

FEC Opens Formal Rulemaking on Internet Disclaimers

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In a special session yesterday, the Federal Election Commission (FEC or Commission) voted to open a rulemaking on the disclaimer requirements applicable to many video, audio, graphic, and text-based political advertisements disseminated through the Internet, cell phones, and other digital devices. This proceeding is the first Internet-focused rulemaking at the FEC in over a decade and will impact Internet advertising for candidates, political committees, interest groups, advertising vendors, and all digital advertising platforms. The new rules could dramatically affect the technological requirements for all digital election ads. Notably, this rulemaking comes just days after a published report (subscription required) indicating that some FEC commissioners are pushing to hold media entities accountable for ensuring that paid advertisements carry the proper disclaimers.

Comments on the Commission's proposals will be due 60 days after publication of the rulemaking notice in the Federal Register, which we anticipate will happen in the next one to two weeks. If so, comments would be due in mid-to-late May.

Following reports of foreign-sponsored ads during the 2016 election, the FEC has come under significant pressure – including from nearly 150,000 public commenters – to reconsider the agency's approach to regulating political speech on the Internet. After several months of behind-the-scenes negotiations between the commissioners, the FEC unanimously agreed on Wednesday to put out for public comment a 64-page Notice of Proposed Rulemaking (NPRM) responding to some of these concerns.

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At its broadest level, the NPRM reflects the Commission's desire to work together in an area of law with the greatest potential for reaching bipartisan consensus: disclaimers for advertisements placed for a fee on a third party's website that contain express advocacy (e.g., "vote for/against Joe Smith"). The NPRM posits two principal approaches to regulating such communications and invites comment on both.

Alternative A, which was touted by Vice Chair Ellen Weintraub on Wednesday, contains several important elements:

- It would apply the same disclaimer rules that govern television and radio communications to online video and audio communications. Given the length of certain oral disclaimers, however, such a requirement could prove prohibitively challenging for the short, "pre-roll" video ads that appear before a user watches particular content on YouTube, for example.
- Alternative A would also import the same disclaimer requirements that apply to printed communications (e.g., newspaper ads) to text and images disseminated online. This would mean, for example, that a paid Facebook advertisement independently urging a candidate's re-election or defeat must state "Paid for by *XYZ trade association*, [insert street address, phone number, or web address], and not authorized by any candidate or candidate's committee" on the face of the digital ad.
- Alternative A would provide an "adaptive disclaimer" option for a limited number of small, non-video communications, but this would only apply where the technology cannot accommodate inclusion of the full disclaimer. That is, the "adaptive disclaimer" option could not be used simply because the advertiser subjectively concludes that a disclaimer is a "burden." Where the full disclaimer is technologically infeasible, however, Alternative A would require the ad to state "Paid for by [name of sponsor]" on the face of the ad and it would require an "indicator" allowing the reader to find the full version of the disclaimer, such as in a pop-up window or on a click-through to a landing website.

Alternative B, by comparison, was endorsed by Chair Caroline Hunter, and it would treat the disclaimers on Internet ads as fundamentally different than disclaimers on advertisements in traditional media. For Internet communications where the full disclaimer would exceed ten percent of the time or space (measured in characters or pixels) of the entire ad, the sponsor would be allowed to use an abbreviated disclaimer identifying the person who paid for such communication – which can be satisfied by a commonly-recognized acronym – and an indicator directing viewers to the location where to find the full disclaimer (e.g., pop-up window or click-through to a landing website). Where this abbreviated disclaimer would itself exceed the ten percent threshold, Alternative B would only require the advertisement include the indicator itself – not the "Paid for by [name of sponsor]" statement.

Finally, the NPRM proposes (on a consensus basis) to modify the Commission's definition of "public communication." This is an important regulatory term-of-art that identifies the types of communications that must include a disclaimer. It also is relevant to the FEC's coordination regulations. An earlier comment to the Commission suggested that the current regulation's 2006-era definition would, for example, regulate a paid ad viewed through the Facebook website but could be read to exempt the same paid ad when viewed on the Facebook application. The FEC's suggested language purports to close the "loophole" the commenter

identified.

The bottom line: This NPRM is an opportunity for candidates, parties, and interest groups to maximize their substantive messaging capabilities by underscoring the need for technological flexibility when dealing with disclaimers on online communications. Likewise, digital advertising vendors and online advertising platforms and applications should provide their technological expertise to the Commission, because their services will be directly impacted.

Wiley Rein is available to draft comments in response to this proposed rulemaking, either individually or as part of a larger coalition of organizations.