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What You Need to Know About the Federal Election Commission's New Internet Communications Disclaimer Rules

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Political committees, advertisers, and advertising platforms have operated under a cloud of uncertainty regarding which disclaimers, if any, must appear on internet-based advertisements. Existing Federal Election Commission (FEC) regulations and guidance left many unanswered questions about the disclaimers required for these increasingly important internet ads. The FEC has finally offered some clarity in this area, though some tough questions remain.

In December, the FEC voted[1] to expand the agency's political advertising disclaimer requirements to explicitly address internet-based ads, capping a winding rulemaking process that began over 11 years ago. These new rules (the Final Rules)[2] went into effect on March 1, 2023.

This article discusses how the disclaimer rules have changed, what ambiguities still exist, and what political committees, advertisers, and advertising platforms should expect going forward.

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HOW DID THE FEC'S DISCLAIMER RULES CHANGE?

The new FEC disclaimer rules expand the scope of the types of internet-based communications that must have disclaimers, and also describe the content that such internet advertising disclaimers must include.

Expanded Scope

FEC regulations place disclaimer requirements on all "public communications" that:

(1) Are made by political committees;
(2) Contain express advocacy; or
(3) Solicit a contribution.

While the content of the general disclaimer requirements depends on the identity of the entity making the communication, all disclaimers must be "clear and conspicuous," must indicate whether the entity is

authorized by a candidate, and must identify the person who paid for the ad.

Currently, internet-based ads only meet the definition of a "public communication" subject to the disclaimer rules if the ads are "placed for a fee on another person's Web site." This leaves a substantial amount of online advertising – anything placed on something other than a website – outside of the scope of the disclaimer regulations. The revised regulations broaden the types of digital ads subject to disclaimers, applying the rules to all "communications placed for a fee on another person's website, digital device, application, or advertising platform."

The FEC noted in its Final Rules that this change is meant to "better accommodate technological changes and reflect the range of 'media through which paid internet communications can be and will be sent and received.'" In addition, the FEC clarified that the expanded scope covers paid ads that are "disseminated via the internet or media that rely on the connectivity of the internet (including social media networks, streaming platforms, mobile applications, and wearable devices)."

Political committees, advertisers, and advertising platforms should read this change as indicating an expansive interpretation of the types of internet-based ads that are covered by the disclaimer requirements. While there will still be debates regarding certain new technologies and advertising methods, a broad view of the application of the new disclaimer rules is a safe starting point.

Defined Disclaimer Contents

The changes in the final rules follow the FEC's long struggle to address the content of internet disclaimers, for which it last issued rules in 2006. While the commissioners previously endorsed[3] updating the regulations to address internet disclaimers, no consensus emerged over the approach.

The existing disclaimer regulations impose additional content and formatting requirements for ads depending on whether the ads appear in print, on radio, or on television. This left ambiguity over whether internet ads should include any of these additional disclaimer requirements, or simply abide by the general disclaimer requirements that apply to all covered ads.

One proposal considered in 2018 would have expanded the "stand by your ad" written and spoken disclaimers required in television and radio ads to include video or audio communications on the internet or other digital media. Another proposal would have created different disclaimer rules for internet communications, specifying required payment and authorization information and when that information is clear and conspicuous.

With its new rules, the FEC picked the path that treats online ads in a distinct way, rather than by analogy to print, television, or radio ads. However, the new rules contain requirements specific to internet ads with video components, or those that are audio only. In addition, the new rules create an alternative disclaimer option for ads that face physical limitations on displaying the full disclaimer.

WHAT ARE THE NEW DISCLAIMER REQUIREMENTS FOR INTERNET-BASED ADS?

Under the new regulations, disclaimers appearing on an internet public communication must meet the general content requirements for all disclaimers: who paid for the ad, whether the ad is authorized by a candidate, and that the content is clear and conspicuous. These requirements apply to any person who pays to place the ad, regardless of whether that person created, produced, or distributed the ad. Notably, internet-based ads do not need the additional "stand by your ad" content, which statutorily applies only to television and radio ads.

The disclaimer on any internet ad with a text or graphic component – even if it also has video or audio – must meet the following criteria, and be observed without taking further action (such as clicking, hovering, etc.):

- Text must be of sufficient size to be clearly readable by the recipient. Disclaimer text at least as large as the majority of the other text meets this requirement.

- There must be a reasonable degree of color contrast between the background and the disclaimer's text, including, for example, black text on a white background.

- If the text disclaimer appears within a video, it must be visible for at least four seconds, and without the user taking any further action.

If an internet-based ad is audio only, the full disclaimer must be included in the audio component.

WHAT IF THE DISCLAIMER CANNOT FIT ON THE INTERNET-BASED AD?

The new rules allow an "adapted disclaimer" when a full disclaimer cannot be provided or would cover more than 25 percent of the communication due to space or

character constraints. The adapted disclaimer must state that the ad is paid for and who paid for the ad, using the payor's full name or a commonly understood abbreviation or acronym.

In addition, the adapted disclaimer must include an "indicator" (words, images, sounds, symbols, icons, etc.), which allows the viewer to use a "mechanism" (hover-over text, pop-up screens, scrolling text, rotating panels, hyperlinks, etc.) to access the full disclaimer through no more than one action.

Political committees and advertisers should start thinking about how their online ads on various platforms can incorporate these adapted disclaimers, when necessary, and work with production vendors to incorporate these changes. For advertising platforms that accept political ads, although the obligation to comply with these regulations applies to those who pay to place such covered ads, the platforms should prepare for questions from customers about how the platform's systems can allow the customers to comply with the adapted disclaimer, indicator, and mechanism rules.

WHAT ABOUT INTERNET-BASED ADS THAT CANNOT FIT AN ADAPTED DISCLAIMER?

Despite the adopted disclaimer rule, the commissioners did not resolve whether the "small items" exception (e.g., exempting an ad appearing on a pencil from carrying a disclaimer) applies to internet-based ads. This question has deadlocked the FEC on multiple[4] occasions.[5] However, statements from three commissioners support the application of the disclaimer exception to very small or short digital ads.

FEC Chair Allen J. Dickerson and Commissioner James E. "Trey" Trainor, III, wrote in their Interpretive Statement[6] that the small items exception reflects the "reality of political speech in a dynamic environment, where we know from experience that favored advertising platforms change from cycle to cycle." Similarly, Commissioner Sean Cooksey's Concurring Statement[7] characterized the exception as "critical to maintaining regulatory flexibility for political campaigning online."

Based on these statements, political committees, advertisers, and advertising platforms can expect the small items exception to be a continued point of debate and ambiguity. Three commissioners have left open the argument that no disclaimers are required on small internet ads, despite the FEC's efforts to provide clarity in this space.

DO THE NEW RULES COVER "PROMOTED" ADS?

Notably, the FEC declined to adopt part of the initially proposed Final Rules that would also have applied disclaimer requirements to communications "promoted for a fee" by third parties using the internet. This could include payments to a third party to promote or boost express advocacy communications by that third party. This issue will be left to a separate rulemaking.[8]

Notes

1. https://www.fec.gov/resources/cms-content/documents/mtgdoc-22-52-B.pdf.
2. https://sers.fec.gov/fosers/showpdf.htm?docid=421096.
3. https://www.fec.gov/resources/cms-content/documents/mtgdoc_18-12-a.pdf%20.
4. https://www.fec.gov/files/legal/aos/2011-09/AO-2011-09.pdf.
5. https://www.fec.gov/files/legal/aos/2013-18/2013-18.pdf.
6. https://www.fec.gov/resources/cms-content/documents/Interpretive-Statement-Regarding-Reg-2011-02-Internet-Disclaimers-Dickerson-Trainor.pdf.
7. https://www.fec.gov/resources/cms-content/documents/Concurring-Statement-re-Internet-Disclaimers-Final-Rule-Cooksey.pdf.
8. https://www.fec.gov/resources/cms-content/documents/mtgdoc-22-55-A.pdf.

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