



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 13, 2018

Ms. Young Mie Kim
Professor, University of Wisconsin-Madison
Madison, WI 53706

Re: Rulemaking on Internet Communication Disclaimers (REG 2011-02)

Dear Professor Kim:

I am writing to request clarification of certain information that you provided to the Commission in connection with the above-referenced rulemaking. As you may be aware, several other commenters in this rulemaking have relied on your information as support for their arguments that the Commission should increase its regulation of online advertising.¹ Your work in this area has also been cited by congressional sponsors of the Honest Ads Act in support of their proposal to impose new statutory restrictions on online advertising.²

Particularly given this reliance by others, it is important for Commissioners and the public to understand the basis for your recommendations in this rulemaking. You have provided the Commission with a report that you co-authored, entitled "The Stealth Media? Groups and Targets behind Divisive Issue Campaigns on Facebook," which seems to serve as the basis for your recommendations.³ The "Stealth Media" report describes two studies of Facebook advertisements in the months leading up to the 2016 presidential elections.

Given the Commission's jurisdictional limitations, the "Stealth Media" report's relevance to this rulemaking is not apparent. The report describes two studies of online advertisements that this

¹ See Campaign Legal Center, *Ex Parte* Communication at 9-10, REG 2011-02 (Internet Communication Disclaimers) (Aug. 27, 2018), available at [sers.fec.gov/fosers](https://www.fec.gov/fosers); Public Citizen and Free Speech for People.org, Comment at 7, n.18, REG 2011-02 (Internet Communication Disclaimers) (May 24, 2018); Paul Ryan, Vice President, Policy & Litigation, Common Cause, Federal Election Commission Public Hearing, Transcript at 73, 98, REG 2011-02 (Internet Communication Disclaimers) (June 27, 2018), available at [sers.fec.gov/fosers](https://www.fec.gov/fosers).

² See Sen. Amy Klobuchar (Apr. 19, 2018) ("Study says half of Facebook ads w [sic] divisive political messages ahead of 2016 election were from suspicious groups. We must pass the Honest Ads Act and make social media companies play by the rules. That way Americans can see who's paying to influence them."), twitter.com/amyklobuchar/status/987129887877226496; Sen. Mark Warner (Apr. 17, 2018) (referring to "Stealth Media" report and stating, "Wow. This study is a bombshell. Congress needs to pass the #HonestAds Act so we can start to get a handle on this."), twitter.com/markwarner/status/986227219671539712.

³ Political Communication (2018), available at <https://www.tandfonline.com/doi/full/10.1080/10584609.2018.1476425>.

Commission does not regulate — ads with content that has “direct or indirect policy implications” (such as current affairs, national or international issues, any issues ever mentioned by federal candidates, party platform issues, and mentions of political parties) and that are sponsored by persons other than political committees — as well as some advertisements that do fall within the Commission’s jurisdiction.⁴ So that I and others may better understand the relevance of the “Stealth Media” report to this rulemaking, please provide us with the data underlying the report.

In addition, I would appreciate clarification of three assertions that you have made to the Commission during the course of this rulemaking. You made these assertions in your oral testimony at the Commission’s public hearing and in your written comments to the Commission. As noted above, other commenters have also relied on them.

First, you have asserted that only three out of 1,038 registered candidate committees placed full disclaimers on their Facebook ads before the 2016 presidential election. On its face, this assertion suggests that 1,035 federal candidate committees did not comply with the Commission’s existing disclaimer rules, which generally require political committees to include disclaimers on their paid internet advertising (with some exceptions). But this assertion derives from footnote 25 of the “Stealth Media” report, which provides that “[i]f the sponsor [of an ad] was *clearly identified* as a candidate committee with a *full disclaimer* (‘paid for by’) and the name of the disclaimer was *exactly matched and verified* with the *FEC data*, we excluded the ads because the focus of this study was tracking the ads by outside groups. With our conservative approach, however, only three candidate committees (out of 1,038 registered candidate committees) turned out to use the registered name on Facebook ads” (emphasis added).

Footnote 25 raises a number of questions for us about your methodology. For example, does the first sentence in the footnote mean that your researchers included in their analysis any ad sponsored by a federal candidate committee unless: (1) the sponsor of the ad was “clearly identified” as a candidate committee, (2) the ad contained a “full disclaimer,” and (3) the name of the candidate committee in the disclaimer was “exactly matched and verified” with “the FEC data”? What do “clearly identified,” “full disclaimer,” “exactly matched and verified,” and “the FEC data” as used here mean? If an ad did not contain a disclaimer, or contained a disclaimer that did not rise to the study’s standards, then how did your researchers determine that the ad was run by a candidate committee? And once your researchers were able to confirm that, in fact, an ad was run by a candidate committee even though it did not contain a “full disclaimer,” did the researchers nonetheless include the ad in their analysis of ads run by “outside groups”?

We note that footnote 25 appears in the “Stealth Media” report’s discussion of Study 1, which analyzed the sponsorship of 36,961 randomly-drawn paid Facebook ads that ran shortly before the 2016 presidential election. Study 1 classified ad sponsors “that disclosed political activities in the 2016 elections, such as Political Action Committees (PACs), Super PACs, Carey PACs, and other groups that reported independent expenditures or electioneering communications” as “FEC groups.” Given that only eight “FEC groups” were analyzed in Study 1 (*see* “Stealth

⁴ The report defines all of these advertisements as “political ads.” *See* “Stealth Media” at n.24.

Media,” Table 1), which is nowhere near 1,038 registered candidate committees, we assume that the footnote was intended to apply to Study 2; Study 2 analyzed the individual “targets” of 26,820 ads run by 3,046 groups. Please confirm whether this was the intent. Please confirm, also, whether candidate committees thus accounted for more than a third of all of the so-called “outside groups” that ran ads analyzed in Study 2, and whether all but three of those candidate committees ran ads that lacked legally mandated disclaimers. Further, please confirm the identities of the 1,038 candidate committees referred to in footnote 25, in light of the fact that only 131 registered presidential candidate committees reported raising more than \$0 in the 2016 election cycle.⁵

Second, you have asserted that approximately 9% of the ads you studied would have required disclaimers because the ads contained so-called “magic words” of express advocacy. What isn’t clear, and for which we would appreciate confirmation, is whether the ads with “magic words” also (1) referred to a clearly identified federal candidate, and (2) failed to provide disclaimers. These facts are particularly significant to the Commission because of limitations on the Commission’s authority to require disclaimers on ads run by persons other than political committees. If these ads should have had disclaimers but did not, that would seem to suggest, again, that certain online advertisers might not be complying with the Commission’s current disclaimer requirements.

We assume that the basis for your second assertion is footnote 30 of the “Stealth Media” report, which provides that 3,258 of the 36,961 ads (8.8%) analyzed in Study 1 contained one or more of the following words: elect; support; cast your ballot for; for president/for congress; vote against; defeat; and reject. Although some have reported this statistic as applying to a much broader universe of Facebook ads,⁶ it appears to pertain, in fact, to a relatively small sample of ads. Please confirm whether this assumption is correct, and provide us with copies of the ads that you believe lacked legally required disclaimers (in addition to providing the other data underlying your report as requested above). Also, please provide the percentage of all of the ads that you studied that did contain disclaimers.

Third, you have asserted that “requiring voters to ‘investigate’” who is behind a political ad would be unrealistic, unfair, and against the “normative guiding principles” that you have identified for online disclaimers. The reason that you have given for this assertion is that voters are “overloaded with the constant flood of information” online, because individual voters received an average of 34 impressions of all Facebook ads each day leading up to the 2016

⁵ See www.fec.gov/data/candidates/?election_year=2016&office=P&has_raised_funds=true.

⁶ See Project Data, Campaign Legal Center, and Issue One, “Closing The Digital Loopholes That Pave the Way for Foreign Interference in U.S. Elections” at 2, 3 (Apr. 2018) (describing study as encompassing “5 million paid ads on Facebook” and referring to “9% of ads” and “9% of the ads in the study” as lacking disclaimers), available at www.issueone.org/wp-content/uploads/2018/04/04-13-18-CLC-IO-Issue-Brief-Young-Mie-Report-FINAL.pdf; Campaign Legal Center, *Ex Parte* Communication at 9, REG 2011-02 (Internet Communication Disclaimers) (Aug. 27, 2018) (characterizing study’s finding as “most ads run in the 2016 election that expressly advocated for or against candidates omitted disclaimers stating who paid for them”) (emphasis in original), available at sers.fec.gov/fosers.

elections, and seven of these ads were “political ads” as you have defined the term. Please explain what “requiring voters to ‘investigate’” means in the context of online ads. For example, would requiring someone to click on an online ad to obtain full information about who sponsored the ad be an unfair and unrealistic investigative requirement? If so, please provide the evidentiary basis for your conclusion. Further, please explain why you consider an average of seven or 34 ad impressions per day to be excessive, and what the legal and evidentiary bases are for the “normative guiding principles” that frame your recommendations.

As you may know, the Federal Election Campaign Act authorizes the Commission to promulgate regulations “as necessary.”⁷ Although your research may suggest that some online advertisers do not comply with the Commission’s existing disclaimer requirements, that issue might best be addressed through education and enforcement, rather than through additional regulations — particularly when new regulations would fall disproportionately on law-abiding citizens exercising their First Amendment rights through online political speech. This rulemaking is ongoing, however, and I have not made any final decisions in this regard.

Thank you for your cooperation. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Caroline C. Hunter". The signature is fluid and cursive, with a long horizontal stroke at the end.

Caroline C. Hunter
Chair

⁷ 52 U.S.C. § 30107(a)(8).