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MEMO

RE: Federal Election Commission (FEC) and State Regulation of Online Political Advertising

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FEC Background:

The Federal Election Commission (FEC) is an independent regulatory agency charged with administering and enforcing federal campaign finance law. The FEC has jurisdiction over campaign financing for the U.S. House, U.S. Senate, the Presidency and the Vice Presidency. In 1971 Congress instituted the Federal Election Campaign Act (FECA), instituting more stringent disclosure requirements. In 1974 Congress established an independent agency, the Federal Election Commission (FEC) to enforce the law, facilitate disclosure and administer the public funding program.

The FEC has six voting members who serve staggered six-year terms. These Commissioners are appointed by the President, with the consent of the Senate, and no more than three Commissioners may belong to the same political party.

The FEC works to clarify the law primarily through two main routes: issuing regulations (codified in Title 11 of the Code of Federal Regulations) and Advisory Opinions (AO), which are issued to individuals seeking guidance on the application of the campaign finance law to their own specific activities. Individuals and organizations involved in any activity approved by an AO may rely on the AO without risk of enforcement action by the FEC, provided that they act in accordance with the AO's provisions.

FEC Regulation of Online Political Advertising:

Given the rapid growth of online political advertising, the FEC has issued very little guidance in this area. What guidance does exist is largely in the realm of required disclaimers.[1] In 2006, the FEC issued a publication on "Special Notices on Political Ads and Solicitations" in an effort to give campaigns and committees more guidance, particularly in the area of disclaimer requirements (i.e., "This ad was paid for by….."). While the publication does not single-out and offer specific guidance for online advertising, it does reference a 2002 Advisory Opinion that was the basis for the first new technology "small items" disclaimer exception on which the FEC (and states) have been relying on for the space limitations of online political advertising.

[1] For more guidance on existing internet disclaimer requirements, see www.venable.com/internet-communications-disclaimers-09-29-2011/

The FEC has long allowed a "small items" disclaimer exception, in situations where a disclaimer notice cannot be conveniently printed. Traditionally, this provision has been applied to items such as pens, bumper stickers, campaign pins, and similar small items (11 CFR 110.11 (f) (1) (i) and (ii). In 2002, the FEC issued an AO (2002-09) stating that the small items disclaimer exception was applicable in the case of SMS messages. The requesting party (Target Wireless) wished to send political advertisements to wireless subscribers, but noted that due to technological limitations, SMS messages are limited to 160 characters per screen, making it difficult to include the required disclaimers.

In their request, Target Wireless noted that requiring disclaimers in these kinds of developing electronic mediums would "constructively estop new media agencies, wireless providers and candidates for public office from utilizing wireless media…when implementing advertising initiatives for candidates." The FEC agreed, issuing an AO stating that the "small items" disclaimer exception applied in this instance, noting that the SMS technology placed similar limits on the length of a political advertisement as those that exist with bumper stickers.

While this AO has largely been the basis for (or at least pointed to) as proof that the FEC allows the absence of a disclaimer when there are obvious character limitations, technically, an AO only applies to the party requesting it, in the exact fact pattern being presented to the FEC. While it can serve as a good indication of how the FEC might decide, an AO is only valid for the party requesting it, in the exact fact pattern being described. Since 2002 there has been an explosion in the interactive platforms being used to reach voters online, and not much new guidance from the FEC.

In 2010 Google made a formal request to the FEC inquiring as to whether disclaimers are required on search ads generated when internet users use Google's search engine to perform searches. The Commission considered the request and issued a formal statement concluding that while not including the disclaimer on search ads was not a violation of any existing law, the FEC could not issue a formal AO because they did not have the necessary four affirmative votes.

In 2011 Facebook requested a waiver under the small items exemption for its site's campaign ads. The Commission considered the request, and responded that Facebook's ad-size restrictions were essentially self-imposed, which is not grounds for an exemption. However, the FEC also said that additional disclaimers in this context were unnecessary, basically keeping the status quo in place.

State Regulation of Online Political Advertising:

While some states have moved forward in providing guidance in this area, it remains largely an unregulated area. Currently, the default legal requirement is to apply the print/broadcast requirements unless a specific Internet exemption exists. For the most part, no exemption exists, largely because the

states have not yet dealt with the issue. Four states have offered guidance in this area: Texas, Florida, Maryland and California.[2]

1. **Texas** – In April 2012 the Texas Ethics Commission released Ethics Advisory Opinion No. 491. The Commission recognized that a 135-character social media text field did not permit the inclusion of state-required disclaimer content. Its guidance permits new media political advertisers a new alternative to comply with the print-era disclaimer requirements: provide a direct link (that includes either "political advertising," "pol ad," or other recognizable abbreviation) to another landing page that provides a complete disclaimer. The landing page must be operable and freely accessible when the advertisement is visible on the social networking website.

   For more information: http://www.ethics.state.tx.us/opinions/491.html

2. **Florida** – Effective July 1, 2010, Florida campaign finance law provides "exceptions to the disclaimer requirements for messages or political advertising via Internet websites, text messages or other technologies" if it is:

   - Placed as a paid link on an Internet website, is no more than 200 characters in length, and directs the user to a website that complies with disclaimer requirements.
   - Placed as a graphic or picture link on an Internet website that directs the user to another website in compliance with disclaimer requirements; however, the link must contain the required disclaimer which makes up at least 5 percent of the total link and cannot be illegible or concealed.
   - Placed at no cost on an Internet website where there is no cost to post content for public users.
   - Placed or distributed on an unpaid profile or account available free to the public or on a social networking website, provided the source of the message or advertisement is clear from the content or format of the message or advertisement.
   - Distributed as a text message or Short Message Service, provided the message is no more than 200 characters in length or requires the recipient to sign up or opt in to receive the message.
   - Connected with or included in any software application or accompanying function, if the user signs up, opts in, downloads, or accesses the application from a website that is in compliance with the disclaimer requirements.
   - Sent by a third party user from or through a campaign or committee website that is in compliance with the disclaimer requirements.

[2] Special thanks to Ron Jacobs at Venable LLP, who provided this section on state-level restrictions http://www.venable.com/ronald-m-jacobs/.

- Contained in or distributed through any other technology-related item, service, or device for which compliance with the disclaimer requirement is not "reasonably practical."

For more information:
http://www.myfloridahouse.com/SECTIONS/Documents/loaddoc.aspx?FileName=h0869.GAP.doc&DocumentType=Analysis&BillNumber=0869&Session=2010

3. **Maryland –** In 2012, the Maryland State Board of Elections promulgated emergency recommendations covering political advertising in new media, such as social media, micro-blogs, and "electronic media advertisements." These emergency regulations expired in December 2010. In January 2011 the Maryland Attorney General released a report of recommendations prepared by a committee of legislators and outside experts to reform the state campaign finance statute and to instruct the State Board of Elections to implement the new statutory requirements through regulation. This report is available at http://www.oag.state.md.us/Reports/campaignfinance.pdf. Generally, the report's recommendations focus on the same issues as the 2010 emergency regulations, but provide more detailed explanations of the issues.

4. **California** – Of the four states that have issued guidance, California has been the most active in examining the issue and proposing regulations. In August 2010, the California Fair Political Practices Commission released a report that established certain principles in regulating online political activity and made specific recommendations for reform.

   A Subcommittee held two hearings that included more than a dozen campaign consultants, Internet experts, public interest advocates, representatives of the Federal Election Commission (FEC) and others. Based on this testimony and extensive research conducted by the Commission staff, the Subcommittee formulated four basic principles to guide further regulatory action and statutory change:

   i. Full and truthful disclosure of campaign activity, including Internet activity, by candidates and political committees, is required to ensure the integrity of democratic institutions and the electoral process.

   ii. If regulations require disclosure with respect to paid political communications that are printed or broadcast, then similar paid communications that are disseminated over the Internet should be accompanied by similar disclosures.

iii. The Commission should avoid regulating volunteer, grassroots political activity and ensure to the extent possible that the Internet remains a flourishing source of robust and vibrant political discourse among citizens.

iv. The Commission should broadly interpret the words of the Political Reform Act to allow regulation consistent with these principles and the objectives of the PRA. Legislative changes should be written to allow flexibility in future regulatory responses to the use of technology that is evolving rapidly and in unanticipated ways.

These principles, in turn, informed the development of specific recommendations for regulatory and statutory changes set forth in Section IV of this report. The Subcommittee's recommendations are also based on the successful work of the Federal Election Commission in this area. The Subcommittee's recommendations include:

- Paid advertising on the Internet should be subject to the same disclosure requirements applied to advertising that is printed or broadcast. In addition to legislative changes to the Political Reform Act necessary to achieve this objective, the following regulatory changes should be pursued by the Commission:
- To ensure that a committee sending a mass campaign email is appropriately identified as a committee sending a mass mailing, the Commission should interpret Section 84305 to require such identification and make clarifying changes to Regulation 18435 as soon as possible.
- Regulations applying to paid advertisements should be extended, to the greatest extent possible, to paid advertisements on the Internet. To this end, the Commission should revisit its earlier determination in Regulation 18450.1 that the advertisement disclosure provisions of the PRA do not apply to any "web-based or Internet-based communication."
- Uncompensated political activity should be exempted from regulation to the extent possible, and the Commission should adopt a clear regulatory exemption applying to individuals acting without the consent or knowledge of a political committee, and who do not trigger the $1,000 expenditure threshold.
- The Commission should clarify that an individual's sending or forwarding emails, linking to a web site, or establishing and maintaining a website does not result in a contribution or expenditure under the PRA. Moreover, these activities are of only nominal value, and the value of the equipment used in such activities is not considered in determining the amount of political expenditures. This safe harbor should also clarify that an individual's uncompensated online political activity (that does also not include

political expenditures of $1,000 or more) undertaken on a work computer will not trigger regulation.

- Uncompensated bloggers should not be regulated at this time but considered to be engaged in activity falling under this exemption. If bloggers or others are communicating through electronic means and receiving compensation from campaigns and political committees, their activity will be revealed through expenditure reports filed by those entities. We acknowledge that witnesses testified that it is good practice for bloggers and others who are compensated by campaigns to reveal that information on their websites, and we applaud that practice. If in the future the right of Californians to full and truthful campaign disclosure is significantly compromised by undisclosed compensated bloggers, the Commission should revisit this decision and consider an appropriate regulatory or legislative response.
- The Commission staff should produce information in formats easy for citizens to use and understand (*e.g.*, FAQ sheets) so that people will understand that uncompensated political activity does not generally trigger regulation, and they will continue to participate actively in the public realm.
- The PRA's media exemption should be interpreted to include online media sources, whether or not they also participate in print or broadcast media.
- The Commission should support the interoperability of online campaign reporting systems at the state and local levels.
- As stated by the 2003 Bipartisan Commission report, regulatory activity should not inhibit online voter education efforts.
- Agencies such as the Commission and the Secretary of State should continue to make information available in a timely way on their websites and provide that information in formats that are easily accessible by Californians.
- Agencies and the Legislature should encourage, and perhaps require, electronic filing of all campaign information required to be disclosed to allow easier and timely access.

SOURCE: http://www.fppc.ca.gov/agendas/08-10/SubCommReport.pdf

Next Steps:

In late 2011 the FEC issued an advanced notice of proposed rulemaking seeking public comment on how it should address internet communications. Specifically, the FEC has asked for feedback regarding how online political advertising and communications are purchased, displayed, etc. The FEC has also requested information it to whether its small items exemption should be universally applied to character-limited advertisements. In a similar vein to recent FTC requests for industry feedback on protecting consumer privacy online, the FEC has also requested feedback on how to minimize the need

to modify the rules as technology changes. The FEC is expected to undertake a formal rulemaking process in 2012 to address these issues. The IAB will be submitting comments.