

presented to the public for comment. Gaining this early understanding of all parties' perspectives allows DOE to address key issues at an earlier stage of the process, thereby allowing more time for an iterative process to resolve issues. A rule drafted by negotiation with informed and affected parties is more likely to maximize benefits while minimizing unnecessary costs than one conceived or drafted without the opportunity for sustained dialog among interested and expert parties. DOE anticipates that there will be a need for fewer substantive changes to a proposed rule developed under a regulatory negotiation process prior to the publication of a final rule.

To the maximum extent possible, consistent with the legal obligations of the Department, DOE will use the consensus of the advisory committee or subcommittee as the basis for the rule the Department proposes for public notice and comment.

*Purpose of the Meeting:* To continue the process of seeking consensus on a proposed rule for setting standards for the energy efficiency of liquid immersed and medium- and low-voltage dry type distribution transformers, as authorized by the Energy Policy Conservation Act (EPCA) of 1975, as amended, 42 U.S.C. 6313(a)(6)(C) and 6317(a).

*Tentative Agenda:* The MV Group will meet at 9:00 a.m. and will conclude at 6 p.m. on Tuesday, November 8, 2011. The LV Group will meet at 9 a.m. through 6 p.m. on Wednesday, November 9, 2011. The tentative agenda for the meetings includes continued discussion regarding the analyses of alternate standard levels and negotiation efforts to address the perceived issues.

*Public Participation:* Members of the public are welcome to observe the business of the meetings and to make comments related to the issues being discussed at appropriate points, when called on by the moderator. The facilitator will make every effort to hear the views of all interested parties within limits required for the orderly conduct of business. To attend the meeting and/or to make oral statements regarding any of the items on the agenda, e-mail [erac@ee.doe.gov](mailto:erac@ee.doe.gov). Please include "MV and LV Work Group 110811" in the subject line of the message. Please be sure to specify which working group discussion you will be attending. In the e-mail, please provide your name, organization, citizenship and contact information. Space is limited.

Participation in the meeting is not a prerequisite for submission of written comments. ERAC invites written comments from all interested parties. If you would like to file a written

statement with the committee, you may do so either by submitting a hard or electronic copy before or after the meeting. Electronic copy of written statements should be e-mailed to [erac@ee.doe.gov](mailto:erac@ee.doe.gov).

Minutes: The minutes of the meeting will be available for public review at <http://www.erac.energy.gov>.

Issued in Washington, DC, on October 5, 2011.

**LaTanya R. Butler,**

*Acting Deputy Committee Management Officer.*

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## FEDERAL ELECTION COMMISSION

### 11 CFR Part 110

[Notice 2011-14]

#### Internet Communication Disclaimers

**AGENCY:** Federal Election Commission.

**ACTION:** Advance Notice of Proposed Rulemaking.

**SUMMARY:** The Federal Election Commission requests comments on whether to begin a rulemaking to revise its regulations concerning disclaimers on certain Internet communications and, if so, what changes should be made to those rules. The Commission intends to review the comments received as it decides what revisions, if any, it will propose making to these rules.

**DATES:** Comments must be received on or before November 14, 2011. The Commission will determine at a later date whether to hold a public hearing on this Notice. If a hearing is to be held, the Commission will publish a notice in the **Federal Register** announcing the date and time of the hearing.

**ADDRESSES:** All comments must be in writing. Comments may be submitted electronically via the Commission's Web site at <http://www.fec.gov/fosers>. Commenters are encouraged to submit comments electronically to ensure timely receipt and consideration. Alternatively, comments may be submitted in paper form. Paper comments must be sent to the Federal Election Commission, Attn.: Amy L. Rothstein, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463. All comments must include the full name and postal service address of the commenter, and of each commenter if filed jointly, or they will not be considered. The Commission will post comments on its Web site at the conclusion of the comment period.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy L. Rothstein, Assistant General Counsel, or Ms. Jessica Selinkoff, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

**SUPPLEMENTARY INFORMATION:** The Federal Election Commission is publishing this Advance Notice of Proposed Rulemaking seeking comments on whether and how the Commission should revise its rules at 11 CFR 110.11 regarding disclaimers on Internet communications. Specifically, the Commission is considering whether to modify the disclaimer requirements for certain Internet communications, or to provide exceptions thereto, consistent with the Federal Election Campaign Act, 2 U.S.C. 431 *et seq.*, as amended ("the Act"). In the event the Commission adopts a final rule on this issue, given the timeframe of the current election cycle, the Commission does not anticipate the rule would become effective for the 2011-2012 election cycle.

#### 1. Current Statutory and Regulatory Framework

Under the Act and Commission regulations, a "disclaimer" is a statement that must appear on certain communications to identify who paid for them and, where applicable, whether the communications were authorized by a candidate. 2 U.S.C. 441d(a); 11 CFR 110.11. *See also* Explanation and Justification for Final Rules on Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds, 67 FR 76962, 76962 (Dec. 13, 2002) ("2002 Disclaimer E&J").<sup>1</sup> 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. 2 U.S.C. 441d(a); 11 CFR 110.11(a). In addition to public communications by political committees, "electronic mail of more than 500 substantially similar communications when sent by a political committee \* \* \* and all Internet Web sites of political committees available to the general public" also must have disclaimers. 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."

<sup>1</sup> Documents related to Commission rulemakings are available at <http://www.fec.gov/fosers>.

11 CFR 100.26. Thus, communications placed for a fee on another person's Web site are subject to the disclaimer requirements. *See* 11 CFR 110.11(a).

The content of the disclaimer that must appear on a given communication depends on who authorized and paid for the communication. If a candidate, an authorized committee of a candidate, or an agent of either pays for and authorizes the communication, then the disclaimer must state that the communication "has been paid for by the authorized political committee." 11 CFR 110.11(b)(1); *see also* 2 U.S.C. 441d(a)(1). If a public communication is paid for by someone else, but is authorized by a candidate, an authorized committee of a candidate, or an agent of either, then the disclaimer must state who paid for the communication and that the communication is authorized by the candidate, authorized committee of the candidate, or an agent of either. 11 CFR 110.11(b)(2); *see also* 2 U.S.C. 441d(a)(2). If the communication is not authorized by a candidate, an authorized committee of a candidate, or an agent of either, then the disclaimer must "clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate's committee." 11 CFR 110.11(b)(3); *see also* 2 U.S.C. 441d(a)(3). Every disclaimer "must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity" of the communication's sponsor. 11 CFR 110.11(c)(1).

Commission regulations contain limited 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"). *See also* Advisory Opinion 2002-09 (Target Wireless).

## 2. Recent Developments Concerning Internet Advertisements

The Commission recently considered two advisory opinion requests seeking to exempt from the disclaimer requirements, under the small items or

impracticable exceptions, certain advertisements placed for a fee on another person's Web site. In the first of these advisory opinion requests, Google, Inc. asked the Commission if it could sell text advertisements consisting of approximately 95 characters to candidates and political committees if those advertisements did not include disclaimers. Google proposed that users would see a disclaimer by clicking on the advertisement and viewing the disclaimer on the advertisement's landing page. *See* Advisory Opinion Request 2010-19 (Google).<sup>2</sup> While the Commission did not agree on the reason for its decision, it concluded that such advertisements were not in violation of the Act. *See* Advisory Opinion 2010-19 (Google).

In the second advisory opinion request on this issue, Facebook asked if its small, character-limited advertisements (ranging from zero to 160 characters) qualified for either the small items or impracticable exception to the disclaimer requirements. *See* Advisory Opinion Request 2011-09 (Facebook). The Commission could not approve an answer by the required four affirmative votes and therefore was unable to render an advisory opinion to Facebook.

In the course of considering these advisory opinion requests, the Commission received one comment from the public urging the Commission to undertake a rulemaking to address the disclaimer requirements in light of technological developments in Internet advertising. The Commission is now considering whether to issue an NPRM to propose amending its rules in this area. The Commission seeks to provide "much needed flexibility to ensure that the regulated community is able to take advantage of rapidly evolving technological innovations, while ensuring that 'necessary precautions' are in place." Advisory Opinion 2007-30 (Dodd); *see also* Advisory Opinion 1999-09 (Bradley) (explaining that it is the Commission's practice to "interpret[] the Act and its regulations in a manner consistent with contemporary technological innovations \* \* \* where the use of the technology would not compromise the intent of the Act or regulations."). The Supreme Court has explained that the disclaimers required by 2 U.S.C. 441d "provide the electorate with information and insure that the voters are fully informed about the person or group who is speaking." *Citizens United v. FEC*, 130 S.Ct. 876,

915, 78 U.S.L.W. 4078 (2010) (internal quotations and alterations removed). Given the development and proliferation of the Internet as a mode of political communication, and the expectation that continued technological advances will further enhance the quantity of information available to voters online and through other technological means, the Commission welcomes comments on whether and how it should amend its disclaimer requirements for public communications on the Internet to provide flexibility consistent with their purpose.

## 3. Commission Regulations Concerning Internet Communications

The Commission has long recognized the vital role of the Internet and electronic communications in election campaigns. The Commission first addressed Internet disclaimers in 1995 when it stated that "Internet communications and solicitations that constitute general public political advertising require disclaimers." *See* Explanation and Justification for Final Rules on Communications Disclaimer Requirements, 60 FR 52069, 52071 (Oct. 5, 1995) ("1995 Disclaimer E&J").

That same year, the Commission considered two advisory opinion requests regarding the application of the Act to Internet solicitations of campaign contributions. *See* Advisory Opinions 1995-35 (Alexander for President) and 1995-09 (NewtWatch). The Commission determined that Internet solicitations are general public political advertisements and, as such, they "are permissible under the [Act] provided that certain requirements, including the use of appropriate disclaimers, are met." Advisory Opinion 1995-35 (NewtWatch).

In 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002, Public Law 107-155, 116 Stat. 81 (2002) ("BCRA"). In BCRA, Congress added new specificity to the disclaimer requirements, expanded the scope of communications covered by the disclaimer requirements, and enacted "stand by your ad" requirements. Congress also added a new definition of the term "public communication." *See* 2 U.S.C. 431(22) and 441d; *see also* 2002 Disclaimer E&J, 67 FR at 76962.

In implementing BCRA, the Commission promulgated a new definition of "public communication" that excluded all communications over the Internet. *See* Explanation and Justification for Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49111 (July 29, 2002). The

<sup>2</sup> Documents related to Commission advisory opinions are available at <http://www.fec.gov/searchao>.

Commission also promulgated new rules to implement BCRA's changes to the disclaimer provisions of the Act. *See* 2002 Disclaimer E&J, 67 FR at 76962. The new rules applied disclaimer requirements to political committee Web sites and the distribution of more than 500 substantially similar unsolicited e-mails. Other than these two specific types of Internet-based activities, however, Internet communications were not subject to the disclaimer requirements. *Id.* at 76963–64.

The Commission adopted its current rules governing Internet communications in 2006 in response to the decision of the U.S. District Court for the District of Columbia in *Shays v. FEC*. *See Shays v. FEC*, 337 F.Supp.2d 28 (D.D.C. 2004) (“*Shays I*”); *see also* Explanation and Justification for Final Rules on Internet Communications, 71 FR 18589, 18589 (Apr. 12, 2006) (“2006 Internet E&J”). That decision held, among other things, that the Commission could not wholly exclude Internet activity from the definition of “public communication.”

Following the *Shays I* decision, the Commission added “Internet communications placed on another person’s Web site for a fee” to the regulatory definition of “public communication.” *See* 11 CFR 100.26. Under the new definition, “when someone such as an individual, political committee, labor organization or corporation pays a fee to place a banner, video, or pop-up advertisement on another person’s Web site, the person paying makes a ‘public communication.’” 2006 Internet E&J at 18594. Furthermore, “the placement of advertising on another person’s Web site for a fee includes all potential forms of advertising, such as banner advertisements, streaming video, popup advertisements, and directed search results.” *Id.* At the same time, however, the Commission confirmed that the “vast majority of Internet communications \* \* \* remain free from campaign finance regulation.” *Id.* at 18590. Because the disclaimer requirement “incorporate[d] the revised definition of ‘public communication,’” Internet communications placed for a fee on another person’s Web site became subject to the disclaimer requirement. *Id.* at 18589–90; *see also id.* at 18594.

#### 4. Possible Revisions to Commission Regulations

The Commission invites comments that address the ways that campaigns, political committees, voters, and others are using, or may soon use, the Internet and other technologies, including

applications for mobile devices (“apps”), to disseminate and receive campaign and other electoral information. The Commission also invites commenters to address the ways in which the Internet and other technologies present challenges in complying with the disclaimer requirements under the existing rules.

The Commission is interested in comments that address possible modifications, such as by technological alternatives, to the current disclaimer requirements. For example, the California Fair Political Practices Commission (“CFPPC”) recently amended its regulations regarding paid campaign advertisements to address the issue of disclaimers in electronic media advertisements that are limited in size. *See* Cal. Code Regs. tit. 2, sec. 18450.4 (effective December 2010). Instead of exempting all small communications from the disclaimer requirements, CFPPC’s new regulation provides that small advertisements may use technological features such as rollover displays, links to a Web page, or “other technological means” to meet the requirements. *Id.* at sec. 18450.4(b)(3)(G)(1). The California regulation contains the following examples of “limited” size advertisements: a “micro bar,” a “button ad,” a paid text advertisement under 500 characters, or a small picture or graphic link. *Id.* The California regulation further provides that, “In electronic media advertisements whose size, space, or character limit constraints (*i.e.*, SMS text message) render it impracticable to include the full disclosure information \* \* \* the candidate or committee sending the mass mailing may provide abbreviated advertisement disclosure containing at least the committee’s [Fair Political Practices Commission number] and when technologically possible a link to the Web page on the Secretary of State’s Web site displaying the committee’s campaign finance information, if applicable.” *Id.* at sec. 18450.4(b)(3)(G)(4). Should the Commission consider abbreviated advertisement disclosure for Internet advertisements? The Commission invites comments that explore the technological and physical characteristics that would define a “small” Internet advertisement.

In the Google and Facebook advisory opinion requests discussed above, the facts indicated that some Internet advertisements link to a Web site or Web page that contains a disclaimer that complies with the Act and Commission regulations. Should the Commission consider allowing such a link, by itself,

to satisfy the disclaimer requirement? If so, how should the Commission approach disclaimer requirements for links in advertisements that direct persons to Web sites without disclaimers or to Web sites owned or operated by persons other than the person paying for the advertisement?

The Commission is also interested in commenters’ data or experiences in purchasing, selling, or distributing small or character-limited advertisements online. The Commission is interested in comments relating to the appropriate application of either the small items or impracticable exception from the disclaimer requirements to small or character-limited Internet advertisements. The Commission is also interested in comments addressing the possibility of developing a new exception for small or character-limited Internet advertisements that might be more appropriate for the medium than the existing regulatory exceptions. The Commission is interested in learning what proportion of Internet political advertising might be affected by such a disclaimer exception. The Commission is also interested in comments addressing what role Internet media providers’ usual and normal advertising model should play in the Commission’s consideration of disclaimer requirements.

Finally, the Commission welcomes comments on any other aspect of the issues addressed in this Notice. 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 Internet technology in the future. Additionally, the Commission invites comment on whether there are other regulations that the Commission should consider revising in light of new or emerging Internet technology.

Dated: October 6, 2011.

On behalf of the Commission.

**Cynthia L. Bauerly,**

*Chair, Federal Election Commission.*

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