



Federal Election Commission
Attn: Neven F. Stipanovic, Acting Assistant General Counsel
1050 First Street, N.E.
Washington, DC 20463

RE: **Internet Communication Disclaimers and Definition of “Public Communication”**

Agency/Docket Number: *Notice 2018-06; 83 Fed. Reg. 12864*

Dear Mr. Stipanovic:

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The American Civil Liberties Union (“ACLU”) submits these comments in response to the Federal Elections Commission’s (“FEC’s”) above-referenced Notice of Proposed Rulemaking (“NPRM”). In the NPRM, the FEC proposes to re-define the term “public communication” and offers two alternatives to govern disclosures and disclaimers for internet-based election communications. Both alternatives would significantly reduce uncertainty about how those placing election ads online should disclose information about the payors and sponsors of those ads. Both alternatives would tend to fill in gaps in information about online election ads and in our view, that is a significant step in the right direction. They would also largely eliminate the gap for election ads viewed on devices other than traditional desktop devices.

While one alternative may end up providing marginally more or less information, we do not presume to be able to divine which will be the better choice. As a civil rights and civil liberties advocacy organization, we are primarily concerned with the electorate’s right to information about those voicing support or opposition to candidates for election, with the integrity of the American system of democratic elections, with the rights of speakers to raise their voices on political issues of the day, and with the rights of others to hear those voices. We cannot say with certainty that “Alternative A” or “Alternative B” serves the civil liberties interests of Americans better or worse than the other. Accordingly, we state our strong support for the notion that Internet communications advocating support or opposition for candidates for office should be subject to substantially the same disclosure and disclaimer requirements as are imposed on election communications in other media, with the understanding that the online environment presents challenges to duplicating the offline compliance environment precisely, as well as opportunities for achieving similar results and serving the same goals in different and perhaps even better ways.

One explanatory note: ACLU has historically opposed disclosure requirements with respect to ads that do *not* expressly advocate for the election or defeat of a

candidate.¹ These comments do not reflect a change in the organization's position even though the extension of a disclosure and disclaimer regimen to Internet election ads might reach some such ads. Transparency in the election system can be a compelling public interest justifying disclosure. Moreover, the laws and regulations that reach beyond communications advocating for or against a candidate are not modified by the proposals set forth in the NPRM. On balance, the proposals do more to close a gaping hole in the legitimate election-related disclosure protocols than they do to capture and compel disclosure of issue advocacy. For purposes of these comments, when we refer to "election ads," we intend to refer to ads expressly supporting or opposing a candidate, for which we support disclosure and transparency, and not any other ads which current rules may sweep into their ambit.

We appreciate the Commission's invitation to fashion comments that strike an independent path not confined to Alternatives A and B, and we offer suggestions for ways to build upon the two alternatives.

1. Any new rule should aim to provide as much information as possible about the most significant investments of funds in online election ads, a baseline amount of information on significant investments, while minimizing the time and expense of reporting for small individual election ad buyers.

Much of the discussion around extending disclosure and disclaimer rules to Internet election ads has focused on making sure that such ads don't escape the requirement imposed on print and broadcast ads. But just as the Internet has forced so many commercial ventures to reconfigure their business models, so too should it nudge agency officials into rethinking what information is available to educate voters about those attempting to sway their voting practices. Not only are billions in advertising dollars moving from offline to online venues, advertisers also have many more choices to target and micro-target audiences with messages precisely designed to impact a narrow demographic band of people. It will always remain important to allow an individual viewer or listener to know who is sponsoring a message, and it will always be important to incorporate that baseline level of information into the election ad itself to the extent possible. With the innovation and flexibility of online communications, there are many ways to achieve that goal and to approximate the information available in offline election ads.

But with regard to the most significant investments of funds in online election ads, why not seek more information? In addition to the identity of the sponsor, there should be a database of information about each ad, about the amount of money spent, targeting information by demographic characteristic, targeting information by geography, click results, and a host of other information that online advertisers already collect. Such data would allow for a more thorough analysis of who has the greatest advertising impact, who they're talking to, and what they're saying. The American public would be far better served by access to this trove of data than by merely digesting stand-by-your-ad disclaimers one by one.

¹ See Letter to U. S. Senate (Jul. 23, 2010) (opposing S. 3628, DISCLOSE Act, for compelling disclosure of issue advocacy communications) at <https://www.aclu.org/letter/aclu-letter-senate-urging-no-vote-disclose-act>; Brief of Appellant, ACLU v. FEC (U. S., Jul. 8, 2003) (No. 02-1734) (challenging disclosure mandates on issue ads) at <https://www.aclu.org/legal-document/aclu-brief-mcconnell-v-fec>.

Given today's pervasive electronic recordkeeping, collecting such information shouldn't be a huge expense, but limiting the mandate to the largest election advertisers would minimize impact on those of more modest means. The responsibility could be placed on election advertisers to self-report or, alternatively, the platforms on which such election ads are placed could build a repository of such data. Some platforms are already promising to make similar sets of data available publicly² and so the infrastructure could be in place soon to provide such a resource, which could be available to researchers, journalists, and even the average voter interested in checking out details behind the promoted tweet on his or her Twitter feed.

2. Encourage those who specialize in Internet innovation to apply innovative compliance techniques.

Google and Facebook, among others, have already offered comments earlier in this rulemaking process.³ They and others operating successfully in the Internet sphere know best about this medium's capabilities and where the next leap will occur. The Commission should encourage such organizations to design and apply for approval of "safe harbor" templates that would fulfill disclosure and disclaimer requirements for election communications appearing on their platforms.

At least one of these Internet giants has already sought an advisory opinion from the FEC.⁴ Doing so is, unfortunately, a lengthy and cumbersome process requiring a serious commitment of legal and technical talent. And, at least in recent history, the Commission is often not able to provide authoritative guidance in the form of four votes. Other federal agencies have adopted expedited processes for key aspects of their regulatory responsibilities.⁵ We urge the Commission to create an abbreviated review process so that online platforms can propose disclosure and disclaimer compliance templates to be used on their platforms – which would then be usable by any advertiser wishing to engage that platform. Any election ad using the approved format would have a safe harbor and be free from challenge for failing to report in accordance with any more specific criteria.

3. Expand the scope of reporting by reconsidering how an election ad is paid for.

² James Hercher, *How Digital Platforms Are Battening Down the Hatches on Political Ads*, **AD EXCHANGER**, Mar. 1, 2018 at <https://adexchanger.com/politics/digital-platforms-battening-hatches-political-ads/>. In the days just prior to submission of these comments, Facebook and Instagram announced plans to require disclosure by those who place "political" ads regardless of any FEC-mandated process and to maintain a dedicated archive with supplemental data. See Karissa Bell, *Facebook and Instagram Crack Down on Shady Political Ads*, **MASHABLE** (May 24, 2018) at https://mashable.com/2018/05/24/facebook-political-ads-transparency/?utm_campaign=Feed%3A+Mashable+%28Mashable%29&utm_cid=Mash-Prod-RSS-Feedburner-All-Partial&utm_source=feedburner&utm_medium=feed#ioX5O76kqsqW.

³ Internet Communication Disclaimers; Reopening of Comment Period and Notice of Hearing, 81 Fed. Reg. 71647 (Oct. 18, 2016) (Comment of Facebook, Inc., Nov. 13, 2017); *id.* (Comment of Google LLC, Nov. 9, 2017).

⁴ Fed. Election Comm'n, AO 2011-09 (Request by Facebook, Apr. 26, 2011); *id.*, AO 2010-19 (Request by Google, Aug. 5, 2010).

⁵ See, e.g., Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807 (Apr. 9, 2018) (expediting environmental decision-making); **U. S. FOOD & DRUG ADMIN., FAST TRACK, BREAKTHROUGH THERAPY, ACCELERATED APPROVAL, PRIORITY REVIEW** (updated Feb. 23, 2018) at [https://www.fda/gpvpfpr\[atocemtsa\]\[rpva:sfastic.20041766.htm](https://www.fda/gpvpfpr[atocemtsa][rpva:sfastic.20041766.htm).

In the offline world, someone produces an ad and then the advertiser or its buyer places that ad on TV, radio, cable, or in print. In an overly abbreviated sense, there is the cost to produce and the cost to broadcast or publish.⁶ That same template holds true in the online advertising world only if you correctly understand the terms. Sometimes the production process is similar, but at times, there can be a more dynamic process involving multiple parties and possibly an element of artificial intelligence. The costs associated with production are sometimes obvious, and at other times are buried in billing associated with other apparently unrelated activities. “Publication” is even more complicated. For example, sometimes the mere publication of an ad is free – say, posting on Facebook or Twitter. Money is spent instead on promotion of the post. Its reach might be the same as another ad for which the advertiser paid thousands to reach a certain number of people. If the organization posting the ad didn’t pay specifically for doing so, it might not fall within the proposed reporting parameters even if that organization paid thousands to a consultant to promote the post.

The rules need either to contemplate these different ways of reaching election audiences or be flexible enough to allow enforcement to spur compliance. We urge the FEC to adapt its determination of “payments” so as to encompass the full context of online communication practices. We also encourage the Commission to look to the platforms for help in identifying the hidden costs of disseminating messages to a mass, yet targeted, online audience.

4. Ensure that the information disclosed isn’t lost due to its transient nature.

Experts note that the flexible nature of online communications offer opportunities to provide core information about election ad sponsors in new and innovative ways.⁷ That is all true – but it’s also true that online communication is transient in ways that broadcast and print are not. There isn’t always a publicly available repository of online data or communications like a Library of Congress. A hover-over lasts as long as an individual’s cursor remains in a particular location. A dynamically generated ad may never appear again once it’s been generated. Any random viewer might know for a moment who sponsored an election ad that was either so persuasive or so abhorrent that it convinced that person to vote for or against a candidate. But it isn’t clear that the person – or some enterprising journalist writing about that person – would be able to find out about the election ad sponsor after the fact.

We urge the Commission to close this loophole in a way that makes sense for election advertisers on the Internet. This could be created in coordination with the repository of targeting data suggested in Paragraph 1 above. But as a separate matter, we recommend the creation of an online library that holds Internet election ads and their core identifying information. Both online advertisers and the platforms they use should have some responsibility for submitting data to the library. Such a requirement would be less onerous than, but similar to, the current FCC rule requiring broadcasters to compile and maintain an online political ad file.

⁶ Maggie Aland, *Local & National TV Advertising Costs & How to Advertise*, [FITSMALLBUSINESS](https://fit-small-business.com/tv-advertising/) (Nov. 28, 2017) at <https://fit-small-business.com/tv-advertising/>.

⁷ Internet Communication Disclaimers; Reopening of Comment Period and Notice of Hearing, 81 Fed. Reg. 71647 (Oct. 18, 2016) (Comments of Electronic Privacy Information Center, Nov. 3, 2017).

From 2012 to 2016, advertising – and election advertising – underwent a sea change. While political advertising increased four percent, digital election advertising increased 789%. Broadcast spending decreased 20%, but online spending increased 800%. Online election ads as a percentage of all ads jumped from 1.4% to 14.4%.⁸ While disclosure of election ad sponsorship is a part of our political society, the online exception to it is an ever-widening hole that threatens to undermine the notions of transparency that undergird our election disclosure rules. The Commission deserves credit in the current polarized environment for finding two credible paths forward. The ACLU supports the existing proposals and stands ready to support any equally viable proposal aimed at translating existing disclosure and disclaimer rules to the online world. We also urge the Commission not to stop at this meritorious proposal, but to provide a path to answer questions that we may not presently envision and to offer channels to an ever broader understanding about those who seek to sway our votes.

We do not see these proposals as negatively impacting core civil liberties interests to the extent applied to online election ads expressly advocating support or opposition to candidates. Accordingly we do not seek to testify at the hearing proposed for June 27. We are willing to provide such testimony, however, if the Commission wishes to learn more about the points raised herein or if it believes our views would provide context for other commentary. Thank you for considering our views.

Sincerely,

A handwritten signature in black ink, appearing to read 'Faiz Shakir', with a stylized flourish at the end.

Faiz Shakir
National Political Director

⁸ Sean J. Miller, *Digital Ad Spending Tops Estimates*, [CAMPAIGNS & ELECTIONS](#) (Jan. 4, 2017); Kate Kaye, *Data-Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast TV Down 20%, Cable and Digital Way Up*, [ADAGE](#) (Jan. 3, 2017)