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July 24, 2017

Federal Election Commission
Office of General Counsel
Attn: Lisa J. Stevenson
999 E Street, N.W.
Washington, D.C. 20463

RECEIVED
By Office of General Counsel at 4:37 pm, Jul 24, 2017

RE: Public Comment on Advisory Opinion Request 2017-05
Great America PAC and Committee to Defend the President

Dear Ms. Stevenson,

Please accept this public comment on the above-captioned advisory opinion request.

1. As discussed at the hearing, Great America PAC ("GAP") and Committee to Defend the President ("CDP") concur in both drafts' proposed resolutions to Questions 1 and 2 (with the exception of the Commission's concerns regarding the validity of CDP's Twitter Handle under 11 C.F.R. § 102.14(a), which is beyond the scope of CDP's request).

2. With regard to Question 3, GAP and CDP urge the Commission to conclude a non-connected political committee may use its Twitter handle as the substantive equivalent of a "World Wide Web address" to satisfy the disclaimer requirements of 11 C.F.R. § 110.11. Both drafts currently provide "a political committee may not substitute alternative identifying information in place of a World Wide Web Address." Draft A, p. 8, lines 3-4; Draft B, p. 8, lines 8-9.

Especially in light of the rapid pace of technological development, the Commission should avoid elevating form over substance by adopting a narrow, hyper-literal construction of 52 U.S.C. § 30120(a)(3). As discussed at the hearing, the purpose of requiring a speaker to include its address, phone number, or world wide web address in disclaimers is to facilitate communication and interaction between the speaker and the audience. That portion of the disclaimer allows viewers or listeners to send feedback to, ask questions of, compliment, protest, contribute to, or otherwise engage with the speaker. A Twitter handle plays this same core function, allowing for much more immediate, interactive engagement with audience members than a physical address or even world wide web address. A speaker's Twitter handle has many of the same essential characteristics as a conventional world wide web address and performs the same essential functions within the Commission's regulatory scheme even more effectively than such addresses.

The Commission has generally eschewed a strict construction of 52 U.S.C. § 30120's disclaimer requirements. Neither the small items exception, 11 C.F.R. § 110.11(f)(1)(i), nor the impracticability exception, *id.* § 110.11(f)(1)(ii), appear in § 30120's text. To the contrary, the statute provides disclaimer requirements apply "***[w]henever*** a political committee makes a disbursement" for certain types of political communications. 52 U.S.C. § 30120(a) (emphasis added). Nevertheless, the Commission has recognized the need to construe the statute in a flexible, practical manner that best facilitates its purposes, interpreting its broad language as implicitly authorizing such reasonable exceptions. The Commission should adopt a similarly broad, purposivist construction of the phrase "world wide web" in § 30120(a)(3).

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In *Aaron Schock*, A.O. 2007-26, at 6 (Dec. 10, 2007), for example, the Commission refused to enforce a statute and accompanying regulation, 2 U.S.C. § 441i(e)(2) and 11 C.F.R. 300.63, by their "literal terms," but rather considered their underlying "rationale." It ultimately construed them in a manner that would best further their purpose. *Id.* The Commission should do the same in this case with the term "world wide web," construing it in light of the quickly evolving nature of online interactive technology and the purposes underlying § 30120's requirements.

The current proposed drafts contend a Twitter handle "is different from a World Wide Web address" in two "material respects." Draft A, p. 8, line 5; Draft B, p. 8, line 10. ***First***, they assert a web address contains a "'domain name' . . . that corresponds to a unique 'location on the Internet,'" while "a Twitter handle does not refer directly to a specific place on the internet." Draft A, p. 8, lines 6-9; Draft B, p. 9, lines 11-14. In actuality, a domain name does not necessarily lead directly to a speaker's website. A speaker can obtain a "shortened" URL for its website that effectively acts as a portal through services such as bit.ly and tinyurl.com. A user who inputs a shortened URL is sent to an intermediary site, from which he is then redirected to the speaker's main website at its typical URL. In light of these technological "way stations," a Twitter handle can be a much more accurate and direct mode of communication and engagement than a traditional web address.

Moreover, if a Twitter handle is typed into the address bar of many web browsers, it often will lead to a unique place on the Internet: the domain page on Twitter's website corresponding to the speaker's handle, featuring its Twitter feed. At the very worst, typing a Twitter handle into an address bar will lead to search results that immediately direct the user to the Twitter domain page. Thus, it is not entirely accurate to distinguish a Twitter handle from a World Wide Web address on the grounds it does not lead listeners, viewers, or readers to a unique location on the Internet.

Second, the drafts contend "a Twitter handle, unlike a domain name, gives no information about what type of organization it references (for example, '.com,' '.org,' or 'gov.')." Draft A, p. 8, lines 11-12; Draft B, p. 8, lines 16-17. As discussed at the hearing, however, any type of entity is permitted to receive any type of domain name except for a ".gov" address. Thus, the fact a traditional World Wide Web address ends in a ".com," ".net," ".org," or some other extension tells a reader, viewer, or listener nothing about the person or entity that posted the page or the nature of the page itself.

At the hearing, the Commission appeared to accept a bit.ly URL like http://bit.ly/1vrV2Om may fulfill the disclaimer requirement, yet such an address facially provides no meaningful information to a reader. Indeed, a committee could alternatively fulfill the disclaimer requirement by including different URLs on different communications that facially appear to refer to different entities, yet all redirect to the same website. A Twitter handle, in contrast, directly fulfills the goal of maximizing the information available to the public because it is a single, consistent name related directly and uniquely to the speaker's Twitter profile page and Twitter stream.

It also bears emphasis that, in large part due to President Donald J. Trump's frequent and highly successful Twitter usage, Twitter has become a ubiquitous and recognized part of both political and general social discourse. Twitter messages are even regularly included as part of both televised newscasts and news articles.

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For these reasons, rather than attempting to distinguish Twitter handles from conventional URLs, the Commission should revise and adopt Draft A, to allow the use of a Twitter handle as the substantive equivalent of a World Wide Web address to satisfy 11 C.F.R. § 110.11. The Commission could even stipulate such authorization is limited to cases where the speaker's Twitter domain page itself contains a "permanent street address, telephone number, or World Wide Web address" for the speaker (as discussed in Question 4, *see* Draft A, p. 8-9; Draft B, p. 9, lines 3-8).

3. GAP and CDP concur in Draft A's response to Question 5, as well as its recognition a person's or entity's Twitter profile page is not ***their*** website, but rather simply a unique location on the Internet, *see supra* p. 1, within the overall http://www.Twitter.com web domain. GAP and CDP urge the Commission to adopt Draft A's reasoning and resolution of that issue.

GAP and CDP urge the Commission to reject Draft B's response to Question 5, which not only concludes a speaker's Twitter profile page qualifies as its web page, *see* Draft B, pp. 10-11, but would require speakers to include disclaimers on their Twitter profile pages on the grounds neither the "small items" exception, 11 C.F.R. § 110.11(f)(1)(i), nor the "impracticability" exception, *id.* § 110.11(f)(1)(ii), apply. *See* Draft B, pp. 11-12. Draft B points out Twitter allows users to include a biography of up to 160 characters, as well as a website address, *id.*, p. 11, lines 16-17, while the required disclaimer is 68 characters, *id.* p. 11, n.11. The existence of a separate space to insert a traditional website URL does not detract from the fact, however, that Twitter allows only 160 characters for a speaker to identify itself and/or its core mission to its audience.

Rather than focusing on the objective characteristics and limitations of the Twitter profile page medium, however, Draft B focuses on the specific biographies GAP and CDP presently use. It points out CDP's present biography is only 71 characters (leaving 89 characters for a disclaimer), while GAP's present biography is only 63 characters (leaving 97 characters for a disclaimer). The applicability of the "small items" exception to Twitter profile pages cannot depend on the essentially arbitrary identity of the requestor or the particular biography they have chosen to employ at a particular moment in time. The fact CDP and GAP have not presently used more of the available biography space does not change the fact the space is extremely limited. Requiring speakers to include a 68-character disclaimer would consume over 40% of it.

As discussed in requestors' original submission, the Commission previously applied the "small items" exception to SMS messages over PCS phones, which were limited to 160 characters each. *Target Wireless*, A.O. 2002-09, at 1 (Aug. 23, 2002). In *Target Wireless*, the Commission did not focus on the length of any particular message the requestor wished to send, or whether it would be possible to include both a particular message and the required disclaimer within the 160-character limit. To the contrary, the Commission focused on the objective limits of the medium itself. Recognizing the required disclaimer would consume 30 of the 160 available characters, the Commission easily concluded the small items exception alleviated the need to devote such a high proportion of available space to a disclaimer. *Id.* at 4. Here, as Draft B itself points out, *see* Draft B, p. 11, line 16, the disclaimer at issue would consume 68 of the 160 available characters. Thus, both the methodology and the specific conclusion of *Target Wireless* mitigate strongly in favor of applying the small items exception to Twitter profile pages (in the event a speaker's Twitter profile page is treated as its webpage in the first place).

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The limited space available in the profile field on a Twitter profile page is comparable to the limited space on "[b]umper stickers" and "pins." 11 C.F.R. § 110.11(f)(i). Indeed, the screens on many mobile devices are not much larger than most campaign buttons, and most screens are certainly smaller than hats. The "small items" exemption alleviates the need to include disclaimers on such material, even though a speaker conceivably could squeeze both their message and the disclaimer into the available space. Likewise, speakers should not be required to devote 40% of the biography field on their Twitter profile pages to disclaimers.

4. Finally, GAP and CDP urge the Commission to reconsider the issues raised by Draft B's proposed response to Question 7, which concludes GAP and CDP "may [not] satisfy the disclaimer requirements by including the disclaimer in a graphic that may not be visible on mobile devices." Draft B, p. 13, lines 20-22.

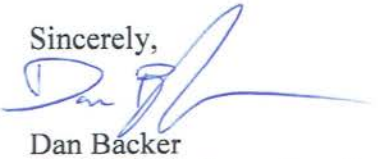
In traditional print communications, the size and visibility of a disclaimer are primarily within the control of the speaker itself. A speaker may comply with statutory requirements simply by ensuring the required text is included, at an appropriate size, on an advertisement it submits to a newspaper 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 total 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.

Electronic communications are vital to modern political discourse. The Commission should be extremely reticent to hold an entity responsible for the fact its required disclaimer does not appear visible or legible on certain devices. Draft B's approach threatens to open the door to a flood of "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 characteristics of electronic communications, the Commission should conclude a speaker satisfies any applicable disclaimer requirements by taking reasonable steps to include such disclaimers, rather than holding them strictly liable should a disclaimer be not visible or illegible on certain devices.

Thank you for your time and consideration.

Sincerely,



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