



AMERICANS FOR PROSPERITY

1310 N. Courthouse Rd. Ste. 700 | Arlington, VA 22201 | p: (703) 224-3201

May 25, 2018

VIA ONLINE RULEMAKING COMMENT ENTRY SYSTEM

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:

Americans for Prosperity (“AFP”) submits the following comments in the above referenced Notice of Proposed Rulemaking.¹

INTRODUCTION

Americans for Prosperity (“AFP”) is a 501(c)(4) non-profit, non-partisan social welfare organization that recruits, educates, and mobilizes American citizens in support of the policies and goals of a free and open society at the local, state, and federal levels. We aim to empower citizens across the country and to remove barriers to opportunity. With our 36 state chapters, 3.2 million activists and thousands of dedicated volunteers, we believe we are the largest and most influential grassroots organization in the nation.

AFP’s interest in this rulemaking is two-fold. First, we believe that freedom of speech is a necessary and integral part of a free and open society, and any regulation of First Amendment activity should be extremely limited in scope. Second, the proposed rule would have a burdensome impact on our First Amendment protected grassroots activity.

Founded in 2002, the Committee for Justice (CFJ) is a nonprofit, nonpartisan organization dedicated to promoting the rule of law, the Constitution's limits on the power of

¹ FEC, Notice of Proposed Rulemaking on Internet Communication Disclaimers and Definition of “public Communication,” 83 Fed. Reg. 12864 (Mar. 26, 2018).

government, and its guarantees of individual liberty including the First Amendment right to free expression. CFJ is concerned with the preservation of these protections as technological advances challenge existing legal principles and, in this case, with the continued vitality and rapid growth of the internet made possible by such protections.

DISCUSSION

Express advocacy communications on the Internet are already regulated by this Commission and require disclaimers, therefore we do not believe a new rule is necessary. However, to the extent that the Commission plans to adopt a new rule, AFP believes that the Commission should adopt an alternative that provides maximum flexibility to those exercising their freedom of speech.

1. THE INTERNET AND THE FIRST AMENDMENT MAKE A GREAT TEAM

Similar to how the Gutenberg press transformed how knowledge was disseminated in the Middle Ages, so has the Internet allowed for an endless amount of information to be accessible at our finger tips, as well as the ability to spread a message at the click of a button. The Internet is the information tool that has equalized the ability for anyone and everyone to engage in politics. It has lowered barriers to entry in the marketplace of ideas in ways that have fundamentally transformed the United States. Technologies that allow for more speech should be encouraged, not stifled. The answer to speech that is distasteful or offensive is more speech, not less.

Speech flourishes in the United States because of our First Amendment, which has distinguished the regulation of speech in the United States from the rest of the world, where governments have enjoyed comparably greater authority to censor and circumscribe it. The explicit, written, entrenched protection of freedom of speech in our Constitution has placed it outside the reach of regulators to alter it. The United States is an outlier in this respect, allowing our speech – in the form of our print, broadcast, and online media – to proliferate to a greater extent than that of our peers. It is in large part because of the Internet that American brands, culture, and even the English language have come to dominate the global marketplace. And while all cogent speech has intrinsic value, the Founders clearly believed that the speech most deserving of protection was speech relating to political matters. They recognized that government officials face the greatest temptation to regulate speech that is made about them, and therefore that the right to criticize or praise the government would be most at risk unless the power to regulate it were placed safely out of its reach, in the Constitution. In this respect, nothing has changed. New technologies are merely means, not ends. The fundamental principle at stake today is the exact same principle contemplated by the Founders. The government shall make no law abridging the freedom of speech.

2. THE COMMISSION SHOULD EMBRACE TECHNOLOGY

The Commission's solicitation of comments offers two alternatives. AFP does not support either. Neither option fully embraces the flexibility of technology to advance disclosure. If the Commission is determined to issue a new regulation, AFP supports the attached hybrid of Alternatives A & B.² Instead of the difficulty of analyzing when an "adapted disclaimer" would apply and what an "adapted disclaimer" could be, we suggest allowing flexibility for the technology to best display the disclaimer for the speaker and provide easy disclosure for the consumer.

Ordinary Americans would immediately recognize the risk of getting this approach wrong by watching any TV commercial for a prescription drug. After a brief description of the product and its intended benefits, a narrator in these commercial delivers a rapid, lengthy, distracting list of potential side effects, while stock footage of dogs, flowers, or happy couples on the beach plays in the background. These disclaimers are a feature of nearly all such commercials, often occupying the majority of the slot. Another example can be found in the terms and conditions attached to new software updates for popular devices. Though these lengthy disclosures are the result of regulations with the good intention of providing more information to consumers to enable them to make informed decisions, the inevitable result is that they are ignored. The actual result is the opposite of the regulator's intent. The consumer is overloaded with information, and any useful details are lost in the noise.

Some ads on Facebook and Google, on the other hand, showcase a more effective approach. Users can click small, recognizable, and clearly marked icons on advertisements and be prompted with questions like, "Why am I seeing this?" Clicking the prompt reveals an explanation, for example, that the ad appeared on their device because Company ABC wanted to reach users between the ages of 18 and 35 in the District of Columbia who are interested in health and fitness. These explanations often ask the user whether the information was useful, enabling companies like Facebook and Google to innovate better and more effective ways to communicate this useful information to their users. In striking contrast to the cumbersome disclosures required of prescription drug commercials and software agreement terms and conditions, which gradually become useless as they are increasingly ignored, the above model based on competition and innovation in the marketplace is getting more useful and effective every day.


We urge the Commission to welcome current and future technologies by adopting a rule that provides sufficient flexibility to comply with the disclaimer requirement, instead of a static and subjective requirement that may quickly become irrelevant due to technological advances. We recommend the Commission adopt the attached rule text that combines elements of Alternatives A & B, with amendments (strikeouts and underlining indicate deleted and added text, respectively). Technology should be a friend to the Commission as it considers adopting a new regulation.

² We agree with the arguments and justifications laid out in the Comment submitted by Freedom Partners Chamber of Commerce, proposing the hybrid of Alternatives A & B.

CONCLUSION

In regulations concerning the First Amendment, the scales should always be tipped in favor of encouraging more speech, not providing more hurdles for the speaker. For the reasons discussed above, should the Commission decide to adopt a new rule, we respectfully ask the Commission to consider the modified version of Alternatives A and B attached to these comments. We appreciate the opportunity to submit these comments and request to speak at the Commission's upcoming hearing to further discuss this rulemaking.

Sincerely,

DocuSigned by:

0620743CEB2B4CC...

Victor E. Bernson, Jr.
Vice President and General Counsel
Americans for Prosperity

Curt Levey
President
The Committee for Justice

Grover Norquist
President
Americans for Tax Reform

ATTACHMENT: PROPOSED RULE TEXT

§ 110.11 Communications; advertising; disclaimers (52 U.S.C. 30120).

* * * * *

(c) * * *

(5) *Specific requirements for internet communications.* [From Alternative B:]

(i) For purposes of this section:

(A) ~~The term~~ *Internet communication* means electronic mail of more than 500 substantially similar communications when sent by a political committee; all internet websites of political committees available to the general public; and any internet public communication as defined in paragraph (c)(5)(i)(B) of this section;

(B) ~~The term~~ *Internet public communication* means any communication placed for a fee on another person's website or internet-enabled device or application;

(C) ~~The term~~ *Technological mechanism* refers to any use of technology that enables the person reading, observing, or listening to an internet public communication to read, observe, or listen to a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section without navigating more than one step away from the internet public communication, ~~and is associated with an adapted disclaimer as provided in paragraph (c)(5)(ii) of this section.~~ A technological mechanism may take any form including, but not limited to, hover-over; mouse-over; voice-over; rollover; pop-up screen; scrolling text; rotating panels; and click-through or hyperlink to a landing page; and

(D) ~~The term~~ *Indicator* refers to any clear and conspicuous visible or audible element ~~of associated with~~ an internet public communication that gives notice to persons reading, observing, or listening to the internet public communication that they may read, observe, or listen to a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section through a technological mechanism. An indicator may take any form including, but not limited to, words such as "Paid for by," "Paid by," "Sponsored by," or "Ad by"; website URL; image; sound; symbol; ~~and~~ or icon.

[Subparagraphs (ii)-(iv) of Alternative B are omitted.]

(ii) Every internet communication for which a disclaimer is required by paragraph (a) of this section must satisfy the general requirements of paragraphs (b) and (c)(1) of this section on the face of the internet communication itself, except an internet public communication may, in the alternative, include the disclaimer using any technological mechanism, provided that some indicator is presented. An indicator is not required if an internet public communication is placed on a website or internet-enabled device or application that does not provide for or allow for indicators, in which case only a technological mechanism is required to satisfy the disclaimer requirement.

(iii) [From Alternative A:] Safe harbor for clear and conspicuous disclaimers for internet communications containing only text or graphic components. ~~A public~~ An internet communication distributed over the internet with text or graphic components but without any video component ~~must contain a disclaimer that is of sufficient type size to be clearly readable by the recipient of the communication.~~ may satisfy the requirement that the disclaimer be clear and conspicuous under paragraph (c)(1) of this section if the ~~A~~ disclaimer: 1. ~~that~~ appears in letters at least as large as the majority of the other text in the communication ~~satisfies the size requirement of this paragraph. A disclaimer under this paragraph must be;~~ and 2. is displayed with a reasonable degree of color contrast between the background and the text of the disclaimer. ~~A disclaimer satisfies the color contrast requirement of this paragraph if it is displayed in,~~ such as black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest text used in the communication.

* * * * *

(f) Exceptions.

[From Alternative B:]

(1) * * *

(iv) Any internet public communication that cannot provide a clear and conspicuous disclaimer either: 1. on the face of the internet public communication itself; or 2. through the use of a technological mechanism ~~an adapted disclaimer~~ as provided in paragraph (c)(5) of this section, such as a static banner ad on a small internet-enabled device that cannot link to a landing page of the person paying for the internet public communication. The provisions of paragraph (f)(1)(i)–(iii) of this section do not apply to internet public communications.