



May 24, 2018

Submitted Electronically

Federal Election Commission
Attn: Neven F. Stipanovic
999 E Street, N.W.
Washington, D.C. 20463

RE: Comments on Notice 2018-06, Internet Communication Disclaimers

Dear Mr. Stipanovic:

Public Citizen and Free Speech For People respectfully submit these comments in response to the Commission's Advanced Notice of Proposed Rulemaking (ANPRM) 2018-06, "Internet Communication Disclaimers and Definition of 'Public Communication.'"

Craig Holman, Government Affairs Lobbyist for Public Citizen, requests the opportunity to testify before the Commission on this matter.

A. The Problem: Growth of Internet Political Advertising and the "Dark Money" Loophole

The problem of disclosure for Internet political advertisements predates the 2016 presidential election, but as the Internet grows in popularity for political advertising by candidates, committees, outside groups – and even foreign sources – it is with utmost urgency that the Commission should re-evaluate its "restrained regulatory approach" to campaign advertising on the Internet, at least in terms of disclosure.¹

The Commission's exemption of most paid campaign advertisements on the Internet and social media platforms from campaign finance transparency requirements has ballooned from an oversight prior to 2008 into a serious scandal today. While the Internet and social media platforms have been used for political dialogue since the 1990s, the 2008 presidential election witnessed a large growth in on-line political communications and campaign ads.² By 2012,

¹ Final Rule, Internet Communications, 71 Fed. Reg. 18589 (April 12, 2006).

² Benjamin Burroughs, "Obama trolling: memes, salutes and agonistic politics in the 2012 presidential election," *Fibreculture Journal* (2013).

political communications on the Internet and social media was so prevalent in the presidential campaign that it became recognized as the “first real social media campaign.”³

On-line political advertising has continued to grow exponentially ever since. Spending on political advertising on the Internet grew almost eightfold between the 2012 and 2016 presidential elections, from \$159 million to \$1.4 billion.⁴ Internet campaign advertising is expected to continue increasing, likely amounting to an estimated \$1.9 billion in the 2018 midterm elections, or 22 percent of all campaign ads.⁵

Meanwhile, the gaping dark money loophole in Internet political advertising has provided foreign parties an easy avenue for meddling in American elections. Under 52 U.S.C. 30121 and 11 C.F.R. 110.20, foreign nationals are prohibited from making donations or disbursements in connection with any federal, state or local election in the United States. Yet, the integrity of the last federal election has been tainted by revelations of extensive Russian meddling through political advertisements on Facebook and other social media platforms in violation of federal law.

Facebook has finally identified 470 inauthentic social media accounts that produced approximately 3,500 political ads at the cost of at least \$100,000 from June 2015 to May 2017 intended to effect the 2016 presidential election.⁶ The ad purchases and accounts originated from a Russian “troll farm” known as the Internet Research Agency that operates at the behest of the Russian government. Another \$50,000 of political ads on Facebook also may have been sponsored by Russian sources.⁷ The full extent of Russian intervention in the 2016 presidential election remains under investigation by Special Counsel Robert Mueller, the Senate Select Committee on Intelligence, the House Permanent Select Committee on Intelligence and other federal investigative authorities.⁸

The Russian political intervention may well have had a significant impact on the outcome of the 2016 elections. A recent survey by the Pew Research Center found that a large majority of American adults – 67 percent – get news on social media and 20 percent do so often. Reddit,

³ Id., at 259.

⁴ Borrell Associates, “The final analysis: Political advertising in 2016,” (Jan., 2017), available at: <https://www.borrellassociates.com/shop/the-final-analysis-political-advertising-in-2016-detail>

⁵ Megan Janetsky, “Low transparency, low regulation on-line political ads skyrocket,” OpenSecrets.org (March 7, 2018), available at: <https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/>

⁶ Nick Penzenstadler, Brad Heath and Jessica Guynn, “We read every one of the 3,517 Facebook ads bought by Russians. Here’s what we found,” *USA Today* (May 13, 2018), available at: <https://www.usatoday.com/story/news/2018/05/11/what-we-found-facebook-ads-russians-accused-election-meddling/602319002/>

⁷ Scott Shane and Vindu Goel, “Fake Russian Facebook accounts bought \$100,000 in political ads,” *New York Times* (Sept. 6, 2017), available at: <https://www.nytimes.com/2017/09/06/technology/facebook-russian-political-ads.html>

⁸ Manu Raju and Jeremy Herb, “Trump attorney Cohen to meet with Hill investigators this week,” *CNN* (Oct. 23, 2017), available at: <http://www.cnn.com/2017/10/23/politics/michael-cohen/index.html>

Facebook and Twitter social media platforms lead the pack of on-line news sources.⁹ Yet, there is very little, if any, disclosure of the sources of this news by the social media platforms, largely removing an important means for recipients of this news to judge its merits. The lack of transparency and accountability allows anyone, including foreign sources, to widely distribute misleading or even false news stories and political ads. The apparent Russian efforts to generate “fake news” have been so pervasive that it has now become a term of art.

Even for outside foreign-funded or deceptive political advertising, current campaign finance regulations fail to bring accountability to campaign advertising on the Internet. Despite statutory requirements for disclaimers and disclosure of the funding source behind campaign ads,¹⁰ regulations promulgated by the Commission have largely exempted Internet communications from the disclosure and disclaimer requirements of federal law. The Commission has imposed only two minor disclosure requirements for campaign ads on the Internet – disclosure is required when a person places a paid advertisement on someone else’s web page,¹¹ and when a registered political committee sends out electronic mail of more than 500 substantially similar communications¹² – but it is not clear whether even these minimal disclosure regulations are being monitored and enforced.

The Internet as a primary avenue of campaign advertising can no longer be ignored by the Commission.

⁹ Elisa Shearer and Jeffrey Gottfried, “News use across social media platforms 2017,” Pew Research Center (May 26, 2016), available at: <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/>

¹⁰ See, for example, 52 U.S.C. § 30120. Publication and distribution of statements and solicitations

(a) Identification of funding and authorizing sources.

Whenever a political committee makes a disbursement for the purpose of financing any communication through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising, or whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, or solicits any contribution through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising or makes a disbursement for an electioneering communication (as defined in [section 30104\(f\)\(3\) of this title](#)), such communication-

(1) if paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee, or ¹

(2) if paid for by other persons but authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication is paid for by such other persons and authorized by such authorized political committee;

(3) if not authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate’s committee.

¹¹ 11 C.F.R. 100.26. “Public Communication.”

¹² 11 C.F.R. 110.11(a).

B. The Solution: Promulgate Disclaimer Requirements for All Internet Political Ads

Public Citizen and Free Speech For People strongly encourage the Commission to promulgate new rules governing disclaimers for political ads on the Internet that encompasses the following components:

- **All forms of Internet campaign advertising must be accompanied with a disclaimer as to the funding source or sources behind the ad;**
- **Regardless of how short the on-line ad may be, all ads should at the very least require the disclaimer “Paid for by ...” in letters of sufficient size to be clearly readable by the recipient, and then provide an indicator to the full disclaimer through either an active hyperlink to another page, hover-over mechanism, pop-up screen or other technological mechanism that offers full disclosure information.**
- **Internet disclaimer rulemaking should be done expeditiously and in place for as much as the 2018 election cycle as possible.**
- **All major social media platforms should provide a library of political ads that includes sponsors and target audiences.**

It would also be highly preferable that the scope of on-line political ads subject to the disclaimer requirements be expanded to include electioneering communications rather than just express advocacy advertisements. However, current law excludes the Internet from the definition of electioneering communications.¹³ So we also call upon Congress to address this shortcoming by passing the “Honest Ads Act” (S. 1989 and H.R. 4077) which would capture Internet advertising within the realm of electioneering communications and provide a comprehensive disclosure regime for on-line political advertising.

In the FEC’s Notice of Proposed Rulemaking, the agency offers two alternative proposals for establishing a system of Internet communications disclaimers. Both offer vast improvements over the wholly inadequate current system. However, neither proposal achieves all the objectives stated above. Nevertheless, Alternative A (drafted principally by Commissioner Ellen Weintraub) more closely achieves these objectives in that it would capture all Internet campaign ads under the disclaimer requirement and not readily allow exemptions to the requirement. Public Citizen and Free Speech For People recommend that even more be done to ensure a robust disclosure system for Internet campaign advertising and reduce the potential for foreign meddling in American elections.

1. Capture All Internet Campaign Ads Regardless of Size or Form

All Internet campaign ads, regardless of size or form, should be required to provide adequate disclaimers of sponsors.

FEC disclaimer regulations for traditional media set forth two key exemptions for the disclaimer requirement. One is the “small item exemption” in which the ad is so small a disclaimer cannot be included, such as on campaign buttons or pens. The second is the “impracticable exemption”

¹³ 52 U.S.C. 30104(f)(3).

in which it is simply not possible to include a disclaimer, such as on skywriting ads. After laying out examples of the types of ads that qualifying for one of these exemptions in FEC rules, the agency has not seen any need to expand the scope of the exemptions in the last 15 years. Instead the FEC has placed the onus on the advertiser to find a way to comply with the disclaimer requirements.

This is an onus that can be even more readily expected of Internet communications. The Internet is a medium that encourages flexibility and innovation. Indeed, technological innovations shaping Internet advertisements can easily find ways to accommodate disclaimer requirements in a practical and clear and conspicuous manner, if compelled to do so.

Paid advertising on the Internet is constantly evolving in nature. Traditional ads, such as a web page or on-line video, are most common. There are also “promoted content” ads when a sponsor pays a social media platform to disseminate more frequently communications with a specified content. Bots, for example, are driven by algorithms rather than real people and distribute communications with a specific content on behalf of a paying user. One study found that during the 2016 presidential debates more than 400,000 accounts used for political discourse were likely bots.¹⁴ Many of these paid messages can be very short and seamlessly integrated into social conversations. Absent disclaimers, such messages are not likely to be perceived as paid messages.

Given the unique medium of Internet communications, disclaimers on all forms of on-line paid campaign advertising are practical and pose little inconvenience to the sponsor or the recipient. Traditional forms of on-line paid ads can carry the same type of disclaimers applicable to television, radio or print ads. On-line campaign ads that have strict character limitations, such as on twitter, or are otherwise designed to use only a small amount of screen space, may easily accommodate an “adapted” disclaimer.

Even in the case of bots, comparable disclaimers are technologically feasible. A paid bot that identified Internet communications by algorithm and disseminates those messages to a targeted audience could also be required to attach a “Paid for by ...” plus an indicator to each message disseminated.

Internet technology and Internet communications programs are sources of innovation, not limitation. The Internet should be approached as a medium that can find a way to comply to disclaimer and disclosure requirements.

The Federal Trade Commission (FTC) adopted the attitude that social media platforms are expected to find ways to follow mandatory disclosure rules when it issued its final disclosure guidelines for digital advertising. “This means that if a particular platform does not provide an

¹⁴ Alessandro Bessi and Emilio Ferrara, “Social bots distort the 2016 U.S. presidential election online discussion,” *First Monday* (Nov. 2016), available at: <http://firstmonday.org/ojs/index.php/fm/article/view/7090/5653>

opportunity to make clear and conspicuous disclosures, then that platform should not be used to disseminate advertisements that require disclosure,” state FTC guidelines.¹⁵

2. Impose an Adapted Disclaimer and Indicator Requirement on Even Brief Internet Campaign Ads

As suggested in the disclaimer proposal of Alternative A, it is critically important that even the shortest Internet campaign ads include at the very least an “adapted” disclaimer (“Paid for by ...”) in letters of a size that are clearly readable by the recipients, followed with an indicator that may consist of an active and descriptive hyperlink that ties directly to the full disclosure information required on another web page, pop-up message, or other clear and conspicuous informational medium.¹⁶

Simply providing a link – particularly a non-descriptive link or symbol – to access the disclosure information, as proposed in Alternative B, would deny many recipients of needed information about the ad.

According to a study by computer scientists at Columbia University and the French National Institute, 59 percent of links shared on social media have never actually been clicked. In other words, most people retweet or share social media news without ever clicking on to the sources.¹⁷ If the disclaimer of “Paid for by ...” is not included in the ad itself, most people are likely to remain oblivious as to who sponsored the message or, worse yet, whether it is even a paid message as opposed to objective news.

The adapted disclaimer requirement would make it clear that the Internet communication is a paid campaign message and alert the recipient as to the person or group sponsoring the message. The accompanying indicator will provide the more inquisitive recipients with additional disclosure information.

3. Pursue Disclaimer Rulemaking Expeditiously and Apply the Disclaimer Rule to the 2018 Elections

With Internet campaign communications expected to account for nearly a quarter of all campaign ads in the 2018 elections, it is imperative that the Commission move swiftly on this rulemaking and mandate disclaimers on Internet ads as soon as possible, preferably in time for the general election cycle.

¹⁵ Federal Trade Commission, “.com Disclosures: How to make effective disclosures in digital advertising,” (March 2013), available at: <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>

¹⁶ It would be acceptable to allow the sponsor to be identified by an abbreviation or acronym as long as such abbreviation or acronym is clearly recognized and commonly known. The FEC should periodically enumerate clearly recognized abbreviations.

¹⁷ Maksym Gabielkov, Arthi Ramachandran, Augustin Chaintreau and Arnaud Legout, “Social clicks: What and who gets read on twitter?” ACM SIGMETRICS/IFIP Performance 2016 (June 2016), available at: <https://hal.inria.fr/hal-01281190/document>

Russian meddling in the 2016 elections reached a crescendo during the general election cycle, particularly in the last few months of the election. This spike in election advertising during the general election cycle is also evident for other dark money groups. Dark money groups accounted for the bulk of approximately 5 million “divisive issue campaign” ads on Facebook in the last couple months of the 2016 general election, with Russian sources accounting for about one of every six of those ads.¹⁸

Russian sources and other dark money groups are already gearing up for the meddling in the 2018 elections through undisclosed and deceptive Internet political communications.¹⁹ With no effective disclaimer and disclosure rules in place for the 2018 elections, foreign meddling in American elections will continue unabated.

4. Require All Major Social Media Platforms to Provide a Library of Campaign Ads

In order to better track the funding sources and sponsors of all Internet political communications, including messages that extend beyond express advocacy ads, the Commission should further require that major social media platforms compile a searchable, sortable and downloadable library of paid on-line political ads that discuss candidates and elections generally. This database should include the sponsor and funders of each ad; the date of dissemination, the target audience; and digital copies of the advertisements.

The Federal Election Commission could reasonably assert the authority to require social media platforms to establish and maintain such libraries of Internet political communications via rulemaking in order to enforce the laws against foreign interference in federal, state and local elections in the United States.²⁰ The federal law, administered by the Federal Election Commission, prohibits contributions, donations and other expenditures by “foreign nationals” in any federal, state or local election as well as an exchange of any “thing of value.” Most recently, Section 303 of the Bipartisan Campaign Reform Act of 2002, also known as the McCain-Feingold Act, strengthened the ban on foreign money in U.S. electioneering to be administered by the Commission.

It is clearly understood that the primary avenue of Russian meddling in American elections is coming through undisclosed advertisements on social media platforms, primarily Facebook but also through Twitter, Google, YouTube and other platforms. Requiring that major social media platforms keep public records of the sources, nature and targets of these Internet political communications will provide the FEC and others with the means to discern foreign-sponsored political advertising and protect the integrity of the laws against such foreign meddling in elections. A comparable public database of political ads for television and radio broadcasters is

¹⁸ Young Mie Kim, “The stealth media? Groups and targets behind divisive issue campaigns on Facebook,” (April 20, 2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3166364

¹⁹ W.J. Hennigan, “Russia is already trying to undermine the 2018 elections, top spies say,” *Time* (Feb. 13, 2018), available at: <http://time.com/5155810/russian-meddling-2018-elections/>

²⁰ 52 U.S.C. 30121; 36 U.S.C. 510; and 11 CFR 110.20.

currently required by the Federal Communications Commission (FCC) as a means to supplement and enforce the Communications Act of 1934.²¹

Such libraries of Internet political communications are in the process of being developed voluntarily by Facebook, and also are proposed for all major social media platforms via legislation in the Honest Ads Act pending before Congress.

C. Conclusion: The FEC Needs to Keep Pace with Changes in the Internet When It Comes to Digital Disclaimer and Disclosure Requirements

It took Russian meddling in our elections to finally get our attention, but now social media platforms, Congress – and most importantly, the Federal Election Commission – are finally debating what to do about it.

The FEC is in mid-course on rulemaking to require disclaimers on Internet campaign ads. Public Citizen and Free Speech For People strongly encourage the Commission to lead the field in closing the dark money loophole in on-line political communications, and to do so swiftly before more damage from Russian interference is done in the 2018 elections.

Americans are angry about being confused and sometimes duped by anonymous and misleading political ads on the Internet. Americans across all political perspectives are calling upon the FEC to require full disclosure of funding sources behind internet campaign ads. According to a recent Marist poll, more than three in four Americans want to know who is paying for social media political ads, including 78 percent of Democrats, 80 percent of Republicans and 82 percent of independents.²² Nearly 150,000 comments were submitted to the FEC last year following the election, (an all-time agency record), with 98 percent of all commenters urging the Commission to update and expand its disclosure requirements for Internet political communications.

Public Citizen and Free Speech For People join in that call. We recommend that the new Internet disclosure rules encompass at least four key components. These include:

- Capture all Internet campaign ads under the disclaimer requirement, regardless of size or form.
- Mandate that even brief on-line campaign ads include at the very least an adapted disclaimer that specifies “Paid for by ...” in letters of sufficient size to be clearly readable by the recipient, and then provide an indicator to the full disclaimer through either an active hyperlink to another page, hover-over mechanism, pop-up screen or other technological mechanism that offers full disclosure information.
- Get the disclaimer rules in place for the 2018 general elections.
- Require major social media platforms to provide a public library of paid Internet political communications so that further Russian meddling in our elections may be curtailed.

²¹ See 47 CFR 73.1212, 76.1615; FCC rules designed to enforce 47 U.S.C. 317, 508.

²² Marist Poll (October 2017), available at: http://maristpoll.marist.edu/wp-content/misc/usapolls/us171015_HBO/Marist%20Poll%20National%20Nature%20of%20the%20Sample%20and%20Tables_October%202017.pdf

Public Citizen and Free Speech For People encourage the Commission to move ahead swiftly with rulemaking called for in NPRM 2018-06 and promulgate a more robust and up-to-date disclosure system for Internet political advertising that will help inform the public and protect our elections from foreign interference.

Sincerely,

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