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# Coolidge-Reagan Foundation

To Defend, Protect and Advance Political Speech



"Free speech. It's just that simple."

May 24, 2018

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

RE: Coolidge-Reagan Foundation's Public Comment for Proposed Regulation  
Concerning Internet Communication Disclaimers, REG 2011-02

Dear Mr. Stipanovic,

Please accept this comment on behalf of the Coolidge-Reagan Foundation ("CRF") concerning the FEC's Notice of Proposed Rulemaking ("NPRM") entitled, *Internet Communication Disclaimers and Definition of "Public Communication,"* Reg. 2011-02, 83 FED. REG. 12,864 (Mar. 26, 2018).

## **Background**

The Internet is one of the most important channels of political speech for the American people in the Twenty-First Century. E-mail, webpages, social media platforms such as Facebook and Twitter, and online video platforms such as YouTube provide popular, free or low-cost, widely accessible vehicles for engaging in political speech, disseminating information, and exchanging political information and ideas. These channels of political communication have allowed ordinary Americans to communicate and participate in the political system on previously unimaginable scales. Expanding disclaimer requirements threatens to burden and chill such political speech, strangling true grassroots political activity and relegating online political communications only to those able to afford specialized counsel to ensure compliance with the FEC's byzantine disclosure requirements concerning size, font, content, duration, and location. *See Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010). The FEC should allow this unique, ubiquitous channel of political communication to continue to flourish, rather than imposing additional requirements that will make it more difficult for Americans to freely express their views online.

The Commission is considering proposed amendments to expand the range of Internet-based "public communications" to which disclaimer requirements would apply, and modifying the way those requirements apply to Internet-based communications. 83 FED. REG. at 12,864. Federal law defines "public communication" as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising." 52

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U.S.C. § 30101(22). Current FEC regulations reiterate this definition, but further explain the “general public political advertising” component of the definition “shall not include communications over the Internet, except for communications placed for a fee on another person’s Web site.” 11 C.F.R. § 100.26.

The Commission originally had decided to completely exempt Internet-based communications from its disclaimer requirements. *See* FEC, *Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 FED. REG. 49,064, 49,071-72 (July 29, 2002). It explained Congress omitted any Internet-related channels of communication from the Bipartisan Campaign Reform Act’s (“BCRA”) definition of “public communication,” though other provisions of the statute expressly references the “Internet” and “World Wide Web address[es].” *Id.* at 49,072. BCRA’s legislative history likewise lacked any indication “Congress contemplated including the Internet in the definition of public communication.” *Id.* The Commission further recognized, “[T]here are significant policy reasons to exclude the Internet as a public communication.” *Id.* It saw no “threat of corruption” in a medium that “allows almost limitless, inexpensive communication across the broadest possible cross-section of the American population.” *Id.* Unlike other forms of communication which are “financially prohibitive for the general population,” the Internet is a “bastion of free political speech, where any individual has access to almost limitless political expression with minimal cost.” *Id.* Regulating Internet-based political speech, the Commission concluded, would therefore impose much more substantial burdens on political dialogue by ordinary Americans than regulation of television and radio advertisements, with very little corresponding benefit.

Following the D.C. District Court’s ruling in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff’d* 414 F.3d 76 (D.C. Cir. 2005), the Commission expanded its definition of “public communication” to include “communications placed for a fee on another person’s Web site.” FEC, *Internet Communications*, 71 FED. REG. 18,589, 18,593 (Apr. 12, 2006). The Commission emphasized it was not “regulat[ing] the vast majority of the American public’s activity on the Internet . . . . Everyday activity by individuals, even when political in nature, will not be affected by the changes made in this rulemaking.” *Id.* at 18,589. The Commission reiterated the Internet is “a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach.” *Id.* Its “accessibility, low cost, and interactive features make it a popular choice for sending and receiving information.” *Id.* The Commission added, “[T]he vast majority of the general public who choose to communicate through the Internet can afford to do so.” *Id.* Even paid advertising “will often be below the cost of advertising in some other media.” *Id.*

Federal regulations contain two main exceptions to disclaimer requirements that often apply to Internet-based communications. First, the “small items” exception provides disclaimers need not appear on “[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed,” 11 C.F.R. § 110.11(f)(1)(i). Under this exception, brief, character-limited political communications electronically conveyed via SMS (“short message service”) need not contain disclaimers. *Target Wireless*, A.O. 2002-09 (Aug. 23, 2002). Though the FEC has failed to reach consensus on several subsequent Advisory Opinion requests, this exception would equally apply to brief, character-limited advertisements on webpages.

Second, the “impracticability” exception specifies a communication need not contain a disclaimer where including one would be “impracticable,” as with “[s]kywriting, water towers,

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[and] wearing apparel,” *id.* § 110.11(f)(1)(ii). Several Commissioners concluded this exception applied to Google’s AdWords program, in which each advertisement was comprised of a 25-character headline, accompanied by two lines of text and a world wide web address that collectively could not exceed 70 characters. Concurring Statement of Chairman Matthew S. Petersen, *Google, Inc.*, A.O. 2010-19, at 1 (Oct. 8, 2010); *see also* Statement for the Record by Commissioner Caroline C. Hunter, A.O. 2010-19, at 6 (Dec. 17, 2010); *Revolution Messaging*, A.O. 2013-18 (Sept. 11, 2013); *Facebook*, A.O. 2011-09 (Apr. 26, 2011).

## **The Commission’s Proposed Regulations**

The pending NPRM contains two main proposed amendments to Commission regulations governing Internet-based political communications. First, the Commission seeks to expand the definition of “public communication,” presently codified at 11 C.F.R. § 100.26, to also include communications placed for a fee on another person’s “internet-enabled device or application.” 83 FED. REG. at 12,864. The NPRM explains this amendment would extend disclaimer requirements to political communications that appear on, or are made through, “mobile applications (‘apps’) on smartphones and tablets, smart TV devices, interactive gaming dashboards, e-book readers, and wearable network-enabled devices such as smartwatches and headsets.” *Id.* at 12,865; *see also id.* at 12,868 (listing other Internet-based means of communication). This sweeping definition would include Internet-based communication services such as Facebook and Twitter, since both services are principally utilized through “apps” when used on cellular telephones or some tablets such as the market-dominant Apple iPad and Samsung Galaxy.

Second, the Commission also is considering modifying disclaimer requirements currently codified at 11 C.F.R. § 110.11, as they apply to Internet-based communications. 83 FED. REG. at 12,865. It is considering two main alternatives. Alternative A would apply all disclaimer requirements that presently apply to printed communication to text and graphics that appear on the Internet, and all requirements that presently apply to radio and television communications to audio and video distributed over the Internet. *Id.* at 12,869. Alternative B would create new disclaimer requirements specifically for Internet-based communications, requiring that disclaimers be “clear and conspicuous” and “meet the same general content requirement as other disclaimers” without the additional requirements that apply specifically to audio, radio, and print communications. *Id.* This alternative also allows speakers to fulfill disclaimer requirements for Internet-based communications through “adapted disclaimers” that take into account the limitations of the medium, and completely exempt them from any disclaimer requirements when technological limitations make them impossible. *Id.*

## **Recommendations**

CRF respectfully recommends the Commission modify its proposed regulations to reduce the burden its expanded disclaimer requirements would impose upon Internet-based political communications, avoid chilling political speech, and fully take advantage of the flexibility modern technology offers.

1. **Maintain Internet Freedom**—The Commission should reconsider the possibility of maintaining the status quo and not adopting either alternative. Creating new requirements for Internet-based political discourse will have a chilling effect on ordinary citizens who will be unsure whether their actions will run afoul of federal law. The Internet has radically democratized

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opportunities for political communication. Even if federal regulation is appropriate for expensive means of communication limited primarily to sophisticated actors, such as television advertisements or large scale paid internet communications, it should resist the temptation to further regulate this critical channel of communication available to *everyone*. The marketplace of ideas and free debate, rather than Government regulation, are the best means of ensuring the public receives the information it needs to assess political candidates, parties, and issues.

2. **Require Case-by-Case Evaluation of Internet-Based Technologies**—In the event the Commission decides to impose additional regulations, it should reject the proposed expansion of the definition of “public communication.” The proposed amendment would automatically extend disclaimer requirements to any “internet-enabled device or application.” 83 FED. REG. at 12,864. With this sweeping expansion, as new forms of communication evolve or “smart” technologies develop, federal regulation will automatically be expanded to them. If the Commission’s regulatory scheme proves unduly burdensome, chilling, costly, or impractical, the onus is on speakers to seek subsequent amendments or exemptions. Rather than presumptively extending federal regulation to all future technology indefinitely, the Commission should continue its current approach of separately considering each various method of communication to determine whether to extend the definition of “public communication” to it. The Commission already has determined paid advertisements on websites should be included within the definition of “public communications.” 11 C.F.R. § 100.26. The Commission should err on the side of liberty and assess each other new form of communication or technology to confirm it is appropriate for regulation and continue to amend § 100.26, as necessary, to keep up with those future developments. CRF respectfully offers this same comment concerning the proposed definition of “internet public communication” in the Commission’s proposed Alternative B. *See* 83 FED. REG. at 12,869.

3. **Grant Speakers Additional Flexibility Through a Modified Version of Alternative B**—In the event the Commission decides to adopt new regulations, it should opt for Alternative B. Alternative A mechanically applies existing regulations for print, radio, and television communications to the Internet. None of those regulations were crafted, however, with regard to unique technological limitations various Internet-based channels of communication may present. Rather than simply shoehorning existing regulations into a fundamentally different context, the Commission should instead adopt better tailored, more flexible rules that do not impose substantial obstacles for speakers as new forms of communication evolve. Alternative B provides such a greater degree of flexibility. The Commission should consider expressly specifying Alternative B’s standard may be satisfied if a communication displays or contains an audio recitation of the text required only by 11 C.F.R. § 110.11(b), (c)(1), and (d), subject to the exemptions in § 110.11(e)-(f), to appear for at least four seconds in the case of videos.

4. **Make Alternative Disclaimer Requirements Less Burdensome**—Alternative B’s most important feature is its inclusion of a safe harbor provision, allowing speakers to use alternative disclaimers when the standard disclaimer would occupy more than 10% of the time or space of the underlying communication. Adopting this policy would ensure the Commission does not unduly burden speakers, interfere with their communications, or increase the cost of their communications. At a minimum, the Commission should allow Internet-based communications to contain a URL or other link to a page containing the full disclaimer otherwise required by federal regulations. Ideally, however, the Commission should permit a speaker to satisfy alternative disclaimer requirements by making the Internet-based advertisement or communication as a whole

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“clickable,” so that it links to a webpage containing the complete statutorily required disclosure, rather than requiring the speaker to include additional specific text in the communication itself.

5. **Create a Safe Harbor for Small-Scale Activities Within the Definition of “Internet Public Communication”**—Rather than defining “Internet public communication” in Alternative B as including all communications placed for a fee on a webpage or “internet-enabled device or application,” the definition should be slightly narrowed to include only communications placed for a fee in excess of some specified amount of money (for example, \$1,000 each, or a total of \$2,500 for all such communications by a speaker). The Commission should exercise its broad discretion to excuse low-level, commonplace activity of the sort ordinary Americans and grassroots groups would engage, to minimize both the chilling effect of the regulations, the complexity of engaging in political communications for ordinary Americans, and the likelihood that substantial numbers of people will inadvertently run afoul of the law. Setting a fairly low threshold will ensure that minor, occasional, small-scale communications, of the sort that neither raise a risk of corruption or unfairly swaying a federal election, are exempt from disclosure requirements, while such requirements still apply to larger, more sophisticated, more widely distributed communications of the sort that *actually* raise substantial concerns. Creating such a safe harbor will help preserve the Internet’s unique role as a broadly accessible channel for political discourse, debate, and communication.

## Specific Responses

CRF respectfully offers the following responses to the Commission’s specific proposals:

1. *Proposed Disclaimer Requirements for Communications Distributed Over the Internet—Organization* (83 FED. REG. at 12,869)—The Commission should adopt Alternative B’s definition of “internet public communication,” but replace the reference to communications placed for a fee on another person’s “internet-enabled device or application” with specific references to particular technologies.

2. *Disclaimer Requirements for Video and Audio Communications Distributed Over the Internet* (83 FED. REG. at 12,869)—The Commission should adopt Alternative B’s disclaimer requirements for Internet-based video and audio communications. Rather than mechanically attempting to shoehorn the Internet, with its diverse methods of sending and receiving messages, into existing regulations for audio, video, and print communications, Alternative B gives speakers flexibility to tailor their disclaimers to the unique features and limitations of each Internet-based medium through which they communicate. As the NPRM itself recognizes, there is a “nearly infinite range . . . of possible combinations of hardware, software, add-ons, screen sizes and resolutions, individualized settings, and other factors . . . [that] can affect the display of a political communication. 83 FED. REG. at 12,871 (quoting Coolidge-Reagan Foundation, Comment at 5 (Nov. 8, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358499> (alterations in original)). Alternative B requires speakers to satisfy the fundamental requirement of providing a “clear and conspicuous” disclaimer without having to satisfy other regulatory provisions that might impose undue burdens in unforeseen ways.

3. *Disclaimer Requirements for Text and Graphic Communications Distributed Over the Internet* (83 FED. REG. at 12,872)—For similar reasons, the Commission should adopt Alternative B’s disclaimer requirements for Internet-based text and graphic communications.

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4. *Adapted Disclaimers for Public Communications Distributed Over the Internet* (83 FED. REG. at 12,873)—The Commission should adopt Alternative B’s approach, under which an Adaptive Disclaimer is permitted when a full disclaimer cannot fit on the face of a text or graphic internet communication, or would occupy more than 10% of an internet public communication’s available time or space. Disclaimers are generally permissible because they are small, limited, brief components of communications. Alternative B ensures full disclaimers do not come to swamp or subsume a substantial part of the underlying political communication. This alternative balances the interests of speakers in effectively conveying their message despite space, time, or technological constraints, with the interests of the public in accessing information concerning the speaker.

5. *How Adaptations Must Be Presented on the Face of the Advertisement* (83 FED. REG. at 12,875)—The Commission should adopt a variation of Commission B’s approach, under which any Adapted Disclaimer may be a URL containing the address to a webpage containing all the information contained by the new disclaimer requirement. The Commission could adopt a variation of this proposal, allowing a URL to constitute an entire Adapted Disclaimer when the URL is substantially comprised of, or otherwise conveys, the speaker’s name or acronym. The Commission should also consider instead allowing a speaker to simply make the advertisement or communication as a whole “clickable” (such as, for example, designating all of it as a hypertext link), so that it links to a webpage containing the complete statutorily required disclaimer. This suggestion is based on Florida law, which provides a successful model for accepting “clickable” disclosures. *See* FLA. STAT. § 106.143(10)(b)-(c). This alternative is preferable to the draft’s current proposal, since it does not burden speakers’ communications by requiring them to include additional unnecessary content in the advertisements or communications themselves. Any interested listener or viewer can see all of the statutorily required disclaimer information for an advertisement or communication simply by clicking anywhere on it.

6. *Adaptations Using One-Step Technological Mechanism* (83 FED. REG. at 12,877)—The Commission should adopt Alternative B’s approach for substantially the reasons set forth above in #5.

7. *Examples of Technological Mechanisms in Adapted Disclaimers* (83 FED. REG. at 12,878)—CRF would again urge the comment set forth above in #5, under which any Adapted Disclaimer may be a URL containing the address to a webpage containing all the information contained by the new disclaimer requirement.

8. *Proposed Exceptions to Disclaimer Requirements for Internet Public Communications* (83 FED. REG. at 12,879)—CRF respectfully urges the Commission to adopt Alternative B; this is the most critical part of the Commission’s proposal. Moreover, the Commission must extend this exception to clarify a disclaimer must be visible or audible only when an advertisement or communication is displayed or presented under the circumstances the speaker primarily intended, so long as the speaker was acting reasonably and in good faith. In other words, the disclaimer requirement should be deemed satisfied so long as the disclaimer is visible or audible on the type of device through which the speaker primarily intended to communicate, through the program through which the speaker primarily intended the communication to be conveyed, and under the settings the speaker intended viewers to use. Speakers should not be subject to administrative, civil, or criminal liability so long as they have made a reasonable, good-

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faith effort to comply with Disclaimer or Adapted Disclaimer requirements. The Commission's proposed exception—particularly with this additional modification—would modernize the “small items” and “impracticability” doctrines, providing clear protection for speakers who communicate through the Internet. As noted earlier, applying disclaimer requirements to Internet-based communications provides virtually limitless opportunities for baseless, partisan attacks against ideological opponents when a particular, unpredictable combination of hardware, software, and settings on a particular device unexpectedly renders a disclaimer unviewable, illegible, or incomplete. It is impossible to test every communication on every possible medium, from a smart watch to a big-screen television, at vastly different resolutions, with different browsers and operating systems. Speakers should ensure their communication or advertisement contains a disclaimer when viewed, heard, or read under the circumstances the speaker reasonably intended in good faith, rather than allowing unusual or unforeseen circumstances to render a disclaimer or Adapted Disclaimer incomplete.

## **Conclusion**

The Coolidge-Reagan Foundation respectfully suggests it is unnecessary to impose additional regulations on Internet-based communications at this time. The Internet is a low-cost, ubiquitous, pervasively democratized channel of political discourse that has fundamentally reshaped political debate in our nation. Additional regulations threaten to both chill grassroots groups' use of paid political communications over the Internet and increase their costs, placing them out of reach of small activist organizations and local political party committees.

To the extent the Commission fails to show principled, regulatory restraint and allow free speech to remain free, the Commission should adopt Alternative B, with the following modifications:

- Instead of referring to “internet-enabled device[s] or application[s]” in Alternative B's definition of “internet public communication,” identify specific technologies that will be subject to the disclaimer regulations, to allow the Commission to consider the extent to which they apply to various media or technologies on a case-by-case basis.
- The Commission should adopt a safe harbor for small-scale communications by defining “Internet public communication” as including all communications placed for a fee in excess of a specified amount (potentially \$1,000 each, or \$2,500 in the aggregate of all such activity) on a webpage or “internet-enabled device or application.”
- Any Adaptive Disclaimer requirement should be satisfied by including a URL to a webpage containing the information required by the applicable disclaimer requirement. Alternatively, a URL should be deemed to satisfy the Adaptive Disclaimer requirement when it is substantially comprised of, or otherwise conveys, the speaker's name or acronym. Ideally, however, the Commission should permit a speaker to satisfy alternative disclaimer requirements by simply making the Internet-based advertisement or communication as a whole “clickable,” so it links to a webpage contains the complete statutorily required disclosure, without adding any additional text.
- Alternative B should specify a disclaimer must be visible or audible only when an advertisement or communication is displayed or presented under the circumstances the speaker

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primarily reasonably intended in good faith. Speakers should not be subject to administrative, civil, or criminal liability so long as they have made a reasonable, good-faith effort to comply with Disclaimer or Adapted Disclaimer requirements.

## Testimony

I wish to testify in person on behalf of CRF at the hearing on June 27, 2018. I am happy to provide any further information or assistance you may require. Thank you for your time.

Sincerely,

/s/ Dan Backer

Dan Backer, Esq  
Counsel  
Coolidge-Reagan Foundation