

November 9, 2017

By electronic submission to www.fec.gov/netdisclaimers

Neven F. Stipanovic
Acting Assistant General Counsel
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

Re: Comments on REG 2011-02—Internet Communication Disclaimers

Dear Mr. Stipanovic:

Issue One respectfully submits this letter in response to the Commission’s Advanced Notice of Proposed Rulemaking (ANPRM) 2011-02. When the Commission reopened the comment period last month, it asked for comments regarding “whether to begin a rulemaking to revise its regulations concerning disclaimers on certain internet communications and, if so, what changes should be made to those rules.”¹ Issue One strongly recommends that the Commission begin rulemaking so its regulations can better address developments in the world of online political advertising.

The Commission has considered how to apply political disclaimer rules to public communications on the internet several times over the past decade, including rulemaking in 2006 and considering of an advisory opinion request from Google in 2010 and Facebook in 2011.² However, the world of online political advertising has changed by leaps and bounds since then. In 2006, 11 percent of American adults used social media and \$40 million was spent on online political advertising for that year’s election.³ In 2016, more than two-thirds of American adults used social media and online political spending was \$1.4 billion for the cycle — the latter figure representing an increase of 3,500 percent.⁴

¹ 82 Fed. Reg. 46937 (Oct. 10, 2017).

² 71 Fed. Reg. 18589 (Apr. 12, 2006) (final rules concerning the definition of “public communication”); Advisory Opinion 2010-19 (Google, Inc.); Response to Advisory Opinion Request 2011-19 (Facebook).

³ Pew Research Center, Social Media Fact Sheet, Jan. 12, 2017, available at <http://www.pewinternet.org/fact-sheet/social-media/> (social media usage); Kate Kaye, *Online Political Ad Spending Down from '04 National Election*, Clickz, Nov. 6, 2006, available at (<https://www.clickz.com/online-political-ad-spending-down-from-04-national-election/82055/>) (online political spending).

⁴ Pew Research Center, Social Media Fact Sheet, Jan. 12, 2017, available at <http://www.pewinternet.org/fact-sheet/social-media/> (social media usage); Sean J. Miller, *Digital Ad Spending Tops Estimates*, Campaign and Elections, Jan. 5, 2017, available at <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates> (online political spending).

The technology behind online advertising has changed as well and rules written largely with print and television media in mind are ripe for an update. For example, in its 2011 request for an advisory opinion exempting its ads and sponsored content from disclaimers requirements, Facebook argued that its ads should qualify for the small items exception and that it was “impracticable” to provide users disclaimer information.⁵ However, the company recently announced that purchasers of political advertising would have to include a disclosure with their election-related ads that reads “Paid for by” and that when a user clicked on that disclosure, they would see “details about the advertiser.”⁶ Clearly the technology is at the point where most online political advertising can feature disclaimers and by their own admission online platform companies have the expertise to find creative solutions to disclaimer requirements.

For decades, sponsorship identification has successfully been a core part of political disclosure in the radio and television context, on the basis that viewers are “are entitled to know by whom they are being persuaded.”⁷ Academic research shows that identifying who is sponsoring advertising helps viewers to recognize potential bias by clearly highlighting the source of the ad’s content.⁸ Research also shows that viewers are less likely to change their opinion based on an advertisement if they know who is behind the ad, because viewers will question the bias of the sponsoring group.⁹ There is no reason why viewers of online political advertising should not see this important information about who is spending money in an effort to influence their vote.

At a time when malicious foreign actors are intent on hijacking the avenues Americans use to communicate, organize and debate with each other, it is critical that viewers have tools to help determine who is behind political advertising. Given the power of online platforms, a relatively small expenditure can reach tens of millions more individuals than traditional advertising mediums.

For example, the Internet Research Agency — a notorious “troll farm” linked to the Russian government — spent more than \$100,000 on approximately 3,000 Facebook advertisements related to the election and divisive social issues that reached approximately 126 million users in

⁵ Advisory Opinion Request 2011-19 (Facebook).

⁶ Rob Goldman, Facebook, *Update on Our Advertising Transparency and Authenticity Efforts*, Oct. 27, 2017, available at <https://newsroom.fb.com/news/2017/10/update-on-our-advertising-transparency-and-authenticity-efforts/>.

⁷ In re: Applicability of Sponsorship Identification Rules, Public Notice, 40 F.C.C. 141 (1963).

⁸ Israel D. Nebenzhal and Eugene D. Jaffe, *Ethical Dimensions of Advertising Executions*, 17 *Journal of Business Ethics* 805–15, May 1998, available at <https://doi.org/10.1023/A:1005850812845>.

⁹ Richard E. Petty and John T. Cacioppo, *Forewarning, Cognitive Responding, and Resistance to Persuasion*, 35 *Journal of Personality and Social Psychology* 645–55, Sept. 1977, available at <http://psycnet.apa.org/record/1979-25961-001>.

the United States.¹⁰ While there is reason to believe that some or all of that activity was already illegal under the ban on foreign nationals “directly or indirectly” making expenditures for the purpose of influencing a federal election,¹¹ having a disclaimer on the advertisements would have provided viewers an important context for which to interpret the messages. At the very least, disclaimers would have provided data that law enforcement and watchdogs could have used to investigate potential foreign interference in American elections.

Disclaimers are also clearly constitutional. The Supreme Court has stated that disclaimers are intended to “insure that the voters are fully informed about the person or group who is speaking” and to “enable[] the electorate to make informed decisions and give proper weight to different speakers and messages.”¹² Requiring disclaimers on online political advertising does not limit or restrict speech, since it simply requires identification of the speaking. In fact, it is actually a benefit to political speech and the marketplace of ideas that is American democracy. As the late Justice Antonin Scalia wrote “[r]equiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed.”¹³

In sum, the time has come for the Commission to update its disclaimer regulations to better address the reality of modern day campaigning, online political advertising and foreign interference in American elections. Issue One strongly recommends that the Commission begin rulemaking to clarify and strengthen disclaimer rules for internet communications.

Respectfully submitted,

A handwritten signature in black ink that reads 'M McGehee'.

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¹⁰ Tony Romm and Kurt Wagner, *Facebook Says 126 Million People in the U.S. May Have Seen Posts Produced by Russian-government-backed Agents*, Recode, Oct. 30, 2017, available at <https://www.recode.net/2017/10/30/16571598/read-full-testimony-facebook-twitter-google-congress-russia-election-fake-news>.

¹¹ 52 U.S.C § 30121 (2012).

¹² *Citizens United v. FEC*, 558 U.S. 310, 368–71 (2010) (internal citations and quotation marks omitted).

¹³ *Doe v. Reed*, 561 US 186, 228 (2010) (Scalia, J., concurring).



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