

Holtzman Vogel

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Chair Allen Dickerson
Vice Chair Dara Lindenbaum
Commissioner Shana M. Broussard
Commissioner Sean J. Cooksey
Commissioner James E. “Trey” Trainor III
Commissioner Ellen L. Weintraub
Federal Election Commission
1050 First Street NE
Washington, D.C. 20463

Re: Draft Final Rule on Internet Communication Disclaimers

Dear Commissioners:

This letter is submitted by the undersigned in connection with Agenda Document No. 22-52-A, REG 2011-02 (Draft Final Rule and Explanation and Justification for Internet Communication Disclaimers). We write to you in our individual capacities and not on behalf of any client. We respectfully urge the Commission to postpone further consideration of the Draft Final Rule pending an additional opportunity for substantive comment from interested parties.

The Commission last took action on this rulemaking in June 2019 when it sought comment on two proposed versions of a new rule. We, and we believe the regulated community in general, were surprised when a Draft Final Rule appeared on the Commission’s open meeting agenda just days after the midterm elections. Until then, the rulemaking had appeared dormant. While it is now apparent that current Commissioners have taken an interest in advancing this rulemaking, we are unaware of any recent disclaimer crisis that would necessitate the current accelerated timetable.

This rulemaking has advanced in fits and starts over the past 11 years, with several different emphases at different times. When first noticed in 2011, the proposal was limited in scope and considered ways to address the “small item” dilemma and possible ways to modernize the Commission’s regulation. During and after the 2016 election, after a long period of inaction, the rulemaking was revived, and the agency was flooded with comments from people who were led to believe the Internet was completely unregulated and that stronger disclaimer rules were needed to fight Russian disinformation on Facebook. A few years later, the Commission proposed to adopt by regulation the disclaimer portions of the DISCLOSE Act that Congress had repeatedly rejected. In 2019, Commissioners produced two competing proposals, both of which were presented only in memorandum form, and which generated virtually no substantive comment. In our view, this lack of comment reflected the community’s sense that the

Commission was not prepared to adopt a final rule. Finally, on November 10, 2022, just two days after the midterm elections and while votes were still being counted, the Commission placed a Draft Final Rule on its open meeting agenda for consideration the following week.

The Draft Final Rule purports to combine the two proposals from 2019 but is significantly more complex than either Alternative A or B, and the appearance of the two alternatives in 2019 did not adequately notice a possible combined approach. While elements of the proposed final rule have been released by the Commission over the past decade with opportunity for comment, the Draft Final Rule represents the first time the Commission has presented a single, concrete proposal to the regulated community. Up until now, this rulemaking has involved competing, and often irreconcilable, proposals that tended to generate comments supporting one approach or the other, while discounting the possibility of a combination of the two.

In our view, an opportunity for comment should be provided to allow the regulated community time to thoroughly review the Draft Final Rule and provide comment on a regulation that will impact its day-to-day activities. We believe the Commission would benefit from public comment that is focused on a single, concrete proposal, and hopefully avoids the distractions and extraneous partisan posturing that infected this rulemaking for several years. The Commission should not act hastily to redefine a term as central to FECA as “public communication.” That term does not merely determine the scope of the disclaimer rules—it is used throughout the Act and Commission regulations. An additional comment period would allow the regulated community the opportunity to consider how the proposed rule will impact their activities, and to communicate with the Commission about practical implications of the rule that might not be obvious at first blush.

The sudden appearance of the Draft Final Rule after several years of dormancy caught many off guard. We are unaware of any recent or widespread abuse of the Commission’s existing disclaimer regime that would require immediate changes to the current Internet disclaimer requirements. More importantly, though, the Commission’s general posture toward disclaimers has suggested that no serious problem is perceived at the agency level. The new proposal sits uncomfortably with the Commission’s existing enforcement practices which treat disclaimer complaints as low priority matters that are routinely dismissed. We also wonder why an expanded disclaimer regulation would be advanced so soon after the Commission issued an advisory opinion determining that most text messages are not “public communications,” meaning they may be coordinated with candidates and distributed without any disclaimers.¹

For the reasons outlined above, we strongly urge the Commission to postpone further consideration of the Draft Final Rule until the regulated community has had ample time to fully

¹ See Advisory Opinion 2022-20 (Maggie for NH) (Oct. 4, 2022), <https://www.fec.gov/files/legal/aos/2022-20/2022-20.pdf>.

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review the implications of the specific proposal. We respectfully request that the Commission request additional comment on the Draft Final Rule at its next open meeting.

Respectfully submitted,

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