

December 2, 2016

Submitted electronically to www.fec.gov/fosers

Neven F. Stipanovic
Acting Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on REG 2013-01: “Technological Modernization”

Dear Mr. Stipanovic,

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Notice of Proposed Rulemaking on “Technological Modernization.” *See* 81 Fed. Reg. 76416 (Nov. 2, 2016).

The NPRM proposes revisions to over 100 FEC regulations to reflect technological advances and their impact on the financing of campaigns for federal office. Among other things, the NPRM proposes to update the definition of “public communication” at 11 C.F.R. § 100.26 to encompass not only communications placed for a fee on another person’s “Web site,” but also paid communications on an “internet-enabled device of application.”¹ 81 Fed. Reg. at 76433. The NPRM similarly proposes to update the disclaimer provisions at 11 C.F.R. § 110.11 to encompass not only “Web sites,” but also “internet applications.” *Id.* at 76434.

For the reasons set forth below we support the Commission’s proposed updates to 11 C.F.R. §§ 100.26 and 110.11, and agree that it offers a reasonable clarification reflective of how Internet use and technology has evolved in the past decade.

However, as a threshold matter, we urge the Commission to revise the definition of “public communication” to stop the alarming increase in the abuse of the so-called “Internet exemption”² to justify the expenditure of millions of dollars raised outside the limits and prohibitions of FECA to fund political activity that is coordinated with a candidate.³ Although the Internet exemption was intended only to allow “individual

¹ The definition of “public communication” is relevant to the application of certain disclaimer requirements, 11 CFR 110.11(a), coordination rules, 11 C.F.R. 109.21(c), and financing limitations, *e.g.*, 11 C.F.R. §§ 100.24(b)(3), 300.32(a)(1)–(2), 300.71.

² Currently, the definition of public communications at 11 C.F.R. § 100.26 exempts “communications over the Internet, except for communications placed for a fee on another person’s Web site.”

³ *See* Matter Under Review 7147 (Correct the Record).

citizens . . . using the internet to speak freely regarding candidates and elections” on their own website,⁴ single candidate super-PACs and section 501(c)(4) organizations are now claiming that virtually any activity that is loosely connected to something published on the Internet is exempted from the definition of a “public communication,” and thus from the definition of “coordinated communication.”⁵

Under this misguided interpretation, we have seen, for instance, a political committee claim that it can spend millions of dollars for staff time, research, polling, fundraising, media relations, as well as for the design and production of sophisticated political ads, in overt coordination with a candidate as long as the finished product is placed on the Internet. Although such expenditures can still meet the definition of “coordinated expenditure” at 11 C.F.R. § 109.20, the FEC should consider amending § 100.26 to make clear that any expenditure beyond a de minimis amount for Internet communications is not exempt from the definition of “public communication.”

Beyond this problem, it is clear that most paid digital political advertisements that are viewed on a mobile app, rather than viewed on a “web site,” still constitute “general public political advertising” and are thus “public communications” under current 11 C.F.R. § 100.26.⁶

For example, there is no discernible difference between a paid ad that appears during an episode of *Two Broke Girls* watched on the Hulu Web site, and a paid ad that appears during a *Two Broke Girls* episode watched through the Hulu mobile app. It would be an absurd outcome, and contrary to Congressional intent, if the former were considered a “public communication” but the latter was not.

Yet, given the recent pattern of aggressive legal interpretations of FECA and its implementing regulations,⁷ there is a risk that some will make such an argument. The

⁴ *Explanation and Justification for Internet Communications*, 71 Fed. Reg. 18589 (Apr. 12, 2006).

⁵ The “coordinated communication” regulation at 11 C.F.R. § 109.21 applies to expenditures for “public communications.”

⁶ “Public communication means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term general public political advertising shall not include communications over the Internet, except for communications placed for a fee on another person's Web site.” 11 C.F.R. § 100.26.

⁷ For example, Republican campaign finance attorney Robert Kelner told the *Washington Post* earlier this year that “We are in an environment in which there has been virtually no enforcement of the campaign finance laws,” such that “it would arguably be political malpractice” not to advise clients that they may push the legal envelope. Matea Gold, *Trump’s Deal With the RNC Shows How Big Money Is Flowing Back to the Parties*, WASH. POST (May 18, 2016),

proposed amendment makes abundantly clear that there is no loophole allowing an ad that appears on a website to be regulated, while one that appears on a mobile app is not.

The Commission's proposed clarification is particularly important because paid digital political advertisements are increasingly viewed on mobile apps rather than websites.

According to some estimates, campaigns and political committees spent around \$1 billion on digital advertising in the 2016 election cycle, with approximately half spent on mobile and social ads.⁸ Today, approximately two-thirds of Americans own an Internet-enabled smartphone,⁹ and two-thirds of American adults use social media.¹⁰

Facebook is a major recipient of that digital campaign spending. The National Republican Congressional Committee, for example, reportedly increased its Facebook advertising by 1,500% over the previous election cycle.¹¹ And Donald Trump's successful presidential campaign "embraced Facebook as a key advertising channel in a way that no presidential campaign has before," *Wired* reported.¹²

Increasingly, those advertisements are viewed through the Facebook app rather than on the Facebook website. Indeed, 58.9 percent of Facebook users now access the social media network *exclusively* from a mobile device, according to the company's third

https://www.washingtonpost.com/politics/trumps-deal-with-the-rnc-shows-how-big-money-is-flowing-back-to-the-parties/2016/05/18/4d84e14a-1d11-11e6-b6e0-c53b7ef63b45_story.html.

⁸ James Hercher, *After a Long Courtship, DC and Ad Tech Are Getting Serious*, ADEXCHANGER (Aug. 19, 2015), <https://adexchanger.com/online-advertising/after-a-long-courtship-dc-and-ad-tech-are-getting-serious/>.

⁹ Tanzina Vega, *The Next Political Battleground: Your Phone*, CNN (May 29, 2015), <http://www.cnn.com/2015/05/29/politics/2016-presidential-campaigns-mobile-technology/>.

¹⁰ Andrew Perrin, *Social Media Usage 2005-2015*, Pew Research Center (Oct. 8, 2015), <http://www.pewinternet.org/2015/10/08/social-networking-usage-2005-2015/>.

¹¹ James Hercher, *Trump Did Have a Paid Media Strategy, and it Focused On Facebook*, ADEXCHANGER (Nov. 15, 2016) <https://adexchanger.com/ad-exchange-news/trump-paid-media-strategy-focused-facebook/>.

¹² Issie Lapowsky, *Here's How Facebook Actually Won Donald Trump the Presidency*, WIRED (Nov. 15, 2016), <https://www.wired.com/2016/11/facebook-won-trump-election-not-just-fake-news/>.

quarter 2016 earnings report.¹³ Mobile advertising revenue represents approximately 84 percent of the company’s advertising revenue.¹⁴

Again, it would be absurd if a paid political Facebook ad were considered a “public communication” when viewed on the Facebook website, but not when viewed through the Facebook app—where a majority of its users now access the social media platform.

The Commission’s proposed amendments to 11 C.F.R. §§ 100.26 and 110.11 are also in keeping with Congressional intent. The current rules were promulgated in 2006, following the D.C. district court decision in *Shays v. Federal Election Commission*.¹⁵ The court in that case invalidated earlier Commission regulations that exempted all “communications over the Internet” from the definition of “public communications,” holding that such an exclusion undermined the congressional objective of regulating abuses associated with coordinated contributions, and that “Congress, by the plain terms of the statute, clearly intended for the term ‘public communication’ to capture all forms of ‘general public political advertising,’ including Internet communications. *Id.* at 67-68.”¹⁶

Following that decision, the Commission conducted a rulemaking to clarify the rules for Internet activity, which it published in 2006. 11 C.F.R. §§ 100, 110, 114. *Explanation and Justification for Internet Communications*, 71 Fed.Reg. 18589 (April 12, 2006).¹⁷ Those rules created a definition of “public communication” that included communications placed for a fee on another person’s “Web site.” 11 C.F.R. § 100.26.

As the Commission notes in the current NPRM, the 2006 rule focused on “Web sites” because that was the predominant means of paid Internet advertising at the time. However, in the decade since, both technology and political campaigning have evolved.

¹³ See Emil Protalinski, *Facebook Passes 1 Million Mobile-Only Monthly Users*, VENTURE BEAT (Nov. 2, 2016), <http://venturebeat.com/2016/11/02/facebook-passes-1-billion-mobile-only-monthly-users/>.

¹⁴ Press Release, *Facebook Announces Third-Quarter 2016 Results*, Facebook Investor Relations (Nov. 2, 2016), <https://investor.fb.com/investor-news/press-release-details/2016/Facebook-Reports-Third-Quarter-2016-Results/default.aspx>.

¹⁵ 337 F. Supp. 2d 28 (D.D.C. 2004), aff’d, 414 F.3d 76 (D.C. Cir. 2005) reh’g en banc denied (Oct. 21, 2005).

¹⁶ Additionally, the Court held that allowing an entire class of activity “to be completely unregulated irrespective of the level of coordination between the communication’s publisher and a political party or federal candidate, would permit an evasion of campaign finance laws, thus ‘unduly compromis[ing] the Act’s purposes,’ and ‘creat[ing] the potential for gross abuse.’” *Id.* (citing *Orloski v. Federal Election Commission*, 795 F.2d 156, 164, 165 (D.C.Cir.1986)).

¹⁷ Available at http://www.fec.gov/law/cfr/ej_compilation/2006/notice_2006-8.pdf.

The Commission correctly proposes that its rules should evolve as well with these changes.

We support the Commission's proposal to update and clarify its rules.

Sincerely,

/s/ Lawrence Noble

/s/ Fred Wertheimer

Lawrence M. Noble
Campaign Legal Center

Fred Wertheimer
Democracy 21

Lawrence M. Noble
Brendan M. Fischer
The Campaign Legal Center
1411 K Street NW, Suite 1400
Washington, DC 20005

Counsel to the Campaign Legal Center

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street NW, Suite 600
Washington, DC 20005

Counsel to Democracy 21