Comments Received During 30-Day Comment Period

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From: Rep. Nathan Coulter (house.mn.gov)
To: Sigurdson, Jeff (CFB)
Cc: beth.fraser@mnsenate.gov; John Boehler
Subject: Comment on Proposed Rule
Date: Tuesday, October 15, 2024 11:16:40 AM

Jeff,

A proposed CFB rule was brought to my attention by Beth Fraser and John Boehler, and I wanted to offer a thought. The rule I'm referring to is:

4511.1100 MAJOR DECISION OF NONELECTED LOCAL OFFICIALS.
Subpart 1. Major decision regarding the expenditure of public money. Attempting to influence a nonelected local official is lobbying if the nonelected local official may make, recommend, or vote on as a member of the political subdivision's governing body, a major decision regarding an expenditure or investment of public money.
Subp. 2. Actions that are a major decision regarding public funds. A major decision regarding the expenditure or investment of public money includes but is not limited to a decision on:
A. the development and ratification of operating and capital budgets of a political subdivision, including development of the budget request for an office or department within the political subdivision;
B. whether to apply for or accept state or federal funding or private grant funding;
C. selecting recipients for government grants from the political subdivision; or
D. expenditures on public infrastructure used to support private housing or business developments.
Subp. 3. Actions that are not a major decision. A major decision regarding the expenditure of public money does not include:
A. the purchase of goods or services with public funds in the operating or capital budget of a political subdivision;
B. collective bargaining of a labor contract on behalf of a political subdivision;
or
C. participating in discussions with a party or a party's representative regarding litigation between the party and the political subdivision of the local official.

My only comment is on Subpart 2, Section D, referring to "expenditures". My concern is that the term could be construed as only referring to direct expenditures, not more indirect forms of financing such as Tax Increment Financing, land value write-downs, etc. I think some clarification is warranted – perhaps something like "expenditures and/or financing"?

Thanks!

Nathan

Representative Nathan Coulter

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For more information and updates, check out my Facebook page and sign up for Email Updates.

Strong School Boards … Strong Minnesota

Minnesota Campaign Finance Board
190 Centennial Office Building
658 Cedar Street
St. Paul, MN 55155-1603

November 1, 2024

Re: Proposed Permanent Rules Relating to Campaign Finance

On behalf of the Minnesota School Boards Association (MSBA), I submit comments to the Minnesota Campaign Finance and Public Disclosure Board (CFB) regarding the proposed administrative rules relating to campaign finance, lobbying, and audits and investigations.

MSBA is a private, nonprofit organization that supports, promotes, and strengthens the work of Minnesota school boards. Every Minnesota school district is an MSBA member. MSBA employs more than 20 staff members with over 150 years of combined experience in the areas of governance, management, finance, communications, policy, legal matters, elections, and advocacy. MSBA provides workshops, resources, services, and connections designed to help boards save time, reduce expenses, govern efficiently, and stay inspired.

MSBA greatly appreciates the discussions with CFB staff regarding lobbyist regulation.

Development of prospective legislation

Development of prospective legislation" means communications that request support for legislation that has not been introduced as a bill, communications that provide language, or comments on language, used in draft legislation that has not been introduced as a bill, or communications that are intended to facilitate the drafting of language, or comments on language, used in draft legislation that has not been introduced as a bill.

MSBA regularly receives requests for information regarding prospective legislation from state legislators, state agencies and departments (including the Minnesota Department of Education), and the executive branch. The scope of this definition may be too broad as it includes communications that serve to share MSBA's experience and expertise rather than to affect potential legislation.

An exception to "development of prospective legislation" is "responding to a request for information by a public official." The term "public official" is not defined in the existing or proposed rules. MSBA regularly receives requests for information from the Minnesota Department of Education and other state agencies. It is not clear whether these employees, including the Commissioners of these agencies, would constitute a "public official" for purposes of the proposed rule.
The line between "developing" and "responding" is uncertain. Similarly, the exception for "providing information to public officials in order to raise awareness and educate on an issue or topic" may be difficult to distinguish from development of prospective legislation.

MSBA holds an annual meeting, the Delegate Assembly, at which Minnesota's school board members gather to discuss resolutions and potential legislation. It is not clear whether this definition would apply to the Delegate Assembly and, if so, what the ramifications would be.

Finally, it is not clear where this proposed definition would apply in the Rules. The term "development of prospective legislation" appears only in the definition.

Registration threshold

An individual must register as a lobbyist with the board upon the earlier of when: A. the individual receives total pay or consideration from all sources that exceeds $3,000 in a calendar year for the purpose of lobbying or from a business whose primary source of revenue is derived from facilitating government relations or government affairs services if the individual's job duties include offering direct or indirect consulting or advice that helps the business provide those services to clients. The pay or consideration for lobbying for an individual whose job duties include both lobbying and functions unrelated to lobbying is determined by multiplying the gross compensation of the individual by the percentage of the individual's work time spent lobbying in the calendar year.

Currently, MSBA registers a number of employees as lobbyists. However, other MSBA staff who do not directly interact with public officials support the activities of MSBA's registered lobbyists by conducting research, reviewing language, discussing options and challenges, and other activities related to prospective legislation. Because the definition of "lobbyist" includes *direct or indirect consulting or advice*, it is possible that many more MSBA employees could come within the reporting threshold.

Registration not required

Subpart 2b(B) states that an association board member is not a lobbyist "unless the individual receives pay or other consideration to lobby on behalf of the association." MSBA board members receive a stipend for their service on the MSBA board, yet only a portion of a board member's time is devoted to lobbying. Some MSBA board members travel to Washington, D.C. to talk with federal legislators. The rules are not clear whether they encompass federal activity. The scope of the term "or other consideration" needs clarification. Would airfare, hotel room, food/beverage, and other expense reimbursements be considered "other consideration"?

Report of designated lobbyist

The proposed rules regarding the designated lobbyist report include, "*if the lobbyist represents an association, a current list of the names and addresses of each officer and director of the association*." MSBA hopes to confirm that MSBA's address may be provided rather than residential addresses.

The proposed rules would require a report of "*each original source of money in excess of $500 provided to the individual or association that the lobbyist represents*." For a membership organization that holds an annual conference and other meetings that include exhibitors and sponsorships, publishes the MSBA *Journal* and other materials that include advertisements, has over 2,000 school board members who typically attend one or more paid trainings or webinars, and collects other revenue, this reporting requirement may quickly become challenging to fulfill.

Lobbyist reporting for political subdivision membership organizations

New proposed rule 4511.0900 states:

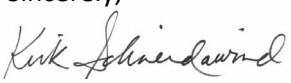
***Required reporting**. An association whose membership consists of political subdivisions within Minnesota and which is a principal that provides lobbyist representation on issues as directed by its membership must report:*
A. attempts to influence administrative action on behalf of the organization's membership;
B. attempts to influence legislative action on behalf of the organization's membership; and

C. attempts to influence the official action of a political subdivision on behalf of the organization's membership, unless the political subdivision is a member of the association.

MSBA hopes that the CFB will provide greater clarity on this expansive requirement. The meaning of "attempt" is uncertain. It could constitute every conversation, phone call, email, and more. If so, the reporting requirement would be tremendously time-consuming and costly, if not actually impossible to fulfill.

MSBA is grateful to the board for its attention to and consideration of these comments. It welcomes an opportunity to work with the board as the rulemaking process proceeds.

Sincerely,



Kirk Schneidawind
Executive Director
Minnesota School Boards Association.

November 6, 2024

Andrew Olson
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Campaign Finance and Public Disclosure Board
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Re: Comments on Rule Draft 4809

To the Minnesota Campaign Finance and Public Disclosure Board:

The Minnesota Council of Nonprofits (MCN) is the largest statewide association of nonprofits in the country, representing over 2,000 member organizations across the state, most of which are 501(c)(3) nonprofits who also report their lobbying activity to the IRS. MCN's mission is to inform, promote, connect, and strengthen individual nonprofits and the nonprofit sector, and a large part of that work is done though our public policy advocacy and lobbying initiatives.

We appreciate this opportunity to comment on your proposed rule changes. As noted in our comments to the Board at the October 25, 2024 hearing, MCN's focus is on lobbying rules and procedures being as clear as possible, so that a nonprofit staff person who engages in some lobbying can easily understand if they need to register, and if so, what they need to report as lobbying activities.

We are suggesting edits to the following sections:

4501.0100 DEFINITIONS

Subp. 4. **Compensation.**

We appreciate the clarification here in adding health care and retirement to the list of compensation included in the definition of compensation. However, we think the rules can go farther in this clarification.

It is a common practice for nonprofit employers to provide their employees with a personalized benefits statement that provides a comprehensive list of all types of compensation provided to the employee. These lists usually include: salary, stipends, medical insurance, dental insurance, HSA contributions, long- and short-term disability insurance, life insurance, 403(b) plan contributions, Social Security tax, Medicare tax, and paid leave benefits (the dollar amount that paid time off including vacation and sick time would be worth if it was paid out).

MCN recommends adding the following items to the current list of what is not included in the definition of compensation: insurance premiums for short- and long- term disability and life insurance, Medicare tax, and paid leave benefits. If the CFB disagrees and determines that any of these items should be included in the calculation of compensation, that must be clearly spelled out in this section.

We think it would also be very beneficial to add non-exhaustive list of what is included in compensation. That list would include: salary, stipends, and contributions to retirement accounts.

MCN's goal in recommending these changes is that when a nonprofit staff person engages in lobbying activity and reads in the lobbying handbook that they need to register if they have been paid more than $3,000 to lobby, that they can easily understand what number to use to determine their compensation under these rules.

4511.0100 DEFINITIONS

Subp 4. **Lobbyist's disbursements**
Given that the definition of "disbursement" has changed drastically, and is not a commonly used term, we recommend retitling this section "Lobbyist's gifts."

Further, we recommend changing "each" to "any." The word "each" could be construed to imply all lobbyists should be reporting something here. "Any" provides clarity that a lobbyist may have no gifts to report.

Lastly in this section, we recommend adding "to an official" after "gift given," in an effort to be exceedingly clear.

Subp. 5a. **Pay or consideration for lobbying.**
We ask the Board to remove the word "gross" before "compensation," because compensation is defined in section 4501.0100. Adding "gross" in this section signals that the calculation is different than the calculation for "compensation," which we do not think is the intent.

4511.1100 MAJOR DECISION OF NONELECTED LOCAL OFFICIALS

Subp. 1. **Major decision regarding the expenditure of public money.**
Subp. 2. **Actions that are a major decision regarding public funds.**

Subparts 1 and 2 in this section are clear that a major decision regarding the expenditure or investment of public money includes selecting recipients for government grants from the political subdivision, and that attempting to influence a nonelected official is lobbying if that

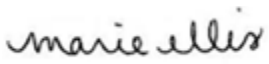
person may make, recommend, or vote on a major decision regarding an expenditure or investment of public money.

We strongly encourage the CFB to clarify this language to include that responding to a grant program's request for proposals or otherwise applying for an existing grant program does not constitute lobbying. Additionally, answering any follow-up questions from the municipality regarding the content of grant application is not lobbying. And finally, that if a potential grantee communicates with a nonelected official about a grant opportunity outside of the normal grant process, and with the intent to influence the nonelected official to choose their proposal, that is lobbying.

We hope these suggestions are helpful in providing the clearest rules possible for lobbyists and potential lobbyists.

As we said in our October comments, MCN's goal is to ensure that Minnesota's legislative process remains open and accessible to all, and that the rules do not inadvertently create or perpetuate structural barriers to participation for smaller organizations and the communities they represent — communities that are often already underrepresented in our state's policymaking. This accessibility is critical to a healthy democracy.

Thank you again for the opportunity to provide input. We look forward to working with you to find solutions that enhance both transparency in and equitable access to Minnesota's legislative process.



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November 6, 2024

Submitted electronically to andrew.d.olson@state.mn.us.

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Re: Comments regarding Proposed Permanent Rules Relating to Campaign Finance, Revisor's ID No. 4809, OAH Docket No. 24-9030-39382

Dear Chair Asp and Members of the Board,

Campaign Legal Center ("CLC") respectfully submits these written comments in response to the Minnesota Campaign Finance and Public Disclosure Board ("Board") regarding the Proposed Permanent Rules Relating to Campaign Finance (Revisor's ID No. 4809, OAH Docket No. 24-9030-39382) ("Proposed Rule").[1]

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy through law at all 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 proceedings. Our work promotes every American's right to an accountable and transparent democratic system.

CLC appreciates the opportunity to share these comments with the Campaign Finance and Public Disclosure Board. As digital ads become ever more prominent in federal, state, and local campaigns, it is imperative that political transparency requirements—including on-ad disclaimers—are applied to digital political ads.[2]

[1] 49 Minn. Reg. 377-391 (Oct. 7, 2024) ("Proposed Rule").
[2] By one account, at least $1.6 billion was spent on digital advertising in federal, state, and local elections during the 2019-2020 cycle. See Howard Homonoff, *2020 Political Ad Spending Exploded: Did It Work?*, FORBES (Dec. 8, 2020), https://tinyurl.com/444rua6c. For the 2023-2024 election cycle, spending for political ads on digital platforms and connected

As drafted, however, the Proposed Rule greatly expands the on-ad disclaimer exception in Minn. Stat. § 211B.04(3) for certain types of digital ads, unnecessarily exempting a substantial amount of digital political ads from this transparency requirement. Our comments first discuss the importance of on-ad disclaimers in promoting First Amendment interests and then explain how the Proposed Rule's expansion of this exception undermines those interests. Finally, our comments provide recommendations for a final rule that is both consistent with the statute and ensures that voters have immediate, easy access to information about who is paying for digital political advertisements.

Discussion

I. On-ad disclaimers promote critical First Amendment interests.

"In a republic where the people are sovereign, the ability of the citizenry to make informed choices [in elections] is essential."[3] Disclosure laws, including on-ad disclaimers, help voters to know who is funding a campaign or trying to influence government decision-making,[4] directly serving the government's critical informational interest in "ensur[ing] that voters have the facts they need to evaluate the various messages competing for their attention."[5]

As the Supreme Court has repeatedly recognized in decades of decisions upholding campaign finance disclosure provisions:

> [D]isclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.[6]

TV—services like Hulu and Netflix—is projected to soar to over $2.6 billion. AdImpact, *Political Projections Report 2023-2024* (June 30, 2024), https://tinyurl.com/2n6536yb.

[3] *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam).

[4] *See No on E v. Chiu*, 85 F.4th 493, 505 (9th Cir. 2023), *cert. denied*, 2024 WL 4426534 (No. 23-926) (Oct. 7, 2024) ("Understanding what entity is funding a communication allows citizens to make informed choices in the political marketplace."); *Gaspee Project v. Mederos*, 13 F.4th 79, 91 (1st Cir. 2021) ("The donor disclosure alerts viewers that the speaker has donors and, thus, may elicit debate as to both the extent of donor influence on the message and the extent to which the top five donors are representative of the speaker's donor base . . . [in *Citizens United*] the Court recognized that the disclaimers at issue were intended to insure that the voters are fully informed . . ." (internal quotation marks and citation omitted)).

[5] *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1005 (9th Cir. 2010).

[6] *Buckley*, 424 U.S. at 66-67 (internal quotation marks and footnote omitted). In *Buckley*, the Supreme Court articulated the constitutional standard for disclosure laws and upheld federal disclosure requirements, explaining that disclosure served three important purposes: "providing the electorate with information, deterring actual corruption and avoiding its

Disclaimers are not only an "efficient tool" for voter education, but also a means of "generating discourse" enabling informed voting—both functions that are "as vital to the survival of a democracy as air is to the survival of human life."[7] On-ad disclaimers are particularly effective at meeting these critical informational interests, facilitating voters' instantaneous appraisal of election advertising.

A robust body of empirical research confirms that knowing the source of election messaging is a "particularly credible" informational cue for voters seeking to make decisions about decisions consistent with their policy preferences.[8] As one legal scholar has observed, "[r]esearch from psychology and political science finds that people are skilled at crediting and discrediting the truth of a communication when they have knowledge about the source, but particularly when they have knowledge about the source at the time of the communication as opposed to subsequent acquisition."[9] Other recent studies also highlight how campaign finance disclosure also provides voters with additional signals regarding candidates' non-policy traits, or "valence" information, "such as competence, honesty, and related characteristics that are important for selecting elected representatives."[10] Avoiding transparency is particularly attractive to spenders with negative messages online, as negative ads are more likely to result in backlash from voters.[11] Together, this research establishes that transparency around and public disclosure of the sources behind campaign spending, including through contemporaneous on-ad disclaimers, equips voters with valuable informational shortcuts that facilitate knowledgeable choices on Election Day.

Minnesota's on-ad disclaimer statute, Minn. Stat. § 211B.04, serves these critical informational interests, while providing, as most disclaimer laws do, for certain

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appearance, and gathering data necessary to enforce more substantive electioneering restrictions." *McConnell v. FEC*, 540 U.S. 93, 196 (2003) (listing the "important state interests" identified in *Buckley*), *overruled in part on other grounds by Citizens United v. FEC*, 558 U.S. 310 (2010). The first of these, the public's informational interest, is "alone sufficient to justify" disclosure laws. *Citizens United*, 558 U.S. at 369; *see also No on E*, 85 F.4th at 504-06; *Gaspee Project*, 13 F.4th at 86.

[7] *Gaspee Project*, 13 F.4th at 91, 95.

[8] Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Finance Disclosure Laws in Direct Democracy*, 4 Election L.J. 295, 296 (2015); *see also* Abby K. Wood, *Learning from Campaign Finance Information*, 70 Emory L. J. 1091 (2021) ("Voters use heuristics, or informational shortcuts, to help them make the vote choice most aligned with their priorities without requiring encyclopedic knowledge . . . on every issue."); Keith E. Schnakenberg, Collin Schumock, and Ian R. Turner, *Dark Money and Voter Learning*, SSRN (May 28, 2023), *available at* https://ssrn.com/abstract=4461514 or http://dx.doi.org/10.2139/ssrn.4461514.

[9] Michael Kang, *Campaign Disclosure in Direct Democracy*, 97 Minn. L. Rev. 1700, 1718 (2013).

[10] Schnakenberg, et. al., *supra* note 8, 1-5; *see also* Wood, *supra* note 8, at 1116.

[11] Shomik Jain and Abby K. Wood, *Facebook Political Ads and Accountability: Outside Groups Are Most Negative, Especially When Hiding Donors*, 18 PROC. OF THE INT'L AAAI CONF. ON WEB AND SOCIAL MEDIA 717, 718 (2024), *available at* https://ojs.aaai.org/index.php/ICWSM/article/view/31346/33506.

limited exceptions where disclaimers are impracticable. However, the Proposed Rule—specifically § 4503.2000—would greatly expand one of these exceptions, relieving candidates, principal campaign committees, political committees, political funds, political parties, and electioneering spenders of their obligation to include an on-ad disclaimer and depriving Minnesota voters of one of the most efficient tools available for informed voting.

II. The Proposed Rule's exceptions are overbroad.

The Proposed Rule's on-ad disclaimer exemption for digital ads is overbroad, expanding the scope of the limited exception for banner ads and "similar electronic communications" in Minn. Stat. § 211B.04(3)(c)(3) to relieve political spenders of their obligation to include an on-ad disclaimer for the majority of political spending online, regardless of whether including such a disclaimer is technologically possible. Interpreting the exemption so expansively is both unnecessary and detrimental to Minnesota voters.

The overall statutory scheme for on-ad disclaimers is important for understanding the limited exception for banner ads and "similar electronic communications." Minn. Stat. § 211B.04 outlines disclaimer requirements for paid political material and electioneering communications, including by identifying materials that are exempt from political disclaimer requirements[12] The other materials specifically exempted from on-ad disclaimers are:

- "fundraising tickets, business cards, personal letters, or similar items that are clearly being distributed by the candidate;"[13]
- "bumper stickers, pins, buttons, pens, or similar small items on which the disclaimer cannot be conveniently printed;"[14] and
- "skywriting, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable."[15]

Read in context, the exemption for "online banner ads and similar electronic communications that link directly to an online page that includes the disclaimer" in the statute reflects that some political ads—including small digital banner ads, but also pens or bumper stickers, shirts, and skywriting—are presented in a format or such limited size as to make an on-ad disclaimer impracticable or technologically impossible. In the case of such communications, the exception—in conjunction with the requirement to link to an online page including the full disclaimer—is an effective way to balance voters' right to know who is spending to influence their ballots and the restrictions of the communication's format.

However, the Proposed Rule expands on this reasonable exception to create a sweeping exemption from Minn. Stat. § 211B.04's disclaimer requirements for a much broader range of paid digital political communications, including any text,

[12] MINN. STAT. § 211B.04(3)(c)(3) (2023).
[13] *Id.* § 211B.04(3)(a).
[14] *Id.* § 211B.04(3)(c)(1).
[15] *Id.* § 211B.04(3)(c)(2).

images, video, or audio disseminated via a social media platform, on an application accessed primarily by mobile phone, or disseminated via the Internet by a third party (among other exceptions), so long as such communications link directly to an online page that includes a disclaimer in the correct format.[16]

While some digital ads included in this sweeping list are truly "similar" to "online banner advertisements"—i.e., communications where the format is so small, short, or otherwise limited that it would not be possible to include a disclaimer without obscuring the message—this is not true for many digital political ads, which may use video or audio formats that are practically identical to traditional broadcast ads.[17] This issue is particularly glaring in Subp. 2(A), (C), and (D), where the Proposed Rule exempts paid political communications distributed through social media platforms, mobile phone applications, and third-party ad brokers. As explained below, such communications should not be exempt from the on-ad disclaimer requirement based solely on these features.

A. Social Media Advertisements

Subp. 2(A) excludes "text, images, video, or audio disseminated via a social media platform" from the on-ad disclaimer requirement outlined in Minn. Stat. § 211B.04, where the communication links directly to an online page containing the disclaimer. Social media platforms, like Meta's Facebook and Instagram and Google's YouTube, are some of the most popular venues for political spending, providing campaigns and other political spenders with the ability to reach large swaths of the voting public with a few clicks.[18]

Social media platforms serve a broad range of content to users—including ads that are virtually indistinguishable from traditional broadcast ads. As a result, political spenders can promote their messages in a wide range of formats, depending on the social media platform, from still images to short-form video (similar to traditional 15-to-60 second broadcast ads) to long-form video of a few minutes and more.[19]

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[16] Proposed Rule § 4503.2000(2).

[17] David Wright, *If you've been seeing more pro-Harris ads online lately, here's why*, CNN, Oct. 30, 2024, https://www.cnn.com/2024/10/30/politics/democratic-digital-advertising-future-forward/index.html.

[18] *See* Brennan Ctr., *Online Political Spending in 2024* (Oct. 16, 2024), https://www.brennancenter.org/our-work/analysis-opinion/online-political-spending-2024 ("So far in the 2024 election cycle, candidates, parties, and other groups have spent more than $619,090,533 on digital advertising concerning the election and political issues on the nation's two largest online platforms, Google (which includes YouTube, Search, and third-party advertising) and Meta. Together they account for almost half of the total digital ad market in the United States, but there is not sufficient publicly available data to determine what percentage of the political ad market they have captured.").

[19] *See, e.g.*, *Facebook ads guide: Update to Meta Ads Manager objectives*, META (last visited Oct. 25, 2025),https://www.facebook.com/business/ads-guide/update *and Create an ad in Meta Ads Manager*, META (last visited Nov. 1, 2024), https://www.facebook.com/business/help/2829711350595695?id=649869995454285. Meta's ad manager page outlines the array of image, video, and carousel (multi-image) advertising

Under Subp. 2(A) of the Proposed Rule, such ads are exempt from including an on-ad disclaimer if they simply link to a page with the disclaimer, even if the ad would be required to include a disclaimer if it were run on broadcast television.

This would result in illogical and inconsistent application of disclaimer requirements to substantially similar (or the same) paid political content if it is distributed via both broadcast channels and social media. Regardless of the platform where an ad reaches a voter, the voter's interest in understanding the source of the advertisement as quickly and easily as possible does not change; excluding digital ads from the on-ad disclaimer requirement is both unnecessary and would harm voters by substantially diminishing the scope of information available about who is spending money to influence their votes.

B. Advertising via Applications and Mobile Devices

The Proposed Rule's effort to address political advertising on mobile applications (or "apps") implicates many of the same issues as social media advertising, and some novel concerns, including how regulators define and apply language around when an app is "accessed primarily via mobile phone."

As with social media, apps—including popular mobile games,[20] music streaming and podcast apps,[21] and major video streaming platforms (like Netflix, Hulu, and

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options available across Meta's platforms, including Facebook, Instagram, Reels, Messenger, WhatsApp, and Audience Network. While some formats are quite limited (e.g., traditional still image ads), others are similar to traditional broadcast television ads or programs (e.g., Meta allows video ads with a duration from one second to 241 minutes).

[20] Reaching potential voters through video games, including images, video, or "playable" ads in mobile apps, is not a new tactic for campaign spenders. In 2020, the Biden campaign developed a playable mobile ad called "Ridin' with Biden" in the eight weeks prior to the election. *See The Biden/Harris 2020 Presidential Campaign: How the Biden Campaign Gamified Democracy and Achieved a Record-Breaking CTR*, MOBILE MARKETING ASSOCIATION (MMA) https://www.mmaglobal.com/case-study-hub/case_studies/view/70842. Barack Obama's 2012 campaign made headlines for its efforts to reach voters via ads in popular video games. *See* Sami Yengun, *Presidential Campaigns Rock The Gamer Vote*, NPR (Oct. 1, 2012), https://www.npr.org/2012/10/01/162103528/presidential-campaigns-rock-the-gamer-vote. Generally, the overlap between gaming, mobile applications, and entertainment presents expanded opportunities for advertisers—including political spenders—to reach audiences and develop positive impressions. *See* Mercedes Cardona, *Level up your video advertising in mobile gaming*, BRAND INNOVATORS (Sept. 19, 2024), https://brand-innovators.com/news/level-up-your-video-advertising-in-mobile-gaming/.

[21] Spotify, a popular audio streaming platform, recently changed its advertising policy to allow political ads after suspending political ads in 2020 over concerns over the rapid online spread of misinformation. Evan Minsker, *Spotify Brings Back Political Ads After Suspending Them in 2020*, PITCHFORK (May 25, 2024), https://pitchfork.com/news/spotify-brings-back-political-ads-after-suspending-them-in-2020/ https://blog.podbean.com/the-new-frontier-for-political-campaigns-harnessing-the-power-of-podcasts/. Across the industry, podcast networks and streaming platforms vary greatly as to their policies regarding political advertising. Alyssa Meyers, *How podcast networks are making their own rules for political advertising—and how they differ from one another*, MARKETING BREW (Oct. 26, 2024),

Peacock)[22]—often offer not only banner-style image ads, but also regular video and still ad breaks, which can include paid political communications.[23] Such ads are often substantially similar in format and content to those distributed on traditional and broadcast media, including video and audio ads.[24] However, under Subp. 2(C) of the Proposed Rule, these digital political ads would be exempt from displaying on-ad disclaimers, provided they comply with the alternative requirement of providing a link.[25] Again, this broad application unnecessarily captures political ads that may be substantially or entirely identical to traditional broadcast ads that would require an on-ad disclaimer.

Subp. 2(C)'s exemption for communications disseminated via app is further complicated by the question of what "an application accessed primarily via mobile phone" means in an era of connected devices, where many popular apps are available on a broad range of devices, including tablets, smart watches, e-readers, smart TVs, and streaming boxes like Apple TV and Roku.[26] Little (if any) public information is available about the relative proportion of smart devices used to access a particular app, although advertisers do distinguish more broadly between ads on

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https://www.marketingbrew.com/stories/2022/10/26/how-podcast-networks-are-making-their-own-rules-for-political-advertising.

[22] *Ads on Netflix*, NETFLIX HELP CENTER (last visited Oct. 25, 2024) https://help.netflix.com/en/node/126831; *Ads on Hulu*, HULU HELP CENTER (last visited Oct. 25, 2024), https://help.hulu.com/article/hulu-ads-on-hulu; *When will I see advertisements during content on Peacock?*, PEACOCK (last visited Oct. 25, 2024), https://www.peacocktv.com/help/article/when-will-i-see-advertisements-during-content; *When will I see ads while watching Disney+?*, DISNEY+ HELP CENTER (last visited Oct. 25, 2024), https://help.disneyplus.com/article/disneyplus-ads.

[23] *See, e.g.*, *About mobile ads*, GOOGLE ADS HELP (last visited Oct. 28, 2024), https://support.google.com/google-ads/answer/2472719 (outlining the various formats mobile ads can take when an advertiser utilizes the Google Ads platform); *Political content*, ADVERTISING POLICIES HELP (last visited Oct. 25, 2024), https://support.google.com/adspolicy/answer/6014595?hl=en#zippy=%2Cunited-states-us-election-ads (discussing Google's policies around political content in advertising).

[24] *Id.* For example, political spenders may run ads on broadcast television and online featuring similar lines of attack on their opponents. *See, e.g.*, Jonathan Weisman, *In Wisconsin's Senate Race, the Republican Highlights Baldwin's Sexuality*, N.Y. TIMES (Oct. 25, 2024), https://www.nytimes.com/2024/10/25/us/politics/wisconsin-senate-race-tammy-baldwin-sexuality.html (discussing a 30-second television ad aired on local broadcast stations) and Eric Hovde, *Investigate Tammy Baldwin*, META AD ARCHIVE (Oct. 4. 2024), *available at* https://www.facebook.com/ads/library/?id=1568975273994700 (Meta Ad Archive record for digital ad with similar content served to Facebook and Instagram users).

[25] Proposed Rule § 4503.2000(2)(C).

[26] For example, Netflix is available on a broad range of devices, from mobile phones to tablets and e-readers to smart TVs and streaming devices. *Netflix Supported Devices | Watch Netflix on your TV, phone, or computer*, NETFLIX HELP CENTER (last visited Oct. 25, 2024), https://help.netflix.com/en/node/14361. Hulu presents a similar range of options. *Download the Hulu app on your device*, HULU HELP CENTER (last visited Oct. 25, 2024), https://help.hulu.com/article/hulu-download-hulu# . Spotify is available on speakers, smart watches, smart TVs, gaming consoles, automobiles, digital voice assistant devices like Alexa, and more. *Devices & troubleshooting*, SPOTIFY (last visited Oct. 25, 2024), https://support.spotify.com/us/category/device-help/.

streaming video content delivered OTT ("over-the-top" – streaming over the internet to devices like mobile phones, tablets, computers via app or website) and CTV ("connected TV" – TV sets connected to the Internet using apps to deliver streaming content, including smart TVs, TV sticks, and gaming consoles).[27]

Even for the subset of apps used for both CTV and OTT streaming, it is unclear under the Proposed Rule how the Board would determine whether an application is "accessed primarily via mobile phone" (as opposed to other mobile devices) for the purposes of this exception; it would seem to necessitate the Board either obtain such information from the multiplicity of apps serving ads or rely on the representation of the political spender. In any event, determining the precise device being used when an ad is seen by a voter is unnecessary because such an approach fails to account for the feature of digital ads that matters, which is whether it is technologically possible to provide a clear on-ad disclaimer.

C. Advertisements Disseminated Online by a Third Party

Perhaps the most problematic exception in the Proposed Rule is Subp. 2(D), which exempts digital political ads via the internet by a third party, "including but not limited to online banner advertisements."[28] Third-party distribution is common for online political ads in many formats, including small online banner ads, but also long-format video ads similar to (or exactly the same as) those aired on broadcast media.[29]

Google dominates the third-party ad market, with its Ad Manager holding "about [a] 90% share of the U.S. Market for ad-serving software."[30] While banner ads remain one of the most common ad formats, appearing in feeds, around articles, and around other online content, Google Ad Manager also presents in-stream ads for audio and video players, "interstitial ads" occurring between content "at natural breaks and transitions, such as level completion," and "rewarded ads" "where a user explicitly opts-into an ad experience to receive a reward from the publisher," as in mobile games.[31] As with ads on social media platforms and mobile apps, there is no reason

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[27] *Need to Know: What's the difference between OTT, CTV, and streaming?*, NIELSEN (Feb. 2024), https://www.nielsen.com/insights/2024/whats-the-difference-ott-vs-ctv/#:~:text=The%20difference%20has%20to%20do,than%20what%20the%20content%20is.&text=Connected%20TV%20(CTV)%20%E2%80%94%20The,internet%20on%20a%20television%20screen.

[28] Proposed Rule § 4503.2000(2)(D).

[29] *Political content*, GOOGLE HELP: ADVERTISING POLICIES HELP (last visited Oct. 25, 2024), https://support.google.com/adspolicy/answer/6014595?hl=en#zippy=%2Cunited-states-us-election-ads.

[30] Paresh Dave, *Google Ad Manager outage costs big websites ad sales*, REUTERS (Dec. 8, 2022), https://www.reuters.com/technology/google-ad-manager-outage-costs-big-websites-ad-sales-2022-12-09/#:~:text=Ad%20Manager%20has%20about%2090,Chmielewski;%20Editing%20by%20Lincoln%20Feast.&text=San%20Francisco%20Bay%20Area%2Dbased,on%20the%20local%20tech%20industry.

[31] *Inventory formats*, GOOGLE AD MANAGER HELP (last visited Oct. 25, 2024), https://support.google.com/admanager/answer/9796545?hl=en.

to categorically exempt such a broad range of advertising formats from on-ad disclaimer requirements in Minnesota.

III. The final rule should incorporate a technological impossibility requirement for determining whether a digital ad is a "similar electronic communication.

CLC recommends the Board narrow the Proposed Rule's language to reflect the statute's more limited exception for banner ads and ads that are truly substantially similar—i.e., ads where it is not technologically possible to display a clear, legible disclaimer statement and still convey the ad's message in the space available—and clarify that disclaimers should be included on digital political ads unless it is technologically impossible to do so.

To enforce this standard, we also propose that the final regulation require that the sponsor of a digital advertisement be able to establish, at the Board's request, why a disclosure statement could not be included on the face of an advertisement due to technological constraints. Where technological constraints prevent the inclusion of an on-ad disclaimer, the rule should continue to require the spender to include a click-through link leading to a page with the clear disclosure statement, as statutorily required.

Other states have similar set similar standards for allowing an alternative method of providing information that would otherwise be included in an on-ad disclaimer. Wisconsin, for example, allows sponsors of "small online ads and similar electronic communications" where disclaimers "could not conveniently be included" to link directly to a website with the required attribution, but "[s]ponsors of such small online ads or similar electronic communications must be able to establish, at the Commission's request, that including the attribution on the ad or communication was not possible due to size or technological constraints."[32] Similarly, California's Political Reform Act permits the sponsor of an "electronic media advertisement" to substitute a complete disclaimer statement on the face of an ad 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."[33] Like Wisconsin, California's Fair Political Practices Commission requires that a sponsor of an electronic media advertisement who claims inclusion of a full disclaimer on the ad is "impracticable" be able to show why it was not possible to include a complete disclaimer on the advertisement.[34]

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[32] WIS. ADMIN. CODE ETH. § 1.96(5)(h); WIS. STATS. § 11.1303(2)(f).
[33] CAL. GOV'T CODE §§ 84501(a)(2)(G), 84504.3(b).
[34] CAL. CODE REGS. tit. 2, § 18450.1(b); *see also* Cal. Fair Political Practices Comm'n, Advice Letter 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.").

At the federal level, the proposed Honest Ads Act would enact a similar standard, requiring qualified internet or digital communications to both "state the name of the person who paid for the communication " and "provide a means for the recipient of the communication to obtain the remainder of the information required under this section with minimal effort and without receiving or viewing any additional material other than such required information" where it is "not possible" to include all of the disclaimer information required on the ad itself.[35]

By adopting the technological impossibility standard, the Board would bring the Proposed Rule into line with the limited list of exceptions outlined in Minn. Stat. § 211B.04. Furthermore, this standard would ensure that Minnesota voters have access to complete information about the sources of digital political ads, provide clear guidance to political spenders, and protect against exploitation of the exemption.

Finally, CLC also recommends the Board specify additional guidelines for how a digital advertisement must provide the required linked disclosure statement for communications that meet the technological impossibility standard. Currently, the Proposed Rule merely requires a communication "link directly to an online page that includes a disclaimer in the form required by that section [of the statute]." We suggest that, in the final rule, the Board should make clear that clicking on a digital advertisement must immediately direct the recipients of the advertisement to a page displaying the disclaimer information required by Minn. Stat. § 211B.04 *without* requiring the recipient to navigate through or view any extraneous material beyond the disclosure statement, as the Honest Ads Act proposes.[36]

Spenders should not get a second bite at the apple in presenting their messages to voters by requiring voters to scroll through additional political or electioneering content to discover who is sponsoring the message. Other states—including

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[35] Honest Ads Act, S. 486, 118th Cong. § 7(b) (2023); *see also* 11 C.F.R. § 110.11(g) (FEC regulation that allows digital political ads covered by current federal disclaimer requirements to use an "adapted disclaimer" where "more than 25% of the communication" would be occupied by a standard disclaimer and requiring such adapted disclaimers to include both an abbreviated on-ad disclaimer (an "indicator") and a "mechanism," which "may take any form including, but not limited to, hover-over text, pop-up screens, scrolling text, rotating panels, and hyperlinks to a landing page," providing the full disclaimer information required); Isaac Baker, *Commission adopts final rule on internet communications disclaimers and the definition of public communication*, FED. ELECT. COMM'N (Dec. 19, 2022), https://www.fec.gov/updates/commission-adopts-final-rule-internet-communications-disclaimers-and-definition-public-communication/ (explaining the adapted disclaimer provision "makes clear that the time or space available for a disclaimer depends on the limitations of the medium or technology in a particular advertisement" and the use of a specific percentage "serves as a bright-line rule that provides sponsors of internet publication communications clear guidance as to when an adapted disclaimer may be used").

[36] Honest Ads Act, S. 486, 118th Cong. § 7(b) (2023).

Wisconsin,[37] Washington,[38] and New York[39]—have promulgated similar regulations for modified disclaimers on certain digital ads, which allow the public to readily obtain key information about the sources of online advertising in elections. This additional clarification would ensure Minnesota voters have one-step access to clear, complete disclosure information when they view digital advertisements that refer to state and local candidates running for office in Minnesota, even where it is not technically possible to include an on-ad disclaimer.

CONCLUSION

CLC thanks the Board for the opportunity to share comments regarding the Proposed Rule and for its consideration during this important rulemaking. We would be happy to answer questions or provide additional information to assist the Board in promulgating the final rule for § 4503.2000.

Respectfully submitted,

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[37] 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.").
[38] 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.").
[39] N.Y. COMP. CODES R. & REGS. 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].").