

FEDERAL ELECTION COMMISSION WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)	
)	MUR 6729
Checks and Balances for Economic Growth)	

STATEMENT OF REASONS OF CHAIRMAN LEE E. GOODMAN AND COMMISSIONERS CAROLINE C. HUNTER AND MATTHEW S. PETERSEN

This matter arose from a complaint alleging that Checks and Balances for Economic Growth ("Checks and Balances") violated the Federal Election Campaign Act of 1971, as amended ("Act" or "FECA"), by not reporting its costs associated with, and not including disclaimers in, two videos it produced and posted for free on the Internet site YouTube. The Commission's Office of General Counsel ("OGC") recommended that the Commission find no reason to believe a violation occurred because free Internet postings by groups like Checks and Balances are exempt from regulation. Consistent with OGC's recommendation, we voted to find no reason to believe a violation occurred and the matter was closed. Our colleagues, however, disagreed with OGC's recommendation, voted against the motion to find no reason to believe, and sought to open an investigation into Checks and Balances. In doing so, they ignored well-established Commission rules that free online political speech from FEC regulation. We write because we are concerned by the apparent trend among some on the Commission to regulate and deter citizens' use of technology and the Internet to facilitate public political discourse.

See generally Complaint; see also Response at 1 (providing YouTube hyperlink to videos).

See First General Counsel's Report at 2, 5–6, 10.

Sept. 16, 2014 Certification.

⁴ *Id.*

See, e.g., Advisory Opinion 2014-02 (Make Your Laws PAC), Statement of Chairman Lee E. Goodman (explaining that Commission's vote approving Draft C of advisory opinion failed to support an unqualified endorsement of contributions using bitcoins); compare Advisory Opinion 2014-02 (Make Your Laws PAC), Agenda Document No. 14-24 (Draft A), with id., Agenda Document No. 14-24-A (Draft B) and id., Agenda Document No. 14-24-B (Draft C); see also, e.g., Advisory Opinion 2013-18 (Revolution Messaging, LLC), Certification (failing to issue advisory opinion exempting mobile phone advertisements from disclaimer requirements under small items exemption for public communications); Advisory Opinion 2013-15 (Conservative Action Fund), Certification (failing to issue advisory opinion treating receipt and contribution of bitcoins as in-kind contributions).

I. BACKGROUND

The Complaint alleged that, in 2012, Checks and Balances broadcast two television advertisements in Ohio entitled "Why Would You Lie?" and "The War On Coal: Sherrod Brown v. Ohio Coal Miners" ("War on Coal"). These communications allegedly constituted "either independent expenditures or electioneering communications," and thus the Complaint asserted that Checks and Balances violated 52 U.S.C. § 30104(g) (formerly 2 U.S.C. § 434(g)) and/or 52 U.S.C. § 30104 (f)(1) (formerly 2 U.S.C. § 434(f)(1)) by failing to disclose its costs associated with producing and distributing them. The Complaint also alleged that Checks and Balances violated 52 U.S.C. § 30120(d)(2) (formerly 2 U.S.C. § 441d(d)(2)) by not including appropriate disclaimers in either communication.

Checks and Balances submitted a response supported by a signed, sworn, and notarized declaration from its President, Dan Perrin. Neither the Response nor the declaration disputed that Checks and Balances produced and distributed the videos identified in the Complaint, but Checks and Balances denied that the communications violated FECA. According to the Response and declaration, the videos "were run only on the Internet" — posted on YouTube 11 — and thus "required no disclaimer and no reporting to the FEC." 12

II. LEGAL ANALYSIS

Because Checks and Balances' videos were distributed for free only on the Internet, they did not violate any FEC reporting or disclaimer requirements. The communications were not "electioneering communications," as that term includes only "broadcast, cable, or satellite communication[s]." Nor were they "independent expenditures," because Commission

Complaint ¶ 27. The Complaint claimed that Checks and Balances spent at least \$896,290 on television air time for these ads, id. ¶ 12, and attached to the Complaint were copies of contracts, invoices, and purchase orders that Ohio television stations submitted to the Federal Communications Commission relating to Checks and Balances' purchase of at least \$534,850 in air time between October 16 and October 29, 2012, purportedly relating to the two communications, id. ¶ 14. In response, however, Checks and Balances explained that these financial records attached to the Complaint related to the production and distribution of a third advertisement not at issue in the complaint that was broadcast on television but did not trigger any reporting or disclaimer requirements. Response at 2; id., Perrin Declaration ¶ 4. No information about the content of this third advertisement is in the record. See First General Counsel's Report at 10 n.5.

See Complaint ¶¶ 27–36.

⁸ *Id.* ¶¶ 37–38.

See generally Response.

ld. at 1 (emphasis in original); id., Perrin Declaration ¶ 3 ("The two advertisements cited by CREW in its Verified Complaint only appeared on the Internet.").

See Response at 1.

¹² Id

¹³ 52 U.S.C. § 30104(f)(3)(A)(i) (formerly 2 U.S.C. § 434(f)(3)(A)(i)); 11 C.F.R. § 100.29(a).

regulations exclude such Internet communications from the Act's definition of "expenditure." ¹⁴

Indeed, when an individual or group engages in uncompensated "Internet activities" — meaning "any . . . form of communication distributed over the Internet" — for the purpose of influencing a Federal election, neither their services nor their use of equipment or services to communicate over the Internet constitute "expenditures" under the Act, unless the communications are placed for a fee on another person's website. This exclusion from regulation is known as the "Internet exemption." The Commission has explained that this is a "broad exemption" intended to "make clear, appropriately so, that individuals [and groups] engaging in unfettered political discourse over the Internet using their own computer facilities (or those publicly available) [are] not . . . subject to regulation under the campaign finance laws." 16

As OGC observed,¹⁷ the direct costs of producing an Internet communication are exempt from regulation on the same basis as costs associated with distributing the communication.¹⁸ Indeed, Advisory Opinion 2008-10 (VoterVoter.com) recognized that

We also agreed with OGC's recommendation that we conclude that Checks and Balances' videos were not independent expenditures for the secondary reason that they contained no "express advocacy" as that term is defined under both 11 C.F.R. §§ 100.22(a) and 100.22(b). See First General Counsel's Report at 6–10. Although we question whether 11 C.F.R. § 100.22(b) has any continuing validity, see MUR 6346 (Cornerstone Action), Statement of Reasons of Vice Chairman Donald F. McGahn and Comm'rs Caroline C. Hunter and Matthew S. Petersen at 9–14 (citing Maine Right to Life Comm. v. FEC, 98 F.3d 1, 1 (1st Cir. 1996)), even assuming arguendo that it does, we agreed with OGC's application of the provision to the facts in this matter. Because Checks and Balances' videos did not contain express advocacy under 11 C.F.R. § 100.22, we concluded that to be another, secondary basis for not finding reason to believe Checks and Balances' committed a reporting violation.

See 11 C.F.R. § 100.155. Moreover, 11 C.F.R. § 100.94 exempts uncompensated Internet activity from the Act's definition of "contribution."

Internet Communications, 71 Fed. Reg. 18,589, 18,603 (Apr. 12, 2006) (internal quotation marks omitted); see also Internet Communications and Activity, FEC Brochure at 1 (May 2006), available at http://www.fec.gov/pages/brochures/internetcomm.pdf ("An uncompensated individual or group of individuals may engage in Internet activities for the purpose of influencing a federal election without restriction. The activity would not trigger any registration or reporting requirements with the FEC." (citing 11 C.F.R. § 100.155) (emphasis added)).

First General Counsel's Report at 6 ("[A]ny production costs the Respondent may have incurred would not constitute contributions or expenditures and, accordingly, would not give rise to an obligation to report those costs as independent expenditures.").

The Internet exemption's applicability to production costs was considered by the Commission in the 2006 rulemaking. For example, a joint comment observed that "[t]ypically, the Commission treats the costs of producing campaign-related materials the same as the costs of distributing the materials" and thus proposed the Commission establish a threshold (e.g., \$25,000) over which the costs of preparing materials for distribution over the Internet would lose the exemption and become subject to the campaign finance laws. Democracy 21, Campaign Legal Center and Center for Responsive Politics, Comment on Notice of 2005-10: Internet Communications at 12 n.10, 16 (June 3, 2005). The Commission, however, decided not to limit the exemption for production costs in the final regulations. Another commenter was asked whether it would be appropriate for the Commission to exempt communications made exclusively over the Internet from the definition of

"[t]he costs incurred by an individual in creating an ad [are] covered by the Internet exemption from the definition of 'expenditure' so long as the creator is not also purchasing TV airtime for the ad he or she created." Consequently, "[f]or purposes of reporting [independent expenditures] under 11 CFR [§] 109.10, . . . creation costs [do] not become reportable independent expenditures [unless and] until the ad is publicly distributed or otherwise publicly disseminated" — a principle the Commission has reaffirmed to the public many times since issuing Advisory Opinion 2008-10 (VoterVoter.com).²¹

In light of Checks and Balances' uncontroverted sworn statements that its videos appeared solely on the Internet, and because there was no evidence the videos were posted to YouTube or any other website for a fee, we agreed with OGC that the communications (including any associated production costs) were exempt from FEC regulation. Accordingly, Checks and Balances had no obligation to report the communications as independent expenditures.²²

Furthermore, neither video needed a disclaimer because, as OGC recognized, communications distributed only over the Internet do not require disclaimers.²³ As to persons other than political committees, disclaimers are required on only electioneering communications and public communications that contain express advocacy.²⁴ Checks and Balances' videos, as noted, were not electioneering communications. And the definition of "public communication" excludes "communications over the Internet, except for communications placed *for a fee* on another person's Web site."²⁵ Since no facts suggested

[&]quot;expenditure" if those communications were made by a "a group of individuals who get together . . . and all of their activity is conducted through the Internet, and the Website contains . . . videos that are produced and contain express advocacy." Tr. of Public Hearing on Internet Communications at 64–65 (June 29, 2005) (testimony of Mr. Robert Bauer). This commenter "absolutely" endorsed such an exemption. *Id.* at 65.

Advisory Opinion 2008-10 (VoterVoter.com) at 7.

²⁰ Id. at 8 n.12.

See, e.g., The Record, (FEC, D.C.), Dec. 2008, at 4 ("Costs incurred by an individual in creating an ad are exempt from the definition of 'expenditure,' as long as the creator is not also purchasing TV airtime for the ad he or she created."). In fact, the language from Advisory Opinion 2008-10 (VoterVoter.com) was featured verbatim in the Commission's monthly Corporate and Labor Guide Supplement and Non-Connected Supplement publications for over two-and-a-half years, from 2008 until the Commission stopped publishing those supplements in 2011. See, e.g., Corporate & Labor Guide Supp., The Record (FEC, D.C.), Aug. 2011, at 36; id., Jul. 2011, at 36; id., Feb. 2010, at 34; id., Mar. 2009, at 26; see also, e.g., Nonconnected Supp., The Record, Aug. 2011, at 22.

See 52 U.S.C. § 30101(17) (formerly 2 U.S.C. § 431(17)) ("The term 'independent expenditure' means an expenditure by a person" (emphasis added)).

See First General Counsel's Report at 10 ("We agree that communications distributed on the internet require no disclaimer.").

See 11 C.F.R. § 110.11(a)(2) & (4).

²⁵ *Id.* § 100.26 (emphasis added).

Checks and Balances placed its videos on any website for a fee, they did not require disclaimers.

III. CONCLUSION

Over eight years ago, this Commission unanimously acknowledged that "[t]he Internet has changed the way in which individuals engage in political activity by expanding the opportunities for them to participate in campaigns and grassroots activities." Recognizing the Internet as a "unique and evolving mode of mass communication and political speech... distinct from other media," the Commission declared it would take a "restrained regulatory approach" with respect to online political activity. In this spirit, the Commission promulgated the Internet exemption to "remove any potential restrictions" on the ability of individuals and groups to use the Internet as a tool for civic engagement and political advocacy. Since then, this freedom has gained wide acceptance, as evidenced by the hundreds of thousands of political videos, websites, blogs, and other social media posted on the Internet without so much as an inquiry by the Commission. Regrettably, the 3-to-3 vote in this matter suggests a desire to retreat from these important protections for online political speech — a shift in course that could threaten the continued development of the Internet's virtual free marketplace of political ideas and democratic debate.

²⁶ Internet Communications, 71 Fed. Reg. 18,589, 18,603 (Apr. 12, 2006).

²⁷ Id. at 18,589.

²⁸ *Id*.

LEE E. GOODMAN Chairman	Oct. 24, 2014 Date
CAROLINE C. HUNTER Commissioner	10/23/14 Date
MATTHEW S. PETERSEN Commissioner	10/23/2014 Date