the disclaimer requirements of 2 U.S.C. 441d.

_____(signed)_____ 9-3-02 _____
Bradley A. Smith Date
Commissioner

_____(signed)_____ 9-3-02 _____
Michael E. Toner Date
Commissioner

1 The disclaimer provisions also apply to "electioneering communications," but electioneering communications are limited to messages transmitted through cable, broadcast or satellite media, and do not apply to telecommunications networks or the Internet. See 2 U.S.C. 434(f)(3), as amended by BCRA; see also Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed Reg. 49064 at 49071-73 (July 29, 2002).

2 BCRA's definition of "public communication" differs slightly from the types of media listed in section 441d(a). "Public communication" includes "telephone banks," which may or may not include (500 or more similar) SMS messages made over telecommunications networks, but it is not clear, as SMS technology has an Internet component as well. In any event, "public communications," as defined at 2 U.S.C 431(22) as amended by BCRA, are not subject to the disclaimer requirements of 2 U.S.C. 441d(a).