



FEDERAL ELECTION COMMISSION

Washington, DC 20463

DATE & TIME OF TRANSMITTAL: **Monday, September 25, 2017** **4:00**

BALLOT DEADLINE: **Tuesday, September 26, 2017** **4:00**

COMMISSIONER: GOODMAN, HUNTER, PETERSEN, WALTHER, WEINTRAUB

SUBJECT: **Draft Reopening of Comment Period for REG 2011-02 (Internet Communication Disclaimers). Memorandum to the Commission dated September 25, 2017.**

- I approve the recommendation(s).
- I object to the recommendation(s).
- I object defensively to the recommendation(s).
- I object for the record.
- I am recused from voting.
- No vote by ballot.

COMMENTS: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

DATE: \_\_\_\_\_ SIGNATURE: \_\_\_\_\_

A definite vote is required. All ballots must be signed and dated. Please return ONLY THE BALLOT to the Commission Secretary. Please return ballot no later than date and time shown above.

FROM THE OFFICE OF THE SECRETARY OF THE COMMISSION

**RECEIVED**

By Office of the Commission Secretary at 1:57 pm, Sep 25, 2017



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

September 25, 2017

**MEMORANDUM**

TO: The Commission

FROM: Lisa J. Stevenson *LJS by ERC*  
Acting General Counsel

Erin Chlopak *ERC*  
Acting Associate General Counsel

Neven F. Stipanovic *NFS*  
Acting Assistant General Counsel

Jessica Selinkoff *JS*  
Attorney

SUBJECT: Draft Reopening of Comment Period for REG 2011-02 (Internet Communication Disclaimers)

Attached is a draft Reopening of Comment Period for REG 2011-02 (Internet Communication Disclaimers). We ask that this be placed on a tally vote to end at the close of business on Tuesday, September 26, 2017.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 110**

3 **[Notice 2017-XX]**

4 **Internet Communication Disclaimers; Reopening of Comment Period**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Reopening of comment period.

7 **SUMMARY:** On October 13, 2011, the Federal Election Commission published an Advance  
8 Notice of Proposed Rulemaking (“ANPRM”) seeking comment on whether to begin a  
9 rulemaking to revise its regulations concerning disclaimers on certain internet communications  
10 and, if so, on what changes should be made to those rules. On October 18, 2016, the  
11 Commission reopened the comment period to receive additional comments in light of legal and  
12 technological developments since that notice was published. The Commission has decided to  
13 again reopen the comment period to receive additional comments in light of developments since  
14 that notice was published.

15 **DATES:** The comment period for the ANPRM published October 13, 2011 (76 FR 63567) is  
16 reopened. Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE  
17 OF PUBLICATION IN THE FEDERAL REGISTER].

18 **ADDRESSES:** All comments must be in writing. Commenters are encouraged to submit  
19 comments electronically via the Commission’s website at <http://www.fec.gov/fosers>, reference  
20 REG 2011-02. Alternatively, commenters may submit comments in paper form, addressed to the  
21 Federal Election Commission, Attn.: Neven F. Stipanovic, Acting Assistant General Counsel,  
22 999 E Street NW., Washington, DC 20463.

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1 Each commenter must provide, at a minimum, his or her first name, last name, city, state,  
2 and zip code. All properly submitted comments, including attachments, will become part of the  
3 public record, and the Commission will make comments available for public viewing on the  
4 Commission’s website and in the Commission’s Public Records Office. Accordingly,  
5 commenters should not provide in their comments any information that they do not wish to make  
6 public, such as a home street address, personal email address, date of birth, phone number, social  
7 security number, driver’s license number, or any information that is restricted from disclosure,  
8 such as trade secrets or commercial or financial information that is privileged or confidential.

9 **FOR FURTHER INFORMATION CONTACT:** Mr. Neven F. Stipanovic, Acting Assistant  
10 General Counsel, or Ms. Jessica Selinkoff, Attorney, 999 E Street NW., Washington, DC 20463,  
11 (202) 694-1650 or (800) 424-9530.

12 **SUPPLEMENTARY INFORMATION:** On October 13, 2011, the Commission published in  
13 the Federal Register an ANPRM seeking comment on whether and how to revise the rules at 11  
14 CFR 110.11 regarding disclaimers on internet communications.<sup>1</sup> Specifically, the Commission  
15 was considering whether to modify the disclaimer requirements for certain internet  
16 communications, or to provide exceptions thereto, consistent with the Federal Election  
17 Campaign Act, 52 U.S.C. 30101-46 (“the Act”). The Commission received seven substantive  
18 comments in response to the ANPRM. All but one of the commenters agreed that the  
19 Commission should update the disclaimer rules through a rulemaking, though commenters  
20 differed on how the Commission should do so.

21 As discussed in the ANPRM, a “disclaimer” is a statement that must appear on certain  
22 communications to identify who paid for it and, where applicable, whether the communication  
23 was authorized by a candidate. 52 U.S.C. 30120(a); 11 CFR 110.11. With some exceptions, the

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<sup>1</sup> See Internet Communication Disclaimers, 76 FR 63567 (Oct. 13, 2011).

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1 Act and Commission regulations require disclaimers for public communications: (1) made by a  
2 political committee; (2) that expressly advocate the election or defeat of a clearly identified  
3 federal candidate; or (3) that solicit a contribution. 52 U.S.C. 30120(a); 11 CFR 110.11(a).

4 While the term “public communication” generally does not include internet communications, it  
5 does include “communications placed for a fee on another person’s Web site.” 11 CFR 100.26.<sup>2</sup>

6 In addition to these internet public communications, “electronic mail of more than 500  
7 substantially similar communications when sent by a political committee . . . and all Internet  
8 websites of political committees available to the general public” also must have disclaimers.  
9 11 CFR 110.11(a).

10 Commission regulations set forth certain 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 disclaimer cannot  
13 be conveniently printed.” 11 CFR 110.11(f)(1)(i) (the “small items exception”). Nor are  
14 disclaimers required for “[s]kywriting, water towers, wearing apparel, or other means of  
15 displaying an advertisement of such a nature that the inclusion of a disclaimer would be  
16 impracticable.” 11 CFR 110.11(f)(1)(ii) (the “impracticable exception”).

17 As discussed in the ANPRM, some internet advertisements are so character-limited that  
18 providing all the disclaimer information required by the Act may take up much of the available  
19 ad characters. See Advisory Opinion 2010-19 (Google) (describing 95-character search result  
20 advertisements); cf. Advisory Opinion Request 2011-09 (Facebook) (describing several  
21 categories of advertisements ranging from zero to 160 characters).<sup>3</sup> However, the ANPRM

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<sup>2</sup> The Commission is currently proposing amendments intended to modernize a number of regulations, including 11 CFR 100.26. To review those proposals and other Commission rulemaking documents, visit <http://www.fec.gov/fosers>, reference REG 2013-01.

<sup>3</sup> Documents related to Commission advisory opinions are available on the Commission’s website.

1 noted that technological options may allow for the display of disclaimers when a user “hovers”  
2 or “rolls” over the advertisement, or on the landing page to which the user is taken after clicking  
3 the advertisement.<sup>4</sup>

4 After publication of the ANPRM, the Commission considered these issues in new factual  
5 contexts. See, e.g., Advisory Opinion Request 2013-18 (Revolution Messaging) (asking whether  
6 “banner ads” viewed on mobile phones, either in website or app, required disclaimers); MUR  
7 6911 (Frankel) (considering whether candidates’ and political parties’ Twitter profiles and  
8 individual tweets required disclaimers).<sup>5</sup> Also, after the ANPRM was published, at least one  
9 additional state joined California in adopting regulations to address small internet  
10 advertisements.<sup>6</sup>

11 In light of these and other legal and technological developments, the Commission  
12 reopened the comment period on October 18, 2016, seeking comments addressing persons’  
13 experiences in complying with (and receiving disclosure from) these state rules as well as other  
14 disclosure regimes.<sup>7</sup> The Commission sought comments that addressed:

- 15 • how campaigns, parties, and other political committees, voters, and others disseminate  
16 and receive electoral information via the internet and other technologies, including any  
17 data or experiences in purchasing, selling, or distributing small or character-limited  
18 advertisements on websites, apps, and mobile devices;

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<sup>4</sup> See, e.g., Contents of Disclosure Statements. Advertisement Disclosure, Cal. Code Regs. tit. 2, sec. 18450.4(b)(3)(G)(1) (California small internet ad disclosure rule discussed in ANPRM).

<sup>5</sup> Documents related to Commission enforcement matters under review (MURs) are available on the Commission’s website.

<sup>6</sup> See Electronic Media, Requirements, Md. Code Regs. 33.13.07.02(D)(2)(b).

<sup>7</sup> See Internet Communication Disclaimers; Reopening of Comment Period and Notice of Hearing, 81 FR 71647 (Oct. 18, 2016). In the notice, the Commission also indicated it would hold a hearing on February 1, 2017. However, because few commenters expressed interest in the hearing, the Commission postponed it.

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- 1 • any challenges in complying with the existing disclaimer rules as applied to internet  
2 communications;
- 3 • the technological or other characteristics that might define a “small” internet  
4 advertisement;
- 5 • how a disclaimer requirement or exception for “small” internet advertisements might be  
6 implemented;
- 7 • the informational benefits of disclaimers on internet communications to assist voters in  
8 identifying the source of advertising so they are better “able to evaluate the arguments to  
9 which they are being subjected”;<sup>8</sup>
- 10 • the informational benefits of disclaimers on internet communications, including websites  
11 and social media pages, to avoid voter confusion and reduce the incidence of solicitations  
12 that appear to be for candidates but are actually for non-candidate committees; and
- 13 • the extent to which the Commission’s consideration of disclaimer requirements should  
14 take into account current or anticipated models of internet advertising.

15 The Commission received six comments during the reopened comment period, all but  
16 one of which supported updating the disclaimer rules. Commenters, however, differed on  
17 whether the Commission should adopt technological modifications to disclaimer requirements  
18 for all online advertisements or exempt paid advertisements on social media platforms from the  
19 disclaimer requirements.

20 Since the close of the latest comment period, the Commission has again considered  
21 disclaimer requirements as applied to social media platform communications.<sup>9</sup> In light of recent

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<sup>8</sup> Citizens United v. FEC, 558 U.S. 310, 368 (2010) (quoting First Nat’l Bank of Boston v. Bellotti, 435 U.S. 765, 792 n.32 (1978)).

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1 developments since the close of the latest comment period, the Commission is interested in  
2 receiving further comments on whether and how to revise its rules regarding disclaimers on  
3 internet communications. The Commission seeks additional comments addressing the bullet  
4 points above and any issues discussed in the ANPRM; the Commission is particularly interested  
5 in comments addressing advertisements on internet-enabled applications and devices (such as  
6 apps, eReaders, and wearable technology). Given the speed at which technological advances are  
7 developing, the Commission welcomes comments that address possible regulatory approaches  
8 that might minimize the need for serial revisions to the Commission’s rules in order to adapt to  
9 new or emerging technologies.

10 On behalf of the Commission,

11  
12 Steven T. Walther,  
13 Chairman,  
14 Federal Election Commission.  
15

16 DATED: \_\_\_\_\_  
17 BILLING CODE: 6715-01-P

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<sup>9</sup> See, e.g., Advisory Opinion 2017-05 (Great America PAC et al.) (concerning whether committees’ Twitter profile pages require disclaimers and how committees may use Twitter handles in disclaimers).