

November 13, 2017

Mr. Neven F. Stipanovic
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Advance Notice of Proposed Rulemaking, Internet Disclaimers (REG 2011-02)

Dear Mr. Stipanovic:

Facebook, Inc. (“Facebook”) submits this letter in response to the reopening of the comment period with respect to the Advance Notice of Proposed Rulemaking originally issued on October 13, 2011 (“ANPRM”).

I. Facebook welcomes further guidance from the Commission regarding disclaimers in Internet communications.

Facebook is firmly committed to transparency in advertising. In furtherance of that goal, Facebook supports policy measures that promote more transparency in paid communications disseminated on the Internet. As recently announced, Facebook is taking several steps to make clear who is running political ads to impact U.S. federal elections on Facebook.¹ In the coming months, we will require more thorough documentation from advertisers who want to run ads related to federal elections, display more information from within the ads about the advertisers running such communications, and build a searchable archive of any such ads that run on the platform. Facebook is building these features because we believe that transparency in political advertising is fundamental to an open and effective democracy.

These internal measures will apply only to advertising on Facebook’s platform, which could have the unintended consequence of pushing purchasers who wish to avoid disclosure to use other, less transparent platforms. That is why, as stated in Facebook’s prior comments submitted in response to the ANPRM in 2011, Facebook strongly supports the Commission providing further guidance to committees and other advertisers regarding their disclaimer obligations when running election-related Internet communications on any digital platform.

In addition, Facebook encourages the Commission to update its disclaimer rules to better fit the way people receive information today. Committees and other

¹ Facebook, *Update on Our Advertising Transparency and Authenticity Efforts*, Oct. 27, 2017, <https://newsroom.fb.com/news/2017/10/update-on-our-advertising-transparency-and-authenticity-efforts/>.

advertisers are engaging in more Internet communications with each passing election, and citizens and civil society organizations are increasingly able to express their views and organize online. According to one study, while total political advertising spending rose approximately four percent from 2012 to 2016, digital advertising grew 789 percent during the same period.² Facebook is grateful to have the opportunity to assist the Commission in crafting rules that apply to this dynamic and increasingly popular forum for political speech.

II. The Commission’s disclaimer rules should establish clear standards and provide options for compliance.

The Federal Election Campaign Act (the “Act”) establishes the basic disclaimer requirements for political advertising subject to federal campaign finance regulation.³ The Act generally requires every covered political ad to include, at least, a written statement that indicates who paid for it.⁴ With this law, Congress established the basic standards regarding which ads are covered, how the disclaimer requirement must be met, and what information the disclaimer must convey. The Commission’s task is to write and enforce rules that apply these standards to the evolving landscape of political speech.

Should the Commission undertake this task following the ANPRM, Facebook encourages it to promulgate rules that provide clarity and flexibility with respect to the ways in which online advertisers can meet these basic requirements. When the Act requires a disclaimer to appear on a printed ad (that is, an ad other than one run on television or radio), the statement must be: (a) large enough to be clearly readable; (b) contained in a printed box; and (c) printed with a reasonable degree of color contrast between the background and the printed statement.⁵ These three criteria are the only statutorily-mandated specifications for disclaimers in printed communications. The Commission has discretion to provide clear, flexible standards to the regulated community as to how advertisers must meet these requirements, and Facebook encourages it to do so.

Digital communication takes many forms. Content that is optimized for viewing on phones, tablets, and other mobile devices is distinct from content that appears on a desktop or laptop computer. Virtual reality and augmented reality platforms hold substantial opportunities to enhance the way we work, communicate, and receive content, and the ways in which people will engage with content on those platforms is still very much evolving. The ways people physically interact with content also vary by medium (e.g., a user can “rollover” content on a desktop screen to see more information, but may not use a mouse or view rollovers on a mobile device). The

² Kate Kaye, *Data-Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast TV Down 20%, Cable and Digital Way Up*, Ad Age, Jan. 3, 2017, <http://adage.com/article/media/2016-political-broadcast-tv-spend-20-cable-52/307346/>.

³ See generally 52 U.S.C. § 30120; 11 C.F.R. § 110.11.

⁴ See 52 U.S.C. § 30120(a).

⁵ *Id.* § 30120(c).

technological capabilities of all platforms continue to grow and change at a remarkable rate, and new technologies are constantly being developed. A consequence of this dynamic environment is that covered advertisers can use technology to meet the Act's disclaimer requirements in a variety of ways.

When Facebook submitted its request for an advisory opinion in 2011, ads on Facebook were small and had limited space for text.⁶ Ad formats available on Facebook have expanded dramatically since that time.⁷ Today, some of Facebook's ads continue to be limited in size, with text limitations or truncations based on format and placement of the ad. But other formats allow for additional creative flexibility. Ads can now include videos, can include scrolling carousels of images, and can even cover the entire screen of a mobile device.

Given this dynamic environment, we encourage the Commission to adopt a regulatory approach that provides advertisers flexibility to meet their disclaimer obligations in innovative ways that take full advantage of the technological advances in communication the Internet makes possible. An approach that prescribes both precisely what information must be disclosed and the transparency goals that must be achieved, but that maintains flexibility as to the specific interface elements by which that information is displayed, would ensure that the Commission's rules will be relevant and viable for the technology that exists today and the technology that will be developed in the future. For example, allowing ads to include an icon or other obvious indicator that more information about an ad is available via quick navigation (like a single click) would give clear guidance on how to include disclaimers in new technologies as they are developed.

The Commission has historically shown versatility in applying the Act's requirements to changing technology, permitting activities that once were carried out in one particular way to be carried out in a new way, or even in many new ways. For example, in 2001 the Commission permitted the use of electronic signatures by restricted class employees to authorize payroll deductions for PAC contributions.⁸ Over time, it has permitted contributions to be accepted by check, credit card,⁹ and ultimately text messages as technology has advanced.¹⁰ And in more recent years it has shown its familiarity with and affinity for new technologies by reviewing in great detail the capabilities of various online applications and websites to determine their permissibility under the Act.¹¹

Taking a flexible, forward-thinking approach with respect to the disclaimer requirements would also be consistent with the ways other agencies have adapted

⁶ See FEC Adv. Op. Request 2011-09 (Facebook).

⁷ See Facebook, *Facebook Ads Guide*, <https://www.facebook.com/business/ads-guide>.

⁸ See FEC Adv. Op. 2001-04 (MSDW PAC).

⁹ See FEC Adv. Op. 1978-68 (Seith for Senate Committee).

¹⁰ See, e.g., FEC Adv. Op. 2012-26 (m-Qube).

¹¹ See, e.g., FEC Adv. Op. 2016-01 (Ethiq); FEC Adv. Op. 2012-22 (skimmerhat); FEC Adv. Op. 2011-19 (GivingSphere).

their regulations to the Internet. For instance, the Federal Trade Commission's Endorsement Guides generally require disclosure when someone promotes a product and receives compensation from the seller of that product or has some other material connection to the seller.¹² The FTC has made clear that the specific manner in which this disclosure is made may vary depending on the context, including the technological medium in which the ad appears.¹³

Ultimately, providing clarity and flexibility is the most effective way to promote and facilitate compliance. As the Commission recognized in its notice reopening the comment period, to maximize efficacy any disclaimer rule that applies to digital advertising must take into account "the speed at which technological advances are developing."¹⁴

III. Facebook supports efforts by policymakers to extend the disclaimer requirement to paid online ads that mention candidates and are run within 30 days before a primary election or 60 days before a general election.

Facebook also supports expanding the range of ad content that triggers the disclaimer requirement to include certain paid online ads that mention candidates.

Under current federal law, when an uncoordinated ad is funded by a person or entity other than a federally-registered political committee, a disclaimer is generally required only if the ad (a) expressly advocates for or against a candidate; (b) solicits contributions; or (c) constitutes an "electioneering communication."¹⁵ An "electioneering communication" is a television or radio ad that references a clearly identified federal candidate and is run in certain pre-election periods (30 days before the primary or 60 days before the general) in the relevant state or district.¹⁶ Congress added this requirement as part of the Bipartisan Campaign Reform Act in 2002, before digital political advertising reached its current popularity. In order to provide consistency in transparency across mediums of communication and in

¹² See 16 C.F.R. §§ 255 *et seq.*

¹³ See, e.g., Fed. Trade Comm'n, *The FTC's Endorsement Guides: What People are Asking*, Sept. 2017, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking#disclos> (recognizing different disclosure methods for different online platforms and noting that there is no special wording that must be used to make a disclosure); Fed. Trade Comm'n Staff, *Native Advertising: A Guide for Business*, Dec. 2015, <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses> ("Advertisers have flexibility as to how to identify native ads as ads, so long as consumers notice and process the disclosures and comprehend what they mean."); Fed. Trade Comm'n Staff, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, Mar. 2013, <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf> ("There is no set formula for a clear and conspicuous disclosure").

¹⁴ *Internet Communication Disclaimers; Reopening of Comment Period*, 82 Fed. Reg. 46937, 46938 (Oct. 10, 2017).

¹⁵ 52 U.S.C. § 30120.

¹⁶ *Id.* § 30104(f)(3).

recognition of the widespread nature of Internet communications, Facebook supports policymakers' efforts to extend the disclaimer requirement to include digital or online communications that mention federal candidates and are run during the 30- or 60-day pre-election periods.

Facebook appreciates the Commission's attention to this significant and impactful issue, and thanks the Commission for the opportunity to comment.

Sincerely,

/s/ Colin Stretch

Colin S. Stretch
General Counsel
Facebook, Inc.