Republican National Committee

VIA ONLINE RULEMAKING COMMENT ENTRY SYSTEM

May 24, 2018

Attn.: Neven F. Stipanovic,
Acting Assistant General Counsel,
Federal Election Commission
1050 First St. NE, Washington, DC 20463

Re: Proposed Rule on Internet Communication Disclaimers and Definition of ‘‘Public Communication’’ (FEC Notice 2018–06)

Dear Mr. Stipanovic,

The Republican National Committee ("RNC") appreciates the opportunity to comment on the Federal Election Commission's ("FEC" or the "Commission") Notice of Proposed Rulemaking ("NPRM") on disclaimers for Internet advertising.[1] The RNC supports the Commission's general goal in this rulemaking to clarify an issue that the agency and advertisers alike have struggled over for the past decade.[2]

During the last two election cycles, the RNC placed hundreds of thousands of digital ads. The RNC also has been the target of fraudulent misrepresentation schemes.[3] Based on these experiences, the RNC has a unique appreciation for the competing interests the FEC must balance in this rulemaking. On the one hand, the Commission's regulations must not be so burdensome as to stifle speakers' ability to communicate effectively through digital ads, which now comprise approximately 15 percent of all political spending and continue to grow rapidly in importance.[4] On the other hand, the Commission's regulations also must sufficiently protect

[1] FEC, Notice of Proposed Rulemaking on Internet Communication Disclaimers and Definition of "Public Communication," 83 Fed. Reg. 12864 (Mar. 26, 2018).

[2] *See* AOs 2010-19 (Google), 2011-09 (Facebook), 2013-18 (Revolution Messaging), and 2017-12 (Take Back Action Fund).

[3] *See, e.g.*, FEC MUR 5472 ("Republican Victory Committee").

[4] Sean J. Miller, *Digital Ad Spending Tops Estimates*, CAMPAIGNS & ELECTIONS (Jan. 4, 2017); Kate Kaye, *Data-Driven Targeting Creates Huge 2016 Political Ad Shift*, ADAGE.COM (Jan. 3, 2017).

voters' interest in knowing who is purchasing the political ads that appear on their computers, mobile devices, and other digital platforms.

While there are many elements to like in both Alternatives A and B, there are also many aspects of both alternatives that are excessively burdensome, confusing, and not conducive to transparency. On balance, both alternatives leave something to be desired. Therefore, the RNC respectfully suggests that the Commission adopt a more flexible approach that focuses simply on whether a disclaimer is presented in any clear and conspicuous manner.

A) THE COMMISSION SHOULD ADOPT A FUNCTIONAL APPROACH

Alternatives A and B both elevate form over function.

Unlike some other laws' disclaimer requirements that purport to convey various information to the public, the Federal Election Campaign Act's ("FECA") disclaimer requirement serves two very basic functions – to inform viewers and listeners of: (1) who paid for an ad; and (2) whether the ad was authorized by any candidate.[5] FECA outlines only minimal and general requirements as to the form disclaimers must take on "printed communication[s]," while it prescribes more detailed requirements for "radio" and "television" ads.[6]

The Commission previously has determined that digital communications are not "printed communications."[7] Nor can digital media be considered "radio" or "television" – a point which we will revisit later in these comments. Therefore, the Commission has great flexibility in this rulemaking. The Commission should use this flexibility to adopt a rule for digital advertising that implements the statute's core functional mandate, gives political advertisers sufficient space and time to speak, and adapts to changing technology.

Unlike television, radio, and print ads, which consist of only a few fixed formats, digital ads take many different forms and appear on a far greater variety of devices. The 18 examples the Commission has issued in conjunction with the NPRM – which do not even include any ads containing video or audio – illustrate this point to some extent. Consider also that wearable technology, virtual reality devices, voice-activated personal assistants, Internet-connected appliances and vehicles, and other yet-to-be-imagined innovations could all be the next frontier for advertising. To the extent Alternatives A and B prescribe detailed and rigid formalistic requirements for disclaimers, the rules inevitably will be incompatible with many digital ad formats and also will quickly become obsolete.

Such a formalistic approach not only is unsuited for digital ads, it is unnecessary. Many digital advertising formats can present the required disclaimer information using a variety of "technological mechanisms" such as those outlined in both alternatives. All that the Commission needs to and should do in this rulemaking is adopt a general requirement that digital ads present

[5] 52 U.S.C. § 30120(a).

[6] *Id.* § 30120(c), (d).

[7] *See, e.g.*, MUR 7245 (Shiva 4 Senate), Factual and Legal Analysis to Shiva 4 Senate at 4 n.16 (collecting authority).

the prescribed disclaimer information in some manner that is clear and conspicuous to a reasonable person. Whether the entire disclaimer is presented on the face of the ad or through an alternative technological mechanism, or some combination thereof, makes no difference under FECA or the Commission's other existing regulations. However, such flexibility will make all the difference to whether the disclaimers get in the way of political advertisers' substantive message and whether the adopted rules withstand constant technological changes.

B) A ONE-STEP TECHNOLOGICAL MECHANISM IS SUFFICIENT AND PREFERABLE TO THE MULTITIERED APPROACHES UNDER ALTERNATIVES A AND B

Consistent with the foregoing principles, the Commission should adopt a rule that permits digital ads to use, as a default, any "technological mechanism" that allows someone to view or hear FECA's prescribed disclaimer information by navigating no more than one step away from the ad's main content.[8] In order to be clearly discernible, the "technological mechanism" should be associated with a clear and conspicuous "indicator" on the face of the ad. (Alternatives A and B both sufficiently define these terms.) Such a streamlined and flexible approach is preferable to either Alternatives A or B for several reasons.

First, using a "technological mechanism" as a primary means for presenting a disclaimer is consistent with how people interface with digital media. People engage much more interactively with digital media than they do with traditional passive media. They "like," share, comment, and click on digital content. Indeed, "click through rates" are one standard metric for gauging the effectiveness of digital ads, as the customary goal is for people to click on a digital ad to obtain more information about the advertiser's goods or services (or candidates or platforms, in the case of political ads). Therefore, it is intuitive and no impediment whatsoever for someone to click, hover over, swipe, or scroll through a political ad if he or she is interested in seeing who paid for it. In fact, it is a benefit to the viewer that digital ads can provide more information about the ad's sponsor through click throughs than radio or television ever could.

Technological mechanisms also are becoming the industry standard. Just this week, the Digital Advertising Alliance ("DAA"), which consists of hundreds of major advertisers and digital advertising platforms, announced that it is rolling out a "PoliticalAd" icon that will appear on political ads and link to more information about the sponsor of each ad.[9] The measure is

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[8] The RNC supports retaining the "small items" and "impracticability" exceptions under 11 C.F.R. § 110.11(f), which should apply where: (1) the digital ad format or platform does not allow for the use of a clear and conspicuous indicator and technological mechanism; and (2) the ad format is too small or makes it impracticable to present the requisite disclaimer. According to the NPRM, "Alternative A's reference to 'external character or space constraints' is intended to codify the . . . small items and impracticable exceptions," while "Alternative B is intended to replace the small items and impracticable exceptions." 83 Fed. Reg. at 12874, 12879. As discussed more below, both alternatives can be problematic with respect to this issue, and the existing exceptions in the Commission's regulations are preferable.

[9] Press Release: Digital Advertising Alliance Launches Initiative to Increase Transparency & Accountability in Political Ads (May 22, 2018), *at* https://digitaladvertisingalliance.org/press-release/digital-advertising-alliance-launches-initiative-increase-transparency-accountability; *see also* DAA Participating Companies & Organizations, *at* http://www.youradchoices.com/participating.

based on the DAA's ubiquitous "Your Ad Choices" icon, which allows people to control how advertisers collect and use their information to present relevant ads.[10]

Second, a technological mechanism allows political advertisers to convey more substantive and meaningful messages, which helps create a more informed electorate. While FECA's disclaimers occasionally interfere with ad content in traditional media, they are much likelier to encroach on a speaker's message on digital media, as illustrated by Examples 2, 4, 5, and 16-18 that the Commission released with the NPRM.

In all of these examples, one or both of the alternatives would require all or a portion of the requisite disclaimer to be presented on the face of the ad and become a focal point of the ad. Under both alternatives, the disclaimers in these examples leave no room for any message other than "Vote Doe." Many of these and the other examples also are not realistic, as the disclaimers take up the portion of the ads where the RNC typically would place substantive text. Thus, Alternatives A and B would be even more speech-prohibitive if they were applied to more realistic examples.

Third, a rule that allows the requisite disclaimer to be presented using a one-step technological mechanism is much easier for advertisers to comply with and for the Commission to apply. Alternative A only permits an "adapted disclaimer" to be used when, "due to external character or space constraints," the ad "cannot fit [the entire] required disclaimer." Even on its face, this is a very ambiguous standard that opens speakers up to liability if they guess wrong at whether their particular ads qualify for an adapted disclaimer. The NPRM further underscores this ambiguity by citing to AOs 2004-10 (Metro Networks) and 2007-33 (Club for Growth PAC) as the benchmarks for when an adapted disclaimer may and may not be used under Alternative A.[11]

In AO 2007-33, the Commission did not permit an adapted disclaimer to be used even where the entire disclaimer would have taken up 24.6 to 36.9 percent of a 10- or 15-second television ad, respectively.[12] Yet, Alternative A, citing AO 2004-10, purports to permit an adapted disclaimer to be used in Examples 2 and 7, where the entire disclaimer takes up 34 and 35 percent of the ads, respectively. These contradictory conclusions demonstrate how Alternative A cannot be understood and applied in a consistent or intelligible manner. The NPRM's suggestion that Alternative A does not permit "business decisions to sell small ads" to justify the use of an adapted disclaimer further confuses matters.[13]

Alternative B is preferable in that it relies on a more objective percentage-based standard for when an adapted disclaimer may be used. However, as Examples 3, 8, 9, and 11 illustrate, even Alternative B's ten-percent threshold can be confusing and subjective in many instances. Under Alternative B, ads generally may not use an adapted disclaimer unless the full disclaimer or "Tier One" disclaimer exceeds ten percent of an ad. However, if a full disclaimer or "Tier One" disclaimer takes up ten percent or less of an ad and is not "clear and conspicuous," then a

[10] *See* Your Ad Choices, *at* https://www.youradchoices.com/learn.

[11] 83 Fed. Reg. at 12874.

[12] AOR 2007-33 at 5.

[13] 83 Fed. Reg. at 12874.

"Tier One" or "Tier Two" adapted disclaimer must be used. And while the disclaimers that take up ten percent of the ads in these particular examples are quite small, there are likely going to be many circumstances when the issue of whether a ten-percent disclaimer is sufficiently "clear and conspicuous" is a judgment call. In short, Alternative B also does not establish an easily understandable bright-line standard in many instances.

Admittedly, whether a disclaimer or "indicator" is sufficiently "clear and conspicuous" may become a question under any approach the Commission adopts. However, Alternative B will often double the opportunity for ambiguity and subjectivity by requiring that the analysis of this issue be conducted twice: once for the full disclaimer on the face of the ad, and again for the "Tier One" adapted disclaimer.

By contrast, the one-step technological mechanism the RNC suggests is more objective and less susceptible to questions about whether an indicator or disclaimer is clear and conspicuous. This is because: (a) the disclaimer can be presented separately without having to compete with the rest of the ad for space or time, and consequently there should typically not be any question about whether the disclaimer is too small; and (b) as mentioned before, an industry standard is already developing for clear and conspicuous indicators.

Lastly, both Alternatives A and B essentially assume websites and other digital platforms will undertake the burden to create advertising formats capable of accommodating a clear and conspicuous disclaimer or adapted disclaimer. Examples 13, 14, and 15 illustrate how both alternatives' proposed disclaimer requirements are met by certain Facebook and Instagram ad formats. However, many of the other examples illustrate how other advertising platforms and products do not lend themselves to either alternative's required disclaimer formats. In addition to Facebook and Instagram, Google Search and Display, YouTube, Snapchat, banner, and in-app ads are just a few examples of the many and diverse websites and digital platforms on which the RNC advertises. Ten years ago the Obama campaign even advertised in a video game.[14] Imagine what new ad types will be created in the next decade.

As much as the $1.4 billion spent on digital advertising (in 2016) now constitutes a major component of all political spending, it is still just a drop in the bucket when compared to the more than $72 billion spent on all digital advertising (in 2016).[15] Candidates, party committees, and PACs will never spend anywhere near the amount Fortune 500 companies spend on digital advertising. It is unlikely that most digital advertising platforms will modify their ad formats to accommodate both a meaningful substantive message and the full or adapted disclaimers that Alternatives A and B require. This will result in many of these advertising formats effectively being off-limits to political speakers. By contrast, the regulatory approach the RNC suggests would allow advertisers more flexibility to use any indicator and one-step technological mechanism available in an advertising format to satisfy FECA's disclaimer requirement, so long as those mechanisms are clear and conspicuous.

[14] Steve Gorman, *Obama buys first video game campaign ads*, REUTERS.COM (Oct. 17, 2008).

[15] *Compare* Miller and Kaye, *supra* note 4 *with* Brandon Katz, *Digital Ad Spending Will Surpass TV Spending For The First Time In U.S. History*, FORBES.COM (Sep. 14, 2016).

C) THERE IS NO JUSTIFICATION FOR EXTENDING THE "STAND BY YOUR AD" DISCLAIMERS TO DIGITAL ADVERTISING

Alternative A would extend the so-called "stand by your ad" disclaimer requirements for "television" and "radio" ads to online video and audio ads. There is no statutory basis or good practical justification for this.

As the NPRM notes, FECA "imposes additional 'stand by your ad' requirements *only* on television and radio communications."[16] The NPRM cites no statutory authority for why digital ads should be subject to these same requirements, and the only practical arguments offered are that: (1) "th[e]se provisions have been in operation for 15 years and are, therefore, familiar to [advertisers]"; and (2) the uniform regulation "would ensure that internet audio [and video] ads could air on radio [and television] without having to satisfy different disclaimer requirements."

These justifications are not grounded in reality. The RNC – like most other political advertisers – generally does not run the same exact ads across digital platforms, on the one hand, and broadcast/cable/satellite platforms on the other. Each advertising platform is associated with unique ad formats, content, strategic goals, artistic considerations, and other related factors. For example, a 15-second video ad on Facebook may then be edited to become a nine-second ad on Snapchat, a six-second ad on YouTube, and a silent-gif on a news site. Moreover, the often time- or space-limited audio and video ad formats on digital platforms means the additional "stand by your ad" requirements will create an even greater headache for digital ad sponsors. The Commission should not impose this substantial burden on digital communications absent any good practical justification or scintilla of a Congressional mandate.

D) CONCLUSION

For the reasons discussed above, the RNC urges the Commission to adopt a rule permitting digital ads to use a technological mechanism as the default method for presenting the FECA-required disclaimer. The RNC requests an opportunity to further discuss these comments with the Commission at its scheduled public hearing on June 27.

Sincerely,

Doug Hochberg
Chief Digital Officer

John Phillippe
Chief Counsel

[16] 83 Fed. Reg. at 12872 (emphasis in the original).