



For hand delivery November 20, 2014

Chairman Lee E. Goodman
Vice Chair Ann M. Ravel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Dear Chairman Goodman and Vice Chair Ravel,

The Center for Competitive Politics (“CCP”) submits this complaint against respondents Mayday PAC, Mayday PAC’s Treasurer, Mark McKinnon, and Mayday PAC’s founder and chief spokesman, Lawrence Lessig.

Throughout the late summer of 2014, Mayday PAC ran a series of television and radio advertisements in connection with Congressional elections in New Hampshire. Many of these communications clearly and consistently failed to satisfy disclaimer requirements mandated by the Federal Election Campaign Act, as amended, and Federal Election Commission regulations. Mayday PAC also distributed mail pieces in Arizona that included non-compliant disclaimers. While these failures are clear from the documentation accompanying this Complaint, not every communication is available to the public, and other violations may exist. Moreover, CCP was unable to review any of the group’s solicitations, which may also have lacked legally compliant disclaimers, and should be examined by the Commission.

Mayday PAC is the brainchild of Harvard Law School professor Lawrence Lessig. His goal is to use a Super PAC to “reduce the influence of money in politics by electing a Congress committed to fundamental reform by 2016.”¹ Mayday PAC is intended as a “SuperPAC to end all SuperPACs... including this one.”² While the intellectual tensions inherent in this approach are obvious,³ Professor Lessig calls on his supporters to “embrace the irony.”⁴

¹ MAYDAY PAC, <https://mayday.us/> (last visited Nov. 17, 2014).

² *Id.*

³ Daily Kos suggested it might also be “ludicrous.” *One PAC To Rule Them All: Lawrence Lessig’s Mount Doom SuperDooperPAC Erupts!*, DAILY KOS (July 6, 2014), <http://www.dailykos.com/story/2014/07/06/1312038/-One-PAC-To-Rule-Them-All-Lawrence-Lessig-s-Mount-Doom-SuperDooperPAC-Erupts> (last visited Nov. 17, 2014).

⁴ *Frequently Asked Questions*, MAYDAY PAC, <https://mayday.us/faq/> (last visited Nov. 17, 2014).

The irony, in the end, is that a group that supports more regulation of political speech flouted existing campaign finance laws. Mayday PAC simply disregarded the law's clear disclaimer requirements in at least two television advertisements, eight radio advertisements, and two mail pieces.

The relevant disclaimer rules have been in place for multiple election cycles. At the time of these violations, the Act's disclaimer provisions were codified, as they had been for years, at 2 U.S.C. § 441d.⁵ None of the relevant regulations had been updated or otherwise altered in several years. In other words, the Act's disclaimer requirements were easily found, and were readily available to any law student, let alone tenured faculty and experienced professionals who purport to be interested in proper disclosure, and who hold themselves out as experts in the law governing campaign finance.

Consequently, it appears that one of three scenarios led to Mayday's clear violations. Either the law is too complex for even sophisticated individuals and entities, or the law was willfully violated, or it was ignored.

Respondent Lawrence Lessig is the Roy L. Furman Professor of Law and Faculty Director of the Edmond J. Safra Center for Ethics at Harvard University.⁶ In 2012, he testified before the Senate Judiciary Committee, saying "I serve proudly on the advisory board of the Sunlight Foundation, and I am a strong supporter of disclosure legislation. Effective disclosure makes it possible for the public to identify the influences that might influence their candidates. It makes it harder for illicit influence to find its effect within a political system."⁷ We note that Professor Lessig exhibited substantial editorial control over some of the ads serving as the basis of this Complaint, in part because "Lessig did the voice overs for some of Mayday's early [radio] ads,"⁸ the ads containing the most egregious violations. Given his expertise in ethics issues and

⁵ It was not until September 2014 that the law was recodified at Title 52.

⁶ According to its website, the Edmond J. Safra Center for Ethics "seeks to advance teaching and research on ethical issues in public life. Widespread ethical lapses of leaders in government, business and other professions prompt demands for more and better moral education. More fundamentally, the increasing complexity of public life - the scale and range of problems and the variety of knowledge required to deal with them - make ethical issues more difficult, even for men and women of good moral character. Not only are the ethical issues we face more complex, but the people we face them with are more diverse, increasing the frequency and intensity of our ethical disagreements." *About*, HARVARD UNIVERSITY EDMOND J. SAFRA CENTER FOR ETHICS, <http://ethics.harvard.edu/pages/about> (last visited Nov. 17, 2014).

⁷ *Lessig Testifies against Citizens United and the Rise of SuperPACs*, HARVARD LAW TODAY (July 24, 2012), <http://today.law.harvard.edu/lessig-testifies-against-citizens-united-and-the-rise-of-super-pacs-video/> (last visited Nov. 17, 2014).

⁸ Byron Tau & Kenneth P. Vogel, *How to Waste \$10 Million*, POLITICO (Nov. 6, 2014), <http://dyn.politico.com/printstory.cfm?uuid=C6D74058-1787-4D93-B807-B1AF2CB5F496> (last visited Nov. 17, 2014).

campaign finance laws, the Commission should investigate whether the violations are knowing and willful and, if so, impose appropriate sanctions.

Respondent Mark McKinnon, Mayday PAC's Treasurer, is a seasoned political operative. According to his Mayday PAC bio, McKinnon has "solv[ed] complex strategic challenges for causes, companies and candidates, including George W. Bush, John McCain, Ann Richards, and Bono" and "has helped engineer five winning presidential primary and general election campaigns."⁹ Senator John McCain has said that McKinnon is "almost a genius."¹⁰

Mayday PAC's Board includes, among others, Zephyr Teachout, a professor at Fordham University Law School who was the first national director of the Sunlight Foundation, Director of Internet Organizing for Howard Dean's presidential campaign, and herself a candidate for Governor of New York.¹¹ The *New York Times* has described her as "a national expert on political corruption and an advocate of precisely the kind of transparency and political reform that Albany needs."¹² Among Mayday's other board members and senior staff are the founders of PACs, a former senior advisor to U.S. Senator Elizabeth Warren, and others with substantial political experience. It lists as its legal counsel a former Chairman of this Commission and noted advocate of greater disclosure.¹³ In short, Mayday PAC has no shortage of skilled professionals with the experience and expertise to comply with the complex rules governing political advocacy.

Other speakers, including those opposed to Mayday PAC's regulatory agenda, comply with these laws. It is inexcusable that Mayday PAC does not.

Documented Disclaimer Violations

1. Television Advertisements – New Hampshire

Prior to New Hampshire's September 9 primary election, Mayday PAC aired two television advertisements ("NH Republican Senator Humphrey endorses Jim Rubens" and "Beantown Brown") in New Hampshire markets. Both ads supported U.S. Senate candidate Jim Rubens. These advertisements' disclaimers did not comply with federal law.

⁹ *About*, Mayday PAC, <https://mayday.us/about/> (last visited Nov. 17, 2014).

¹⁰ *Id.*

¹¹ *Id.*

¹² Editorial, *The Governor's Primary in New York*, N.Y. TIMES (Aug. 26, 2014), http://www.nytimes.com/2014/08/27/opinion/editorial-governor-cuomo-ethics-reform-hinders-endorsement-zephyr-teachout.html?_r=0 (last visited Nov. 17, 2014).

¹³ *About*, MAYDAY PAC. <https://mayday.us/about/>.

Both advertisements included the following written disclaimer: “PAID FOR BY MAYDAY PAC. NOT AUTHORIZED BY ANY CANDIDATE OR CANDIDATE’S COMMITTEE. MAYDAY.US.” For unknown reasons, this same disclaimer was also provided orally. The written and audio disclaimers are either incomplete or incorrect.

Television Advertisement #1: “NH Republican Senator Humphrey endorses Jim Rubens”¹⁴

Written disclaimer: “PAID FOR BY MAYDAY PAC. NOT AUTHORIZED BY ANY CANDIDATE OR CANDIDATE’S COMMITTEE. MAYDAY.US.”

Audio disclaimer: “Paid for by Mayday PAC. Not authorized by any candidate or candidate’s committee. Mayday.us.”

Television Advertisement #2: “Beantown Brown”¹⁵

Written disclaimer: “PAID FOR BY MAYDAY PAC. NOT AUTHORIZED BY ANY CANDIDATE OR CANDIDATE’S COMMITTEE. MAYDAY.US.”

Audio: “Paid for by Mayday PAC. Not authorized by any candidate or candidate’s committee. Mayday.us.”

Neither advertisement included the legally-mandated disclaimer, in either written or oral form.¹⁶ 52 U.S.C. § 30120(d)(2) (formerly 2 U.S.C. § 441d(d)(2)) requires that television advertisements such as Mayday PAC’s “include ... in a clearly spoken manner, the following audio statement: ‘XXXXX is responsible for the content of this advertising ...(with the blank to be filled in with the name of the political committee or other person paying for the communication...)’” This statement “shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds.”¹⁷

¹⁴ Available at <https://mayday.us/rubens/>.

¹⁵ *Id.*

¹⁶ Both advertisements can be viewed on Mayday PAC’s website at <https://mayday.us/rubens/>.

¹⁷ These provisions are implemented by FEC regulation at 11 C.F.R. § 110.11(c)(4).

Mayday PAC failed to adhere to the Act's well-known disclaimer requirements, and voters across New Hampshire were deprived of the information those disclaimers are required to convey. The disclaimer is not optional.

2. *Radio Advertisements – New Hampshire*

In the lead-up to the New Hampshire primary, Mayday PAC aired eight radio advertisements that failed to comply with federal disclaimer requirements. The PAC's disclaimers—which are reproduced below—were deficient in at least three ways. *First*, they failed to acknowledge that Mayday PAC was responsible for the content of at least eight radio ads.¹⁸ *Second*, none of the radio ads disclaimed whether they were “authorized by any candidate or candidate’s committee,” as the law requires.¹⁹ Instead, Mayday PAC used the unfamiliar phrase “not affiliated with any candidate or campaign,” which may or may not be the same thing as “authorized by a candidate or candidate’s committee.”²⁰ This innovative language thus fails to inform the listener of the key fact the disclaimer requires, defeating both the letter and the spirit of the law. *Third*, five of these eight radio ads failed to “clearly state the ... permanent street address, telephone number or World Wide Web address of the person who paid for the communication.”²¹

This was not a victimless error. By ignoring the disclaimer requirements, Mayday PAC was able to include substantially more substantive speech than was afforded to other speakers, saving as much as six seconds per spot for its preferred message. These six seconds of political speech were gained by omitting the government-mandated speech required of others. Consequently, as a matter of basic fairness, Mayday PAC should pay sanctions at least equivalent to the cost of the airtime used to communicate its message in lieu of the proper disclaimer.

Four of the eight radio ads were 30-second spots, and four were 60-second spots. Assuming the buys for the radio ads were roughly equal—a fact the Commission should verify—Mayday PAC saved approximately 10% of its advertising costs compared to other non-candidate speakers. This amount is not trivial. Mayday PAC's FEC reports state that \$266,783 (not counting production costs) was spent on these ads; failure to abide by federal law saved the group over \$26,500.

¹⁸ 52 U.S.C. § 30120(d)(2) (formerly 2 U.S.C. § 441d(d)(2)).

¹⁹ 52 U.S.C. § 30120(a)(3) (formerly 2 U.S.C. § 441d(a)(3)).

²⁰ For example, a PAC may be “unaffiliated” with a candidate’s campaign as that term is defined by the FEC, but still engage in limited coordinated communications which would be authorized by the candidate or candidate’s campaign. See 11 C.F.R. 109.20 (rules on coordination) and 11 C.F.R. 110.3 (rules on affiliated committees).

²¹ See 52 U.S.C. § 30120(a)(3) (formerly 2 U.S.C. § 441d(a)(3)). The final three radio advertisements remedied this failing by including the closing sentence, “[f]or more information visit mayday.us.”

Radio Advertisement #1: “Humphrey Endorsement”

Audio: “Paid for by Mayday PAC. Not affiliated with any candidate or campaign.”

Radio Advertisement #2: “Stark Contrast”

Audio: “Paid for by Mayday PAC. Not affiliated with any candidate or campaign.”

Radio Advertisement #3: “70 Percent”

Audio: “Paid for by Mayday PAC. Not affiliated with any candidate or campaign.”

Radio Advertisement #4: “Integrity L”

Audio: “Paid for by Mayday PAC. Not affiliated with any candidate or campaign.”

Radio Advertisement #5: “Integrity MM”

Audio: “Paid for by Mayday PAC. Not affiliated with any candidate or campaign.”

Radio Advertisement #6: “Crony Capitalism”

Audio: “Paid for by Mayday PAC. Not affiliated with any candidate or campaign. For more information visit mayday.us.”

Radio Advertisement #7: “Call Time”

Audio: “Paid for by Mayday PAC. Not affiliated with any candidate or campaign. For more information visit mayday.us.”

Radio Advertisement #8: “Mayday Intro”

Audio: “Paid for by Mayday PAC. Not affiliated with any candidate or campaign. For more information visit mayday.us.”

3. *Print Advertising - Arizona*

Mayday PAC distributed two mail pieces supporting Ruben Gallego in advance of Arizona's August 26 primary election.²² Both mailers included the following disclaimer:

Paid for by MAYDAY PAC
PO Box 38044
Cambridge, MA 02238
Not affiliated with any candidate or campaign.

Neither mailer stated, as required by law, whether the mailing was “authorized by any candidate or candidate’s committee,” and neither mailer’s disclaimer appears within “a printed box set apart from the other contents of the communication.”²³ Again, Mayday PAC’s statement that it was “not affiliated” with a candidate does not inform the reader whether or not a candidate or candidate’s committee authorized the communication.

The information contained in this disclaimer has two purposes. First, it is intended to help readers identify the speaker, and specifically whether that speaker is merely a proxy for a candidate. Of equal importance, it serves to identify coordinated communications that may be subject to contribution limits.²⁴ Consequently, while the disclaimers fail to comply with the law in any case, the FEC should also inquire as to whether any of these communications were authorized by a candidate or candidate’s committee, and take appropriate action if coordinated expenditures were made in excess of contribution limits.

Conclusion

Informing viewers and listeners not merely who paid for an ad, but that the payer “is responsible for” its contents; whether a candidate authorized the ad; and setting such information aside in print boxes all serve vital functions. Or so we are told. Indeed, in MUR 6348, then-FEC Chair Cynthia L. Bauerly and Commissioners Steven T. Walther and Ellen L. Weintraub wrote that “[t]he public also has a right to know who is responsible for such advertisements” and that paid “communications by a political committee must include disclaimers...[W]ithout

²² These mailers are reproduced at https://mayday.us/images/AZ-7_10%20x%206.pdf and https://mayday.us/images/AZ7-14-02_11x8.pdf.

²³ 52 U.S.C. § 30120(a)(3), (c)(2) (formerly 2 U.S.C. § 441d(a)(3), (c)(2)).

²⁴ This choice of language may not be incidental, but a conscious decision intended to promote Mayday PAC’s message. Mayday PAC’s communications and self-description, found on Mayday PAC’s website, repeatedly stress that the organization is “independent.” Stating that the PAC was “unaffiliated” rather than that the message was not authorized by a candidate may well have been seen as a means of strengthening the PAC’s message of “independence” from all parties and candidates. Unfortunately, it was an illegal means, as it fails to comply with the statutory and regulatory disclaimer mandates.

enforcement of the Act’s disclaimer requirements...the opportunity for such knowledge is substantially diminished.”²⁵

In a statement for the record regarding Advisory Opinion Request 2013-18 (Revolution Messaging, LLC), Vice Chair Ann M. Ravel, Commissioner Steven T. Walther and Commissioner Ellen L. Weintraub wrote:

Political advertising disclaimers serve an extremely important function in our democracy – they “ensure that the voters are fully informed about the person or group who is speaking.” The Supreme Court has affirmed, time and again, that disclosures of this type are essential – they “appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption;” they allow voters to “evaluate the arguments to which they are being subjected;” and they “enable [] the electorate to make informed decisions and give proper weight to different speakers and messages.” Without information about the sources of political advertising, voters cannot accurately assess the validity of those messages.²⁶

The information conveyed by these disclaimers is allegedly necessary to “provide[] the electorate with information ‘as to where political campaign money comes from and how it is spent by the candidate’ in order to aid the voters in evaluating those who seek federal office.”²⁷

While noting, and agreeing, that this legal authority supports sensible disclaimer requirements, the Center opposes, as a policy matter, certain of the disclaimer requirements violated here. To take but one example, CCP believes that the Bipartisan Campaign Reform Act’s broadcast disclaimer requirements abridge First Amendment speech rights by imposing disclaimers that are too long and contain unnecessary syllables, such as the senseless need to speak the word “advertising” instead of “ad.”

But no matter how silly or pointless these hyper-technical disclaimer requirements may seem, the law is the law. Across the country, in every election year, hundreds of speakers—many of which lack the multi-million dollar budgets of Mayday PAC or the legal expertise of its founder and staff—are expected to, and do, comply with these laws, often at great financial cost. Especially for small organizations, these requirements impose tremendous stress upon officers,

²⁵ Cynthia Bauerly, Steven Walther, and Ellen Weintraub, Statement of Reasons in MUR 6348 (David Schweikert for Congress, et al.), FEDERAL ELECTION COMMISSION (Mar. 11, 2011), available at: <http://eqs.fec.gov/eqsdocsMUR/11044290336.pdf>.

²⁶ Ann Ravel, Steven Walther, and Ellen Weintraub, Statement for the Record in Advisory Opinion Request 2013-18 (Revolution Messaging, LLC), FEDERAL ELECTION COMMISSION (Feb. 27, 2014), available at: <http://saos.fec.gov/aodocs/1252267.pdf> (citations omitted).

²⁷ *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (quoting citation omitted).

directors, and treasurers. CCP appreciates that in recent years the Commission has treated most allegations of disclaimer violations as “low rated” matters that do not warrant the agency’s time and attention.

On occasion, however, a disclaimer case makes its way to the Commission’s enforcement agenda,²⁸ and there is good reason why the violations detailed in this letter should be among them. CCP is unaware of any other situation such as this, in which a Super PAC with over \$10 million in funding, led by the director of a leading academic center on ethics, and supported by the resources and expertise of seasoned political operatives, spent at least hundreds of thousands of dollars to distribute advertising flouting the law’s disclaimer requirements.

Mayday PAC distributed at least 12 separate ads with improper disclaimers—via television, radio, and mail. In the past, the Commission has forgiven disclaimer violations that it determined were oversights by amateurs or low-budget campaigns, or which were subsequently corrected. This is not such a case. Initial television ads were essentially correct, then subsequent television ads were incorrect, before later ads again became essentially compliant. While it appears that the television ads were eventually corrected, we have no evidence subsequent radio ads were corrected. Mayday PAC’s FEC reports also show that at least \$125,563 of radio ads with *incorrect* disclaimers appear to have been bought *after* TV ads ran with *correct* disclaimers. Perhaps many hundreds of thousands of dollars were spent on other communications, including other radio ads, online ads, phone calls, paid canvassers and more with incorrect disclaimers.²⁹

To decline enforcement on these facts is to state, in effect, that the federal disclaimer requirements are a dead letter. Both Congress in passing the Act and the Commission in its regulations could have chosen to set forth broad disclaimer guidelines, leaving particulars to the speaker. Both chose, instead, to mandate highly specific language and formatting for disclaimers. Given these Congressional and regulatory judgments that specific language and formatting are required, they must be required of all speakers.

Finally, in light of these concerns and Mayday PAC’s previous statements supporting political disclosure, CCP suggests that Mayday submit to a voluntary full audit by the Commission of its activities in the past election. Alternatively, Mayday PAC should conduct an

²⁸ See, e.g., MUR 6348 (Schweikert).

²⁹ For example, CCP was unable to review the hundreds of thousands of dollars for other radio ads, online advertising and many of the advertising expenditures for the group, which were not posted on Mayday PAC’s website. At <https://mayday.us/campaigns/20141107-reporting-back/>, the group claims to have run “4,603 gross rating points of radio ads reaching 800K+ listeners; 555,708 calls made to likely voters on or just before Election Day; 25,202 doors knocked on by 800 volunteers, canvassers and organizers; 770,000 pieces of mail sent to over 500,000 individuals and households; 56.5 million digital impression targeted to hundreds of thousands of persuadable voters.”

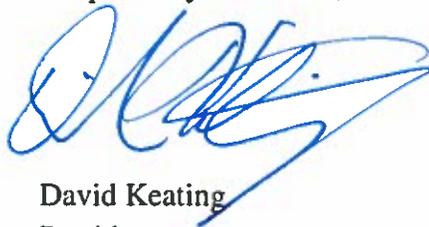
independent internal review of its compliance with the law and regulations, and voluntarily report any additional violations to the FEC and the public. If the organization is unable to comply with relatively straightforward disclaimer rules, it may also have violated more complex requirements.

I have enclosed copies of the advertisements cited herein.

CCP respectfully requests that the Commission investigate the matter set forth above, and impose appropriate penalties upon Mayday PAC and its agents.

The above information is true and correct to the best of my knowledge, information, and belief.

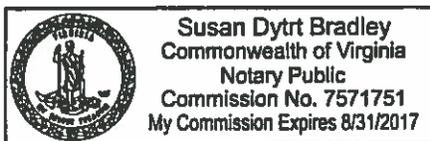
Respectfully submitted,



David Keating
President

City of Alexandria
Commonwealth of Virginia

Signed to and Sworn before me this 19th day of November, 2014.



CC:

Commissioner Caroline C. Hunter

Commissioner Matthew S. Petersen

Commissioner Steven T. Walther

Commissioner Ellen L. Weintraub

Office of General Counsel, Federal Election Commission

Daniel A. Petalas, Associate General Counsel for Enforcement