

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Lois Frankel for Congress and Janica Kyriacopoulos) **MUR 6911**
in her official capacity as treasurer, *et al.*)

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

I. INTRODUCTION

At issue in this matter is the Commission's regulation of campaign communications on free social media platforms such as Twitter. The Complaint alleged that several Respondent committees¹ have Twitter accounts² and have posted messages, known as "tweets," from those accounts without including disclaimers required under the Federal Election Campaign Act, as amended ("the Act"), and Commission regulations. Specifically, the Complaint alleged that disclaimers are required but missing on each Respondent's Twitter profile³ and all tweets from each Respondent's Twitter account. In support of this allegation, the Complaint argued that Twitter profiles are like "websites" and tweets are like "electronic mail" as those terms are used in 11 C.F.R. § 110.11(a).

¹ Respondent committees are Lois Frankel for Congress, Paul Spain for Congress, DNC Services Corporation/Democratic National Committee, and Republican National Committee.

² The complaint alleges the Respondent committees communicated on Twitter.com using the following unique Twitter usernames: @LoisFrankel, @spain22congress, @theDemocrats, and @GOP.

³ With respect to this alleged violation, we understand the Complaint's use of the term "Twitter account" to refer to the public display of that account on the Twitter profile. The Twitter profile, along with the username, identifies a Twitter user. See Profile, Twitter Help Center: The Twitter Glossary, <https://support.twitter.com/groups/50-welcome-to-twitter/topics/204-the-basics/articles/166337-the-twitter-glossary> (last visited Sept. 3, 2015) ("Twitter Glossary"). A Twitter user's profile displays information a user chooses to share publicly, such as lists of who follows the user and who the user follows, the user's "bio"—which is "a short (up to 160 characters) personal description"—and all of the user's tweets. See *id.* (and at definition of "bio").

Respondents Lois Frankel for Congress, Paul Spain for Congress,⁴ and DNC Services Corporation/Democratic National Committee (“DNC”) acknowledged in their responses that the identified Twitter usernames were theirs. Respondent Republican National Committee (“RNC”), in its response, admitted it had a Twitter account; the RNC’s website (gop.com) directed users to the Twitter username that was the subject of the Complaint. All Respondents denied the alleged violations of the Act and regulations. Several Respondents further asserted that even if their tweets constituted public communications or e-mail communications, they would be subject to the “small items” or “impracticable” exceptions to the disclaimer rule.⁵

The Commission’s Office of General Counsel (“OGC”) recommended that the Commission find no reason to believe Respondents had violated the Act or any Commission regulation by using the Twitter platform. For the reasons set forth below, we agreed with the OGC and voted to find no reason to believe the Respondents violated 52 U.S.C. § 30120(a) by failing to include disclaimers on Twitter profiles or tweets.

II. FACTUAL AND LEGAL ANALYSIS

The Act and Commission regulations require political committees to post disclaimers on certain communications.⁶ Included in the scope of this disclaimer requirement are: (1) all public communications by political committees; (2) all internet websites of political committees available to the general public; and (3) electronic mail of more than 500 substantially similar communications when sent by a political committee.⁷

⁴ Frankel and Spain were candidates in the 2014 general election in Florida’s 22d Congressional District.

⁵ See Lois Frankel for Congress Resp. at 3; RNC Resp. at 3; DNC Resp. at 4; 11 C.F.R. § 110.11(f)(i)-(ii).

⁶ See 52 U.S.C. § 30120(a)(1); 11 C.F.R. § 110.11(a)-(b).

⁷ 11 C.F.R. § 110.11(a)(1).

A. Respondents' Twitter Profiles and Tweets Are Not "Public Communications"

The Twitter profiles or tweets do not fall in the first category because the Twitter profiles and tweets in this matter do not constitute "public communications." Internet communications are regulated "public communications" only when they are "placed for a fee on another person's website."⁸ Twitter is a free service that does not charge users to create accounts, display profiles, or send tweets.⁹ The Complaint did not allege, and the information available in the record did not suggest, that any of the accounts or tweets at issue in this matter were placed on Twitter for a fee. Consequently, as free communications on Twitter, the Twitter profiles and tweets at issue are not "public communications" under 11 C.F.R. § 100.26.

B. Respondents' Twitter Profiles Do Not Constitute Committee "Websites" for Purposes of the Disclaimer Requirement

The Complaint alleged that Respondents' Twitter profiles should be treated as websites under 11 C.F.R. § 110.11(a) because they are available to the public.¹⁰ But section 110.11(a)(1) applies not to all websites "available to the public," but only to websites "of political committees."

Individuals and groups use social media platforms like the Twitter website to post information. While Twitter content—including each Respondent's profile—is created by users, it is placed on a third-party's website: Twitter.com.¹¹ Twitter creates, pays for, and maintains

⁸ *Id.* § 100.26.

⁹ See Twitter via SMS FAQs, <https://support.twitter.com/articles/14014-twitter-via-sms-faqs#> (last visited Sept. 3, 2015).

¹⁰ Compl. at 1.

¹¹ See Terms of Service, TWITTER (effective May 18, 2015), <https://twitter.com/tos?lang=en> (last visited Sept. 3, 2015) ("Twitter TOS") (stating that users must agree to Terms of Service that "govern [users'] access to and use of our Services, including our various websites . . . (collectively, the 'Services'), and any information, text, graphics, photos or other materials uploaded, downloaded or appearing on the Services (collectively referred to as 'Content')").

the right to restrict content on its website.¹² Twitter controls the terms by which users may access the website.¹³ And Twitter retains its ownership interests in the website and underlying software, while merely granting users a limited right to use Twitter's website, software, and other Twitter services.¹⁴

Therefore, a committee creating and posting a Twitter profile is posting that content on a third-party's website, not creating its own website. Accordingly, Respondents' Twitter profiles do not constitute committee websites for purposes of the disclaimer requirement.¹⁵

C. Respondents' Tweets Do Not Constitute "Electronic Mail" for Purposes of the Disclaimer Requirement

The Complaint alleges that Respondents' tweets should be treated as e-mails under section 110.11(a) because they are electronic (internet-based) messages.¹⁶ As noted above, section 110.11(a) requires disclaimers for "electronic mail of more than 500 substantially similar communications when sent by a political committee."

¹² See *id.* ¶ 7 ("All right, title, and interest in and to the Services (excluding Content provided by users) are and will remain the exclusive property of Twitter"); *id.* ¶ 8 ("We reserve the right at all times (but will not have an obligation) to remove or refuse to distribute any Content on the Services, to suspend or terminate users, and to reclaim usernames without liability to you"); cf. Committee on House Administration, *Member's Handbook* (adopted Dec. 16, 2011), available at <http://cha.house.gov/handbooks/members-congressional-handbook> (allowing members of the House of Representatives to establish "profiles, pages, channels or any similar presence on *third-party* sites that allow individuals or organizations to offer information about themselves to the public (Social Media Accounts)" (emphasis added)).

¹³ See Twitter TOS ¶ 8 (Twitter "reserve[s] the right at all times . . . to remove or refuse to distribute any Content on the Services, to suspend or terminate users, and to reclaim usernames"); see also *id.* at ¶10 (Twitter "may suspend or terminate your accounts or cease providing you with all or part of the Services at any time for any or no reason.").

¹⁴ See *id.* ¶ 6 (Twitter grants users only "a personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software that is provided to you by Twitter as part of the Services. This license is for the sole purpose of enabling you to use and enjoy the benefit of the Services as provided by Twitter, in the manner permitted by these Terms.").

¹⁵ See Lois Frankel for Congress Resp. at 2-3; RNC Resp. at 3; DNC Resp. at 3. Paul Spain for Congress states that its Twitter "[p]age" contains a disclaimer, and attaches a screenshot showing disclaimer language ("Paid for by Paul Spain for Congress") on the now-defunct @spain22congress Twitter profile. Paul Spain for Congress Resp. at 1, 2. Lois Frankel for Congress responds that its Twitter profile contains a link to the campaign's website that contains a disclaimer. Lois Frankel for Congress Resp. at 1.

¹⁶ Compl. at 1.

Respondents' tweets, like e-mails, facilitate communications to persons over the internet. But tweets and e-mails are not the same. E-mail, like postal mail, is a communication sent to specific addressees selected by Respondents. Respondents' tweets, by contrast, are not targeted communications—*i.e.*, communications sent to selected addresses. Public Twitter account tweets can be read by any person on the internet, regardless of whether that person is a Twitter user or follows any particular Twitter account. Moreover, the disclaimer requirement applies when a committee "sends more than 500 substantially similar e-mail communications."¹⁷ Unlike 501 e-mails, a singular tweet is not "more than 500 substantially similar communications."¹⁸ A single tweet may be read by less than 500 people or more than 500, but it is one communication. In sum, Respondents' tweets, while in some ways similar to committee e-mails, are fundamentally different from targeted e-mails and thus are not committee "electronic mail of more than 500 substantially similar communications" subject to the Act's disclaimer requirement.¹⁹

III. CONCLUSION

Respondents' Twitter profiles and tweets are content posted, for free, to a third-party's website and thus are neither committee websites, nor internet communications placed for a fee on another person's website, nor e-mail of more than 500 substantially similar communications.²⁰ Accordingly, Respondents' communications on the Twitter social media

¹⁷ See Internet Communications, 71 Fed. Reg. 18,589, 18,601 (Apr. 12, 2006) (emphasis added).

¹⁸ See 11 C.F.R. § 110.11(a)(1).

¹⁹ See *id.*; RNC Resp. at 2-3.

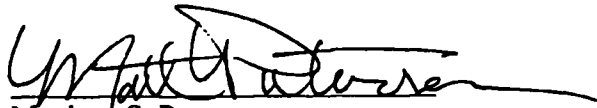
²⁰ See 11 C.F.R. § 110.11(a)(1).

platform are not subject to the Act's disclaimer requirement. Thus, we voted to find no reason to believe that Respondents violated 52 U.S.C. § 30120(a).²¹

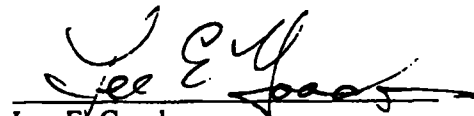
To find otherwise would hamper free communication through the thousands of new and developing social media platforms and would dampen use of the Internet for the free and robust exchange of ideas. Social media platforms as diverse as Facebook and Instagram to Snapchat and the *New York Times* comment boards would be swept into a cumbersome and often speech-prohibitive disclaimer scheme. We have previously expressed concern about the trend among some Commissioners to regulate and deter the use of new technologies and the Internet to facilitate public political discourse.²² Here, once again, we resist the effort by some to extend Commission regulatory burdens deep into the free and non-corruptive communication opportunities evolving on the Internet.

²¹ In light of this finding, the Commission does not address several of the Respondents' arguments that the communications may fall under the "small items" or "impracticable" exceptions to the disclaimer rule. See 11 C.F.R. § 110.11(f)(i), (ii).

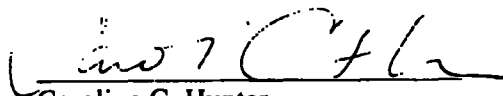
²² See MUR 6729 (Checks and Balances for Economic Growth), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen ("We write because we are concerned by the apparent trend among some on the Commission to regulate and deter citizens' use of technology and the Internet to facilitate public political discourse."), and Statement of Vice Chair Ann M. Ravel ("In the past, the Commission has specifically exempted certain types of Internet communications from campaign finance regulations. In doing so, the Commission turned a blind eye to the Internet's growing force in the political arena."); see also, Advisory Opinion Request 2013-18 (Revolution Messaging, LLC), Statement of Vice Chair Ann M. Ravel, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub ("Given the many technological options available, speakers can share their messages freely while still complying with the Act's disclaimer requirements."); Revolution Messaging LLC Press Release, FEC Criticized for "Shortsighted" Deadlock on Mobile Phone Ads, <https://revolutionmessaging.com/2014/02/27/fec-criticized-for-shortsighted-deadlock-on-mobile-phone-ads/> ("The Democratic FEC commissioners have no sense of the technology available to today's political campaigns. They are employing 20th century logic to 21st century campaigns," Revolution Messaging's partner and head of digital advertising Keegan Goudiss said today.").


Matthew S. Petersen
Chairman

Apr. 12, 2016
Date


Lee E. Goodman
Commissioner

Apr. 12, 2016
Date


Caroline C. Hunter
Commissioner

Apr. 12, 2016
Date