

Will FEC Adopt Disclosure Rules for Internet Political Ads?

March 20, 2018

Digital platforms that sell political ads are closely following the Federal Election Commission's review of two alternative sets of rules, both of which would impose new disclosure requirements on certain digital political ads.

The FEC hoped to issue a bipartisan proposal for new digital disclosure rules covering political ads within the FEC's jurisdiction. The decision to request public comment on alternative plans suggests the FEC commissioners were unable to reach bipartisan agreement on a single approach. Alternative A closely tracks a proposal issued by Democrat Commissioner Ellen Weintraub a few weeks ago. If adopted, Alternative A would require online ads to follow the same disclosure rules that are currently in place for TV, radio and print. FEC Chairwoman Caroline Hunter, a Republican, has said publicly that she prefers an alternative to Weintraub's approach. Accordingly, Alternative B would require disclaimers on internet ads to be "clear and conspicuous and to meet the same general content requirement as other disclaimers," but would not impose the specific requirements that apply to TV, radio and print. Under Alternative A, disclaimers generally would have to be included within the body of each ad, whereas under Alternative B, many digital ads would only need a hyperlink to another landing page that would contain the disclaimers.

Under both proposals, the responsibility for ensuring compliance with FEC disclaimer rules would rest with the party paying for the ad – the internet platform on which the ad appears would not be responsible for confirming compliance. Internet platforms might, however, have to modify or adapt their platforms to accommodate the required disclaimers, which may be costly and cumbersome on mobile devices and on other formats that have limited space.

The FEC will hold a public hearing on the proposed rules on June 27, 2018, and public comment will be due 60 days after the proposals are published in the Federal Register. Since the FEC has only four commissioners, any new rules must be adopted by unanimous consent. The Democratic commissioners are pushing to have the new rules in place by the 2018 midterm elections. The Republican commissioners have opposed changing the FEC's rules during an election cycle.

The FEC's jurisdiction is limited under federal election law, so any new disclosure rules would cover only (1) ads sponsored by federal candidates or regulated political committees, and (2) ads from PACs or other issue groups that call directly for votes for or against a federal candidate. Ads that address political issues, but do not call for votes, or that are run for or about state or local candidates cannot be regulated by the FEC. Many states, however, pass legislation that mirrors federal election law. If new federal rules are adopted, we expect many states would pass similar laws covering state and local candidates. Moreover, some in Congress are watching these proceedings and, depending on the outcome, additional federal legislation is possible.

Digital platforms that sell political ads will need to follow this FEC proceeding closely to determine whether they will be subject to FEC rules this year. While the FEC's inability to reach a consensus proposal may hinder their efforts to pass new rules in 2018, the FEC could arrive at a compromise position, especially if public comment strongly backs a hybrid approach. The participation of digital platforms in the rulemaking process could sway the outcome of this rulemaking – either toward one of the options under consideration or away from enacting rules at all. Digital platforms should consider whether the proposals raise technical or other concerns, or potentially limit political speech, and present any evidence to the FEC so that the FEC can consider those concerns in formulating its final rules. If you would like more information about the FEC's proposals and how those proposals could impact your digital platform, or need help with participating in the proceeding before the FEC, the Cooley lawyers on this alert are prepared to

answer your questions.

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