

November 9, 2017

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Via Mail

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

OFFICE OF GENERAL
COUNSEL

Re: REG 2011-02; Notice 2017-12 - Internet Communication Disclaimers; Reopening of Comment Period

Dear Mr. Stipanovic:

The Computer & Communications Industry Association (CCIA) respectfully submits the enclosed comments in response to the FEC's recent reopening of the public comment period on REG 2011-02 and the Advanced Notice of Proposed Rulemaking on Internet Communication Disclaimers.

Sincerely,



John A. Howes, Jr.
Policy Counsel

Computer & Communications Industry Association (CCIA)
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Before the
Federal Election Commission
Washington, D.C.

In the matter of

Internet Communication Disclaimers;
Reopening of Comment Period

Notice 2017-12

**COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

OFFICE OF GENERAL
COUNSEL

RECEIVED
FEDERAL ELECTION
COMMISSION
2017 NOV 14 AM 11:58

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**COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)¹**

CCIA respectfully submits these comments in the above-referenced proceeding.² For over four decades, CCIA has stood for free speech, open markets, competition, and innovation. CCIA and its member companies are committed to ensuring transparency regarding political and election-related advertising that occurs on online platforms. Given the rapidly changing Internet advertising marketplace and efforts by foreign actors to influence recent elections, CCIA welcomes the FEC's inquiry into how its Internet disclaimer rules can help promote transparency in online political advertising. A thoughtful and deliberate process, like this proceeding, will ensure that stakeholders are given a fair opportunity to engage in the process and to ensure the FEC can develop forward-looking policies that account for the dynamic nature of online political advertising. CCIA believes that transparency can be improved and that voters should be informed regarding what ads they see online but also urges the FEC to ensure that legitimate speech and honest political discourse are not stifled.

¹ CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA's members is available online at <http://www.ccianet.org/members>.

² Internet Communication Disclaimers; Reopening of Comment Period, Fed. Elections Comm'n, 82 Fed. Reg. 46937 (proposed Oct. 13, 2011) (to be codified at 11 C.F.R. pt. 110), <http://sers.fec.gov/fosers/showpdf.htm?docid=357882>.

I. FECA and Its Application to Internet Advertising.

The FEC's rules regarding disclosure requirements for certain public communications have narrow application to public communications by certain actors as outlined by the Federal Election Campaign Act (FECA).³ The rules require certain disclaimers for certain types of public communications, including those made by a political committee (e.g. a committee authorized by a certain candidate), communications that expressly advocate the election or defeat of a clearly identified federal candidate, or communications that solicit contributions. The required disclaimers must identify who paid for the communication, and in some cases, they require that the disclaimer statement identify whether the communication was authorized by a candidate.

The FEC has provided certain exceptions to its rules—the most notable are the “small items exception” and the “impracticable exception”, which are important in the context of political ads on the Internet. Generally, the small items exception applies to “[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed”,⁴ and the impracticable exception considers media of communication like “[s]kywriting, water towers, wearing apparel”.⁵

In seeking to apply its political disclaimer rules and FECA to the dynamic, emerging Internet advertising space, the FEC has recognized that “the term ‘public communication’ does not usually include internet communications”,⁶ but the FEC has noted that “public communications” “does encompass communications placed for a fee on another person’s

³ 11 C.F.R. § 110.11 (2014); 52 U.S.C. § 30120 (2012).

⁴ 11 C.F.R. § 110.11(f)(1)(i) (2014).

⁵ 11 C.F.R. § 110.11(f)(1)(ii) (2014).

⁶ *Advance NPRM on internet disclaimer notices reopened for comment*, Fed. Elections Comm’n (Oct. 10, 2017), <https://www.fec.gov/updates/advance-nprm-internet-disclaimer-notices-reopened-2017/>.

website.”⁷ When promulgating those rules, the FEC sought “to remove potential restrictions on the ability of individuals and others to use the Internet as a low-cost means of civic engagement and political advocacy.”⁸

In its most recent application of the rules, the FEC issued an advisory opinion regarding “text ads generated when Internet users use Google’s search engine to perform searches.”⁹ The FEC “could not reach a response to the questions presented” by Google, but found permissible the practice of providing the URL of the ad sponsor’s website and “a full disclaimer that would appear on the landing page that appears when a user ‘clicks through’ a text ad.”¹⁰ Although there have been subsequent requests to clarify the application of the FEC’s rules to other types of political ads on the Internet, notably Facebook’s in 2011,¹¹ the FEC has not addressed other contexts.

II. The FEC Must Maintain the Distinction Between Communications About Candidates and Issues.

FECA and the FEC’s rules that apply the Act show the importance of transparency regarding paid political communications. Campaign advertisements seek to influence voters, so whenever a communication is made regarding a specific, political candidate, it is important for the potential voter to know the source of that communication—*i.e.*, who is trying to influence him or her. If a communication from a candidate’s campaign contains a disclaimer indicating

⁷ *Id.*; see also 11 C.F.R. § 100.26 (2014) (“The term *general public political advertising* shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site.”).

⁸ Final Rule, Internet Communications, Fed. Elections Comm’n, 71 Fed. Reg. 18589 (proposed Apr. 12, 2006) (to be codified at 11 C.F.R. pts. 100, 110, 114)

⁹ ADVISORY OPINION 2010-19, Fed. Elections Comm’n (Oct. 8, 2010), <http://saos.fec.gov/aodocs/AO%202010-19.pdf> [hereinafter Google Advisory Opinion].

¹⁰ *Id.*

¹¹ Letter from Marc E. Elias, *et al.*, to Christopher Hughey, Esq. Acting General Counsel, Federal Elections Commission (Apr. 26, 2011), <https://www.fec.gov/files/legal/aos/77149.pdf> (requesting an advisory opinion on the applicability of the FEC’s rules to small, character-limited ads); Letter from Rosemary C. Smith, Acting General Counsel, Federal Elections Commission, to Marc E. Elias, *et al.* (June 15, 2011), <https://www.fec.gov/files/legal/aos/77163.pdf> (informing Facebook that the FEC “concluded its consideration of [Facebook’s] advisory opinion request without issuing an advisory opinion.”).

that it is actually from that campaign, then the potential voter has greater peace of mind that the communication appropriately represents that candidate's views. However, depending on the media used, these communications can often be seen by people who are not registered voters (e.g., due to age or nationality) or not registered to vote in the jurisdiction that candidate seeks to serve. The nonvoting recipient of the campaign message may not be able to act on it at the ballot box, but the nonvoter may be able to contribute to the electoral process in other ways. For example, a teenager may be motivated to volunteer to knock on doors for a candidate. Recipients of campaign messages need to be able to reasonably rely on truthful statements and explanations of the identity of the speaker who bought the ad.

FECA clearly identifies that the speakers must disclose who they are,¹² and disclaimers provide critical information as to the source of the message. It is important to maintain the distinction present in FECA and the FEC's rules regarding who must provide the disclaimer. If a political committee makes a disbursement for a communication, it must provide the disclaimer. If a person makes a disbursement for a communication "expressly advocating the election or defeat of a clearly identified candidate",¹³ it must also provide the disclaimer. The second instance is very important because FECA includes situations when the candidate or a committee authorized by that candidate authorizes that person to speak, as well as if the person is not authorized at all by the candidate, who was the subject of the communication. A person "not authorized by a candidate, an authorized political committee of a candidate, or its agents shall

¹² See 52 U.S.C. § 30120(a)(1) (2012) ("[I]f paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee"); *id.* at § 30120(a)(2) ("[I]f paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee"); *id.* at § 30120(a)(3) ("[I]f not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.").

¹³ *Id.* at § 30120(a).

clearly state [his/her] name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate’s committee.”¹⁴ The latter situation of the unaffiliated third party reflects the centrality of transparency to FECA because a prospective voter could fairly or unfairly associate or confuse the unaffiliated person with the candidate about whom the unaffiliated person is speaking directly for or against.

FECA clearly applies to “any [paid] communication . . . or any other type of general public political advertising” made by a political committee.¹⁵ It also clearly applies to affiliated persons and third party speech “expressly advocating the election or defeat of a clearly identified candidate”.¹⁶ Indeed, the statute applies to any paid communication from a political committee, but when it comes to third party speech, authorized or unaffiliated with a candidate’s committee, the statute does not envision an extension to paid advocacy on the Internet about issues when a specific candidate is not clearly mentioned.¹⁷ This distinction is relevant because, in the context of the 2016 elections, prospective voters and Internet users were exposed to paid communications about specific candidates—not to mention everyone around the country who received and conveyed messages about the elections. However, when ads are paid for by unaffiliated third parties advocating on certain issues without mentioning specific candidates, neither FECA nor the FEC’s rules would apply. While transparency is central to FECA and the FEC plays a vital role in promoting it, FECA simply does not apply to unaffiliated paid advocacy on the Internet about issues when a specific candidate is not clearly mentioned.

¹⁴ *Id.* at § 30120(a) (3).

¹⁵ *Id.* at § 30120(a).

¹⁶ *Id.*

¹⁷ *See id.* at § 30120(d)(2) (providing additional disclosure requirements for paid communications via radio or television by unaffiliated third parties).

Although Internet platforms have increased their efforts to provide transparency and disclosure to their users, FECA places the disclaimer burden squarely with the speaker. Requiring every online platform that sells ads to conduct a review of every transaction for political speech regarding issues or candidates would result in innumerable false positives. There are many other incumbent, retiring, former, and aspiring Members of Congress with the same first names and/or last names. For example, from 2001 until 2013, the Senate contained two Senator Nelsons: Bill of Florida and Ben of Nebraska. Searching for the term “Senator Nelson” could have revealed results for either, both, or neither. There are multiple Congressmen with the last name of Smith: Adam of Washington, Adrian of Nebraska, Chris of New Jersey, Jason of Missouri, and Lamar of Texas.

FECA places responsibility for disclosure on the speaker, so clarifying existing rules and placing the responsibility of disclosure on those who purchase ads would provide greater certainty for advertisers, campaigns, platforms, and, most importantly, for voters.

III. The FEC Should Take into Account Constraints on the Efficacy of Online Disclaimers.

In addition to constraints present in FECA itself, there are also temporal, technical, and structural limitations to the efficacy of certain disclaimers. The FEC’s rules have accounted for some of these limitations. The exceptions to the FEC’s rules are very important because the examples provided in the rules account for structural and temporal constraints inherent to the respective means of communication. They acknowledge the fact that there are inherent limits to the efficacy of the disclaimer messages and the ability of the message’s recipient to adequately interpret the disclaimer and the message itself. For the voter to effectively know who paid for the advertisement, it is important to consider the type of ad and how a user could effectively receive the information contained in a disclaimer.

A. Platform Differences.

There are inherent differences with different media and their capabilities for providing the audience with adequate disclaimer information. FECA makes different disclaimer demands for applicable communications by radio and television,¹⁸ and the FEC's rules also have different requirements for radio and television.¹⁹ Although the FEC did not come to a decision or deliver an Advisory Opinion on Facebook's 2011 request, its Advisory Opinion on Google's request, as well as the earlier Target Wireless Advisory Opinion,²⁰ show the inherent differences in advertising platforms. There are a myriad of options for advertising via different media and different platforms online. In addition to character-limited ads that just feature text, there are banner ads with images and text, video ads with text, and audio ads that also feature a corresponding interactive image or video on an app. Indeed, as technology develops, advertising could become available via augmented reality and virtual reality.

Many Internet platforms already provide disclaimer solutions and are working on ways to enhance disclosures to users—even without FEC guidance.²¹ For example, Facebook recently

¹⁸ Compare *id.* at § 30120(d)(1)(A) (radio) with *id.* at § 30120(d)(1)(B) (television).

¹⁹ Compare 11 C.F.R. § 110.11(c)(3)(i) (radio) with 11 C.F.R. § 110.11(c)(3)(ii)-(iii) (“television or through any broadcast, cable, or satellite transmission”). *But see* 11 C.F.R. § 110.11(c)(4) (“Specific requirements for radio and television communications paid for by other persons and not authorized by a candidate”).

²⁰ ADVISORY OPINION 2002-09, Fed. Elections Comm'n (Aug. 23, 2002), <http://saos.fec.gov/aodocs/2002-09.pdf> [hereinafter Target Wireless Advisory Opinion] (concluding the small items exception applies to Target's planned “content-plus-political advertising” via “Short Messaging Service” (“SMS” or “text message”).

²¹ Rob Goldman, *Update on Our Advertising Transparency and Authenticity Efforts*, Facebook (Oct. 27, 2017), <https://newsroom.fb.com/news/2017/10/update-on-our-advertising-transparency-and-authenticity-efforts/> (outlining additional transparency measures for all advertising); Kent Walker and Richard Salgado, *Security and disinformation in the U.S. 2016 election*, Google (Oct. 30, 2017),

<https://www.blog.google/topics/public-policy/security-and-disinformation-us-2016-election/> (announcing new initiatives for greater transparency and enhanced security regarding efforts to misuse and spread disinformation during the 2016 election by actors linked to the Russia-backed Internet Research Agency); *Political Advertising*, Oath, <https://advertising.aol.com/advertising-policies/advertising-categories/political-advertising> (last visited Nov. 8, 2017) (“All political advertising must clearly identify who paid for the communication and whether or not it was authorized by a candidate and/or organization on the ad banner, video, or link prior to click-thru or viewing of content. Unauthorized ads must also include contact information for the sponsoring organization. ‘Paid for by’ disclosure must be clear and conspicuous (i.e., easily identifiable by contrasting color and font on the ad banner or video).”).

announced plans to require verification of all political advertisers and a “Paid for by” disclosure that will show details about the advertiser.²² Facebook will also build “an archive of federal-election related ads so that we can show both current and historical federal-election related ads” and require “more thorough documentation from advertisers who want to run election-related ads.”²³ Google has announced that it will “identify the names of advertisers running election-related campaigns on Search, YouTube, and the Google Display Network”, verify that advertisers are permitted to run election ads, and “requir[e] that advertisers proactively identify who they are and where they are based before running any election-related ads.”²⁴ Internet platforms are also in constant competition with each other to improve their user experiences, so any undue burdens placed on the platforms themselves or on the disclaimers provided by speakers to whom FECA applies could adversely affect the user experience. If the user’s ability to receive disclaimers is curtailed by requirements that do not fit the medium, then those users could move their attention elsewhere, which could affect an effective means for legitimate candidates to reach new voters.

B. Differences in Display Depending on the Device.

The FEC has previously noted the limitations inherent in presenting disclaimers on mobile phone screens, and it has applied the small items exemption to technologies facilitated by mobile phones, like text messaging.²⁵ Consumers are increasingly using mobile devices to access the Internet. Indeed, last year, for the first time, Internet usage on mobile devices, like smartphones and tablets, surpassed usage on desktop PCs and laptops.²⁶ Even when tablet use is

²² Rob Goldman, *Update on Our Advertising Transparency and Authenticity Efforts*, Facebook (Oct. 27, 2017), <https://newsroom.fb.com/news/2017/10/update-on-our-advertising-transparency-and-authenticity-efforts/>.

²³ *Id.*

²⁴ Kent Walker and Richard Salgado, *Security and disinformation in the U.S. 2016 election*, Google (Oct. 30, 2017), <https://www.blog.google/topics/public-policy/security-and-disinformation-us-2016-election/>.

²⁵ Target Wireless Advisory Opinion, *supra* note 20.

²⁶ Yoni Heisler, *Mobile internet usage surpasses desktop usage for the first time in history*, BGR (Nov. 2, 2016),

excluded, web usage on mobile phones still accounts for 46.53% of Internet traffic, and that figure will very likely keep growing.²⁷ Most websites also have mobile-friendly versions to account for the size constraints of smartphones that average about 5 to 5.6 inches in screen size;²⁸ however, enhanced disclosures, which would have to be legible, could still take up an impractical amount of space.

C. Differences in Temporal Limits on Ads.

Many platforms allow for advertisers to purchase audio ads that could be fifteen seconds in length or even shorter. FECA and the FEC's rules provide requirements for ads on over-the-air broadcast radio wherein the speaker must disclose certain identifying information via audio, which could take up five seconds of the ad or more. This same requirement, which stems from FECA, does not exist for online advertising and the FEC should avoid rigidly extending the same broadcast radio spoken-word disclaimer requirements for radio to online platforms. For a thirty second radio ad, five seconds may not be too intrusive as the listener could still hear twenty-five seconds of the speaker's intended message. However, for a fifteen second ad on an Internet-enabled platform, such a disclosure could take up over a third or even half of the speaker's time. The FEC has applied more flexible disclaimer rules for Internet search users to see disclaimers once they have clicked through a search ad. Similar accommodations could be appropriate for Internet streaming music services.

Another temporal limit is the fact that ads on Internet platforms may be available for only limited periods of time. Advertisers may decide to purchase ad space for limited periods of time of a few days or just a few hours for events like flash sales. It is also often difficult to pinpoint to

<http://bgr.com/2016/11/02/internet-usage-desktop-vs-mobile/>.

²⁷ *Id.*

²⁸ Jo Best, *Bigger screens, smaller prices: How your smartphone will change this year*, ZDNet (Feb 17, 2015), <http://www.zdnet.com/article/bigger-screens-smaller-prices-how-your-smartphone-will-change-this-year/>.

whom and when an ad is shown — or if the viewer even saw it while scrolling through Twitter — as they may not generate impressions or meaningful interactions, like clicking on the ad.

D. Differences in Ad Buying.

Not all online ad buying is the same. Political campaigns, media companies, interest groups, individuals, etc. all have different buying strategies and use different methods. For example, IAB predicted that as a percentage of marketing spending, spending on programmatic ads will have grown from 28% in 2013 to over 80% by 2018.²⁹ Programmatic ad buying takes many forms from open auctions to automated and guaranteed deals, but it is generally marked by targeting specific audiences and involves some sort of automation. In the context of elections, third-party agencies could purchase programmatic ads, nonprogrammatic ads, or both on Internet platforms on behalf of campaign committees. This is an important distinction as it impacts the type of political content that could ultimately make its way to voters.

It should be noted that candidate committees are not the only political actors that buy ads. In many states and localities, state and local candidates run field operations (e.g. door knocking and phone banking), hold joint events and rallies, and pay for advertising with Federal candidates. They are often coordinated by a state party or county central committee. These are often called “coordinated campaigns”, and the FEC rules account for “coordinated party expenditures and independent expenditures by political party committees.”³⁰ Any action by the FEC regarding online political ads would have to also account for coordinated campaigns, political parties, and other political committees.

²⁹ Carl Kalapesi, *Top 10 Things You Need to Know about Programmatic but Were too Afraid to Ask*, IAB (Nov. 4, 2014), <https://www.iab.com/news/top-10-things-you-need-to-know-about-programmatic/>.

³⁰ 11 C.F.R. § 100.26(d).

IV. The FEC Should Look Toward the Future When Considering Its Disclaimer Requirements.

CCIA hopes the Commission will use this proceeding as an opportunity to consider how its actions will affect future elections, as Commissioner Weintraub recently indicated in letters requesting comment from certain companies.³¹ For example, the online ad tools used by Russian-backed actors were readily available to the public and have been available for years. These tools are frequently used by campaign committees of official candidates. However, this is not the first time that technology has been used effectively in an election. Bernie Sanders' campaign was lauded and broke records for fundraising from smaller amounts that were usually collecting online, but so were President Obama's campaigns, and Presidential candidate Howard Dean is largely credited with revolutionizing the practice in 2004.³²

Campaigns are constantly trying new methods to appeal to new voters, and political campaign communication and advertising methods change with every election cycle. As technology develops, new forms of advertising could become available. For example, augmented reality and virtual reality technologies and offerings are developing and coming to markets, and they could serve as opportunities to advertisers, including future political campaigns. The FEC should be cognizant of the constant innovation in Internet advertising, and also avoid chilling legitimate campaign speech.

V. The FEC Should Be Wary of Regulatory Overreach that Could Chill Speech.

The FEC should be mindful that an overextension of its rules, especially to areas that were not delineated by Congress, could unduly chill speech and important political discourse.

³¹ @EllenLWeintraub, Twitter (Nov. 6, 2017 2:52 PM), <https://twitter.com/EllenLWeintraub/status/927669977196490753>.

³² Clare Foran, *Bernie Sanders's Big Money*, The Atlantic (Mar. 1, 2016), <https://www.theatlantic.com/politics/archive/2016/03/bernie-sanders-fundraising/471648/>; Jordan Fabian, *Obama praises Sanders's small-dollar fundraising operation*, The Hill (Apr. 28, 2016), <http://thehill.com/homenews/administration/278088-obama-praises-sanders-small-dollar-fundraising-operation>.

As stated previously, FECA and the FEC's rules generally apply only in the limited circumstances of communications by a political candidate's authorized campaign committee or when someone pays a fee to disseminate speech in favor of or against a specific candidate.

Many online platforms provide capabilities for individuals to post their messages online for free. Usually, these messages are just seen by the individual's friends or family, people with whom the individual is already in contact, or people who are following the individual. Many, but certainly not all platforms, provide tools or certain capabilities that, for a fee, will allow an individual to disseminate that individual's message further. Although people can use these tools and enhanced capabilities to express opinions about certain political candidates or issues, by and large, they are used to promote events, like charitable fundraisers, concerts, cultural gatherings, community meetings, etc.

The FEC should be cognizant of how an extension of its rules could affect legitimate forms of speech, political campaigning, and commerce. Notwithstanding that some nefarious actors have utilized online tools, the vast majority of online advertising is legitimate speech: precisely what American principles of free expression exalt. For example, individual voters, who want to express themselves and their ideas by buying ads on online platforms, could be affected. In the context of political campaigns, the FEC should take into account how its rules could affect speakers and candidates, who are not incumbent politicians or do not have PACs. CCIA cautions against regulatory action that does not allow for flexible solutions, for it could discourage this dynamic marketplace where platforms are constantly competing and innovating new options for legitimate speakers that want to reach new audiences.

VI. Conclusion.

Online platforms are committed to bringing greater transparency to online election advertising. It is important that the FEC continue working toward more transparency for

campaign communications while also recognizing FECA's requirements and the need for a balanced, "restrained regulatory approach"³³ that has so far guided the FEC. In any course the FEC may take from this proceeding, CCIA encourages the FEC to balance the importance of improving transparency with possible chilling effects on legitimate, open political discourse. The FEC should also take into account how its actions would affect the ability of voters to obtain important identifying information, the ability of candidates and campaign committees to effectively disseminate their messages, and the constraints inherent to many forms of advertising. Although many types of online advertising exist today, as technology continues to develop at a rapid pace, it is not known what kinds of advertising could be done in the future on different platforms and via different means. The FEC should continue its work to provide more clarity on the application of its communication disclaimer rules to online political advertising.

November 9, 2017

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³³ Final Rule, *supra* note 8.