



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich and Commissioners Baker, Cardenas, Wilson, and Wood

From: Dave Bainbridge, General Counsel
Sukhi K. Brar, Assistant General Counsel
Toren Lewis, Commission Counsel

Subject: Prenotice Discussion of Proposed Regulatory Changes Concerning Online Campaign Advertisements

Date: April 5, 2021

Introduction

At the March 18, 2021 Commission Meeting, staff identified a number of issues concerning the application of the advertising disclosure requirements of the Political Reform Act (the “Act”) and regulations to blogs, news sites, social media platforms, and other types of online media. At the request of the Commission, this memorandum serves to outline proposed regulatory and statutory changes to address the issues presented at the March 18th meeting.

Staff submits these proposed regulatory changes for prenotice discussion; the proposals put forth in this memo are intended to facilitate discussion and allow the Commission to provide guidance and instruction to staff prior to presenting final versions for approval at a subsequent Commission meeting.

Proposed Amendments

As highlighted at the March 18, 2021 Commission meeting and detailed in the attached March 18th memorandum and presentation, there are a number of situations in which changes to existing regulations and codification of informal advice could provide the public with greater information about third party online communications paid for by committees.

Amendments to Regulation 18421.5

The Commission adopted Regulation 18421.5 in 2013 to provide additional disclosure on campaign statements when a committee paid an internet website for favorable content. Since that time, the platforms on which such paid content appears have expanded beyond blogs to other electronic formats such as social media and community news sites. Staff proposes updating the regulation to address the expansion of platforms on which such paid content now appears.

Further, staff has identified a lack of transparency in circumstances when a committee pays an “influencer” to post an advertisement using the influencer’s own social media profile.

When a committee posts on its own social media account, it is clear who paid for and produced the communication and where to find additional information about the committee. But when a committee pays a third party—such a social media “influencer”—to post certain types of advertisements on the influencer’s page, the Act does not address how the public, in viewing the influencer’s page, would be made aware of the disclosures contained on the committee’s page.

Lastly, Regulation 18421.5, subdivision (g) permits a committee to include a disclosure on the internet content rather than provide additional information on its campaign statement. But the form of the disclosure is not consistent with what would be required by the Act as the regulation was adopted before the relevant advertising disclosure statutes.

To address these issues, staff proposes the following regulatory changes:

- Expand the expenditure reporting requirements of Regulation 18421.5 to include more specific information about a paid online communication such as a paid social media poster’s username “handle,” or the title of an op-ed or article, in addition to “...the payee, the name of the individual providing the content, and the name of the website or the URL,” and require the abovementioned information for each platform for which a committee pays a person to post, rather than only “in the first instance.”
- Harmonize the advertisement disclosure requirements of Regulation 18421.5 and those of the Act where there is overlap.

New Regulation Specifying Advertising Disclosures on Electronic Advertisements

In addition to requiring enhanced disclosure on campaign statements under Regulation 18421.5, staff recommends adopting a new regulation that specifies the disclosure requirements on certain forms of electronic advertisements where currently there is a lack of certainty or guidance regarding where disclosure is required.

As mentioned above, the Act does not explicitly address advertising disclosure on social media posts by a third-party influencer paid by a committee. The committee paying for the advertisement is required to have a disclosure on its social media profile or landing page but there is not necessarily a way for a person viewing the influencer’s post to connect to the disclosure on the committee’s profile or landing page. The Legal Division has informally advised that an influencer paid by a committee to post on social media should tag the committee in the influencer’s post, so that voters can link back to the committee’s profile or landing page to view the advertisement disclosure.

Similarly, when a committee publishes information on its own website or blog, it is clear what disclosure is required and the reader can ascertain who paid for and published the site. But when a committee pays a third party to post something about a candidate or committee on an outside website/blog, Regulation 18421.5 only requires extra reporting on a recipient committee’s campaign reports, or, if the committee chooses, on the post itself. In addition to the requirements of Regulation 18421.5, Section 84504.3(d) of the Act technically requires a disclosure at the top or bottom of every publicly accessible page of a “website” paid

for by a committee when the content meets the definition of an advertisement. However, when a committee pays a third party to post content on a blog or other website that is not the committee's own blog or website, it is not clear where the disclosure should be located. In informal email advice, the Legal Division has advised that a committee could satisfy both Regulation 18421.5 and the Act's requirements by including a "ad paid for by" disclosure statement with the individual blog post.

Finally, the Legal Division has received questions regarding whether videos posted on social media that qualify as advertisements under the Act only require disclosure on the landing page of the committee and not on the videos themselves. Under Section 84504.3 of the Act, the Legal Division has advised that advertisements in the form of videos, no matter where they are posted, must follow the special video rules, including on social media.

To address the issues identified above, staff proposes drafting and adopting one or more new regulations that provide as follows:

- Advertisements in the form of posts on social media by a third party paid by a committee must tag or otherwise include a link to the profile or landing page of the committee that paid for the advertisement.
- Individual website or blog posts that meet the Act's definition of an advertisement must have disclosures on the individual posts. The required disclosure for such a communication shall be located at the top or bottom of each individual post, rather than the top or bottom of every page of the website.
- A video posted on social media must contain the disclosures on the video and not only on the poster's profile page. This is a clarification of Section 84504.3(g), which specifies that electronic media advertisements in the form of videos shall comply with the disclosure requirements for videos under Sections 84504.1 or 84504.5 of the Act, depending on the type of committee that paid for the advertisement.¹

Statutory Amendment – Require advertising disclosures directly on posts

Currently, the Act provides that social media advertisements "shall only be required to include" the "Ad paid for by" disclosure on the profile page, landing page, or similar location of the committee that paid for the advertisement. In addition, Section 84504.3(h)(1) provides that such a committee "shall not be required to include [the required disclosure] on each individual post, comment, or other similar communication."

However, only requiring a committee to feature a disclosure on its profile or landing page does not alert a viewer who sees the advertisement in their newsfeed where to go for more

¹ Generally speaking, video advertisements must include "Ad paid for by [committee's name]," with the disclosure appearing on a solid black background on the entire bottom one-third of the display screen, or the bottom one-fourth if the committee has no top contributors. The disclosure must be displayed at the beginning or end of the ad for at least five seconds of a broadcast of 30 seconds, or less or for at least 10 seconds of a broadcast longer than 30 seconds. If a video is distributed as an electronic media advertisement and is longer than 30 seconds, the disclosures must be displayed at the beginning of the advertisement.

information about who paid for the advertisement. Even if the committee’s post contains a link to the committee’s profile or landing page by clicking the committee’s username that appears with the post, that link does not clearly instruct the viewer to click through for more information. Meanwhile, if a committee pays an influencer to post an advertisement via the influencer’s social media profile, the post is not necessarily linked to the committee’s profile or landing page where the disclosures are required to be.

The Commission may consider supporting legislation amending Section 84503.3(h) to require disclosure on each individual advertisement posted, instead of just the landing page—whether posted by a committee or by a social media influencer—so it is clear to viewers that they can click the link to find more info about the advertisement and who paid for it. For example, each post could be required to contain a disclosure to the effect of “Paid Ad,” followed by a link that takes viewers to committee’s more detailed disclosure information.

Summary

The proposed amendments to existing Regulation 18421.5 and proposed new regulations—separate from, or in addition to the proposed statutory changes to Section 84504.3 of the Act—would provide the public with more information about online content paid for by committees at a time when campaigns are increasingly paying third parties to post online content.

Attachments

Attachment A – Staff memorandum, *Issues Related to Online Campaign Advertisements*. (March 18, 2021).

Attachment B – Staff presentation, *Online Campaign Advertisement: Trends and Issues*. (March 18, 2021).



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To: Chair Miadich and Commissioner Baker, Cardenas, Wilson, and Wood

From: Dave Bainbridge, General Counsel
Sukhi K. Brar, Assistant General Counsel
Toren Lewis, Commission Counsel

Subject: Issues Related to Online Campaign Advertisements

Date: March 8, 2021

Introduction

Staff has identified a number of issues and questions concerning the application of the advertising disclosure requirements of the Political Reform Act (the “Act”)¹ and Regulations to blogs, news sites, social media platforms, and other types of digital/electronic media. The purpose of this memorandum is to provide the Commission with an overview of the of types questions the Legal and Enforcement Divisions have encountered in this area, along with a discussion of the state of current law as it relates to these questions, in order to facilitate a discussion about proposed regulatory changes.

Summary of the Law

An “advertisement” is “any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures.” (Section 84501(a).) The Act requires candidates and committees to include disclosures on campaign advertisements so that the public can identify the committee that paid for or authorized the communication. Generally speaking, most advertisements that do not fall within one of the many specific categories under the Disclose Act must include “Ad paid for by” followed by the name of the committee.² (Section 84502(a)(1).) The required disclosure for a particular advertisement depends on the type of advertisement, as well as who paid for the advertisement. Materials disseminated by a candidate for the candidate’s election require less disclosures, or in some cases none at all, because it is generally clear to the public that the candidate is sending the communication. Stricter advertisement disclosure rules apply to advertisements done by other types of

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Advertisements may be required to include additional disclosures including top contributors to the committee and disclosures related to whether the advertisement involves an independent expenditure that supports or opposes a candidate. Those details are not described in this memorandum. (See Sections 84503 and 84506.5.)

committees, advertisements supporting or opposing ballot measures and independent expenditure advertisements because it is less clear to the public who is responsible for these advertisements.

Electronic Media Advertisements Under Section 84504.3

Disclosure requirements for online advertisements under the Act vary depending on who paid for the advertisement, whether the advertisement discusses a candidate or ballot measure, and the medium of the advertisement. While the Act does not define “electronic media advertisement,” Section 84504.3 (Disclosure; Electronic Media Ads) provides for specific disclosure requirements for certain forms of online advertisements, including websites, emails, social media landing pages, and images/graphics hosted by an online platform that can link to a committee’s website containing the required advertisement disclosures. The general rule for non-social media electronic media advertisements paid for by a committee is that they must include a disclosure on the advertisement that states which committee paid for the advertisement along with top contributors and independent expenditure information or a disclosure that includes the text: “Who funded this ad?,” as a hyperlink that leads to an internet website containing disclosures including, paid for by committee, top contributors and independent expenditure information. (Section 84504.3(b).) Social media advertisements generally require disclosures only on the landing page or profile page of the committee that paid for the advertisement and not on the advertisement itself.

“Online Platform Disclosed Advertisements” Under Section 84504.6

Certain types of electronic media advertisements fall into an entirely different category of advertisements called “online platform disclosed advertisements,” for which Section 84504.6 of the Act provides specific disclosure requirements. Online platform disclosed advertisements generally fall into one of two categories:

- (1) A paid electronic media advertisement on an online platform (made via a form of electronic media that allows users to engage in discourse and post content, or any other type of social media, for which the committee pays the online platform).
- (2) A paid electronic media advertisement on an online platform that is a graphic, image, animated graphic, or animated image that the online platform hosting the advertisement does not allow to hyperlink to an internet website containing required disclosures and is not a video, audio or email advertisement.

(Section 84504.6(a)(2)(A).)

Generally, online platform disclosed advertisements are required to have disclosures on the advertisements themselves or link to such disclosures and the online platform maintains a publicly accessible database of advertisements by committees that have purchased \$500 or more in advertisements from the platform. (Section 84504.6) The online platform disclosure rules do not differentiate by committee type unlike most other advertising disclosure rules in the Act.

Bloggers and “Influencers”

Media reports suggest that during the 2020 election cycle, the practice of paying so-called “influencers”—individuals with large followings on social media—to create and post political content, increased significantly.³ Regulation 18421.5, often referred to as the “blogger” regulation, applies when a recipient committee pays a person to provide favorable or unfavorable content about a candidate or ballot measure on an internet website other than the committee’s own website.⁴

Regulation 18421.5 requires additional information to be reported with the expenditure for such a payment on the committee’s *campaign statements*, not on the *content itself*. The committee’s campaign statements must specifically describe amounts the committee paid to provide favorable or unfavorable content on a website, blog, social media platform, or video posted online. The statement must also include the payee, the name of the individual providing content, the name of the website or the URL on which the communication is published in the first instance and use the expenditure code “WEB.” Paid advertisements that are purchased at regularly published rates are not subject to this additional reporting. The extra reporting is not required if the fact that a campaign has paid for the content is included with each instance of the content appearing on the internet or other digital platform.

Regulation 18421.5 does not apply to major donor committees or to independent expenditure committees.⁵

The Uncompensated Internet Activity and News Media Exceptions

The Act and regulations contain exceptions from the advertising disclosure requirements for unpaid volunteers who use the internet, as well as for news organizations. Section 82025(c)(5) provides that for an individual or a group (alone or in coordination with a committee) who engages in Internet activities for the purpose of supporting or opposing a candidate or measure, neither of the following is a contribution or an expenditure:

- The individual’s uncompensated (volunteer) personal services related to such Internet activities
- The individual’s use of equipment or services for uncompensated Internet activities, regardless of who owns the equipment and services.

The exemption does not apply to an individual blogger who receives a majority of his or her advertisement revenue from a single candidate or committee, because he or she is not considered to be providing uncompensated personal services.

³ Elizabeth Culliford, From Facebook to TikTok, U.S. political influencers are paid for posts, Reuters., Oct. 29, 2020, <https://www.reuters.com/article/us-usa-election-socialmedia-sponsored/from-facebook-to-tiktok-u-s-political-influencers-are-paid-for-posts-idUSKBN27E1T9>.

⁴ A recipient committee is a committee that receives \$2,000 or more in contributions in a calendar year.

⁵ Major donor committees and independent expenditure committees do not receive contributions. Major donor committees are individuals or entities that make contributions of \$10,000 or more in a calendar year. Independent expenditure committees are individuals or entities that make independent expenditures of \$1,000 or more in a calendar year.

Regulation 18215, meanwhile, excludes from the definition of contribution a payment made by any broadcasting station (including a cable television operator, programmer or producer), website, or a regularly published newspaper, magazine, or other periodical of general circulation, including any internet or electronic publication, that routinely carries news and commentary of general interest, for the cost of covering or carrying a news story, commentary, or editorial. Section 82025(c)(4)(A) excludes from the definition of expenditure costs incurred for communications that expressly advocate the nomination, election, or defeat of a clearly identified candidate or candidates, or the qualification passage, or defeat of a clearly identified measure or measures by a broadcasting station, including a cable or satellite television operation, programmer, or producer, website, or a regularly published newspaper, magazine, or other periodical of general circulation, including an internet or electronic publication, that routinely carries news and commentary of general interest, for the cost of covering or carrying a news story, commentary, or editorial.

In recent years, paid editorials, “fake news” sites, and “community journalism” pages, often on social media platforms, have played a controversial role in federal, state, and local elections. The Commission has never analyzed whether the news media exemption applies to a newspaper editorial written by an author who was paid by a committee. The US Supreme Court has shown great deference to newspapers’ freedom of the press under the First Amendment, and thus further analysis of relevant First Amendment precedent is warranted with respect to proposed regulations that could affect the rights of journalists and news outlets.

Selected Issues for Consideration

Below are several examples of issues that both the Legal and Enforcement Divisions have recently encountered on the subject of advertisement disclosures and electronic media communications, where additional clarification would be helpful:

What disclosure is required when a committee pays an “influencer” to post on a social networking platform? Where should the disclosure appear?

Under Section 84504.3(h) of the Act, a committee with advertisements on its social media page must include a disclosure on its profile page or landing page. However, if a committee pays an influencer to post an advertisement on the influencer’s profile/landing page, it is not clear what, if any, disclosure would need to be included. The Legal Division has informally advised that an influencer paid by a committee to post on social media should tag the committee in the influencer’s post, so that voters can determine who paid for the advertisement because currently disclosure is required on the committee’s landing or profile page.

If a blogger posts on the blogger's own site in exchange for payment from a committee, what disclosure, if any, would be required on the blog posts themselves? Does a disclosure consistent with Disclose Act requirements relieve a committee of enhanced reporting requirements under the "blogger" regulation?

Regulation 18421.5 requires extra reporting on a recipient committee's campaign reports, or if the committee chooses, on the post itself. However, for purposes of the Disclose Act, a blog post that meets the Act's definition of advertisement does not fit cleanly into any of the categories provided in Section 84504.3, which governs electronic media advertisements, that do not fall under Section 84504.6. The categories set forth in Section 84504.3 include a "website," or "social media post," but not specifically a "blog" post. The website category would require disclosures on a website itself at the top or bottom of the page, not necessarily next to the specific blog post if the page has multiple blog posts of different subjects. Whereas a social media post would only require disclosure on the committee's landing or profile page not the blog post itself. Further complicating this distinction is the fact that, due to the ever-evolving digital media landscape, what were once referred to as "blog posts" now arguably also take place on social media platforms (such as Facebook, LinkedIn, etc.) in addition to separate, standalone "blogging" websites (such as Blogger or, more recently, newsletter platforms like Substack). In informal email advice, the Legal Division has advised for a paid blog post that met the Act's definition of advertisement, that a committee could satisfy both Regulation 18421.5 and the Disclose Act requirements by treating a blog post like the one described above similar to how website would be treated under Section 84504.3(d)—requiring a "paid for by" on the blogger's post. However, Section 84504.3(d) technically requires a disclosure at the top or bottom of every publicly accessible page of the "website," so this advice was adjusted to instead require the disclosure at the top or bottom of the blog post that is related to the committee.

Is disclosure required if a committee pays a writer to author an editorial that meets the Act's definition of advertisement for an online news site, if the site itself receives no payment from either party? If so, what disclosure, where, and by whom?

If the author of the article is not affiliated with the news site, the editorial would meet the general definition of an advertisement, and Section 84502(a)(1) of the Act would require a "paid for by" disclosure in the article. However, this is an area in which the government's interest in promoting advertising disclosure and newspapers' freedom of the press under the First Amendment may be at odds, since a disclosure on an editorial could be construed as a content-based regulation of protected speech.

Are "community news" and "community journalism" sites covered by the news media exemption? What if any disclosures would be appropriate if the site has a connection to a committee?

As mentioned above, the news media exemptions contained in Section 82025 and Regulation 18215 exempt "the cost of covering or carrying a news story, commentary, or editorial" by "internet or electronic publications" that routinely carry "news and commentary of general interest" from the definitions of both "contribution" and "expenditure," respectively.

Neither Regulation 18215 nor Section 82025 differentiate between “traditional media outlets” and “community journalism.” Case law indicates that laws drawing such distinction may present First Amendment issues, due to courts’ deference to the freedom of the press. The question is whether a distinction can, and should, be drawn between established news outlets and other sources of information that may be affiliated with a committee and exist, at least in part, to further the interest of the affiliated committee.



ONLINE CAMPAIGN ADVERTISEMENTS

Trends and Issues

THE ONLINE CAMPAIGN LANDSCAPE

- Rise in paid social media “influencers”
- Distinctions between “blogging,” social media posts, and other forms of electronic media
- Emergence of “community journalism” and “fake news” sites





ONLINE CAMPAIGN ADS: EXAMPLES



Blogger



SELF-IMPOSED BANS ON “POLITICAL ADS”



- Twitter and TikTok both broadly prohibit paid ads by candidates, political parties, elected or appointed officials, as well as legislative/regulatory advocacy.
- TikTok says its policy also prohibits content by “paid influencers,” while Twitter says its policy does not.
- Facebook and Google have imposed and then rescinded temporary bans on political ads at various points.



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COMMITTEE/CANDIDATE'S POST ON THEIR OWN SOCIAL MEDIA ACCOUNT

- A candidate or committee makes a post on their own social media profile/page.
- Clear who paid for the ad.
- For candidates, "ad paid for by" disclosure or hyperlink required on candidate's profile/landing page.
- Committees must link back to required disclosure on committee's profile or landing page.



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PAID INFLUENCER POST ABOUT A CANDIDATE/MEASURE

- A candidate or committee pays a social media “influencer” to post on the influencer’s social media profile/page about the candidate/committee.
- Currently Act does not require disclosure on the influencer’s post/page. FPPC Legal Division has informally advised tagging the committee in the influencer’s post, so that voters can determine who paid for the ad.
- Not clear who paid for the ad; looks like the influencer alone is the source of the post.



A BLOG WITH MULTIPLE POSTS, ONLY ONE OF WHICH MEETS THE DEFINITION OF AN AD

- A blogger publishes posts about a wide array of topics (e.g. travel, crafts, spirituality, parenting).
- A candidate/committee pays them to post about the candidate/committee on their blog.
- The “Blogger Regulation” (18421.5) requires extra reporting on a recipient committee's campaign reports, or if the committee chooses, on the post itself.
- Rules could be clarified as to what disclaimer required under Disclose Act, and where (on individual post? Top/bottom of “website”?)

PAID NEWSPAPER EDITORIAL



- A committee pays a writer to author an editorial that meets the Act's definition of advertisement for an online news site.
- The site itself receives no payment from either party.
- What disclosure, where, and by whom?
- Questions as to what qualifies as news site vs. blog.
- First Amendment questions.