



May 25, 2018

Via electronic filing

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

Re: Notice of Proposed Rulemaking, Internet Communication Disclaimers and Definition of “Public Communication” [REG 2011-02]

Dear Mr. Stipanovic,

The Interactive Advertising Bureau (“IAB”) appreciates the opportunity to provide comments on the Federal Election Commission’s (“FEC” or “Commission”) Notice of Proposed Rulemaking on Internet Communication Disclaimers and the Definition of “Public Communication” (“NPRM” or “Rulemaking”).¹ The IAB and its member companies are firmly committed to a transparent, web-based advertising ecosystem, and rules that foster an informed electorate without chilling political speech.²

In furtherance of this commitment, the IAB urges the Commission to update its internet disclaimer requirements to account for advances in modern technology, and is supportive of many of the proposals in the Rulemaking. In crafting new rules tailored to address a transformed online political advertising environment, the Commission should strive to encourage innovation as a tool for transparency. Providing regulatory flexibility and promoting the use of alternative disclaimers can ensure compliance, regardless of the forms online political advertising takes in the future.

Industry self-regulation can serve as an important part of the Commission’s approach to regulating online advertisements. The new internet communication disclaimer rules should encourage the use of self-regulatory mechanisms as one way to comply with new rules.

¹ See Internet Communication Disclaimers and Definition of “Public Communication,” 83 Fed. Reg. 12864 (Mar. 26, 2018).

² As the NPRM notes in footnote 22, “[P]olitical speech . . . is central to the meaning and purpose of the First Amendment.” *Citizens United v. FEC*, 558 U.S. 310, 329 (2010).

The IAB also welcomes the opportunity to work closely with the FEC and our member companies to improve disclosures for political advertising across the digital advertising industry. Accordingly, in these comments, IAB will describe how the Digital Advertising Alliance’s (“DAA”) Self-Regulatory Principles of Transparency and Accountability apply to certain online digital political advertising and the proposals contained in the NPRM. This will include a discussion of how the Self-Regulatory Principles offer enhanced political advertisement transparency and additional non-governmental accountability. Finally, IAB will focus its comments on the two alternatives for adapted disclaimers.

I. Interactive Advertising Bureau and Digital Advertising Alliance

Founded in 1996, the IAB empowers the media and marketing industries to thrive in the digital economy. The IAB’s members include more than 650 leading media and technology companies involved in all aspects of digital advertising and marketing campaigns. Together, the IAB’s members collectively account for 86 percent of U.S. online advertising.

The IAB educates policymakers, consumers, marketers, agencies, media companies and the wider business community about the value of interactive advertising. Working with its member companies, the IAB evaluates and recommends standards and practices and fields critical research on interactive advertising. In addition, the IAB fosters self-regulatory approaches to critical issues facing participants in today’s internet marketplace.

The DAA is an independent, non-profit consortium of the nation’s largest media and marketing trade associations, including the IAB. Representing thousands of member companies, these associations have come together to develop and implement standards for online, mobile, and cross-device internet disclosures. The DAA began in 2009 with its publication of the Self-Regulatory Principles for Online Behavioral Advertising (“OBA Principles”). Additional guidance documents issued by DAA include, the Self-Regulatory Principles for Multi-Site Data (“MSD Principles”), the Application of the Self-Regulatory Principles to the Mobile Environment (“Mobile Guidance”), and the Application of the Principles of Transparency and Control to Data Used Across Devices (“Cross-Device Guidance”) (collectively, the “DAA Principles”).³ The DAA Principles require companies

³ Digital Advertising Alliance, *Self-Regulatory Principles for Online Behavioral Advertising* (July 2009); Digital Advertising Alliance, *Self-Regulatory Principles for Multi-Site Data* (Nov. 2011); Digital Advertising Alliance, *Application of Self-Regulatory Principles to the Mobile Environment* (Jul. 2013); Digital Advertising Alliance, *Application of the DAA Principles of Transparency and Control to Data Used Across Devices* (Nov. 2015).

offering certain online advertisements to inform consumers about their data collection and use practices, and to offer consumers control over certain data practices.

The main method for providing enhanced notice to internet users is the DAA's YourAdChoices icon, which is embedded in or around display, mobile, and video digital advertisements. By clicking on the YourAdChoices icon, consumers are able to link to a clear disclosure regarding the company's data collection and use practices, as well as other tools.⁴



*DAA's Transparency Icon.*⁵

With its success in a variety of areas, the DAA has now launched a program to bring transparency to the political process. While in some contexts the DAA's self-regulatory approach has reduced or even eliminated the need for agency regulation, in the context of political advertising, IAB believes the DAA can supplement and be a part of the FEC's regulatory framework.

II. The New Self-Regulatory Political Advertising Principles

Given the growing use of digital advertising platforms and technologies to reach potential audiences with political advertising, and the need to develop a uniform approach for political advertisers, the DAA has created a self-regulatory framework that applies to express advocacy in advertisements online and in mobile apps. This means that a political advertiser that pays for the promotion of an express advocacy message is responsible for providing enhanced notice in or around that political advertisement, which links to a notice disclosing certain information about the political advertiser.

⁴ A recent poll found strong public awareness and adoption of the DAA AdChoices program. *See* Lou Mastria, "Despite Headline, Survey Shows Strong 'AdChoices' Awareness," Digital Advertising Alliance (May 14, 2018) available at: <http://www.digitaladvertisingalliance.org/blog/despite-headline-survey-shows-strong-%E2%80%98adchoices%E2%80%99-awareness>.

⁵ *DAA Icon Ad Marker Creative Guidelines*, DIGITAL ADVERTISING ALLIANCE (Oct. 30, 2013), http://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/DAA_Icon_Ad_Creative_Guidelines.pdf.

The guidance defines “Political Advertiser” as a “person or entity that pays for the display of a Political Advertisement.”⁶ In turn, a “Political Advertisement” means an “advertisement that contains Express Advocacy.”⁷

Covered advertisers are required to include an icon or specific wording in or around the political advertisements that “provides clear, meaningful, and prominent notice that the advertisement is a Political Advertisement.”⁸ This can be accomplished by providing an icon or wording “through a setting or mechanism provided by a platform or operating system that is consistent with this Principle.”⁹ Moreover, the *enhanced* notice would be provided in addition to any disclaimer required by state or federal law.

A. Proposed Self-Regulatory Principles Offer Enhanced Political Advertisement Transparency

The application of the Self-Regulatory Principles to political advertisers will provide for enhanced online political advertisement transparency. This is accomplished by requiring the notice on political advertisements to include: (1) the name of the political advertiser, (2) a telephone number, physical address, web address, or alternative contact information, (3) any information required by state or federal law, and (4) a link to either a relevant government database or a DAA-Developed web site.¹⁰ When the political advertisement is too small to include a disclaimer as required by state or federal law, the political advertiser will provide the required disclaimer within the notice and include the name of the CEO, a member of the executive committee or board of directors, or treasurer of the political advertiser.¹¹

Linking to the relevant government database, which instantly directs the ad’s viewer to a readily accessible, online, searchable database of contributions and expenditures, or a DAA-Development web site, which maintains similar information or links to that information, provides greater disclosure to the public than a simple disclaimer.

⁶ Appendix A at X.

⁷ *Id.* at X.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

Viewers of a political advertisement can quickly identify the advertiser, evaluate how much money has been raised and spent by the advertiser, and see who funds the advertiser. In contrast, upon viewing a traditional disclaimer, the viewer must proactively search the relevant government database to find the same information. For political advertisers that are not required to register as political committees, such as certain nonprofit organizations, they will be required to clearly state that they are not obligated to register and report with the applicable state or federal agency (e.g., the FEC).

Such a notice is the type of technological mechanism that the Commission should support in this rulemaking.

B. Proposed Self-Regulatory Principles Offer Greater Accountability

In addition to providing for enhanced transparency, the Self-Regulatory Principles offer improved accountability by placing political advertisements under DAA's Accountability programs. These include:

Monitoring: Programs will review Political Advertisements on the Internet for compliance with the Principles. Programs will maintain a process for taking complaints from the public, from competitors, and from government agencies concerning possible non-compliance with the Principles.

Transparency and Reporting: Findings of non-compliance (in particular those that are not corrected), the reasons for those findings, and any actions taken with respect to instances of non-compliance, will be publicly reported by the Programs. These reports may be used by regulators to evaluate compliance with the Self-Regulatory principles and federal or state law.

Compliance: The Accountability program will send the public reports of uncorrected violations to the appropriate government agencies.

Because the self-regulatory process covers the *entire* digital advertisement marketplace, the self-regulatory guidance will provide for an independent enforcement entity to monitor and help correct non-compliance.

C. Self-Regulatory Principles as Part of the FEC's Regulatory Framework

To be clear, IAB is not suggesting that the FEC not undertake a rulemaking effort. Rather, IAB suggests that the FEC could use the DAA requirements as one way to comply with

FEC rules. In particular, recognizing the DAA signifier as a way of satisfying the FEC’s disclaimer requirements would allow for greater flexibility, provide simple, objective criteria to determine whether the FEC’s requirements have been met, and provide a symbol that will become well-known to users across the country and across platforms.

III. Perspective on Alternatives A and B: Adapted Disclaimers

The Commission asks whether the proposed rules allow for flexibility to address future technological developments while honoring the important function of providing disclaimers to voters.¹² Broadly, the answer is resoundingly yes.

The rulemaking moves the Commission away from the *ad hoc* use of Advisory Opinions to approve or disapprove of the use of internet disclaimers or exemptions, which had proven to be inefficient or impracticable. IAB previously observed that the FEC should use this rulemaking to recognize *any* known alternative means of displaying a disclaimer as compliant with FEC requirements.¹³ The NPRM largely provides that flexibility. By promoting and codifying the use of an “adaptive” disclaimer, which is a “technical mechanism used to provide access to a full disclaimer,”¹⁴ the rulemaking makes great strides towards achieving equilibrium between technological flexibility and visible disclaimers.

Adopting regulations that recognize known alternative means of displaying a disclaimer in compliance with FEC requirements would bring the FEC’s internet disclaimers up to speed with today’s technological advances in online advertising.

The rules, however, should support innovation by providing leeway on the type of technical mechanism that meet the full disclaimer requirements. The greater flexibility inherent in the rules, the more likely the rules will remain technologically relevant and followed. Innovation will lead to greater transparency.

Focusing on the rules regarding adaptive disclaimers, while the NPRM presents Alternative A and Alternative B, the Commission clearly “welcome[s] comments on any aspect” of the alternatives. In that spirit, IAB offers the following considerations.

¹² 83 Fed. Reg. at 12879.

¹³ Interactive Advertising Bureau Comment on REG 2011-02, at 2 (Nov. 10, 2017)

¹⁴ *Id.* at 12877.

A. When a Communication May Use a Technological Adaption

Under Alternative A, the determination of when a communication may use technological adaptations “is intended to be an objective one.”¹⁵

Because IAB and its member companies are committed to enhancing transparency and accountability in online political advertising, an objective standard provides the regulated community with clear, direct guidance. In that way, Alternative A’s objective approach has merit. We note agreement with the observation in the rulemaking that focusing on technological benchmarks (pixels, number of characters, etc.) to trigger the use of a technological adaptation is susceptible to technology development.¹⁶

One concern with the objective standards described in Alternative A is that as new technology develops, the Commission anticipates addressing the application of adaptive technology in the advisory opinion context.¹⁷ This risks reverting the application of these rules to the *ad hoc* use of Advisory Opinions this rulemaking seeks to avoid.

As the earlier discussion of the Self-Regulatory Principles of Transparency and Accountability make clear, the use of adaptive disclaimers can serve as a basis for greater disclosure and transparency. Promoting the use of adaptive technology should be encouraged, rather than relegated as an exception to the general rule. These alternative means of displaying a disclaimer do not change its content, but rather utilize technology to adapt a disclaimer’s delivery method to comport with a viewer’s modern-day expectations in the digital marketplace.

Such a change would align the Commission with the regulatory regimes in many states and codify the outstanding exemptions from the advisory opinion process. For example, these alternative disclaimers have been used by multiple campaign finance regulators in some form and include:

1. Roll-over displays of the disclaimer;¹⁸

¹⁵ 83 Fed. Reg. at 12874.

¹⁶ *Cf. id.* (This approach to determining when a communication cannot fit a required disclaimer—rather than by the particular size of the communication as measured by pixels, number of characters, or other measurement—is intended to minimize the need for serial revisions to Commission regulations as internet technology may evolve.”).

¹⁷ *Id.*

¹⁸ California and Washington both provide for rollover disclaimers under state law.

2. Click-paths to a landing page that includes a compliant disclaimer;¹⁹
3. Display of a disclaimer on social media homepages for paid posts from those accounts;²⁰ and
4. Other technological advances that incorporate “paid for by” language in internet advertising.²¹

B. How Adaptations Must Be Presented on the Face of the Advertisement

Under Alternative A, , hovering-over, voicing-over, rolling-over, providing a pop-up screen from, or hyperlinking to a landing page from the DAA’s transparency icon alone would be prohibited. Because DAA’s transparency icon has become the ubiquitous symbol for consumer transparency in the digital advertising ecosystem, requiring the payer’s name in addition to an indicator is unduly limiting.

Take, for example, the Commission’s disclaimer proposals applied to sample ads. Example 6, which is a vertical banner with an adapted disclaimer only, does not meet the requirements for Alternative A simply because the full name of the political advertiser is not shown.²²

But, under the DAA’s Self-Regulatory Principles of Transparency and Accountability, that indicator would link to either a relevant government database or a DAA-developed website, which would provide ad viewers with additional, comprehensive information about the political advertiser than a traditional disclaimer. And, given the ubiquity of the DAA’s transparency icon, ad viewers would readily adapt to relying on the icon for such information. Finally, with the DAA’s Accountability program measures in place, simply providing an easily recognizable indicator or symbol (or in DAA parlance, notice) should be sufficient. For this reason, Alternative B’s two tier approach may be more workable in practice.

¹⁹ This was approved in Advisory Opinion 2010-19 (Google).

²⁰ This was proposed as an alternative by the Democratic Commissioners in the Facebook Advisory Opinion proceeding and in an enforcement matter involving a disclaimer on a Twitter account (MUR 6911).

²¹ Facebook’s proposal of October 27, 2017 includes such a disclaimer, *available at* <https://www.facebook.com/facebook/videos/10156659531526729/>.

²² *Disclaimer Proposals Applied to Sample Internet Ads for REG 2011-02: Internet Communication Disclaimers and Definition of “Public Communication”* at 7, FED. ELECTION COMM. (May 10, 2018).

Regardless, relying on indicators is a technologically beneficial approach to address a lingering online concern: broken hyperlinks. Because the DAA will either link to the government page or a self-maintained website, it will ensure that political advertisers' information remains accessible.

IV. Moving Forward

IAB urges the Commission to move forward with its rulemaking so that it can establish clear, flexible, and simple rules for online advertisements. Given the stark differences in Alternatives A and B, and the possibility that the rules the FEC adopts may reflect a combination of the two, IAB urges the Commission to issue a further notice of proposed rulemaking with a single set of proposed rules. This would allow interested parties to provide further clarification and suggestions on that one proposal, and make it easier for the Commission to adopt a final rule that will withstand judicial review. While IAB appreciates the need for multiple options at this stage, there are too many different variations of how the alternatives may come together to allow commenters to know what the final rule will look like under the D.C. Circuit's "logical outgrowth" standard.²³

V. Conclusion

The IAB and its member companies are committed to enhancing transparency and accountability in online political advertising. We support the FEC issuing new rules to update the FEC's current disclaimer rules.

IAB believes the best way to ensure that the final rules provide the necessary regulatory flexibility without becoming technologically outdated, is to broadly support the use of adaptive technological mechanisms, which will provide (in a variety of ways) comprehensive disclaimers. Such technology should be embraced by the rules; not relegated as an exemption. Innovation is key to transparency.

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²³ *Env'tl. Integrity Project v. E.P.A.*, 425 F.3d 992, 996 (D.C. Cir. 2005).

The IAB appreciates the opportunity to comment on the Commission's NPRM. In addition to these written comments, IAB requests an opportunity to have a representative testify before the Commission, in person, at the June 27, 2018 public hearing.

Respectfully submitted,

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