



FEDERAL ELECTION COMMISSION

11 CFR Part 110

[Notice 2016-13]

Internet Communication Disclaimers; Reopening of Comment Period and Notice of Hearing

AGENCY: Federal Election Commission.

ACTION: Reopening of comment period and notice of hearing.

SUMMARY: On October 13, 2011, the Federal Election Commission published an Advance Notice of Proposed Rulemaking (“ANPRM”) seeking comment on whether to begin a rulemaking to revise its regulations concerning disclaimers on certain internet communications and, if so, on what changes should be made to those rules. The Commission has decided to reopen the comment period to receive additional comments in light of legal and technological developments since that notice was published. The Commission is also announcing a public hearing.

DATES: The comment period for the ANPRM published October 13, 2011 (76 FR 63567) is reopened. Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The Commission will hold a hearing on these issues on February 1, 2017. Anyone wishing to testify at the hearing must file timely written comments and must include in the written comments a request to testify.

ADDRESSES: All comments must be in writing. Commenters are encouraged to submit comments electronically via the Commission’s website at <http://www.fec.gov/fosers>, reference REG 2011-02, or by email to InternetDisclaimers@fec.gov. Alternatively, commenters may

submit comments in paper form, addressed to the Federal Election Commission, Attn.: Neven F. Stipanovic, Acting Assistant General Counsel, 999 E Street NW., Washington, DC 20463.

Each commenter must provide, at a minimum, his or her first name, last name, city, state, and zip code. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the Commission's website and in the Commission's Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social security number, driver's license number, or any information that is restricted from disclosure, such as trade secrets or commercial or financial information that is privileged or confidential.

FOR FURTHER INFORMATION CONTACT: Mr. Neven F. Stipanovic, Acting Assistant General Counsel, or Ms. Jessica Selinkoff, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On October 13, 2011, the Commission published in the Federal Register an ANPRM seeking comment on whether and how to revise the rules at 11 CFR 110.11 regarding disclaimers on internet communications.¹ Specifically, the Commission was considering whether to modify the disclaimer requirements for certain internet communications, or to provide exceptions thereto, consistent with the Federal Election Campaign Act, 52 U.S.C. 30101-46 ("the Act"). The Commission received seven substantive comments in response to the ANPRM. All but one of the commenters agreed that the Commission should update the disclaimer rules through a rulemaking, though commenters differed on how the Commission should do so. In light of subsequent legal and technological developments, the Commission is reopening the comment period and will hold a hearing.

¹ See Internet Communication Disclaimers, 76 FR 63567 (Oct. 13, 2011).

As discussed in the ANPRM, a “disclaimer” is a statement that must appear on certain communications to identify who paid for it and, where applicable, whether the communication was authorized by a candidate. 52 U.S.C. 30120(a); 11 CFR 110.11. With some exceptions, the Act and Commission regulations require disclaimers for public communications: (1) made by a political committee; (2) that expressly advocate the election or defeat of a clearly identified federal candidate; or (3) that solicit a contribution. 52 U.S.C. 30120(a); 11 CFR 110.11(a). While the term “public communication” generally does not include internet communications, it does include “communications placed for a fee on another person’s Web site.” 11 CFR 100.26.² In addition to these internet public communications, “electronic mail of more than 500 substantially similar communications when sent by a political committee . . . and all Internet websites of political committees available to the general public” also must have disclaimers. 11 CFR 110.11(a).

Commission regulations set forth certain exceptions to the general disclaimer requirements. For example, disclaimers are not required for communications placed on “[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed.” 11 CFR 110.11(f)(1)(i) (the “small items exception”). Nor are disclaimers required for “[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable.” 11 CFR 110.11(f)(1)(ii) (the “impracticable exception”).

As discussed in the ANPRM, some internet advertisements are so character-limited that providing all the disclaimer information required by the Act may take up much of the available ad characters. See Advisory Opinion 2010-19 (Google) (describing 95-character search result

² The Commission is currently proposing amendments intended to modernize a number of regulations, including 11 CFR 100.26. To review those proposals and other Commission rulemaking documents, visit <http://www.fec.gov/fosers>, reference REG 2013-01.

advertisements); cf. Advisory Opinion Request 2011-09 (Facebook) (describing several categories of advertisements ranging from zero to 160 characters).³ However, the ANPRM noted that technological options may allow for the display of disclaimers when a user “hovers” or “rolls” over the advertisement, or on the landing page to which the user is taken after clicking the advertisement.⁴

Since the publication of the ANPRM, the Commission has considered these issues in new factual contexts. See, e.g., Advisory Opinion Request 2013-18 (Revolution Messaging) (asking whether “banner ads” viewed on mobile phones, either in website or app, required disclaimers); MUR 6911 (Frankel) (considering whether candidates’ and political parties’ Twitter profiles and individual tweets required disclaimers). The Commission seeks comments on how the issues and possible approaches discussed in the ANPRM might or might not apply to these new technological presentations. The Commission also notes that, since the ANPRM was published, at least one additional state has joined California in adopting regulations to address small internet advertisements.⁵ The Commission seeks comments addressing persons’ experiences in complying with (and receiving disclosure from) these state rules as well as other disclosure regimes. The Commission is also interested in comments that address:

- how campaigns, parties, and other political committees, voters, and others disseminate and receive electoral information via the internet and other technologies, including any data or experiences in purchasing, selling, or distributing small or character-limited advertisements on websites, apps, and mobile devices;

³ Documents related to Commission advisory opinions are available at www.fec.gov/searchao.

⁴ See, e.g., Contents of Disclosure Statements. Advertisement Disclosure, Cal. Code Regs. tit. 2, sec. 18450.4(b)(3)(G)(1) (California small internet ad disclosure rule discussed in ANPRM).

⁵ See Electronic Media, Requirements, Md. Code Regs. 33.13.07.02(D)(2)(b).

- any challenges in complying with the existing disclaimer rules as applied to internet communications;
- the technological or other characteristics that might define a “small” internet advertisement;
- how a disclaimer requirement or exception for “small” internet advertisements might be implemented;
- the informational benefits of disclaimers on internet communications to assist voters in identifying the source of advertising so they are better “able to evaluate the arguments to which they are being subjected”;⁶
- the informational benefits of disclaimers on internet communications, including websites and social media pages, to avoid voter confusion and reduce the incidence of solicitations that appear to be for candidates but are actually for non-candidate committees; and
- the extent to which the Commission’s consideration of disclaimer requirements should take into account current or anticipated models of internet advertising.

The Commission also invites additional comments on any issues discussed in the ANPRM and is particularly interested in comments addressing advertisements on internet-enabled applications and devices (such as apps, eReaders, and wearable technology). Given the speed at which technological advances are developing, the Commission welcomes comments that address possible regulatory approaches that might minimize the need for serial revisions to the Commission’s rules in order to adapt to new or emerging technologies.

On behalf of the Commission,

⁶ Citizens United v. FEC, 558 U.S. 310, 368 (2010) (quoting First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 792 n.32 (1978)).

Matthew S. Petersen,
Chairman,
Federal Election Commission.

Dated: October 7, 2016.

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