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Internet Communications Disclaimers

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Most political advertisements must include some form of a disclaimer explaining who paid for the ad and whether it was approved by a candidate. Internet advertising can present difficulties for including disclaimers if there are physical size limitations (e.g., banner ads) or text limitations (e.g., text messages or Twitter messages). The FEC has grappled with how to include disclaimers in several advisory opinion requests and has now decided to deal with the issue in a rulemaking proceeding. Comments will be due 30 days after the notice of proposed rulemaking is published in the Federal Register.

Existing Internet Disclaimer Requirements

Currently, the following internet communications require disclosures (**11 C.F.R. 110.11(a)**):

- . All websites of political committees;
- . All electronic mail of more than 500 substantially similar messages;
- . All communications placed for a fee on another person's website that are purchased by a political committee; and
- . All communications placed for a fee on another person's website that are purchased by any other person and contain express advocacy.

The content of the disclaimer will depend on who is paying for the content (**11 C.F.R. 110.11(b)**):

- Candidates: Must state that it is paid for by the candidate.
- Other Committees/Authorized by Candidate: Must state that it is paid for by the committee and authorized by the candidate.
- Other Committees/Not Authorized by Candidate: Must state that it is paid for by the committee and not authorized by any candidate or candidate's committee. The disclaimer must also include either the permanent street address, telephone number, or web address of the person who paid for the communication.

Format of the Disclaimer

The disclaimer must be clear and conspicuous, such that the reader has adequate notice of the identity of the person paying for the communication. It must not be difficult to read or easily overlooked.

Print communications must include a box around the disclaimer and be "of sufficient text size to be clearly readable by the recipient" (12-point font being acceptable for materials that are no more than 24 by 36 inches). There must be a reasonable degree of color contrast between the background and the text. Specifically, the "degree of color contrast between the background and the text" may be "no less than the color contrast between the background and the largest text used in the communication."

There are additional disclaimers for television and radio advertisements. Although there may be video and audio in online advertisements, these specific rules do not apply to internet communications. (**11 C.F.R. 110.11(c)**)

The FEC's Application of the Disclaimer Rules

There are exceptions for small items such as bumper stickers, pins and buttons, or items that are impracticable such as clothing or skywriting. (**11 C.F.R. 110.11(e)**) In the past, the FEC has used this exemption to allow text messages to be sent without a disclaimer. (**Advisory Opinion 2002-09**) The FEC reasoned that because "short message service" text messages are limited to 160 characters,

they are like bumper stickers and cannot include the requisite disclaimers. More recently, however, the Commission has been less willing to grant an exemption from the rules, or it has been unable to provide a legal rationale for exemptions. For example, in [AO 2010-19](#), the FEC considered Google's text ads, which have headlines of up to 25 characters and then two lines of text (containing 70 characters, with a display URL). The FEC found that it would not be a violation of the rules to not include a disclaimer in the text ads, but could not provide a legal basis for this decision. Several of the commissioners would have simply considered the ads to be covered under the small item exemption. Others suggested that candidates could purchase larger ads on Google that had space for the disclaimer. Similarly, in response to a request by Facebook for its small advertisements, which limit the amount of text, the FEC could not reach a majority decision to allow the advertisements to be sold without requiring disclaimers.

Thus, the FEC has not been able to provide clear guidance for how emerging technologies should be addressed under the disclaimer requirements.

On the other hand, the California Fair Political Practices Commission ("FPPC") recently adopted rules for internet communications. [Cal. Code Regs. Tit. 2, sec. 18540.4](#). Under those rules, the limited size advertisements, such as button ads, text ads of under 500 characters, graphic ads or SMS messages, do not have to include the full disclaimers required as long as there is an abbreviated disclosure that contains at least the committee's FPPC registration number and, when technologically possible, a link to the Secretary of State's web page with the committee's information.

The FEC's Notice

Against that backdrop, the FEC issued an [advanced notice of proposed rulemaking](#) seeking comment on how it should address internet communications. It specifically noted the FPPC's rules and asked whether it should consider similar abbreviated requirements.

The FEC also asked whether it should consider allowing a link to a web page by itself as the disclaimer. It further asked how it should deal with links to websites without their own disclaimers, or websites owned and operated by people other than those paying for the disclaimer.

In addition to questions about the regulations, the FEC asked for data and experience in purchasing, selling, or distributing small or character-limited advertisements online.

The FEC also asked whether it should use the small items exemption to character-limited advertisements.

The FEC asked what percentage of internet advertising would be impacted by such an exemption.

In addition, the FEC asked "what role Internet media providers' usual and normal advertising model should play in the Commission's consideration of disclaimer requirements." This seems to be directed toward the issue of whether companies should change the types of ads they offer to match the FEC's regulations.

Finally, the FEC asked whether there is a regulatory approach that might minimize the need to modify the rules as technology changes.

Submitting Comments

Comments will be due 30 days after the notice is published in the Federal Register. Should you be interested in submitting comments, please feel free to contact [Ron Jacobs](#) at 202-344-8215 or rmjacobs@venable.com.