

Small Mobile Ads Pose Huge Dilemma for FEC (and Advertisers)

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For the third time in recent years, the Federal Election Commission (FEC) struggled to reach a consensus on what disclaimers are required for political advertising on the Internet—an increasingly important medium for campaigns, PACs, and advocacy groups to reach voters. In the latest advisory opinion request (AOR 2013-18), which the FEC first considered at a public meeting last December, mobile-ad vendor Revolution Messaging asked whether its clients could modify the required disclaimers on account of the strict space limitations on mobile-device advertising. After several months of hearings and internal deliberations, the FEC sent a closeout letter on February 27 to the requester, advising that the agency could not come to a decision on the matter.

The campaign finance statute and FEC regulations require all paid mass advertising by political committees, as well as ads qualifying as “independent expenditures” sponsored by anyone else, to contain certain notices with very specific language. Relative to the tight space limitations of small media such as mobile-device ads, which generally range from 120 X 20 pixels to 320 X 50 pixels, the required disclaimers can be quite lengthy and unwieldy. Revolution Messaging proposed providing alternatives to identifying the sponsors of the ads by linking to the sponsors' websites, including the advertisers' name or logo, or simply identifying that the ads were “paid for” by the sponsor.

Three of the FEC commissioners voted for a draft opinion concluding that the mobile-device ads would satisfy the regulatory exceptions for “small items,” such as bumper stickers, pins, buttons, and pens, on which disclaimers are not required at all, as well as for forms of advertising where disclaimers would be “impracticable,” such as skywriting, water towers, and wearing apparel. The other three commissioners voted for a draft concluding that mobile advertisers are still required to satisfy the complete disclaimer requirements, and that they could do so by resorting to “rich media,” animated, or expandable ads, notwithstanding the requester's representations that such forms of mobile advertising were more intrusive for users, more expensive, and less popular.

The FEC was first asked to consider exempting Internet ads from the full disclaimer requirements in 2010, when Google presented to the agency its “AdWords” advertising program, which contained a similarly stringent limit on the number of characters an ad could contain (AO 2010-19). While Google's request proposed to satisfy the disclaimer requirements by including the full disclaimers on the “landing pages” linked to by the AdWords ads, the FEC gave Google the green light (after protracted deliberations) without any

explanation as to why it was approving the request. In 2011, Facebook presented the FEC with another request regarding its ads, which implicated similar character limitations, but did not provide an alternative landing page disclaimer for the ads (AO 2011-09). As in the latest advisory opinion request, the FEC failed to issue an opinion to Facebook.

Campaigns, PACs, and anyone engaging in speech about political issues face a bewildering array of disclaimer requirements at the federal and state levels pertaining not only to campaign finance, but also broadcast, telephone, and tax laws. With the firm's complementary strengths in telecommunications and tax law, the Election Law practice group at Wiley Rein is uniquely situated to assist clients in making sense of these laws even when the regulators are unable to provide clear guidance, and also in seeking potential modifications or exemptions to the requirements from regulatory agencies.