

United States Senate

WASHINGTON, DC 20510

November 13, 2017

Steven T. Walther
Chairman
Federal Election Commission
999 E Street NW
Washington, DC 20463

Notice 2017-12

Re: 11 CFR Part 110

Dear Chairman Walther,

Over the past year, our country has come to realize the ease with which foreign actors can interfere in our elections, undermining the integrity of – and reducing public confidence in – the electoral process. As part of a wide-ranging interference campaign during the 2016 election, Russian operatives used advertisements on social media platforms to sow division and discord, distorting public discourse and coarsening our political debate. The actions undertaken by Russia should not be considered an anomaly; they will be the norm in future elections if we do not take immediate action to improve the transparency and security of our election process. The efficacy of these efforts will depend, in no small part, on whether our election laws remain riddled with loopholes that enable online political advertising to escape the same transparency and accountability requirements of other forms of large-scale political advertising.

In 2002, when Congress passed the Bipartisan Campaign Reform Act, nobody predicted the incredible impact that internet advertisements would come to have on our elections. At the time, Congress was primarily concerned with ensuring that broadcast, cable, and satellite communications – meaning TV and radio ads that attracted the overwhelming majority of political advertising dollars – were transparent. Television and radio ads continue to play an impactful role in our elections, however, the explosive growth of internet advertisements, or digital ads, cannot be ignored. In the 2016 election, spending on digital advertising reached \$1.4 billion, a 789 percent increase from the \$159 million spent in 2012.¹ All signs indicate that the shift to digital advertising will continue to grow disproportionately.

The media landscape is, to be sure, markedly different than it was in 2006, when the Federal Election Commission (FEC) last completed a rulemaking addressing online political advertisements.² While the FEC at the time concluded that disclaimer requirements could apply

¹ Kate Kaye, “Data-Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast TV Down 20%, Cable and Digital Way Up,” *Ad Age* (January 3, 2017), available at <http://adage.com/article/media/2016-political-broadcast-tv-spend-20-cable-52/307346/>.

² U.S. Federal Election Commission, “Internet Communications,” 71 Fed. Reg. 70 (April 12, 2006), pp. 18589-18614.

to paid online ads, large swaths of internet advertisements have been effectively exempted from these requirements through a series of FEC advisory opinions.

As the FEC evaluates whether to reconsider these decisions and initiate a rulemaking to revise its regulations concerning disclaimers, it bears emphasizing how different, the internet – and the way users interact with it – is today compared to when the FEC last holistically considered this topic. In its 2006 Order, for instance, the FEC stressed the vastly different consumption patterns characteristic of the internet, noting that “the internet differs from traditional forms of mass communication because individuals must generally be proactive in order to access information on a website, whereas individuals...passively view a billboard while driving or walking down a street.” While this characterization might accurately have portrayed the internet as it operated in 2006 – dominated by online discussion forums, message boards, listservs, blogs, and newsgroups – the growth of the internet in the last decade, and social media in particular, has changed that calculation. As online activity has been increasingly mediated by a handful of social networks, apps, and content aggregators, passive consumption of information – and advertising – has become the norm for Americans online. Despite the FEC’s past assertion that, in contrast to “traditional forms of mass communication” individuals must “be proactive in order to access information [online],” contemporary social media platforms are structured to deliver an uninterrupted stream of information and advertising to the user, with minimal or no proactive steps by the user. These ads are now akin to the passive viewing of billboards or television ads, and (contrary to the FEC’s characterization in 2006) are *more* “invasive” than traditional media since they are often targeted based on a user’s search history, demographics, and other factors, with ads following users across the web based on their activity on completely unaffiliated sites.

Other aspects of internet usage have also changed markedly. For instance, social media was still in its infancy when the FEC last comprehensively evaluated appropriate rules for internet advertisements. Today, 79 percent of online Americans – 68 percent of all Americans – are users of the largest social media platform, and more than half of Americans who use the internet have more than one social media account.³ Over 160 million Americans use the largest social media platform on a daily basis, spending an average of 35 minutes on the site each day.⁴ By contrast, the most-watched television broadcast in U.S. history – Super Bowl XLIX – was viewed by 114 million Americans.⁵

Increasingly, the internet has become the leading source of news and information for Americans. Illustrating the enormous shift, the FEC noted in 2006 that only 18 percent of all Americans cited the internet as their leading source of information in the 2004 presidential election; in 2016, that

³ See Shannon Greenwood, Andrew Perrin, and Maeve Duggan, “Social Media Update 2016,” Pew Research Center (November 11, 2016), available at <http://www.pewinternet.org/2016/11/11/social-media-update-2016/>.

⁴ James B. Stewart, “Facebook Has 50 Minutes of Your Time Each Day. It Wants More,” New York Times (May 5, 2016), available at <https://www.nytimes.com/2016/05/06/business/facebook-bends-the-rules-of-audience-engagement-to-its-advantage.html>.

⁵ Eyder Peralta, “Super Bowl XLIX Was Most Watched Show In TV History,” National Public Radio (February 2, 2015), available at <http://www.npr.org/sections/thetwo-way/2015/02/02/383352809/super-bowl-xlix-was-most-watched-show-in-tv-history>.

number had grown to 65 percent.⁶ The use of social media – and the internet more broadly – to inform the decisions of the electorate heightens the need for scrutiny of the ads placed on those sites.

Not only has the way people use the internet changed dramatically since 2006, but the level of competition online has also shifted. In 2006, the FEC distinguished the internet from other mass communications mediums by arguing that the internet had “minimal barriers to entry, including its low cost and widespread accessibility.” While almost anyone can start a new website or create online ads, it has become harder to break through as an online platform because the market has consolidated and online activity has become increasingly mobile – mediated by apps owned by a handful of the largest technology companies. For example, Nielsen found that the top eight most widely used mobile apps in 2016 were owned by just two companies.⁷ The broader usage trends are mirrored in online advertising trends: those same two companies accounted for 99 percent of the increase in total internet advertising revenue from 2015 to 2016.⁸ All of these factors highlight the need for the FEC to review its policy towards digital ads.

While a number of trends have made the internet more like traditional mass communications mediums subject to the FEC’s disclaimer rules, many of the distinguishing features of online advertising highlight unique *risks* to continuing to exempt many online advertisements from the FEC’s disclaimer rules. Most notably, online advertising (and associated user tracking and data collection tools) have enabled online advertisements to target users with advertisements in ways that current broadcast, television, or satellite-based communications cannot.

Additionally, the public nature of broadcast television, radio, and satellite communications ensures a level of publicity for any political advertisement. In addition to being broadly accessible to the electorate, these communications are accessible to the press, fact-checkers, and political opponents through media monitoring services that track broadcast content across television and radio markets. As a result, strong disincentives exist today for a candidate to disseminate materially false, inflammatory, or contradictory messages to the public. By contrast, social media platforms tout their ability to target portions of the electorate with direct, *ephemeral* advertisements – visible only to the targeted individual users. This lack of transparency online – combined with the ability to granularly target users on the basis of collected user data – has incentivized the use of contradictory, materially false, and racially inflammatory ads. And they have provided an enticing set of tools for foreign interests intent on sowing disinformation, discord, and division among the electorate. Clarifying digital ad disclaimer requirements would help to address these problems.

The use of social media platforms by foreign operatives and those who seek to incite fear and hatred has led many to question the current system of political ad disclosure. We believe the FEC

⁶ See Jeffrey Gottfried et al, “The 2016 Presidential Campaign – a News Event That’s Hard to Miss,” Pew Research Center (February 4, 2016), available at <http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss/>.

⁷ Nielsen, “Tops of 2016: Digital” (December 28, 2016) (providing metrics of top smartphone apps), available at <http://www.nielsen.com/us/en/insights/news/2016/tops-of-2016-digital.html>

⁸ Wolf Richter, “Online ad revenues are surging, but 2 companies are getting most of the spoils,” Business Insider (April 27, 2017), available at <http://www.businessinsider.com/online-ads-revenues-going-to-google-and-facebook-the-most-2017-4>.

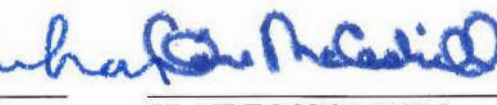
can and should take immediate and decisive action to ensure parity between ads seen on the internet and those on television and radio. This action is not about regulating speech. The freedom of Americans to express themselves online is a right that we all hold dear and creating parity between online political advertisements and those running on broadcast, cable, and satellite mediums will not undermine these rights. Indeed, as even the late Justice Antonin Scalia wrote in *Doe v. Reed*, "Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed."⁹ Updating our disclosure laws to include digital political advertising is essential to maintaining a democracy where citizens can make informed decisions.

The FEC must close loopholes that have allowed foreign adversaries to sow discord and misinform the American electorate. The lack of transparency of digital ads is a threat to our national security. Without change, the misuse of online advertisements during the 2016 election will serve as a template for other foreign powers who wish to influence our elections. Failure to act threatens the very foundation of our democracy.


Sincerely,

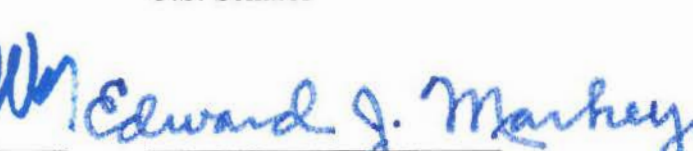

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U.S. Senator

⁹ *Doe v. Reed*, 561 U.S. 186, 228 (2016) (Scalia, J., concurring).



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U.S. Senator



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