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May 25, 2018

Federal Election Commission
Attn: Neven F. Stipanovic
Acting Assistant General Counsel
1050 First Street, NE
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**Re: Notice 2018-06; Internet Communication Disclaimers and Definition of
“Public Communication”**

Dear Mr. Stipanovic,

These comments are submitted by the undersigned counsel on behalf of the NRSC and NRCC. Both the NRSC and NRCC are national party committees, and both have many years of experience producing and distributing digital advertising. Both committees – and the candidates they represent – have always endeavored to include disclaimers on their online advertising consistent with Commission requirements and guidance. We offer the following comments on the Commission’s specific proposals and hope the Commission will consider two broader points as well.

First, among the many committees that are subject to the Commission’s regulations, we do not believe there is an actual problem of anonymous online advertising. There may be some confusion about *how* to place a disclaimer on certain communications, but we have not seen any evidence that committees treat the internet as a disclaimer-free zone. The regulated community will continue to abide by whatever disclaimer requirements are imposed, and, as is usually the case, the burdens of understanding and applying any new requirements will fall exclusively on those who already play by the rules. If successful, this rulemaking may provide clarity to the regulated community and perhaps produce more consistency in the way disclaimers are displayed online. However, no one should believe, or suggest to the public, that new disclaimer

regulations will have any impact whatsoever on the online postings of Russian or other foreign agents.

Second, disclaimer requirements have a very real impact on speech; a disclaimer is not “just disclosure” that is harmlessly attached to the speaker’s message without consequence. Disclaimers occupy time and space that would otherwise be devoted to the speaker’s substantive message. While it may be constitutionally permissible for the government to commandeer some small amount of a political speaker’s time and space in the interest of providing source and payment information to the public, this is still a burden on speech. After several years of operating under BCRA’s disclaimer requirements, the “National Republican Senatorial Committee” and the “National Republican Congressional Committee” found that their names did not fit on many smaller ads (including online ads) and consumed too much time in the audio portions of television and radio disclaimers. The committees addressed this problem by changing their legal names, and are now the NRSC and NRCC, respectively. The Commission should remain cognizant of the fact that the disclaimer requirements it imposes and enforces have an actual effect on speech.

I. The Commission’s Rulemaking Should Emphasize and Reiterate That “*Placed For A Fee*” Remains a Prerequisite for Internet Disclaimers

This Rulemaking reopens the definition of “public communication” at 11 C.F.R. § 100.26 for the “limited purpose” of considering whether the term “website” should be replaced with “internet-enabled device or application.” NPRM at 12,865. We have no objection to this clarification and do not think that it would change the law as it is understood by committees that produce and distribute digital advertising in various formats.

We urge the Commission to take this opportunity to reiterate that the term “public communication” *still* includes only Internet-based communications that are “*placed for a fee* on another person’s website or internet-enabled device or application.” This proposition seemed uncontroversial until recently when certain Commissioners began to seek ways to apply the disclaimer requirement more broadly than the very plain language of the existing regulation allows. *See, e.g.*, MUR 6729 (Checks and Balances for Economic Growth), Statement of Reasons of Vice Chair Ann M. Ravel (disclaimer rules should apply to ads placed for free on

YouTube).¹ Whether the Commission retains the existing definition of “public communication,” or adopts the new term “internet public communication,” we urge the Commission to take this opportunity to make clear to the regulated community that “*placed for a fee*” actually means what it says. The Commission should specifically reject the position that a video placed on YouTube, or other similar platform existing today, or which may be available in the future, where there is no placement fee, may still somehow qualify as a “public communication.” We hope that the Commission will incorporate into the Explanation and Justification of any Final Rule the NPRM language describing Alternative A that explains that “video posted for free on YouTube.com” is “not placed for a fee” and is “not a ‘public communication.’” NPRM at 12,871. This renewed agreement among the Commissioners would reassure the regulated community that it will not be subjected to further efforts to change the plain language of the disclaimer rules through enforcement actions.

II. The Commission Lacks Statutory Authority to Extend “Stand By Your Ad” Requirements to Internet Communications

The Commission should carefully consider whether it has the authority to extend the “stand by your ad” requirements beyond television and radio communications, as is proposed in Alternative A. 52 U.S.C. § 30120 is among the most precise provisions found in the Act, and carefully sets forth different disclaimer requirements for printed communications (newspaper, magazine, outdoor advertising facility, and mailing), and radio and television communications (communications [made] through any broadcasting station). *See* MUR 5526 (Graf for Congress), Statement of Reasons of Chairman Michael E. Toner, Vice Chairman Robert D. Lenhard, and Commissioners David M. Mason, Hans A. von Spakovsky, Steven T. Walther, and Ellen L. Weintraub at 2 (“FECA then establishes additional disclaimer requirements on a medium-by-medium basis for four categories of communications”).

The statutory “stand by your ad” provision is clear. An additional statement of approval or responsibility is required in communications “transmitted through radio” or “transmitted through television.” *See* 52 U.S.C. § 30120(d)(1), (2). With respect to candidate advertisements, the enforcement mechanism is the availability of the “lowest unit charge” advertising rate from

¹ While only Vice Chair Ravel signed the referenced Statement, two other Commissioners voted with her for unexplained reasons.

“broadcasting stations” that disseminate the candidate’s “television broadcast” or “radio broadcast.” See 47 U.S.C. § 315(b)(2).² There is absolutely no statutory ambiguity here, and where there is no ambiguity, there is no “‘implicit’ delegation to an agency to interpret a ‘statute which it administers.’” *Epic Systems Corp. v. Lewis*, 584 U.S. --- (2018), Slip. Op. at 19 quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 841, 844 (1984). There is no plausible argument to be made that the Commission may extend the “stand by your ad” requirements beyond broadcast communications as a “gap filling” measure under *Chevron*.

Internet communications are *not* “communications through any broadcasting station,” and they are *not* radio or television ads, no matter how much they may resemble radio or television ads. Through litigation, it has already been established that Internet communications are subject to the Act’s disclaimer requirements *not* because they are deemed “similar to” print or broadcast ads, but because “some” Internet communications fall within the broader category of “general public political advertising.” See *Shays v. FEC*, 337 F.Supp.2d 28, 67 (D.D.C. 2004) (“Congress did not expressly include the term ‘Internet’ in its statutory definition of ‘public communication,’ but it did include the phrase ‘any other form of general public political advertising.’ ... While all Internet communications do not fall within this descriptive phrase, some clearly do.”). Under the statute, the “stand by your ad” requirements very plainly do *not* apply to the “general public political advertising” category of communications.

Internet communications fall within the “general public political advertising” category, which is subject only to the general disclaimer requirements. In the absence of new statutory requirements, the Commission has no authority to extend the specific disclaimer requirements that apply to print, radio, and television communications to Internet communications. If the

² The legislative history is as clear as the statutory language with respect to the intended and actual scope of “stand by your ad” provision. Senator Collins, an original co-sponsor of the “stand by your ad” amendment, stated: “Candidates who run negative *television and radio ads* against their opponents should have to stand by their ads.” 147 Cong. Rec. S.2693 (March 22, 2001) (remarks of Sen. Collins) (emphasis added). As Senator Wyden explained when he offered the “stand by your ad” amendment to the McCain-Feingold legislation: “In order to qualify for the advertising discounts that Federal law requires candidates for Federal office receive, those candidates would have to personally stand by any mention of an opponent in a *radio or television advertisement*.” 147 Cong. Rec. S2692 (March 22, 2001) (remarks of Sen. Wyden) (emphasis added). In 2002, Senator Wyden added: “The stand-by-your-ad proposal that was included in the legislation we voted on today is straightforward. It says simply that to qualify for the special advertising discount given to candidates now for Federal office, those candidates have to personally stand by any mention of an opponent in a *radio or television ad* by placing a photo on the screen and standing he or she personally approved the *broadcast* or personally identify themselves in a *radio ad* and reading a statement saying they have approved the ad.” 148 Cong. Rec. S2174 (March 20, 2002) (remarks of Sen. Wyden) (emphases added).

Commission adopts Alternative A, it risks a court decision like it recently received in *Swallow*. See *FEC v. Swallow*, C.D. Utah April 6, 2018, Case No. 2:15-cv-439-DB, slip op. at 5 (“While it may, or may not, be a good idea to expand the reach of FECA in such a way, such expansion may happen only through an Act of Congress, pursuant to Article I of the United States Constitution. Such power does not exist in an independent agency comprised of six unelected commissioners.”).

The NPRM explains that “Alternative A is based on the premise that these advertisements are indistinguishable from offline advertisements that may be distributed on radio or television, broadcast, cable, or satellite in all respects other than the medium of distribution,” and “the proposition that the informational interest relied upon by the Supreme Court with respect to broadcast communications is equally implicated in the context of ... public communications distributed over the internet.” NPRM at 12,870. This premise may provide a logical way of approaching the issue, but this is not how Congress wrote the statute. Congress very plainly made distinctions according to the medium of distribution, and the Commission is not free to substitute its judgment on this issue. Similarly, the Supreme Court might agree with the stated proposition about the informational interest, but again, whether Congress *could* adopt Alternative A as legislation is not the relevant issue. The Commission does not have authority to rewrite Congress’s statutes, and the *Citizens United* decision did not create an exception to that very basic rule or grant the Commission any new powers.

The proposed expansion of “stand by your ad” to Internet communications is not new. The Senate sponsor of BCRA’s “stand by your ad” provision, Senator Wyden, proposed extending the “stand by your ad” requirements to other forms of communications, including the Internet, as early as 2004. See S. 2392, Political Candidate Personal Responsibility Act of 2004 (expanding “stand by your ad” requirements to printed media, internet communications, and prerecorded telephone communications). The more recently considered DISCLOSE Act also included an expansion of the “stand by your ad” requirements. The comments submitted by Members of Congress urging the Commission to extend “stand by your ad” through regulation should be viewed in this context. These Members are asking the Commission to do something that Congress has repeatedly declined to do since at least 2004. In fact, currently pending legislation (the Honest Ads Act) would extend the “stand by your ad” requirements to Internet

communications. If *Congress* wishes to alter the existing statutory regime to extend these requirements, *Congress* clearly knows how to do so.

For the same reasons, the Commission lacks authority to apply the specific disclaimer requirements that apply to print ads to “text and graphic public communications distributed over the Internet.” NPRM at 12,872. Alternative A, moreover, is selective in which of the “specific requirements” it would apply to online advertising, as it appears that the “printed box” requirement would *not* apply. Whether applied in whole or in part, the specific requirements set forth at 52 U.S.C. § 30120(c) apply only to “any printed communication.” In 2006, the Commission determined that “the term ‘printed communication’ in 2 U.S.C. § 441d(c) does not include communication on Internet pages. Hence, the additional disclaimer requirements of § 441d(c) do not apply to Internet pages.” MUR 5526 (Graf for Congress), Statement of Reasons of Chairman Michael E. Toner, Vice Chairman Robert D. Lenhard, and Commissioners David M. Mason, Hans A. von Spakovsky, Steven T. Walther, and Ellen L. Weintraub at 4; *see also* MUR 5672 (Save American Jobs Association, Inc.) and 5733 (Davis), Statement of Reasons of Chairman Robert D. Lenhard, Vice Chairman David M. Mason, and Commissioners Michael E. Toner, Hans A. von Spakovsky, and Ellen L. Weintraub at 3 (“Just as the ordinary meaning of ‘print’ does not include Internet pages ... it also does not include electronic mail.”). The statutory provision at issue has not been amended in the interim.

Alternative B, which “would require disclaimers on internet communications to be clear and conspicuous and to meet the same general content requirement as other disclaimers, without imposing the additional disclaimer requirements that apply to print, radio, and television communications,” is consistent with the Act, the court’s decision in *Shays*, and Commission precedent. The appropriate role of the Commission is to implement and enforce the law as it exists, and not to step in and act where Congress declines to do so. If Congress wants to expand the scope of the “stand by your ad” requirements, it can do so by adopting language similar to that found in the currently-pending Honest Ads Act.

III. The “Stand By Your Ad” Requirement Does Not Serve A Disclosure Interest and Should Not Be Part of a Disclaimer Rulemaking

As it considers whether to expand the “stand by your ad” requirements to Internet communications, the Commission should keep in mind that disclosure is *not* the purpose of the

“stand by your ad” requirement. The “stand by your ad” requirement does not provide viewers with information about the funding behind an advertisement, and it was never represented as a disclosure provision by its sponsors and proponents.

Proponents of the “stand by your ad” requirement were not motivated by a desire to promote disclosure and transparency. Rather, they believed that by forcing ad sponsors to explicitly state that they approved, or are responsible for, their own advertisements, they could deter negative advertising and “elevate the tone” of political discourse. The “stand by your ad” requirement was first introduced in 1999 as the Political Candidate Personal Responsibility Act. The bill’s Senator sponsor, Senate Wyden, explained the proposal as follows:

Mr. President, today I am introducing legislation, along with Congressman WALDEN in the House of Representatives, that would fight the scourge of negative political campaigns with the simple yet powerful tool of accountability. If candidates choose to run for office by disparaging their opponents rather than standing on their own records and beliefs, they should at least be expected to take responsibility for the ad campaigns that they run. Under this legislation, there would be meaningful financial penalty—in the form of higher advertising rates—for those who fail to do so.

For me, this bill arises out of unpleasant personal experience. I was elected to this body in a special election against the man I am now proud to call my friend and colleague, GORDON SMITH. That campaign was the nastiest, most negative, least edifying political season that my state has ever been through. The unabashedly negative ads that both of our campaigns put on the air were a sour departure from Oregon’s tradition of responsible, thoughtful politics.

What I learned all too well in that campaign is that negative politics corrupts everything that it touches. It harms not only its target, but its sponsor as well. Negative ads are one of the biggest reasons for the cynicism and even disgust that so many Americans feel toward the political process. They cheapen the very institution of democracy.

There’s no way, of course, to mandate a sense of shame or legislate an end to negative ads. But in an era when elections are determined more and more by television and radio advertising, it is not too much to ask that candidates be held responsible for the statements they make in their ads.

Under current campaign law, broadcasters are required to give qualified candidates for federal office their lowest price for ads, what is known as the lowest unit broadcast rate. In order to qualify for this rate, candidates must comply with federal campaign finance laws, and include proper disclaimers in the

ad, among other regulations. The Political Candidate Personal Responsibility Act would attach two additional requirements to the discounted ad rate. The first requirement is that for both television and radio advertisements, the lowest unit rate will only be available if a candidate, when referring to his or her opponent, makes the reference him or her self. Radio advertisements must also contain a statement by the candidate in which the candidate identifies him or herself and the office for which the person is running. The second requirement is that in any television or radio ad where a candidate makes reference to his or her opponent, the candidate must appear or be heard for at least 75 percent of the broadcast time. If a candidate chooses to air an advertisement that does not comply with these requirements, he or she will be ineligible to receive the lowest unit rate for a period of 45 days in a primary and 60 days in a general election.

In other words, if you want the benefits of discounted broadcast time, you can't make disparaging statements that you aren't willing to say yourself. No more hiding behind grainy photographs, ominous music, and anonymous announcers.

Ultimately, one of our greatest responsibilities as elected officials is to encourage greater public participation in all levels of the political process. Campaign activities should not only represent the views of the candidates, but they should also encourage voters to participate in the democratic process. The growing negative trend of campaign advertisements degrades the process and discourages people from becoming involved.

145 Cong. Rec. S. 6066 (May 26, 1999) (remarks of Sen. Wyden).

In 2001, Senator Wyden's "stand by your ad" legislation was offered as an amendment to the McCain-Feingold bill. Senator Wyden explained that by linking the "stand by your ad" requirement to the availability of the lowest unit charge advertising rate, "in this country we are no longer subsidizing dirty campaigning." 147 Cong. Rec. S.2697 (March 22, 2001) (remarks of Sen. Wyden). In 2002, Senator Wyden again spoke in favor of the provision and said "I believe the stand-by-your-ad proposal, which holds candidates accountable ... is going to help clean up campaigns. It is going to help make candidates more accountable and make the politics and political discourse in this country more positive and more open. 148 Cong. Rec. S.2175 (March 20, 2002) (remarks of Sen. Wyden).

There is no discussion in the NPRM about the underlying purpose of the "stand by your ad" requirement, and there is no discussion of the supposed "disclosure" purpose it serves. From 1999-2002, the proponents of "stand by your ad" requirements were honest and forthright about their intentions; they never sought to disguise the requirement as a simple "disclosure" provision.

“Stand by your ad” statements do not appear to serve any of the governmental interests that are generally recognized as justifying campaign finance disclosure requirements. The commonly cited “informational interest” is already served by the “paid for by” disclaimer requirement. “[F]ight[ing] the scourge of negative political campaigns” has never been recognized as a valid governmental interest and there is no justification for expanding Congress’s requirement beyond the statutory confines that Congress imposed.

IV. Small Items and Adapted Disclaimers

Any rule that allows for the use of “adapted disclaimers” on small, character- or space-limited online advertisements should serve the basic, underlying goal of providing *effective* disclaimers. An “effective disclaimer” is one that conveys the information required by statute in a manner that is visible or easily accessed.

Both Alternative A and B recognize that the “small items” and “impracticable” exceptions have a place in the world of online advertising. This is a welcome acknowledgement given that in recent years some Commissioners have taken the position that these exceptions either do not or should not apply in the digital world.³ Both alternatives acknowledge that those exemptions very plainly *do* apply to digital advertising, and the adoption of either would make clear that earlier objections to applying the exceptions to certain online advertisements were simply objections to the end results (*i.e.*, under existing rules, if the exemption applies, then no disclaimer is required). Both Alternative A and B would change the current end result and require an adapted disclaimer instead.

Under Alternative A, an “adapted disclaimer” would be required on “internet advertisements that cannot, due to external character or space constraints, practically include a full disclaimer on the face of the communication.” NPRM at 12,874. Alternative A would allow the adapted disclaimer when the full disclaimer “cannot fit” “due to external character or space constraints.” In other words, the proposed “adapted disclaimer” would be used where the small items and impracticable exceptions apply. *See* NPRM at 12,874 (“Alternative A’s reference to

³ *See, e.g.*, Advisory Opinion Request 2013-18 (Revolution Messaging, LLC), Statement for the Record by Vice Chair Ann M. Ravel and Commissioners Steven T. Walther and Ellen L. Weintraub at 2 (“Neither exception applies here, as there are no physical or technological limitations which prevent the provision of a complete disclaimer. Moreover, the ‘small items’ exception ... is a narrow exception which was intended to encompass only advertising on physical items...”).

‘external character or space constraints’ is intended to codify the approach to those terms as the Commission has discussed them in the context of the small items and impracticable exceptions”). We believe this could serve as a reasonable, baseline standard. The NPRM indicates that “the determination of whether a public communication ... cannot fit a full disclaimer is intended to be an objective one.” *Id.* Under Alternative B, the “adapted disclaimer” would be used “when a full disclaimer would occupy more than a certain percentage of any internet public communication’s available time or space.” NPRM at 12,874. Alternative B proposes a 10% bright-line threshold.

In our view, Alternative A leaves too much room for subjective judgments while Alternative B may be too hyper-technical. Under Alternative A, we fear situations where either the Office of General Counsel or Commissioners will find a violation because the committee might have done something different to make the disclaimer “fit.” Disputes will also arise over the “clearly readable” concept. For instance, the disclaimer in Example 3 appears to be “clearly readable” and should satisfy any disclaimer requirement. Under Alternative B, there is likely only a negligible, and perhaps indiscernible, difference between 9% and 11% of an ad in the context of small online advertisement – yet, that negligible difference would have legal consequence. If disclaimer compliance is reduced to counting pixels, then the broader objective of providing an effective disclaimer has been sacrificed for rigid certainty.

In cases where an “adapted disclaimer” may be used, we agree with Alternative B that the payor should be able to use a clearly recognized abbreviation or acronym. As noted above, both the NRSC and NRCC changed their names in order to use an acronym in disclaimers. Many organizations use abbreviations or acronyms that are well-known and easily recognized. Requiring a small advertisement to state that it is “Paid for by the American Association of Retired Persons” defeats the purpose of allowing an “adapted disclaimer” in the first place; “Paid for by AARP” may even be clearer. The payor’s full name is only one click away via the “indicator.” If the Commission is willing to permit an online advertisement to include an “adapted disclaimer” in the first place – with all of the statutorily required disclaimer information available through the “indicator” or another one-click method – then the Commission has already conceded that the “informational value” conveyed by disclaimers is not limited to “the face of the communication.” If someone is unfamiliar with an abbreviation or acronym, and actually

cares who paid for the advertisement, that person can simply click through to view the required information.

Lastly, Alternative B provides a disclaimer exception where it is not possible to include either a full or adapted disclaimer. Alternative A does not provide any such exception and appears to leave the would-be speaker with three choices: (1) do not speak at all; (2) speak in a different manner that allows for a disclaimer; or (3) speak in the preferred manner while violating the disclaimer requirements. Whether constitutional or not, the government *should not* force any speaker to choose from the three options in the paragraph above. The government *should* recognize that the First Amendment right of the speaker to speak in his or her chosen manner is far more important than, and in fact greatly outweighs, the government's interest in requiring a disclaimer on a tiny online advertisement. If the nation can survive decades of water tower advertising without disclaimers, then it can survive the occasional small internet ad without a disclaimer.

We appreciate the opportunity to provide the Commission with comments in this matter. We request the opportunity to participate in the Commission's public hearing and believe the Commission may benefit from hearing from our respective Internet Technology directors.

Sincerely,



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