CENTER for COMPETITIVE POLITICS
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December 17, 2014

Mr. Michael Sullivan
Massachusetts Office of Campaign and Political Finance
John W. McCormack Building
One Ashburton Place, Room 411
Boston, MA 02108

Re: Recommendations to Massachusetts Campaign Finance Task Force on Internet Ad Disclaimers and Election Cycle Contribution Limits

Dear Director Sullivan and members of the Campaign Finance Task Force:

On behalf of the Center for Competitive Politics ("CCP"),[1] I write to comment on several of the issues scheduled to be discussed at the upcoming meeting of the Campaign Finance Task Force ("Task Force"), as described in Section 29 of Chapter 210 of the Acts of 2014.

CCP would like to comment on some practical and constitutional concerns that we sincerely hope the Task Force will address in their discussion of disclosure requirements for Internet advertisements (issue ii) and the discussion of the feasibility and merits of per election contribution limits as opposed to yearly limits (issue iii). Wise recommendations made by the Task Force at this time can assist the OCPF in its mission to maintain the integrity of Massachusetts' campaign finance laws while also avoiding costly future litigation against the Commonwealth of Massachusetts that would challenge the constitutionality of the annual contribution limits.

I. In considering recommendations for disclaimer requirements on Internet advertisements, the Task Force should recognize the impracticality of such disclaimers on many Internet ads.

With regard to the Task Force's second subject of study, "(ii) disclosure requirements for internet advertisements which are of limited size, including requiring disclosure to be placed on a

[1] The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, we presently represent nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado, Delaware, and Nevada. We are also involved in litigation against the state of California.

landing page, rollover display or other technological means that provide the user with disclosure information rather than requiring such information in the original advertisement," CCP urges the Task Force to emphasize to the General Court the importance of not instituting regulations on Internet advertisements that are impractical, or that fail to account for either current practices used in commercial advertisements or future technological innovation.

Massachusetts law has long recognized that disclaimer and disclosure requirements for certain types of political speech are impractical and inconvenient, and, therefore, infringe on individuals' ability to exercise their First Amendment rights in elections. Yard signs, flyers, and buttons, for instance, are exempt from standard advertising disclaimers.[2] Note that, while it is indeed possible to have a yard sign that provides the significant amount of space necessary to display disclosure information required for other paid media, Massachusetts wisely recognizes that such requirements would be so impractical as to significantly restrict the speech rights of those looking to promote their political message. This lesson should hold true for disclosure requirements on Internet advertisements. While it *may* be technically feasible to create a web banner ad that includes the required disclosure information, doing so particularly in ads intended for display on smaller devices used to access the Internet, like smartphones, may be impractical to the point of restricting political speech.

Technology is constantly in flux, and, at some point, common-sense regulation should be the norm. If an ad is undeniably of "limited size," and the reproduction of the (unnecessarily wordy) disclaimer is undeniably inconvenient (in both the technical and ordinary senses of the word), the better approach is to allow the speech while permitting the disclaimer's omission.

We urge the Task Force, therefore, to make recommendations to the General Court that permit an exemption from disclaimer provisions for certain types of Internet advertising where it is readily apparent that a disclaimer is a significant burden on speech, such as, but not limited to, banner ads under certain sizes, Google or other search engine-based ads, Facebook ads, Twitter ads, and all ads on mobile devices. A safe harbor under any disclaimer requirement should also be provided for any Internet ad that either contains the name of the advertiser in the ad itself or links to a website with a disclaimer.

II. When considering recommendations for disclaimer requirements on Internet advertisements, the Task Force should remain sensitive to the effect of unforeseen technological innovations on any proposed mandates.

The Task Force should further recognize that the Internet is a fast-moving and ever-changing medium for expressions of political speech. Mandating certain disclaimers for particular types of Internet advertising will fail to predict future innovation in Internet communication technology. For example, mandating a "rollover display" for online ads presupposes that online ads will have rollover functionality, as is standard with today's personal computer and mouse. It is not, however, hard to imagine a near future world where campaigns

[2] Michael J. Sullivan, "OCPF-IB-10-01: Disclaimers on Independent Expenditures and Electioneering Communications and Communications Made to Influence or Affect the Vote on a Ballot Question," Massachusetts Office of Campaign and Political Finance Interpretative Bulletin. Retrieved on December 16, 2014. Available at: http://files.ocpf.us/pdf/legaldocs/IB-10-01-11.pdf (September 18, 2014), p. 4.

want to run Internet advertisements that conform to devices that do not use this technology. Already, much Internet traffic occurs on mobile devices (such as iPhones and iPads), where such rollover functionality may be highly inconvenient, expensive, and/or unavailable. The future may well bring technological advancements that render compliance with this type of disclaimer mandate impossible.

The OCPF, a body with a very particular expertise that does not extend to the business choices of mobile phone advertisers, for example, should avoid a situation in which it attempts to get ahead of both innovation and the market. Speakers will lose, as a practical matter, their preferred means of communicating with the public.

Technology is a tool, nothing more. And while it can certainly provide new means of conveying broadcast advertisements, disclaimer and all, it can also create new versions of traditional items like bumper stickers. The OCPF should not be put in the business of requiring mobile advertisers to force full-screen pop-up ads on consumers, simply because this entirely different product exists for some mobile platforms, any more than it should force political campaigns to abandon conventional bumper stickers if a larger format bumper sticker becomes available.

In no case should the law or the OCPF effectively prohibit the use of commercially available Internet advertising through disclaimer requirements that are impractical for political ads.

CCP, therefore, urges the Task Force to recommend that the General Court institute no broad disclosure mandates on Internet advertising that may, in the future, restrict speech in a technological medium where disclaimers are impractical or unnecessarily infringe on speech. Instead, the Task Force should recommend that the OCPF Director be provided with authority to approve reasonable disclaimer alternatives or exemptions for Internet advertising.

III. When considering recommendations for amendments to the temporal nature of the Commonwealth's contribution limit regime, the Task Force should propose limits on an election cycle or per election basis, with no timing restrictions.

With respect to the Task Force's third subject of study, "(iii) the feasibility, merits and administrative requirements of applying limits on contributions for each special election primary and general rather than per calendar year," CCP believes that the Task Force should recommend to the General Court the introduction of election cycle limits or per election limits with no timing restrictions, as opposed to annual limits. Amending the limits in this manner will afford an equal fundraising opportunity to all potential candidates for the Commonwealth's statewide and legislative offices, while avoiding a likely successful constitutional challenge to Massachusetts' current annual limit regime.

Annual contribution limits blatantly advantage incumbent officeholders over challengers. Incumbents are able to raise funds from the moment they begin their term, while challengers often do not seek office so far in advance. The net result is that, for state legislative offices,

incumbent politicians effectively have a contribution limit that is often twice as high as that of challengers under the current limits. For statewide offices with four-year terms, such as Governor, the limit is effectively *two to four times* higher for an incumbent in Massachusetts.

We believe the Commonwealth's annual contribution limit is clearly unconstitutional, as it blatantly discriminates against challengers and favors incumbents. California had a similar law, but the United States Court of Appeals for the Ninth Circuit struck it down in 1992, saying that "[w]e recognize that the state has a legitimate interest in preventing corruption and the appearance of corruption, but hold that this interest will not a support a discriminatory formula for limiting contributions."[3]

Currently, the Center for Competitive Politics is litigating a case against federal contribution limits on the grounds that per election limits (as opposed to election cycle limits) violate the First Amendment by favoring incumbents without primary opposition.[4] Federal campaign finance laws limit campaign contributions to candidates to $2,600 for the primary election and $2,600 for the general election. However, donations of $5,200 are permitted through the day of the primary, though only half that amount can be spent on the primary race.

In the complaint, which was filed in the U.S. District Court for the District of Columbia against the Federal Election Commission, CCP Legal Director Allen Dickerson wrote:

> [T]he law allows a contributor to associate with an individual candidate up to $5,200 per election cycle. Ms. Holmes and Mr. Jost will abide by that limit. They do not wish, however, to split their contributions between the primary and general elections in order to fully exercise their associational rights. Instead, they wish to give to candidates challenging incumbents who did not face significant opposition from within their own political party.

Simply because the plaintiffs, Ms. Holmes and Mr. Jost, wish to support the victor of the primary against the incumbent, they can give only half as much money as many contributors who have already supported the opposing party candidate who has been effectively raising as much as $5,200 for the general election. Ms. Holmes and Mr. Jost, therefore, have their First Amendment rights of association diminished due to factors entirely outside their control. The Fifth Amendment's guarantee of equal protection under the law also bars such laws. Under 52 USC 30110, the *Holmes* case has been certified for review before the en banc D.C Circuit Court of Appeals. A ruling for the plaintiffs would call into question any per election contribution limit that provided an advantage to incumbents.

To avoid these potential legal challenges and to protect the integrity of Massachusetts' electoral process, CCP urges the Task Force to recommend changes to either an election cycle contribution limit or a system of per election limits (both primary and general), in which contributions may be allocated to the primary election even after the primary date – either to retire debts from the primary or to be rolled over for use for the general election campaign. This

[3] *Service Employees International Union v. Fair Political Practices Commission*, 955 F.2d 1312 (1992).
[4] *Holmes v. FEC*, Case No. 14-5281 (D.C. Cir. 2014) (en banc).

system would not disadvantage a challenger running against an incumbent who faced no primary opposition. Indeed, this system was recently implemented in Colorado after a prior law was found unconstitutional.[5]

CCP also recommends that the contribution limit for statewide offices be set at either $4,000 for the election cycle or $2,000 per election with the allocation provision noted above. Statewide candidates are able to raise as much as $4,000 during an election cycle, so such a contribution limit would merely be a restatement of the maximum allowed under current law. Similarly, the contribution limit for state legislative races could be set at either $2,000 for the election cycle or $1,000 per election.

Such a system is highly feasible: of the 38 states that have limits on individual contributions to candidates, 34 have either per election or per election cycle limits. The system outlined above, further, would be highly meritorious, as it would enable incumbents and challengers to compete on equal footing with regard to contribution limitations. Finally, such a system would have no impact on the overall amount of contributions allowed under current law.

* * *

It is our sincere hope that you take into account these issues and potential solutions when the Task Force makes its recommendations to the General Court. Should you have any questions regarding these recommendations or any other campaign finance proposals, please do not hesitate to contact the Center's External Relations Director, Matt Nese, at (703) 894-6835 or by e-mail at mnese@campaignfreedom.org.

Respectfully yours,

David Keating
President

CC: Representative Garrett J. Bradley
Representative Shawn Dooley
Selectman Jeffrey Yull
Ms. Lisa Gentile, Senior Counsel for Senate President Therese Murray
Ms. Rebecca Murray, Associate Legal Counsel, Secretary of the Commonwealth, Elections Division
Ms. Pam Wilmot, Executive Director, Common Cause Massachusetts

[5] Secretary of State Scott Gessler, "Colorado Campaign and Political Finance Manual," Colorado Secretary of State. Retrieved on December 16, 2014. Available at: http://www.sos.state.co.us/pubs/elections/CampaignFinance/files/CPFManual.pdf (August 2014), p. 12. ("*Note:* A candidate committee may accept and spend contributions for the primary and general election at any time during the election cycle.")