

FEC Concludes Certain Facebook Ads Require Disclaimers; Rulemaking on Disclaimers Close at Hand

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The Federal Election Commission (FEC) recently concluded in an advisory opinion that certain paid Facebook ads are required to include disclaimers under the campaign finance laws and regulations. Although the opinion addressed a relatively narrow set of circumstances, it should serve as a reminder to online political advertisers that their activities may trigger reporting and disclaimer requirements under federal and state laws.

The FEC opinion was requested by Take Back Action Fund (TBAF), a Section 501(c)(4) nonprofit advocacy group, which was represented by counsel at the Campaign Legal Center. Both organizations advocate for stricter campaign finance laws, and the request was an apparent attempt to spur the FEC to regulate online political activity more broadly. Perhaps because of the recent revelations of Russian attempts to interfere with the 2016 elections through Facebook ads (among other media), TBAF's request represented that it intended to sponsor Facebook ads expressly advocating the defeat of certain federal candidates.

Under the federal campaign finance law, anyone who pays for ads that expressly advocate the election or defeat of a federal candidate must include a disclaimer. (Federal political action committees (PAC) also are required to include disclaimers on most of their public communications.) If an express advocacy ad is made independently of a candidate or political party, reporting requirements for "independent expenditures" also will apply if more than \$250 is spent in a calendar year.

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At issue in the TBAF advisory opinion are the FEC's "small items" and "impracticability" exemptions to the disclaimer requirements. Written in the pre-Internet era, these exemptions apply to a non-exhaustive list of items such as bumper stickers, pins, buttons, pens, skywriting, water towers, and wearing apparel. The exemptions are important because the requisite disclaimer must be displayed in a clear and conspicuous manner and can be quite lengthy, especially for independent non-PAC entities that have to include more information in their disclaimers.

In the digital era, the FEC concluded in 2002 that political ads in the form of text messages (SMS) were exempt as "small items." However, the FEC struggled as digital technology progressed. In 2010, the FEC narrowly concluded that character-limited Google "AdWords" did not have to contain disclaimers on the face of the ads if the ads contained a "click-through" hyperlink to a "landing page" that displayed the required disclaimer. In 2011 and 2013, the FEC failed to issue any opinions as to whether Facebook and mobile ads could be exempt altogether from the disclaimer requirements.

Against this backdrop, the latest request from TBAF focused specifically on Facebook "Image" and "Video" ads. Both of the alternative analyses supported by the FEC commissioners noted that: (1) these ads may cover the full screen of a mobile device and take up several inches in width and height on standard desktop monitors, and a video ad may run for up to 240 minutes; and (2) there are no limits on the number of text characters that appear above and below image ads, and text also may be embedded within the images and videos. In addition, while an excess of embedded text may result in Facebook reducing delivery of these ads to users or truncation of text, this does not affect any applicable "legal text."

All of the FEC commissioners agreed that the disclaimer requirement would apply under these circumstances. However, three of the commissioners endorsed a narrow analysis emphasizing that their conclusion was based on the fact that TBAF did not represent that the "small items" or "impracticability" exemptions applied here. The other two commissioners endorsed a broader analysis expressly concluding that neither exemptions applied here given the unrestrictive digital media at issue. Both groups of commissioners also noted the distinction between the much larger Facebook ads at issue in the latest request and the much smaller ads at issue in Facebook's 2011 request, in which the company proposed to exempt its ads under the "small items" and "impracticability" exceptions.

Given the very specific forms of online ads at issue in the TBAF opinion, it is not possible to conclude whether other forms of digital ads with more space or length constraints may nonetheless qualify for one of the disclaimer exemptions. The TBAF opinion also does not address the related issue of the FEC's "Internet exemption," under which most forms of unpaid Internet communications are exempt from any applicable disclaimer and reporting requirements. Under this exemption, the FEC has struggled to agree on whether unpaid YouTube videos or social media profile pages, for example, are regulated.

The FEC's general counsel's office is currently drafting a notice of proposed rulemaking (NPRM) which will attempt to more broadly address the disclaimer requirement for paid Internet and digital advertising. How the agency ultimately comes down on many of these unresolved issues remains to be seen, and may depend on public comments and testimony in response to the NPRM once it is released.

It is also important to note that online political communications in connection with state and local candidates and ballot measures are governed by state (and in some cases local) law. Many states' laws may address reporting and disclaimer requirements for online activity differently from how federal law handles these issues. In addition, various bills have been introduced in Congress and state legislatures that would further regulate digital political communications.

Wiley Rein's Election Law Group continuously monitors legislative and regulatory agency developments at the federal and state levels affecting Internet political activity. We assist clients interested in submitting public comments or testifying at hearings on these issues, as well as complying with the existing laws and regulations that apply to digital media.