



FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 4, 2011

MEMORANDUM

AGENDA ITEM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Rosemary C. Smith *RS*
Associate General Counsel

Amy L. Rothstein *ALR*
Assistant General Counsel

Jessica Selinkoff *JS*
Attorney

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

For Meeting of 10-6-11

SUBMITTED LATE

Attached is a revised draft Advance Notice of Proposed Rulemaking for Internet
Communication Disclaimers. We request that this draft be placed on the agenda for
October 6, 2011.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 110

[Notice 2011-XX]

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 at 11 CFR 110.11 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 [insert date 30 days after date of publication in the Federal Register]. 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 website 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

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”). In the event the Commission adopts a final rule on this issue, given
21 the timeframe of the current election cycle, the Commission does not anticipate the rule
22 would become effective for the 2011-2012 election cycle.

23 1. Current Statutory and Regulatory Framework

24 Under the Act and Commission regulations, a “disclaimer” is a statement that
25 must appear on certain communications to identify who paid for and, where applicable,

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

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

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

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

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

12 Commission regulations contain limited exceptions to the general disclaimer
13 requirements. For example, disclaimers are not required for communications placed on
14 “[b]umper stickers, pins, buttons, pens, and similar small items upon which the
15 disclaimer cannot be conveniently printed.” 11 CFR 110.11(f)(1)(i) (the “small items
16 exception”). Nor are disclaimers required for “[s]kywriting, water towers, wearing
17 apparel, or other means of displaying an advertisement of such a nature that the inclusion
18 of a disclaimer would be impracticable.” 11 CFR 110.11(f)(1)(ii) (the “impracticable
19 exception”). See also Advisory Opinion 2002-09 (Target Wireless).

20 2. Recent Developments Concerning Internet Advertisements

21 The Commission recently considered two advisory opinion requests seeking to
22 exempt from the disclaimer requirements, under the small items or impracticable
23 exceptions, certain advertisements placed for a fee on another person’s website. In the

1 first of these advisory opinions, Google, Inc. asked the Commission if it could sell text
2 advertisements consisting of approximately 95 characters to candidates and political
3 committees if those advertisements did not include disclaimers. Google proposed that
4 users would see a disclaimer by clicking on the advertisement and viewing the disclaimer
5 on the advertisement's landing page. See Advisory Opinion Request 2010-19 (Google).²
6 While the Commission did not agree on the reason for its decision, it concluded that such
7 advertisements were not in violation of the Act. See Advisory Opinion 2010-19
8 (Google).

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

15 In the course of considering these advisory opinions, the Commission received
16 one comment from the public urging the Commission to undertake a rulemaking to
17 address the disclaimer requirements in light of technological developments in Internet
18 advertising. The Commission is now considering whether to issue an NPRM to propose
19 amending its rules in this area. The Commission seeks to provide "much needed
20 flexibility to ensure that the regulated community is able to take advantage of rapidly
21 evolving technological innovations, while ensuring that 'necessary precautions' are in
22 place." Advisory Opinion 2007-30 (Dodd); see also Advisory Opinion 1999-09

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

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

14 3. Commission Regulations Concerning Internet Communications

15 The Commission has long recognized the vital role of the Internet and electronic
16 communications in election campaigns. The Commission first addressed Internet
17 disclaimers in 1995 when it stated that “Internet communications and solicitations that
18 constitute general public political advertising require disclaimers.” See Explanation and
19 Justification for Final Rules on Communications Disclaimer Requirements,
20 60 FR 52069, 52071 (Oct. 5, 1995) (“1995 Disclaimer E&J”).

21 That same year, the Commission considered two advisory opinion requests
22 regarding the application of the Act to Internet solicitations of campaign contributions.
23 See Advisory Opinions 1995-35 (Alexander for President) and 1995-09 (NewtWatch).

1 The Commission determined that Internet solicitations are general public political
2 advertisements and, as such, they “are permissible under the [Act] provided that certain
3 requirements, including the use of appropriate disclaimers, are met.” Advisory Opinion
4 1995-35 (NewtWatch).

5 In 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002, Pub. L.
6 No. 107-155, 116 Stat. 81 (2002) (“BCRA”). In BCRA, Congress added new specificity
7 to the disclaimer requirements, expanded the scope of communications covered by the
8 disclaimer requirements, and enacted “stand by your ad” requirements. Congress also
9 added a new definition of the term “public communication.” See 2 U.S.C. 431(22) and
10 441d; see also 2002 Disclaimer E&J, 67 FR at 76962.

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

21 The Commission adopted its current rules governing Internet communications in
22 2006 in response to the decision of the U.S. District Court for the District of Columbia in
23 Shays v. FEC. See Shays v. FEC, 337 F.Supp.2d 28 (D.D.C. 2004) (“Shays I”); see also

1 Explanation and Justification for Final Rules on Internet Communications,
2 71 FR 18589, 18589 (Apr. 12, 2006) (“2006 Internet E&J”). That decision held, among
3 other things, that the Commission could not wholly exclude Internet activity from the
4 definition of “public communication.”

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

19 4. Possible Revisions to Commission Regulations

20 The Commission invites comments that address the ways that campaigns, political
21 committees, voters, and others are using, or may soon use, the Internet and other
22 technologies, including applications for mobile devices (“apps”), to disseminate and
23 receive campaign and other electoral information. The Commission also invites

1 commenters to address the ways in which the Internet and other technologies present
2 challenges in complying with the disclaimer requirements under the existing rules.

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

1 The Commission invites comments that explore the technological and physical
2 characteristics that would define a “small” Internet advertisement.

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

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

22 Finally, the Commission welcomes comments on any other aspect of the issues
23 addressed in this Notice. Given the speed at which technological advances are

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

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On behalf of the Commission,

Cynthia L. Bauerly
Chair
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-P