



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2011 SEP 21 P 4: 32

SECRETARIAT

AGENDA ITEM

For Meeting of 9-22-11

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Rosemary C. Smith *RCR for RCS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

SUBJECT: Draft Advance Notice of Proposed Rulemaking for Internet
Communication Disclaimers

Attached is a draft Advance Notice of Proposed Rulemaking for Internet
Communication Disclaimers. We request that this draft be placed on the agenda for
September 22, 2011.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 110**

3 [Notice 2011 - __]

4 **Internet Communication Disclaimers**

5 **AGENCY:** Federal Election Commission.

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

7 **SUMMARY:** The Federal Election Commission requests comments on whether
8 to begin a rulemaking to revise its regulations at 11 CFR 110.11
9 concerning disclaimers on certain Internet communications and, if
10 so, what changes should be made to those rules. The Commission
11 intends to review the comments received as it decides what
12 revisions, if any, it will propose making to these rules.

13 **DATES:** Comments must be received on or before [insert date 30 days after
14 date of publication in the Federal Register]. The Commission will
15 determine at a later date whether to hold a public hearing on this
16 Notice. If a hearing is to be held, the Commission will publish a
17 notice in the Federal Register announcing the date and time of the
18 hearing.

19 **ADDRESSES:** All comments must be in writing. Comments may be submitted
20 electronically via the Commission's website at
21 <http://www.fec.gov/fosers>. Commenters are encouraged to submit
22 comments electronically to ensure timely receipt and
23 consideration. Alternatively, comments may be submitted in paper

1 form. Paper comments must be sent to the Federal Election
2 Commission, Attn.: Amy L. Rothstein, Assistant General Counsel,
3 999 E Street, NW., Washington, DC 20463. All comments must
4 include the full name and postal service address of a commenter,
5 and of each commenter if filed jointly, or they will not be
6 considered. The Commission will post comments on its Web site
7 at the conclusion of the comment period.

8 **FOR FURTHER**
9 **INFORMATION**

10 **CONTACT:**

Ms. Amy L. Rothstein, Assistant General Counsel, or Ms. Jessica
11 Selinkoff, Attorney, 999 E Street NW., Washington, DC 20463,
12 (202) 694-1650 or (800) 424-9530.

13 **SUPPLEMENTARY**
14 **INFORMATION:**

The Federal Election Commission is publishing this Advance
15 Notice of Proposed Rulemaking seeking comments on whether and how the Commission
16 should revise its rules at 11 CFR 110.11 regarding disclaimers on Internet
17 communications. Specifically, the Commission is considering whether to modify the
18 disclaimer requirements for certain Internet communications, or to provide exceptions
19 thereto, consistent with the Federal Election Campaign Act, 2 U.S.C. 431 et seq., as
20 amended (“the Act”).

21 1. Current Statutory and Regulatory Framework

22 Under the Act and Commission regulations, a “disclaimer” is a statement that
23 must appear on certain communications to identify who paid for and, where applicable,
24 whether the communication was authorized by a candidate. 2 U.S.C. 441d(a); 11 CFR
25 110.11. See also Explanation and Justification for Final Rules on Disclaimers,

1 Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds, 67 FR
2 76962, 76962 (Dec. 13, 2002) (“2002 Disclaimer E&J”).¹ With some exceptions, the Act
3 and Commission regulations require disclaimers for public communications: (1) made by
4 a political committee; (2) that expressly advocate the election or defeat of a clearly
5 identified Federal candidate; or (3) that solicit a contribution. 2 U.S.C. 441d(a); 11 CFR
6 110.11(a). In addition to public communications by political committees, “electronic
7 mail of more than 500 substantially similar communications when sent by a political
8 committee . . . and all Internet websites of political committees available to the general
9 public” also must have disclaimers. 11 CFR 110.11(a).

10 While the term “public communication” generally does not include Internet
11 communications, it does include “communications placed for a fee on another person’s
12 Web site.” 11 CFR 100.26. Thus, communications placed for a fee on another person’s
13 Web site are subject to the disclaimer requirements. See 11 CFR 110.11(a).

14 The content of the disclaimer that must appear on a given communication depends
15 on who authorized and paid for the communication. If a candidate, an authorized
16 committee of a candidate, or an agent of either pays for and authorizes the
17 communication, then the disclaimer must state that the communication “has been paid for
18 by the authorized political committee.” 11 CFR 110.11(b)(1); see also
19 2 U.S.C. 441d(a)(1). If a public communication is paid for by someone else, but is
20 authorized by a candidate, an authorized committee of a candidate, or an agent of either,
21 then the disclaimer must state who paid for the communication and that the
22 communication is authorized by the candidate, authorized committee of the candidate, or

¹ Documents related to Commission rulemakings are available at www.fec.gov/fosers.

1 an agent of either. 11 CFR 110.11(b)(2); see also 2 U.S.C. 441d(a)(2). If the
2 communication is not authorized by a candidate, an authorized committee of a candidate,
3 or an agent of either, then the disclaimer must “clearly state the full name and permanent
4 street address, telephone number, or World Wide Web address of the person who paid for
5 the communication, and that the communication is not authorized by any candidate or
6 candidate’s committee.” 11 CFR 110.11(b)(3); see also 2 U.S.C. 441d(a)(3). Every
7 disclaimer “must be presented in a clear and conspicuous manner, to give the reader,
8 observer, or listener adequate notice of the identity” of the communication’s sponsor.
9 11 CFR 110.11(c)(1).

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

18 2. Recent Developments Concerning Internet Advertisements

19 The Commission recently considered two advisory opinion requests seeking to
20 exempt from the disclaimer requirements, under the small items or impracticable
21 exceptions, certain advertisements placed for a fee on another person’s website. In the
22 first of these advisory opinions, Google, Inc. asked the Commission if it could sell text
23 advertisements consisting of approximately 95 characters to candidates and political

1 committees if those advertisements did not include disclaimers. Google proposed that
2 users would see a disclaimer by clicking on the advertisement and viewing the disclaimer
3 on the advertisement’s landing page. See Advisory Opinion Request 2010-19 (Google).²
4 While the Commission did not agree on the reason for its decision, it concluded that such
5 advertisements were not in violation of the Act. See Advisory Opinion 2010-19
6 (Google).

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

13 In the course of considering these advisory opinions, the Commission received
14 one comment from the public urging the Commission to undertake a rulemaking to
15 address the disclaimer requirements in light of technological developments in Internet
16 advertising. The Commission is now considering whether to issue an NPRM to propose
17 amending its rules in this area. The Commission seeks to provide “much needed
18 flexibility to ensure that the regulated community is able to take advantage of rapidly
19 evolving technological innovations, while ensuring that ‘necessary precautions’ are in
20 place.” Advisory Opinion 2007-30 (Dodd); see also Advisory Opinion 1999-09
21 (Bradley) (explaining that it is the Commission’s practice to “interpret[] the Act and its
22 regulations in a manner consistent with contemporary technological innovations . . .

² Documents related to Commission advisory opinions are available at www.fec.gov/searchao.

1 where the use of the technology would not compromise the intent of the Act or
2 regulations.”). The Supreme Court has explained that the disclaimers required by 2
3 U.S.C. 441d “provide the electorate with information and insure that the voters are fully
4 informed about the person or group who is speaking.” Citizens United v. FEC, 130 S.Ct.
5 876, 915, 78 U.S.L.W. 4078 (2010) (internal quotations and alterations removed). Given
6 the development and proliferation of the Internet as a mode of political communication,
7 and the expectation that continued technological advances will further enhance the
8 quantity of information available to voters online and through other technological means,
9 the Commission welcomes comments on whether and how it should amend its disclaimer
10 requirements for public communications on the Internet to provide flexibility consistent
11 with their purpose.

12 3. Commission Regulations Concerning Internet Communications

13 The Commission has long recognized the vital role of the Internet and electronic
14 communications in election campaigns. The Commission first addressed Internet
15 disclaimers in 1995 when it stated that “Internet communications and solicitations that
16 constitute general public political advertising require disclaimers.” See Explanation and
17 Justification for Final Rules on Communications Disclaimer Requirements,
18 60 FR 52069, 52071 (Oct. 5, 1995) (“1995 Disclaimer E&J”).

19 That same year, the Commission considered two advisory opinion requests
20 regarding the application of the Act to Internet solicitations of campaign contributions.
21 See Advisory Opinions 1995-35 (Alexander for President) and 1995-09 (NewtWatch).
22 The Commission determined that Internet solicitations are general public political
23 advertisements and, as such, they “are permissible under the [Act] provided that certain

1 requirements, including the use of appropriate disclaimers, are met.” Advisory Opinion
2 1995-35 (NewtWatch).

3 In 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002, Pub. L.
4 No. 107-155, 116 Stat. 81 (2002) (“BCRA”). In BCRA, Congress added new specificity
5 to the disclaimer requirements, expanded the scope of communications covered by the
6 disclaimer requirements, and enacted “stand by your ad” requirements. Congress also
7 added a new definition of the term “public communication.” See 2 U.S.C. 431(22) and
8 441d; see also 2002 Disclaimer E&J, 67 FR at 76962.

9 In implementing BCRA, the Commission promulgated a new definition of “public
10 communication” that excluded all communications over the Internet. See Explanation
11 and Justification for Final Rules on Prohibited and Excessive Contributions: Non-Federal
12 Funds or Soft Money, 67 FR 49064, 49111 (July 29, 2002). The Commission also
13 promulgated new rules to implement BCRA’s changes to the disclaimer provisions of the
14 Act. See 2002 Disclaimer E&J, 67 FR at 76962. The new rules applied disclaimer
15 requirements to political committee websites and the distribution of more than 500
16 substantially similar unsolicited emails. Other than these two specific types of Internet-
17 based activities, however, Internet communications were not subject to the disclaimer
18 requirements. Id. at 76963-64.

19 The Commission adopted its current rules governing Internet communications in
20 2006 in response to the decision of the U.S. District Court for the District of Columbia in
21 Shays v. FEC. See Shays v. FEC, 337 F.Supp.2d 28 (D.D.C. 2004) (“Shays I”); see also
22 Explanation and Justification for Final Rules on Internet Communications,
23 71 FR 18589, 18589 (Apr. 12, 2006) (“2006 Internet E&J”). That decision held, among

1 other things, that the Commission could not wholly exclude Internet activity from the
2 definition of “public communication.”

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

17 4. Possible Revisions to Commission Regulations

18 The Commission invites comments that address the ways that campaigns, political
19 committees, voters, and others are using, or may soon use, the Internet and other
20 technologies, including applications for mobile devices (“apps”), to disseminate and
21 receive campaign and other electoral information. The Commission also invites
22 commenters to address the ways in which the Internet and other technologies present
23 challenges in complying with the disclaimer requirements under the existing rules.

1 The Commission is interested in comments that address possible modifications,
2 such as by technological alternatives, to the current disclaimer requirements. For
3 example, the California Fair Political Practices Commission (“CFPPC”) recently
4 amended its regulations regarding paid campaign advertisements to address the issue of
5 disclaimers in electronic media advertisements that are limited in size. See Cal. Code
6 Regs. tit. 2, sec. 18450.4 (effective December 2010). Instead of exempting all small
7 communications from the disclaimer requirements, CFPPC’s new regulation provides
8 that small advertisements may use technological features such as rollover displays, links
9 to a webpage, or “other technological means” to meet the requirements. See id. at sec.
10 18450.4(b)(3)(G)(1). The California regulation contains the following examples of
11 “limited” size advertisements: a “micro bar,” a “button ad,” a paid text advertisement
12 under 500 characters, or a small picture or graphic link. See id. The California
13 regulation further provides that, “In electronic media advertisements whose size, space,
14 or character limit constraints (i.e., SMS text message) render it impracticable to include
15 the full disclosure information . . . the candidate or committee sending the mass mailing
16 may provide abbreviated advertisement disclosure containing at least the committee’s
17 [Fair Political Practices Commission number] and when technologically possible a link to
18 the webpage on the Secretary of State’s website displaying the committee’s campaign
19 finance information, if applicable.” See id. at sec. 18450.4(b)(3)(G)(4). Should the
20 commission consider abbreviated advertisement disclosure for internet advertisements?
21 The Commission invites comments that explore the technological and physical
22 characteristics that would define a “small” Internet advertisement.

1 In the Google and Facebook Advisory Opinion requests discussed above, the facts
2 indicated that some Internet advertisements link to a website or webpage that contains a
3 disclaimer that complies with the Act and Commission regulations. Should the
4 Commission consider allowing such a link, by itself, to satisfy the disclaimer
5 requirement? If so, how should the Commission approach disclaimer requirements for
6 links in advertisements that direct persons to websites without disclaimers or to websites
7 owned or operated by persons other than the person paying for the advertisement?

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

20 Finally, the Commission welcomes comments on any other aspect of the issues
21 addressed in this Notice. Given the speed at which technological advances are
22 developing, the Commission welcomes comments that address possible regulatory

1 approaches that might minimize the need for serial revisions to the Commission's rules in
2 order to adapt to new or emerging Internet technology in the future.
3 Additionally, the Commission invites comment on whether there are other regulations
4 that the Commission should consider revising in light of new or emerging Internet
5 technology.

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On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-P