United for Portland

October 20, 2020

City of Portland
Elections Office
1221 SW 4th Avenue, Room 130,
Portland, OR 97204

Dear Ms. Hansen:

We write in response to Complaint 2020-44-UP based on allegations by Messrs. Kessler and Timmons. For the reasons provided below, we respectfully assert that those allegations are without substance and that United for Portland has fully complied with the requirements of city law in its disclosures on the "Reject Sarah Iannarone" video ad.

In addition, we request a short extension of time to respond after the October 19, 2020 5:00 PM deadline mentioned in your notice letter. Our Committee has provided extensive information, in consultation with outside legal counsel, to ensure that our reply was as complete and responsive as possible as well as responding to questions posed by Cody Sibly yesterday. We have responded to those particular questions in a separate email message.

The Kessler complaint alleges that the disclosure violates the definition of "Prominently Disclose" appearing in PCC § 2.10.080(o) because:

> (1) the text is not legible,
>
> (2) the text is not "readily comprehensible to a person with average reading [and] vision," and
>
> (3) the font is too small and in too low of contrast with the background. The Timmons complaint alleges those same violations in addition to claiming that the disclosure violates the definition of "Prominently Disclose" because
>
> (4) four seconds is too short a time for the average reader to comprehend the quantity of words required to be displayed, and
>
> (5) the video compression makes the words illegible.

"Prominently Disclose" is a defined term, and the definition is "readily comprehensible to a person with average reading, vision, and hearing faculties, with . . . any video disclosure remaining readable on the regular screen (not closed captioning) for a not less than 4 seconds[.]" That is, the generic "readily comprehensible" standard appears to be defined by each of the "safe harbors" listed for the different types of ads (web, radio, print, &c).

The City Auditor's Office views the safe harbors as the standard: if the disclosure satisfies the safe harbor. In addition, the City Auditor's Office does not also inquire into whether the disclosure is "readily comprehensible to a person with average reading, vision, and hearing faculties." That approach is supported by the plain language of the rule, which suggests that the safe harbors are meant to be both applied and specific definitions of the vague "readily comprehensible" standard, rather than just a list of nonexclusive examples. City law does not say, for example, that the disclosures must be readily comprehensible, "including, at a minimum for video ads, that any video

disclosure remain visible . . .," &c. Therefore, the plain text of the rule and the Auditor's application thus far suggest that a video disclosure is "readily comprehensible" if the disclosure is readable onscreen (and not in closed captioning) for not less than four seconds. That is the only requirement.

Here, the disclosure was readable onscreen for between four and five seconds and the text was not in closed captioning. That satisfies the safe harbor and, accordingly, the rule. Mr. Kessler's and Mr. Timmons's concerns regarding the text are therefore not cognizable complaints under city law: it does not matter the size of the text or the color contrast as long as the text can be read for four seconds or more—which it can.

Mr. Timmons's unique complaints argue that four seconds is not enough time for the average reader to comprehend the volume of text required by the disclosures. That is really a complaint about the law itself; for the reasons explained above, because the video ad satisfies the four-second safe harbor, it satisfies the "readily comprehensible" requirement. The screenshots speak for themselves: Even if a person wears glasses, he/she can still read the entire disclosure sitting at a natural distance from a monitor or watching the ad on a phone. City law does not require a certain compression rate; it requires the disclosure to be readable for four seconds. The disclosure is readable for four seconds.

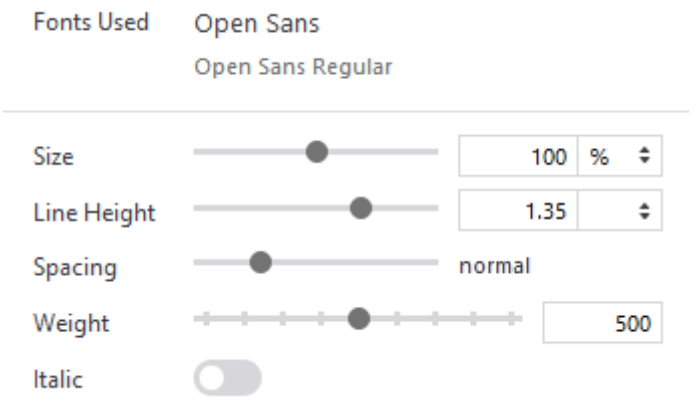
Mr. Kessler also alleges that the committee did not comply with the requirements of city law in its disclosures on the "Check the Record" webpage.

Mr. Kessler claims that the disclosure on the "Check the Record" webpage violates the definition of "Prominently Disclose" because the text of the disclosure is smaller and narrower than the majority of the text on the webpage.

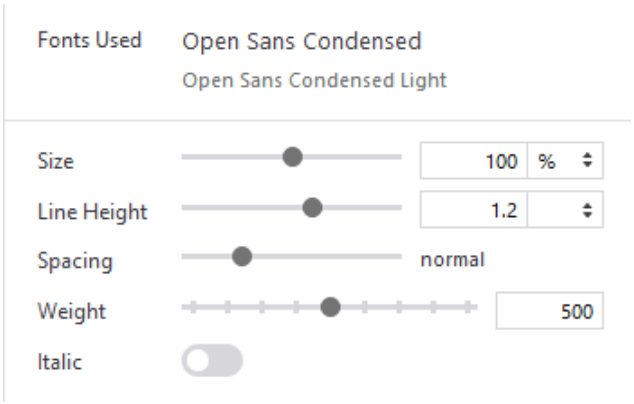
In the context of online print material, the definition of "Prominently Disclose" requires that the text of a webpage disclosure appear "in type of a contrasting color in the same or larger font size as used for the majority of text in the message[.]"

Here, the majority of the text appears in the center of the page under each of the four subheadings, and the disclosure text appears at the bottom of the page. The disclosure text looks like it is smaller than the rest of the text on the page.

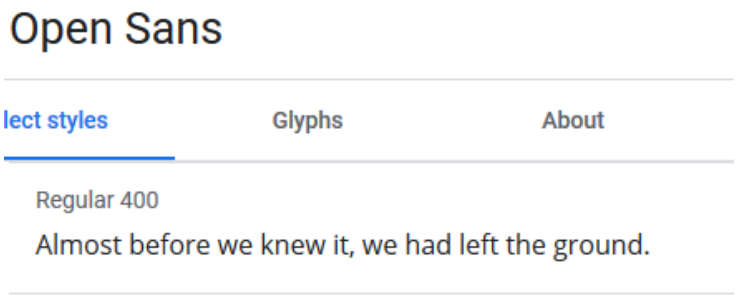
To confirm, we used the browser inspector. The browser inspector identified the font used in the main paragraphs as Open Sans (Regular), with a size of 100% (which means it's set to 100% of the default browser font size). At that setting, Open Sans (Regular) has a line height of 1.35:

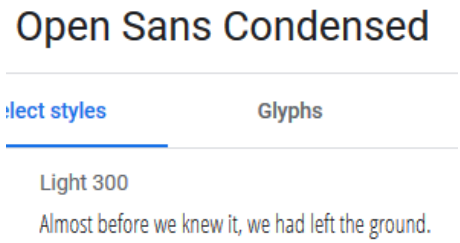


The disclosure paragraph is a slightly different font, Open Sans Condensed (Light), also set to a size of 100%. At that setting, Open Sans Condensed (Light) has a line height of 1.20:



Thus, even if both fonts are set to the same font size, any text written in Open Sans Condensed (Light) is always going to appear smaller than that in Open Sans (Regular). You can see the effect with the screenshots below, compared with the fonts on Google Fonts using the same font size (16 pt.):





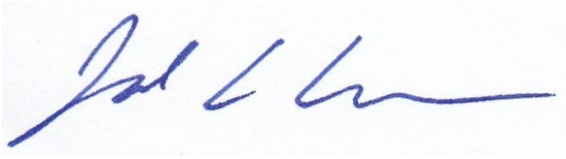
So even though the fonts might technically be same font size, they don't appear to be the same size because one of the fonts is naturally condensed and has less space between its lines.

Returning to the language of the rule, PCC 2.10.080(o) states that "Prominently Disclose" means "any website or email message in type of a contrasting color in the same or larger font size as used

for the majority of text in the message[.]" That definition is in contrast to the requirement for print ads, which states that the text must "appear[]" in the same or larger font size as the majority of the text.

While that difference in language might suggest that the Committee is in compliance because the font sizes may be the same even if they don't appear the same, we think that the complaint has no merit. For the same reason that the disclosure in the "Reject Sarah Iannarone" video ad does pass muster, the disclosure here does even if it does not look like it is the same size as the majority of the text on the page.

Please let me know if the Elections Office has any further questions or requests for additional information.



Joel C. Corcoran
Treasurer, United for Portland