



June 17, 2019

Submitted electronically to eth.rulecomments@wi.gov

Katie McCallum, Chair
Wisconsin Ethics Commission
101 E. Wilson Street, Suite 127
Madison, WI 53703

Dear Chair McCallum,

The Campaign Legal Center (“CLC”) respectfully submits these written comments to the Wisconsin Ethics Commission (“Commission”) regarding the proposed rulemaking to clarify attribution requirements for political communications under Wis. Stat. § 11.1303.¹

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening American democracy across all levels of government. Since the organization’s founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court and in numerous other federal and state court cases. Our work promotes every citizen’s right to participate in the democratic process and to know the true sources of funds spent to influence elections.

We support the Commission’s decision to initiate this rulemaking in order to clarify Wisconsin’s requirements for attributions on political communications. Our comments are intended to help ensure the Commission promulgates a final rule that judiciously implements Wis. Stat. § 11.1303 and provides the people of Wisconsin with meaningful information about political advertising in state elections.

Our comments begin with an overview of Wisconsin’s statutory attribution requirements and the proposed rule. Next, the comments assess the proposed rule’s standard for whether an attribution is “readable, legible, and readily accessible,” and recommend the Commission add “safe harbors” for including attributions on different types of communications that will satisfy the “readable, legible, and readily accessible” standard. The third section assesses the exemption from attribution requirements for “online ads and similar electronic communications” in the proposed rule. In this section, we recommend that the final rule should: (i) not extend the attribution exemption beyond the statute’s limited terms; (ii) limit the exemption only to cover *small* online and electronic ads that cannot include complete attributions due to size or technological limitations; (iii) require sponsors of online

¹ Proposed Rule Making Order, CR 19-035, Wis. Admin. Reg. No. 760A3 (Apr. 15, 2019).

and electronic ads to establish, at the Commission’s request, that full attributions were not included on specific advertisements due to size or technological constraints; and (iv) specify guidelines for how online and electronic ads should display direct links to required information when full attributions cannot be placed on the ads.

I. Overview of Wis. Stat. § 11.1303 & Proposed Rule

Pursuant to Wis. Stat. § 11.1303(2)(b), an “express advocacy”² communication made by a committee must clearly identify its source by including the phrase “Paid for by” followed by the name of the sponsoring committee in the communication. Similarly, if an express advocacy communication is made by a person other than a committee and costs over \$2,500, it must include a “Paid for by” statement identifying its source.³ In addition, an express advocacy communication that is not made in coordination with a candidate’s campaign⁴ must state that the communication is “Not authorized by any candidate or candidate’s agent or committee.”⁵ The statute further stipulates that attributions on written communications must be “readable, legible, and readily accessible,” but does not define this standard.⁶

Express advocacy communications appearing on certain “small items,” including social media communications and small advertisements on mobile phones, are exempt from the statute’s attribution requirements if the required statements “cannot be conveniently printed” on the communications.⁷ Under the statute, the Commission is authorized to specify, by rule, “small items or other communications to which [attributions] shall not apply.”⁸ The rulemaking authorization in § 11.1303(2)(f) is in addition to the Commission’s general authority to promulgate rules necessary to “carry out” the state’s campaign finance law.⁹

The Commission has issued the proposed rule in an effort to update its regulatory requirements following significant changes to Wisconsin’s campaign finance law made by Wisconsin Act 117 (2015).¹⁰ Currently, the Commission provides advice to committees and others required to comply with § 11.1303, but has not formally issued rules on the requirements for attributions under state law. Thus, the proposed rule, in addition to eliminating references to outdated forms and repealed statutory provisions, is intended to clarify when an attribution is “readable,

² See Wis. Stat. § 11.0101(11) (defining “express advocacy” to include any communication that references the election or defeat of a “clearly identified candidate” and contains terms such as “vote for,” “vote against,” “elect,” or “defeat.”)

³ *Id.* § 11.1303(2)(c).

⁴ *Id.* §§ 11.0505(1)(b)(6); 11.0605(1)(b)(6); 11.1001(1)(b)(6).

⁵ *Id.* § 11.1303(2)(d).

⁶ *Id.* § 11.1303(2)(g).

⁷ *Id.* § 11.1303(2)(f).

⁸ *Id.*

⁹ *Id.* § 19.48(1). See also Wis. Stat. § 227.11(2)(a) (“Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute, but a rule is not valid if the rule exceeds the bounds of correct interpretation.”).

¹⁰ See Proposed Rule Making Order, CR 19-035, Wis. Admin. Reg. No. 760A3 (Apr. 15, 2019).

legible, and readily accessible” and to delineate the scope of the statutory exemption for communications on certain small items.¹¹

II. Proposed Rule’s Standard for “Readable, Legible, and Readily Accessible” Attributions

The proposed rule mandates that all attributions required by § 11.1303 must be “readable, legible, and readily accessible.” The proposal then separately defines the terms “readable,” “legible,” and “readily accessible.”¹² While defining each term in the “readable, legible, and readily accessible” standard would offer some explanation of this requirement, the Commission should describe in greater detail how attributions for different types of communications, including video, audio, and written or graphic advertisements, can satisfy the standard.

i. Recommendation: Add Safe Harbors for Including Attributions on Different Types of Communications

In the final rule, the Commission should consider adding “safe harbors” for including attributions on particular forms of communications that, if followed, will satisfy the “readable, legible, and readily accessible” standard. The Federal Election Commission (“FEC”) regulation for political advertising disclaimers generally requires all disclaimers to appear “in a clear and conspicuous manner,” and explains that a disclaimer does not satisfy this standard “if it is difficult to read or hear, or if the placement is easily overlooked.”¹³ In addition to the “clear and conspicuous” standard, the FEC’s regulation requires written disclaimers on print and television advertisements to appear in “clearly readable” writing.¹⁴

To explain when a disclaimer is “clearly readable,” the FEC regulation describes “safe harbor” criteria for including written disclaimers on print and television ads that, if met, satisfy the “clearly readable” requirement.¹⁵ For example, the FEC regulation specifies that a written disclaimer on a television advertisement is “clearly readable” if it: (i) appears in letters “equal to or greater than four (4) percent of the vertical picture height;” (ii) is visible for at least four seconds; and (iii) appears “with a reasonable degree of color contrast between the background and the disclaimer statement.”¹⁶

The Commission should review the safe harbor provisions in the FEC’s disclaimer regulation and consider adding similar safe harbor specifications for attributions in the final rule. Importantly, specifying safe harbors in the final rule

¹¹ *Id.*

¹² *See* Proposed Rule Making Order, Text of Rule § 7 (“In this section: (a) ‘Readable’ means able to be read easily. (b) ‘Legible’ means each individual letter or character is clearly printed so it can be easily understood. (c) ‘Readily accessible’ means capable of being seen without much difficulty.”).

¹³ 11 C.F.R. § 110.11(c)(1).

¹⁴ *Id.* § 110.11(c)(2)(i), (c)(3)(iii), (c)(4)(iii).

¹⁵ *Id.*

¹⁶ *Id.* § 110.11(c)(3)(iii)(A)-(C), (c)(4)(iii)(A)-(C).

would offer more clarity and guidance to committees and others subject to Wis. Stat. § 11.1303.

III. Proposed Rule’s Exemption for “Online Ads & Similar Electronic Communications”

The proposed rule includes a list of “material that does not need an attribution” under Wis. Stat. § 11.1303. The proposal’s list includes “online ads and similar electronic communications where the language required could not conveniently be printed, and that link directly to a website that includes the language require by s. 11.1303, Stats.” The proposed rule’s exemption for all “online ads and similar electronic communications” is significantly broader than the statute’s more limited exception for communications on certain “small items,” which, in terms of online and digital advertising, only exempts “social media communications” and “certain small advertisements on mobile phones” *if* the necessary attributions “cannot be conveniently printed” on them.¹⁷

In light of the rapid growth of online and digital advertising in recent elections, and the ease with which attribution disclaimers can now be conveniently printed on many such communications, the Commission should more carefully tailor the rulemaking proposal’s exemption for online ads and similar communications.

According to research firm Borrell Associates, digital ad spending in federal, state, and local elections exceeded \$1 billion both in 2018 and during the 2016 election cycle.¹⁸ The estimated \$1.8 billion spent on digital advertising in last year’s midterm elections alone represents a 2,400% increase over total digital expenditures made during the 2014 midterms.¹⁹ The upsurge in online political advertising is very likely to continue in future elections, as campaigns, PACs, and advocacy groups increasingly rely on digital media to target and engage prospective voters.

The rise in online campaign advertising has also exposed our democracy to new threats. Special Counsel Robert Mueller’s report on Russian election interference highlights how the Kremlin’s agents utilized Facebook, Twitter, and other online platforms as part of a “sweeping and systematic” operation to influence the 2016 U.S. presidential election.²⁰ To avoid detection, Russia’s operatives created numerous social media accounts using the names of fictitious American citizens and

¹⁷ Wis. Stat. § 11.1303(2)(f).

¹⁸ See Rob Lever, *Despite Restrictions, Digital Spending Hits Record in US Midterms*, AFP (Nov. 13, 2018), <https://www.yahoo.com/news/despite-restrictions-digital-spending-hits-record-us-midterms020115626.html>; Kate Kaye, *Data-Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast TV Down 20%, Cable and Digital Way Up*, ADAGE (Jan. 3, 2017), <https://adage.com/article/media/2016-political-broadcast-tv-spend-20-cable-52/307346>.

¹⁹ Rob Lever, *Despite Restrictions, Digital Spending Hits Record in US Midterms*, AFP (Nov. 13, 2018), <https://www.yahoo.com/news/despite-restrictions-digital-spending-hits-record-us-midterms020115626.html>.

²⁰ SPECIAL COUNSEL ROBERT S. MUELLER III, U.S. DEP’T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1 (Mar. 29, 2019).

advocacy organizations.²¹ One Russian group, the Internet Research Agency, reportedly purchased over 3,500 political ads on Facebook prior to the 2016 election, and ultimately reached as many as 126 million people through the social media platform.²² As noted in the Mueller report, federal law expressly prohibits “foreign nationals” from making contributions or expenditures in connection with any federal, state, or local election in the U.S.²³ Despite this broad prohibition, Russia’s 2016 influence operation was facilitated by gaps in campaign finance law that allowed political advertising disseminated online to escape the transparency requirements applicable to ads run on other mediums.

i. Recommendation: The Final Rule Should Not Expand Attribution Exemptions Beyond the Statute

The statute refers only to “social media communications” and “certain small advertisements on mobile phones” as examples of “small items” subject to the attribution exemption, yet the proposed rule reaches beyond the statute’s terms by expressly exempting all “online ads and similar electronic communications where the language required could not conveniently be printed.”

Given the increasing volume of online political advertising and the demonstrated willingness of foreign actors to exploit digital transparency loopholes to influence U.S. elections, the Commission should not unnecessarily expand attribution exemptions beyond the language of the statute.

Instead, the Commission’s final rule should limit the exemption to *small* online and electronic ads that cannot include full attributions due to size or technological constraints. Like Wisconsin Stat. § 13.1303, Maryland’s Election Law authorizes the State Board of Elections to specify disclaimer requirements for “campaign material” that is too small to include the complete disclaimer statements required by statute.²⁴ In its regulations, the Maryland State Board of Elections has itemized digital ad formats that are exempt from full disclaimer requirements, and the non-exhaustive list includes communications of 200 characters or less in length, button ads, micro bars, and graphic or picture ads where including a full disclaimer “is not reasonably practical” due to the size of the graphic or picture.²⁵

In its final rule, the Commission should narrow the online ad exemption to small advertising that cannot accommodate complete attributions due to size or technological limitations. To help define the scope of the exemption, the final rule also could include examples of online ad formats that qualify for the exemption.

ii. Recommendation: Clarify that “Small Items” Exemption Only Applies to Small Online & Electronic Advertisements Where Complete Attributions “Cannot Be Conveniently Printed” Due to Size or Technological Limitations

²¹ *Id.* at 22.

²² *Id.* at 25-26.

²³ *Id.* at 184.

²⁴ Md. Code Ann., Elec. Law § 13-401(a)(3).

²⁵ Md. Code Regs. 33.13.07.02(D)(2)(c).

By its express terms, the statutory attribution exemption for “social media communications” and “certain small advertisements on mobile phones” applies *only* if the necessary attributions “cannot be conveniently printed.”²⁶

As the prevalence of online political advertising has increased in recent years, and the problems associated with secretive online advertising have become more apparent, some internet platforms have adjusted their advertising policies to accommodate political ad disclaimers. In fact, Facebook,²⁷ Google,²⁸ and Twitter²⁹ now *require* that election-related advertisements include “Paid for by” statements with the name of the ad sponsors. These new policies ensure that attributions can be “conveniently printed” on political ads disseminated by those three platforms.

The Commission’s final rule should reflect this reality, and make clear that the statute’s reference to “social media communications” and small mobile advertisements is not a wholesale exemption from attribution requirements. Accordingly, the final rule should clarify that the exemption only applies when inclusion of a complete attribution is not possible on certain small online ads due to size or technological constraints.

iii. Recommendation: Require Sponsors of Online & Electronic Advertising to Be Able to Establish That Particular Ads Could Not Include Complete Attributions

In addition to clarifying the scope of the exemption for online and electronic ads, the final rule should stipulate that sponsors of online political communications must be able to establish, at the Commission’s request, that including complete attributions on a particular ad was, in fact, not possible due to legitimate size or technological constraints. This addition would help to prevent ad sponsors from abusing the exemption and to ensure that full attributions appear on online advertising when possible.

Similar to Wis. Stat. § 11.1303, California’s Political Reform Act permits the sponsor of an “electronic media advertisement” to substitute a complete disclaimer statement with a hyperlink to the required information when including a complete disclaimer would be “impracticable or would severely interfere with the [sponsor’s] ability to convey the intended message due to the nature of the technology used to make the communication.”³⁰ By regulation, California’s Fair Political Practices Commission has stipulated that a sponsor of an electronic media advertisement who claims inclusion of a full disclaimer on the ad is “impracticable” has the burden of

²⁶ Wis. Stat. § 11.1303(2)(f).

²⁷ Ads About Social Issues, Elections or Politics, FACEBOOK, <https://www.facebook.com/business/help/198009284345835> (last visited June 14, 2019).

²⁸ List of Ad Policies, GOOGLE, <https://support.google.com/adspolicy/answer/6014595?hl=en> (last visited June 14, 2019).

²⁹ Political Content in the United States, TWITTER, <https://business.twitter.com/en/help/ads-policies/restricted-content-policies/political-content/US-political-content.html> (last visited June 14, 2019).

³⁰ Cal. Gov’t Code §§ 84501(a)(2)(G), 84504.3(b).

establishing why it was not possible to include a complete disclaimer on the advertisement.³¹

In the final rule, we recommend the Commission include a similar provision requiring sponsors of online advertisements to be able to establish to the Commission that full attributions genuinely could not be “conveniently printed” on their advertising. This would safeguard against exploitation of the “small items” exemption and provide Wisconsin voters with more information about the sources of online and electronic political ads, as intended by state law.

iv. Recommendation: Specify Guidelines for Including Direct Links on Online Advertisements When Complete Attributions Are Not Possible

For online ads on which attributions genuinely cannot be placed, the final rule should provide greater description of the requirement to include a direct link to the necessary statements to ensure that recipients of these ads can access the information with minimal effort and without viewing extraneous material. Digital technology is now sufficiently advanced that attribution information can be readily provided through means other than a link to a website.

Washington State’s Public Disclosure Commission (“PDC”), which administers campaign finance law in that state, generally requires all online political advertisements to include disclaimers in the same manner as other forms of advertising “to the extent practical.”³² However, by regulation, the PDC permits “small online advertising” with limited characters to include, in lieu of a full disclaimer, an automatic display that directs the ad recipients to the necessary disclaimer statements.³³ The regulation specifies that the automatic displays “must be clear and conspicuous, unavoidable, immediately visible, remain visible for at least four seconds, and display a color contrast as to be legible.”³⁴ Further, the PDC’s regulation describes permissible formats for the automatic displays; small online advertising is compliant with Washington’s disclaimer requirements if it includes the disclaimer statement in a non-blockable pop-up, roll-over display, or comparable mechanism appearing on the ad, or if it includes a separate text box within the ad that is conspicuously linked to a webpage with the necessary disclaimer.³⁵ We recommend that the Commission review the PDC’s regulation regarding on-ad displays and adopt similar guidelines in the final rule.

³¹ Cal. Code Regs. tit. 2, § 18450.1(b); *see also* Cal. Fair Political Practices Comm’n, Op. No. I-17-017 (Mar. 1, 2017), at 4 (“Where character limit constraints render it impracticable to include the full disclosure information specified, the committee may provide abbreviated advertisement disclosure on the social media page. . . . If abbreviated disclaimers are used a committee must be able to show why it was not possible to include the full disclaimer.”).

³² Wash. Admin. Code § 390-18-030(3).

³³ *Id.* Like the Wisconsin Ethics Commission, the PDC has statutory authority to exempt, by rule, certain forms of political advertising from disclaimer requirements if including full disclaimers is not “practical.” *See* Wash. Rev. Code Ann. § 42.17A.320(7).

³⁴ Wash. Admin. Code § 390-18-030(3)(a).

³⁵ *Id.* § 390-18-030(3)(b).

Additionally, the Commission’s final rule should clarify that any alternative mechanism for providing attributions should require only one step by ad recipients to directly access the required information. When following a link or indicator to access the attribution for a small online ad, the recipients should be immediately directed to the full attribution without having to navigate through or view any material other than statements required by Wis. Stat. § 11.1303.³⁶

Greater clarity regarding requirements for including direct links on online advertising would assist candidates, committees, and other groups in complying with state law’s attribution requirements, and also ensure that Wisconsin voters can readily access information about sources of online and electronic political advertising.

Conclusion

CLC appreciates the opportunity to comment on this important rulemaking. We are willing to answer questions or to provide additional information in order to assist the Commission with promulgation of the final rule.

Respectfully submitted,

/s/
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Director, Federal Reform Program

/s/
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³⁶ For example, the New York State Board of Elections requires paid internet or digital advertising that cannot fit a complete attribution to include an adapted attribution allowing recipients to “locate the full attribution by navigating no more than one step away from the adapted attribution and without receiving or viewing any additional material other than the full attribution required by this section.” N.Y. Comp. Codes R. & Reg. tit. 9, § 6200.10(f)(2)(ii).