

Spot-On is submitting comments in response to NPRM Reg. 2011-02 (Internet Communication Disclaimers) and requesting time to speak to the Commission at its public hearing on this matter.

Please feel free to contact us at the address below.

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# **SPOT-ON<sup>®</sup>**

**POLITICAL ADS and ANALYTICS**

*Response to Federal Election Commission  
NPRM Reg. 2011-02 (Internet Communication Disclaimers)*

*May 25, 2018*

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## **Spot-On Response FEC NPRM Reg. 2011-02 (Internet Communication Disclaimers)**

**May 25, 2018**

Spot-On is responding to the Federal Election Commission Notice of Proposed Rulemaking (NPRM) on [REG 2011-02 \(Internet Communication Disclaimers\)](#). We are also requesting time to speak at the June 27, 2018 FEC hearing on this issue.

Based in San Francisco, CA, Spot-On is a cloud-based ad buying service specializing in political and advocacy efforts. Our firm has been in business since 2008. We specialize in buying directly from media outlets with an emphasis on high impact visually 'rich' media placements on well-read local news outlets.

We also have extensive experience buying and placing ads on multiple platforms: audio, video, mobile and desktop. We maintain strong business relationships with popular vendors and third-party resellers and buying platforms. Our customers run the gamut of those involved in political speech at all levels of political activity: Local, state, regional and federal.

Since Spot-On is a vendor - not a strategy or consulting firm - our comments to the commission are narrowly focused on questions where we believe we have expertise.

To begin, we'd like to make a few comments on the overall online ad buying climate and how it's changed in the months since the Commission and Congress began looking into the activity surrounding the 2016 election.

Over the past year, a series of self-regulating proposals have been made by various online entities. While this is a laudable trend that recognizes the role that lax oversight of online ad buying had in the 2016 election, some aspects are troubling.

In short, publishers and platforms have started setting their own rules for political and advocacy speech advertisements without regard for the protected nature of political speech and with an eye more on preserving their corporate image or brand rather than public service.

For instance, the music site, Spotify, a Swedish company, doesn't take 'negative' ads but it has, as far as we've been able to determine, no written

policies on this. Spotify will take ‘positive’ ads from everyone but, again, we haven’t been able to get a determination.

It’s not just the newcomers. The online arm of the cable channel, CNN.com won’t take ads for political entities funded by tobacco companies. However CNN.com is happy to take ads on that same topic if the funding doesn’t come from a tobacco company. That is a *de facto* endorsement of one form of political speech over another. Pandora uses California state laws as guidance for the disclaimers it requires – even for ads that run in other states. The Los Angeles Times and its former owners tronc have repeatedly asked Spot-On to prove we have permission to use photographs of elected officials, even in endorsement ads.

These policies are not being crafted in a vacuum. A look at the larger context is also warranted. Spotify’s recently decided to limit “hate” campaigns<sup>1</sup>. Facebook has created a list of advocacy efforts it will consider political speech<sup>2</sup> and is asking news outlets to label their stories as political<sup>3</sup>.

These are noble, but misguided efforts. As the commission and anyone reading this filing could attest political speech is subjective. We may all agree today on “hate” speech but tomorrow that judgement might change. In recent Congressional hearings, Sen. Ted Cruz<sup>4</sup> and Rep. Trey Gowdy<sup>5</sup>, among others, expressed concerns about how Google, Facebook and Twitter – all self-described platforms - evaluate and overseeing the placement of political advertising and speech.

Lawmakers are right to be troubled. The political speech and ad policies we’ve seen are often arbitrary, written by corporate executives more

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<sup>1</sup> New York Times, “Spotify Cuts R. Kelly Music From Playlists, Cites New Policy”  
<https://www.nytimes.com/aponline/2018/05/10/us/ap-us-r-kelly-spotify.html>

<sup>2</sup> DigiDay, “Facebook’s Issue Ads Policy Adds Barrier to Brands Jumping on Social Movements.” <https://digiday.com/marketing/facebook-ads-policy-adds-barrier-brands-jumping-social-movements/>

<sup>3</sup> Bloomberg, “Facebook Rethinks News Organizations as Political Advertisers”  
<https://www.bloomberg.com/news/articles/2018-05-18/facebook-to-include-news-organizations-in-political-ad-database>

<sup>4</sup> YouTube, “Sen. Cruz Questions Mark Zuckerberg on Alleged Political Bias at Facebook – April 10, 2018” <https://www.youtube.com/watch?v=-VJeD3zbZZI>

<sup>5</sup> YouTube, “Rep. Gowdy Questions Facebook on Ads”  
[https://www.youtube.com/watch?v=R5BejNo\\_614](https://www.youtube.com/watch?v=R5BejNo_614)

interested in protecting their brands and “user experience” than in hewing to traditional media’s attempt to play a neutral role in political discourse.

As Spot-On looks to the future, we see a world where TV stations and channels – long the backbone of political campaign advertising efforts – create internet-delivered streaming services without consistency or much thought about First Amendment rights or obligations. Those rules may well, as Sen. Cruz and Rep. Gowdy have pointed out, discourage or silence voices not amenable to corporate branding or policy goals.

This trend is complicated by the porous nature of online ad sales which has been accurately and thoroughly described by other commenters.<sup>6</sup> We will discuss our concerns about the black box nature of these transactions below in the context of the use of the “icon” or “badge” label for political ads sales, a trend we find equally troubling.

Below are Spot-On’s responses to questions posed by the Commission in its NPRM where we feel we can make the most valuable contribution to this discussion.

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*- Are the different degrees of First Amendment protection afforded political speech as opposed to commercial speech relevant to any consideration of other agencies’ disclosure regimes?*

Spot-On has suggested in other forums that the use of voter data to target and focus ads on specific types of voters would be a ‘trigger’ to help platforms and publishers better supervise the sale and display of online advertising. We envision this use, which is ubiquitous for almost every sort of politically oriented ad, as a starting point that could create a framework in which states and the FEC could determine appropriate rules as technology changes in the future. A means of evaluating ad placement that looks at the use of a particular kind of data, rather than a particular kind of ad or ad format would mean disclosure was based not on speech but on behavior or intention. This metric is more in keeping with the intent of the advertiser, not the reaction of the voter.

This scenario could entail involvement by the Federal Trade Commission. The FTC has a history of looking at the use of data for online ad placement and has some domain expertise in evaluating the use of data in advertising placement.

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<sup>6</sup> “Digital Deceit, The Technology Behind Precision Propaganda on the Internet” by Dipayan Ghosh and Ben Scott, January 2018.

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- *The Commission requests comment on all elements of both proposals [Alternatives A and B]. The two proposals need not be considered as fixed alternatives; commenters are encouraged to extract the best elements of each, or suggest improvements or alternatives, to help the Commission fashion the best possible rule.... Are the proposed definitions sufficiently broad to encompass new technologies? Are they platform-neutral? Should the definition of "internet public communication" include a reference to virtual reality, social networking, or internet platforms?*

Spot-On would like to express a strong preference for the "adaptive disclaimer" approach to all election ad disclosures with a second preference for the scenarios described by Alternative B. These are the most flexible and least intrusive disclosure scenario envisioned by the commission and would easily be accommodated by our proposal to use data and action, not ads and reaction to determine if an ad is political in nature.

We are not endorsing Alternative A for the reasons described to support the use of this alternative.

*"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."*

Simply put: Ads that appear on the Internet are not appearing on a delivery system similar to radio, television, broadcast, cable or satellite. Those ads and they ways in which they are delivered are constrained - in delivery and sales - by geography. As a medium of distribution, the internet is the medium of communication and it is international in scope.

The idea that print and TV ad disclosure are suitable because they're familiar is nonsense. Internet advertising for brands has been thriving for some 20 years; hundreds of young men and women work at firms like ours, buying, designing, selling and overseeing the placement of online political ads. The idea that political efforts need to rely on rules governing outreach that voters no longer rely on for information is silly as it locks the commission into arguments about type sizes, fonts and color contrasts.

By way of example, we point to the commission's own difficulty distinguishing between well-known and established ad formats:

*“Similarly, does the Commission need to clarify the term “video” to address whether an advertisement with a GIF is a communication “with a video component” or one with a “graphic” component? Similarly, should the Commission expressly include or exclude from the term “video” static (i.e., non-moving) paid digital advertisements in dynamic (i.e., moving) environments such as “billboard” ads inside interactive gaming systems, or virtual-reality and augmented-reality platforms?”*

There is a great deal of confusion in the political world about the difference between an animated ad (an ad that contains motion delivered by a series of moving frames created by a graphic artist usually in the .gif format) and a video ad (usually delivered in an mpeg format and often just a digital version of a television ad). Many believe that all ad with movement are by their nature, video. They are not and the distinction is lost on most observers.

Alternative B is somewhat better than Alternative A in that it appears to suggest that ‘reasonableness’ as a rule-of-thumb for determining the type and style of a required disclosure accommodating the flexible nature of online ad displays.

But both alternatives A and B fall short to our way of thinking as they seem to assume that all interaction with ads carried via Internet-connected devices or applications are will remain constant with users at some point listening or seeing a disclosure in its full format. We do not think this will always be the case.

For instance, in the months the commission has been looking at this issue, it’s become clear that speech recognition technology will be the primary manner in which the overwhelming number of consumers and voters will soon use the “Internet.”

Imagine an audio ad delivered via a service connected to Alexa, the Amazon home audio system. Currently, that ad would have only the “paid for by...” disclaimer as both audio and, if included, on the accompanying visual display. But with adaptive disclaimers, the ad might include an additional phrase: “Paid for by John Doe for Congress. Do you want to hear more, about John?” An affirmative answer, could give a listener an email or text message, a saved link to a website or other information. This is just one off-the-cuff example of the need for what are currently called “adaptive disclosure” rather than scenarios that attempt to corral online ad placements as if the medium that transmitted them was as constant and constrained as TV, print and radio have been with a fixed, always attentive audience.

Spot-On would prefer an adaptive disclaimer scheme for all audio, video and banner ad formats as it allows for the most flexibility moving forward as

technology changes and it by its very nature assumes a reasonable means for disclosure and disclaimers which can change with the type of ad being served to the voter and the ways in which those ads can be transmitted.

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*- An indicator may take any form including, but not limited to, words, images, sounds, symbols, and icons. What are the advantages and disadvantages of this approach? What would be the advantages and disadvantages of the Commission's designing and promulgating a single indicator to be used across all media and platforms?*

Spot-On is reluctant to join a movement to label political advertising with special “icons” or badges. It’s not clear to us who would be inserting these marker, how their use would be enforced and what measure would or should be taken to undo a mis-characterization.

We think the icon proposal could easily create a 21<sup>st</sup> Century Scarlet Letter for political speech, encouraging publishers and platforms to shunt political ads aside to less visible position or to quietly reject them out-of-hand. And we see even more confusion ahead as third-party ad exchanges try to traffic ads bearing these icons.

The political “icon” could be appended by a corporate entity who might be tempted to deliberately misuse the badges to deter advertising or speech that the corporate employees or management deemed objectionable. Another scenario, recently endorsed by the Digital Advertising Alliance, suggest that advertisers should append the political icons<sup>7</sup>. Again, we have questions about enforcement and believe that these sorts of markers will lead to publishers shunning political inventory as too controversial or not in keeping with their corporate goals or political outlooks.

The DAA’s attempt is notable as it attempts to address a loophole in all of the regulatory schemes that Spot-On has seen. The simple fact is that almost all political ad buying flows through the third-party ad buying platforms, without any review for accuracy or legally required disclosures. Most of the bidding platforms used by political entities do not enforce existing laws because their employees either don’t know or don’t care about it. Many of the people who review ads on these platforms work and live outside the U.S. And, of course,

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<sup>7</sup> Wall Street Journal, “Ad Group Announces Rules for Transparency in Political Advertising.” <https://www.wsj.com/articles/ad-group-announces-rules-for-transparency-in-political-advertising-1526983200>



ad exchanges and platforms place hundreds of millions of ads at a time making review of compliance difficult and unreliable.

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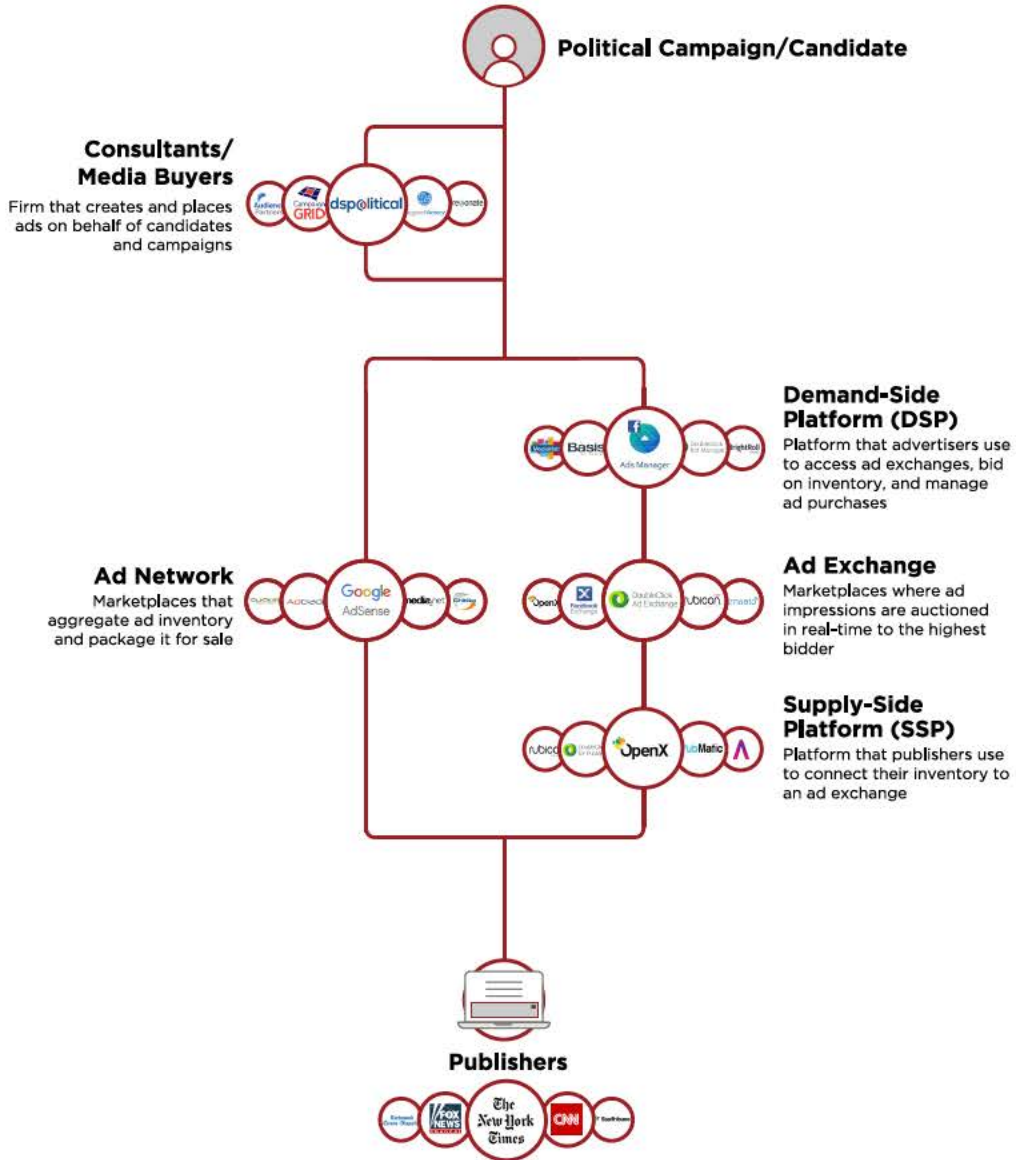
U.S. politics appears to be moving to a world where non-public facing entities – perhaps entities owned by residents of other nations – have a powerful impact on where ads appear online. Voluntary icons or badges will not change that behavior. Instead, they are likely to create a new form of confusion along with the false promise that political speech is protected when, in actual fact, it is not.

Our overriding concern is that online platforms – those that do business directly with the public and those that provide services for businesses – will enact their own rules and regulations for political speech without regard for traditional standard and practices that most political actors rely on in the “analog” or “real” world. Additionally, we are concerned that the Commission will be locking political advertisers into schemes that reflect the constancy of the online world without regard to the dynamic and multi-dimensional nature of the internet.

As a nation, we have seen that the open, free-for-all nature of online ad buying can create an environment where speech is derailed by faceless, nameless operators which poorly defined – even nefarious - interests. To help members of the Commission understand this environment, we have attached a schematic of the ad tech environment. More troubling, this behavior is rewarded since it allows campaigns to cloak their activity. The current ‘black box’ approach using a fraud-ridden and poorly policed online ad buying system also wastes campaigns’ money on ads that aren’t seen and don’t reach voters.

This is why we are suggesting that a look at the action of the advertiser rather than the appearance of ads themselves is warranted. Our data-driven scheme does not chill free speech. On the contrary, it marks political advertisers and separates them from brand ads in much the same way that rules governing broadcast and cable separate political advertisers from car dealers and grocery stores, but it preserves their ability to speak freely and without interference.

# The Digital Advertising Marketplace



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*This schematic is derived from a similar map included in "Digital Deceit, The Technologies Behind Precision Propaganda on the Internet" by Dipayan Ghosh and Ben Scott, January 2018.*