



January 25, 2021

Submitted electronically to elections.sos@oregon.gov

The Hon. Shemia Fagan
Oregon Secretary of State
255 Capitol Street NE, Suite 501
Salem, Oregon 97310

Dear Secretary Fagan,

Campaign Legal Center (“CLC”) respectfully submits these written comments to the Oregon Secretary of State’s Office (“Secretary”) regarding the Notice of Proposed Rulemaking (“Proposed Rule”) to implement the campaign advertising disclaimers requirements in O.R.S. § 260.66.¹

CLC is a nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels of government. Since its 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 American’s right to an accountable and transparent democratic system.

CLC supports the Secretary’s decision to initiate this rulemaking regarding Oregon’s new disclaimer requirements for “communications in support of or in opposition to a clearly identified candidate.” With the increasing prominence of digital advertising in federal, state, and local campaigns, it is imperative that election officials extend political transparency requirements to communications distributed via digital channels.² Our

¹ See Office of the Sec’y of State, Notice of Proposed Rulemaking (Dec. 4, 2020), <https://sos.oregon.gov/elections/Documents/Proposed-rulemaking0165-012-0540T-120420-Receipt-NoticeFilingTrackedChanges.pdf>; see also 2019 Or. Laws ch. 636 (H.B. 2716).

² By one account, at least \$1.6 billion was spent on digital advertising in federal, state, and local elections during the 2019-2020 election cycle. See Howard Homonoff, *2020 Political Ad Spending Exploded: Did It Work?*, FORBES (Dec. 8,

comments are therefore intended to assist the Secretary in promulgating a final rule that can flexibly apply to different types of political advertising, including digital ads, and that provides clear guidance to the regulated community on the disclaimer requirements in O.R.S. § 260.266.

First, we recommend revising the Proposed Rule’s definition of “digital communication” to enable that term to flexibly cover different varieties of digital advertising. Second, we propose amending the medium-specific disclaimer requirements in Section 4 of the Proposed Rule so that they clearly apply to digital ads. Finally, we recommend clarifying the modified disclaimer requirements for “digital communications” under O.R.S. § 260.266(2)(d) as part of the final rule. Each part of our comments also includes an example of recommended rule text, based on our recommendations, that we hope the Secretary will consider adopting as part of the final rule.

I. Defining “digital communication” to cover a comprehensive range of digital advertising.

The disclaimer requirements of O.R.S. § 260.266 generally apply to “communications distributed via . . . the Internet,” *id.* § 260.266(7)(b)(B)(i), and the law specifically references “digital communications” in two provisions, *id.* § 260.266(2)(d), (4)(c). The Proposed Rule would introduce a definition of “digital communication” to delineate the scope of the new disclaimer requirements for digital advertising in Oregon elections. As defined in the Proposed Rule, a “digital communication” would include “a communication using text or images and distributed in some way other than in hard copy, such as via television, advertisements in news feeds, social media, on the internet in any way, by phone, text message, or through any other electronic device or electronic medium.” Proposed R. 165-012-0525(2)(b).

Although the rule’s definition of “digital communication” should be broad enough to ensure that both known types and potential future forms of digital advertising are covered, regulating traditional media ads within the “digital communication” definition could have unintended consequences. The Proposed Rule’s definition of “digital communication” generally would cover any advertising that is not distributed “in hard copy,” and lists types of advertisements that are not usually classified as “digital,” such as communications “via television” and “by phone.”³ The definition’s breadth

2020), <https://www.forbes.com/sites/howardhomonoff/2020/12/08/2020-political-ad-spending-exploded-did-it-work/?sh=28c5ba503ce0>.

³ See, e.g., World Economic Forum, Digital Media and Society: Implications in a Hyperconnected Society 5 (Jan. 2016), http://www3.weforum.org/docs/WEFUSA_DigitalMediaAndSociety_Report2016.pdf (defining “digital media” to include “digital platforms (e.g. websites and

could become problematic in practice, because O.R.S. § 260.266 includes modified requirements for disclaimers on “digital communications” that are ill-suited for broadcast or cable TV ads and other non-digital media. In particular, O.R.S. § 260.266(2)(d) allows a “digital communication” to include only the name of the communication’s sponsor as long as the communication also displays an “active link to a website” displaying the remainder of the disclaimer information required by law, but this alternative is unworkable in the context of television and other non-digital ads. Moreover, extending the statute’s modified disclaimer requirements to non-digital ads that do not present the same technological or size constraints would unnecessarily undermine the public’s interest in transparency of those political ads. The Proposed Rule thus could inadvertently restrict the application of disclaimer requirements to non-digital political advertising, including TV ads.

In the final rule, the Secretary should revise the definition of “digital communication” to focus on communications that are disseminated through internet-based or digital platforms, while using terminology that both accounts for existing digital advertising forms and ensures sufficient flexibility to cover future digital advertising practices or technologies. We have suggested textual revisions, below, for the “digital communication” definition that are based on equivalent terms used in H.R. 1, the comprehensive federal election reform legislation, which the House of Representatives passed in 2019.⁴ Our suggested changes to the “digital communication” definition would allow the final rule to be flexibly applied to the full range of digital ads, and ultimately result in greater transparency of digital advertising in Oregon elections.

Recommended text for final rule:

R. 165-012-0525(2)(b) “Digital communication” means a communication ~~using text or images and distributed in some way other than in hard copy, such as via television, advertisement in news feeds, social media, on the internet in any way, by phone, text message, or through any other electronic device or electronic medium~~ in support of or in opposition to a clearly identified candidate that is placed or promoted on an internet or digital platform, including but not limited to search engine marketing, display advertisements, video or audio advertisements, native advertising, and sponsorships. For purposes of the preceding sentence, ‘internet or digital

applications), digitized content (e.g. text, audio, video and images) and services (e.g. information, entertainment and communication) that can be accessed and consumed through different digital devices.”).

⁴ See H.R. 1, 116th Cong. § 4206(a)(1)(B) (2019) (“The term ‘qualified internet or digital communication’ means any communication which is placed or promoted for a fee on an online platform”); see also *id.* § 4208(a) (defining “online platform,” in relevant part, as “any public-facing website, web application, or digital application”).

platform’ means a public-facing website, internet-enabled application, or other digital application (including but not limited to a social network, ad network, or search engine) that displays, or causes to be displayed, digital communications.

II. Ensuring the medium-specific disclaimer requirements account for digital advertising.

Under O.R.S. § 260.266(6), the Secretary must “prescribe the form of [disclaimer] statements required on communications” by rule, and such rule must ensure that disclaimer statements are “[i]n a font, size and color that are easy for an average person to read, if the communication appears in a printed or digital format.” Accordingly, Section 4 of the Proposed Rule sets out specific requirements for “printed or digital statements” on covered communications, and for disclaimer statements on television communications.

For “printed or digital statements,” the Proposed Rule stipulates that a statement’s font size may be “no smaller than 10 point font.” Proposed R. 165-012-0525(4)(c). While this font-size requirement makes sense for disclaimer statements on printed materials, it is likely incompatible with some common digital ad formats, including mobile ads and small digital display advertising. Moreover, because the Proposed Rule would generally exempt a communication from having to include disclaimer statements if the required information cannot be “included on the [communication] using the standards set out in this rule relating to readability,” Proposed R. 165-012-0525(3)(a), a 10-point font requirement could have the unintended effect of exempting many digital ads from the disclaimer requirements altogether.⁵

To ensure small digital communications are not unintentionally exempted from the requirements of O.R.S. § 260.266, we recommend clarifying in the final rule that the 10-point font specification applies *only* to statements on printed (i.e., hard-copy) communications. In lieu of a 10-point font specification for disclaimer statements on digital advertising, the final rule should incorporate a more pliable standard for font size on digital statements.

For example, H.R. 1, the comprehensive federal election reform bill, specifies that disclaimers on “text or graphic” digital ads will satisfy federal law’s “clear and conspicuous” standard if they “appear[] in letters at least as large as the majority of the text in the communication.”⁶ This more flexible

⁵ While the Proposed Rule separately states that a communication distributed by “social media” is not “too small” to include the necessary disclaimer statements, it does not explain whether other types of digital ads are considered “too small” to include the required disclaimer statements. See Proposed R. 165-012-0525(3)(b).

⁶ H.R. 1, 116th Cong. § 4207(b).

requirement is meant to allow disclaimer statements to be adapted to the myriad forms of digital advertising. In the final rule, we recommend that the Secretary include analogous language regarding the font size for disclaimer statements on digital communications.

Section 4(g) of the Proposed Rule requires “television communications” to include “a clearly readable written statement that appears at the end of the communication, for a period of at least four seconds with a reasonable degree of color contrast between the background and the disclaimer statement.” However, the Proposed Rule does not address what is required for disclaimer statements on digital video advertisements, such as political ads on YouTube, which should include the same disclaimer visualization as TV ads.

Considering the similarities between TV ads and digital video advertising, we recommend that the Secretary also include “digital video communications,” along with television communications, under Section 4(g). This minor addition would provide clarity for the sponsors of digital video ads and help to facilitate compliance with the disclaimer requirements generally.

Recommended text for final rule:

R. 165-012-0525(4)(c) The font size for a printed statement shall be no smaller than 10 point font. 12-point font on printed material measuring no more than 24 inches by 36 inches is the best way to meet this requirement. The font size for a digital statement shall be in letters at least as large as the majority of text in the communication.

...

(g) Television communications or digital video communications must contain a clearly readable written statement that appears at the end of the communication, for a period of at least four seconds with a reasonable degree of color contrast between the background and the disclaimer statement. The written statement must occupy at least four percent of the vertical picture height.

III. Clarifying the modified disclaimer requirements for “digital communications” under O.R.S. § 260.266(2)(d).

Pursuant to O.R.S. § 260.266(2)(d), a “digital communication” must only include the name of the communication’s sponsor and may omit other statements required by the law if “the digital communication includes an active link to a website that prominently displays the additional information required by this subsection.” This provision effectively permits the sponsors of digital ads to omit “Top 5 Contributor” statements from their advertising *so long as*

the digital ads are linked to a web page containing the necessary information about the sponsors' largest contributors or donors.

The Proposed Rule does not describe how political committees and other sponsors of political ads can satisfy the modified disclaimer requirements for digital communications in O.R.S. § 260.266(2)(d). To ensure that Oregon voters who are served digital ads about state candidates can easily access all information required by law, we recommend that the Secretary add guidelines in the final rule to clarify the modified disclaimer requirements for digital communications under O.R.S. § 260.266(2)(d).

In particular, the Secretary's final rule should make clear that an "active link" included on a digital communication must immediately direct the recipients of the communication to a page displaying the remaining information required by O.R.S. § 260.266—without requiring the recipients to navigate through or view any extraneous material beyond the disclaimer statements. This addition would ensure Oregon voters have one-step access to complete disclaimer information when they are targeted and served with digital advertisements supporting or opposing state candidates. Other states, including Washington,⁷ New York,⁸ and Wisconsin,⁹ have promulgated similar regulations regarding modified disclaimers on certain digital ads, which allow the public to readily obtain key information about the sources of online advertising in elections.

Recommended text for final rule:

R. 165-012-0525 [NEW SUBSECTION] A digital communication that provides the required information pursuant to ORS 260.266(2)(d) shall, in a prominent manner:

⁷ Wash. Admin. Code 390-18-030(3) (specifying that "small online advertising" with limited character space may include, in lieu of full disclaimer, "automatic displays" with the required disclaimer information if such displays are "clear and conspicuous, unavoidable, immediately visible, remain visible for at least four seconds, and display a color contrast as to be legible.").

⁸ N.Y. Comp. Codes R. & Reg. tit. 9, § 6200.10(f)(2)(ii) (requiring an "adapted attribution" included on a "paid internet or digital advertisement" to "allow a recipient of the communication 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 [rule].").

⁹ Wis. Admin Code, § Eth. 1.96(5)(h) (permitting "small online ads or similar electronic communications" on which disclaimers cannot be "conveniently printed" to include a link that "direct[s] the recipient of the small online ad or similar electronic communication to the attribution in a manner that is readable, legible, and readily accessible, with minimal effort and without viewing extraneous material.").

- (a) State the name of the person that paid for the digital communication; and
- (b) Include an active link for the recipient of the digital communication to immediately view the remainder of the information required under ORS 260.266 with minimal effort and without receiving or viewing any additional material other than such required information.

Conclusion

Thank you for your consideration of CLC's comments and recommendations for this important rulemaking. We would be happy to answer questions or provide additional information to assist the Secretary in promulgating the final rule for O.R.S. § 260.266.

Respectfully submitted,

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