

Record

May 2005

Federal Election Commission

Volume 31, Number 5

Regulations

Notice of Proposed Rulemaking on Internet Communications

On March 24, 2005, the Commission approved a Notice of Proposed Rulemaking (NPRM) seeking comments on a proposed rule to define paid Internet ads as “public communications.” The NPRM also republishes and invites comments on the current definition of “generic campaign activity.” These actions are in response to the U.S. District Court for the District of Columbia’s recent decision in *Shays v. FEC*, which held that the current definitions of “public communication” and “generic campaign activity” impermissibly exclude all Internet communications.

The proposed addition of paid Internet ads to the definition of “public communication” would affect all other Commission rules that incorporate the term “public communication.” In addition to the definition of “generic campaign activity,” these would include rules governing state, district and local party committees and disclaimers.

The NPRM also invites comments on proposals to:

- Modify the Commission’s rules concerning which Internet communications require disclaimers;

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Federal Election Commission
999 E Street, NW
Washington, DC 20463

800/424-9530
 202/694-1100
 202/501-3413 (FEC Faxline)
 202/219-3336 (TDD for the
 hearing impaired)

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Published by the Information
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Amy Kort, Editor

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- Add new rules specifically excepting certain volunteer activity on the Internet from the definitions of “contribution” and “expenditure”; and
- Expressly exempt from the definitions of “contribution” and “expenditure” certain media activity over the Internet.

The rules proposed in the NPRM are intended primarily to ensure that political committees properly finance and disclose their Internet communications, without impeding individual citizens from using the Internet to speak freely regarding candidates and elections.

Definition of “Public Communication”

The proposed rule would amend the definition of “public communication” at 11 CFR 100.26 to include paid Internet ads placed on another individual’s or entity’s web site as a form of “general public political advertising.” The Commission invites comments on this proposal and asks whether it is appropriate to include only Internet ads that are placed for a fee. Should “general public political advertising” also include ads where the space was provided for something of value other than a monetary payment, such as through an exchange of comparable advertising? Should the Commission

additionally amend its regulation to explicitly state that “bloggers” are not included in the “public communication” definition?

Party Committee Web Sites

State, district and local party committees must use entirely federal funds to pay for public communications that promote, attack, support or oppose (PASO) a clearly identified federal candidate. 2 U.S.C. §431(20)(A)(iii) and 11 CFR 100.24(b)(3). The proposed rule would still allow these party committees to reference federal candidates on their official sites without automatically federalizing the year-round costs of maintaining the site. The Commission seeks comments on this approach, as well as on whether the costs of a web site that includes a public communication that PASOs a candidate could be paid in part with nonfederal funds and how an allocation ratio could be determined.

Disclaimers

Currently, the Commission’s disclaimer rules apply to any “public communication,” which in the context of disclaimers includes more than 500 substantially similar unsolicited emails sent within any 30-day period and political committee web sites that are available to the general public. 11 CFR 110.11(a). The Commission proposes to add a definition of “unsolicited email” to the rule that focuses on whether the email addresses were acquired through a commercial transaction. The Commission seeks comments on this approach, asking whether the definition should include a minimum cost for obtaining the email address and whether there is a more appropriate definition of “unsolicited email.”

The Commission also proposes to apply the proposed expansion of the definition of “public communication” at 11 CFR 100.26 to the disclaimer requirements. As a result, an ad placed for a fee on another person’s web site would require a

disclaimer if it expressly advocated the election or defeat of a federal candidate or solicited contributions.

Bloggers Paid by Candidates

The Federal Election Campaign Act (the Act) and Commission regulations require a political committee to report disbursements to the Commission, including any disbursement made to a blogger, and the Commission makes these reports publicly available. The Commission does not, therefore, propose to change the disclaimer rules to require bloggers to disclose payments from a candidate, a campaign or a political committee. The Commission asks whether this approach is appropriate and whether, in the alternative, a blogger could or should be required to disclose payments.

Coordinated Communications

Under the proposed expansion of the definition of “public communication” at 11 CFR 100.26, certain Internet ads could be considered “coordinated communications” (and thus in-kind contributions to the candidate or committee) if they are:

- Placed on another person’s or entity’s web site for a fee; and
- Coordinated with a candidate, campaign committee or party committee. 11 CFR 109.21.

The proposed rules would continue to exempt from the definition of “coordinated communication” ads that are created by outside vendors for a fee but placed on the payor’s own web site—including the web site of a corporation or other prohibited source. The rules would also continue to exempt from the coordinated communication rules ads that are placed on a prohibited source’s web site for free, even though a fee would normally be charged. The Commission asks whether this is an appropriate approach and whether any of the Commission’s other rules already regulate this type of activity.

Dissemination, distribution or republication of campaign material. A

person who finances a public communication that disseminates, distributes or republishes, in whole or in part, campaign-prepared materials may, under certain circumstances, be found to have made a coordinated communication under the current regulations. 11 CFR 109.21(c)(2). Changes to the definition of “public communication” would expand the reach of this regulation to include certain Internet ads placed for a fee on another entity’s web site, but would not affect content placed by an individual on his or her own web site, blog or email. The Commission asks whether it should specifically exempt all dissemination, distribution or republication of campaign material on the Internet.

Media Exemption

Under the Act, a news story, commentary or editorial distributed through the facilities of a broadcasting station, newspaper, magazine or other periodical publication is not considered an “expenditure” unless the facilities are owned or controlled by a political party, political committee or candidate. 2 U.S.C. §431(9)(B)(i). This “media exemption” assures that newspapers, television stations and other media can freely cover and comment on political campaigns. The Commission proposes to amend its regulations to make clear that any media activities that otherwise would be entitled to the “media exemption” are likewise exempt when they are transmitted over the Internet. 2 U.S.C. §431(9)(B)(i). The Commission requests comments on this proposal and asks whether the exemption should be limited to the Internet activities of media entities that are covering or carrying a news story, commentary or editorial and/or to media entities that also have off-line operations. Additionally, the Commission asks whether bloggers and/or on-line forums should be entitled to this exemption. Does it make any difference under the statute if a blogger receives compen-

sation or any other form of payment from any candidate, political party or political committee for his or her editorial content? Would such a payment mean that the blogger is “controlled” by a candidate or party committee and, thus, not entitled to the press exemption under 2 U.S.C. §431(9)(B)(i)?

Definition of “Contribution” and “Expenditure”

The Commission proposes to create exceptions from the definitions of “contribution” and “expenditure” for certain individual or volunteer Internet activity. Under these proposed rules, an uncompensated individual acting independently or as a volunteer would not make a contribution or expenditure simply by using computer equipment or Internet services to engage in Internet activities for the purpose of influencing a federal election. The proposed rule would apply to computers and other facilities that the individual would ordinarily have access to—including those provided at a public library or school—but would not permit someone to purchase this equipment for the sole purpose of allowing another person to participate in volunteer activity. The purchase of mailing lists, including email lists, for the purpose of forwarding candidate and political committee communications would continue to be considered an expenditure. Likewise, the exceptions would not apply to paid advertising or payments for the use of another person’s web site, other than a nominal fee.

Under these proposed rules, an individual or volunteer producing or maintaining a web site or blog, or conducting grass-roots campaign activity on the Internet, from his or her own home or elsewhere, would not make a contribution or expenditure and would not incur any reporting responsibilities for that activity. Thus, an individual could download materials from a candidate or party

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web site or forward a candidate's or party's emails without that activity being considered the republication of campaign materials or an in-kind contribution. The Commission seeks comments on these proposals, as well as on whether additional regulatory amendments are needed to address volunteers' use of corporate or labor union facilities for volunteer activities. See 11 CFR 114.9(a)(1) and (b)(1).

Comments

All comments must be addressed to Mr. Brad C. Deutsch, Assistant General Counsel, and submitted in either electronic, fax or hard copy form by June 3, 2005. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Hard copy comments should be sent to the Federal Election Commission, 999 E Street NW, Washington, DC 20463. Faxed comments should be sent to 202/219-3923, with a hard copy follow-up to insure legibility. Electronic mail comments should be sent to internet@fec.gov or submitted through the Federal eRegulations Portal at www.regulations.gov. All comments must be submitted in writing and include the full name and postal service address of the commenter. Comments that do not contain this information will not be considered.

Public Hearing

The Commission will post comments on its web site at the end of the comment period. A public hearing on this NPRM will be held June 28-29, 2005, in the Commission's 9th floor Hearing Room, 999 E Street, NW, Washington DC. Any commenters who submit comments electronically and wish to testify at the hearing must also send a copy of their comments to internettestify@fec.gov.

Additional Information

The NPRM was published in the April 4, 2005, *Federal Register* (70 FR 16967) and is available on the FEC web site at http://www.fec.gov/law/law_rulemakings.shtml and from the FEC faxline, 202/501-3413.

—Amy Kort