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FEC Releases NPRM for Disclaimers on Internet Communications

The Federal Election Commission (FEC) took a step last week toward clarifying the "paid for by" and other disclaimer requirements that apply to political advertisements that appear on digital media. At its meeting on March 14, 2018, the FEC voted to publish in the *Federal Register* a [Notice of Proposed Rulemaking on Internet Communication Disclaimers and the Definition of "Public Communication"](#) (the NPRM).

In this client update, we discuss the two sets of proposed rules that the FEC puts forth in the NPRM. The FEC is accepting comments on its alternative proposals for 60 days, and has set a public hearing on this topic for June 27, 2018.

Two Alternative Sets of Rules

The NPRM sets forth two alternative proposals to amend its regulations for disclaimers on public communications on the internet. Both proposals would continue to require disclaimers for many internet communications, but both would allow certain communications to use a so-called "adapted disclaimer." The FEC explains that the alternatives are not "fixed proposals." Rather, it is possible that a potential final rule in this area could include elements of each alternative.

Alternative A: Extending Rules for Radio, TV, and Print Communications to the Internet. The NPRM's "Alternative A" would modify the FEC's existing disclaimer regulations by applying the full disclaimer requirements that currently apply to radio, television and printed public communications to public communications distributed over the internet.

Thus, Alternative A would require a public communication distributed over the internet that includes an audio or video component to include (1) the general "paid for by" and "authorized/not authorized by" disclaimer information that applies to all public communication, and (2) the "stand by your ad" requirements that currently apply to radio and television communications. Similarly, Alternative A would require text or graphic-based public communications on the internet to comply with the disclaimer requirements that currently apply to offline printed public communications. Those printed public communication rules require that a disclaimer be "of sufficient type size to be clearly readable" and be "printed with a reasonable degree of color contrast between the background and the printed statement."

Alternative B: Requiring "Clear and Conspicuous" Disclaimer Information. Alternative B would require public communications distributed over the internet to include the "paid for by" and "authorized/not authorized by" disclaimers that apply generally to public communications, but it would not extend the "stand by your ad" and other particular requirements of radio, TV and printed public communication disclaimers to the internet. Under Alternative B, the "paid for by" and "authorized/not authorized by" disclaimers would need to be "clear and conspicuous" and not difficult to read or hear, as required by current regulations.

"Adapted" Disclaimers and Other Exceptions

Both Alternatives in the NPRM propose that some public communications distributed over the internet may comply with the disclaimer requirements by utilizing an "adapted disclaimer." An adapted disclaimer would provide an alternative to including a full disclaimer on the face of the communication as long as the full disclaimer information was still easily available to the reader or listener of the ad.

Alternative A: Adapted Disclaimers for Technological Limitations on Text/Graphic Ads. Under Alternative A, an advertiser could use an adapted disclaimer on a text or graphic communication when the full required disclaimer cannot fit on the face of the communication "due to external character or space constraints" that are "intrinsic to the technological medium."

When a full disclaimer cannot fit on the face of a communication because of external character or space constraints intrinsic to the technology, then the advertiser may use an adapted disclaimer consisting of (1) the name of the person who paid for the communication on the face of the communication, in letters of sufficient size to be clearly readable, and (2) an "indicator" that gives the reader notice that further disclaimer information is available. The indicator could be any visible or audible element of the ad, including words, images, sounds, symbols or icons. There must be "technological mechanism" associated with the indicator that allows the reader to locate the full disclaimer "by navigating no more than one step away from the adapted disclaimer." Examples of a technological mechanism under Alternative A include, but are not limited to, "hover-over mechanisms, pop-up screens, scrolling text, rotating panels, or hyperlinks to a landing page with the full disclaimer." Alternative A would not permit advertisers to use an adapted disclaimer on communications with an audio or visual component.

Alternative B: Using a Space/Time Bright-Line Test for Adapted Disclaimers. Under Alternative B, an advertiser could use an adapted disclaimer when the full disclaimer would occupy more than a 10 percent of the overall time or space of a communication—including communications with an audio or video component. The relative metric for calculating the 10 percent bright-line test depends on the type of ad: for text ads, the metric is number of characters; for ads consisting of graphics or images, the metric is pixels; and for audio or video ads, the metric is seconds. The adapted disclaimer must identify the sponsor by name or common abbreviation, plus include an indicator that gives the reader notice that full disclaimer information is available. Again, the indicator could be any visible or audible element of the communication, including words, a website URL or an image, sound, or icon. Alternative B proposes that the technological mechanism that must be associated with the adapted disclaimer and provide the full disclaimer information could take the form of any of the mechanisms described under Alternative A, with the addition of "voice-over, mouse-over, and roll-over" mechanisms.

Alternative B proposes two additional aspects of its disclaimer rules. First, if an abbreviated disclaimer used under the 10 percent test above (i.e., a disclaimer consisting of the name or abbreviation of the sponsor, plus an indicator) would still take up more than 10 percent of the time or space of a communication, then the advertiser could use a "second tier" adapted disclaimer consisting solely of an indicator that provides a full disclaimer via a technological mechanism. Second, Alternative B proposes an exception to the disclaimer requirements for internet public communications that cannot provide a disclaimer either in the communication itself or via either of the adapted disclaimers discussed above.

Conclusion

This update provides an overview of the FEC's NPRM on disclaimers for internet public communications, but does not fully examine every aspect of the proposed Alternatives A and B. The NPRM specifically asks for feedback on a wide variety of questions that the NPRM raises, and commenters will have 60 days from the date the NPRM is published in the *Federal Register* to submit their feedback to the FEC. Commenters who wish to testify at the hearing must first file written comments, and must include a request to testify in those written comments.

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