



May 25, 2018

Via electronic filing

Federal Election Commission
Attn: Neven F. Stipanovic
Acting Assistant General Counsel
1050 First St. NE
Washington, DC 20463

Re: Notice of Proposed Rulemaking, Internet Communication Disclaimers and Definition of “Public Communication” [REG 2011-02]

Dear Mr. Stipanovic:

Internet Association (“IA”) appreciates the opportunity to submit these comments to the Federal Election Commission (“Commission”) in response to its Internet Communications Disclaimers and Definition of “Public Communication” Notice of Proposed Rulemaking. As the association representing the leading internet companies, IA supports the use of technology to increase transparency in political communications. IA believes that the rules should be flexible, so as not to constrain future technological advancements. IA also believes that technology plays an important role in providing information, and that rollovers, click-throughs, and other technology yet to be developed, can provide far more meaningful information to users than traditional “in the box” disclaimers. The FEC should develop rules that encourage innovation, not rules that limit or restrict new technology. Moreover, the rules should be simple to implement and not require political speakers to seek frequent advisory opinions from the Commission.

I. About Internet Association

IA is the only trade association that exclusively represents leading global internet companies on matters of public policy. Its mission is to foster innovation, promote economic growth, and empower people through the free and open internet. IA believes the internet creates unprecedented benefits for society, and as the voice of the world’s leading internet companies, IA works to ensure that legislators, consumers, and other stakeholders understand these benefits.

IA member companies are committed to working with legislators and other stakeholders to ensure greater transparency in online political advertising and to prevent foreign governments or their agents from using online platforms to disrupt the integrity of elections. We believe that



the Commission should focus on improving transparency generally and preventing illegal behavior by foreign agents while also protecting privacy, free speech, and political debate online.

II. The Definition of Public Communication

At the outset of the NPRM, the Commission has asked how to amend the definition of “public communication” to best capture internet communications as technology develops. The proposed language would amend the definition of public communication to state that “general public political advertising shall not include communications over the internet, except for communications placed for a fee on another person’s website or internet-enabled device or application.” The Commission asks whether this is a technically accurate way to describe how paid communications can and will be sent and received. IA believes this definition is generally appropriate and will remain relevant as technology advances, but that it could be modified slightly to be clearer. To that end, IA suggests the sentence be adjusted to say “general public political advertising shall not include communications over the internet, except for communications placed for a fee on a third-party’s website, application, platform, or internet-enabled device.” IA believes this more accurately captures the requirement for payment and a website, platform or device other than the speaker’s own.

III. Alternatives A and B – In General

The Commission has framed two alternative approaches to internet communications. As suggested by the NPRM, IA believes that there are features in both alternatives A and B that are appropriate and elements that are not optimal. In particular, IA makes the following overarching observations:

- Internet disclaimers can provide far more information to users than a static print disclaimer and can be accessed on demand in a way that video and audio disclaimers cannot.
- Setting rules or a framework to determine what size communication is eligible for an alternative disclaimer is not practical because the same ad may be served in a variety of formats on varying sizes of screens, and across diverse platforms.
- Although some ads may be large enough to include the traditional “paid for by” box, content consumers can obtain significantly more information through an indicator and one-click access to a more robust disclaimer page. Spending time and resources to try to identify the cut-line on a case-by-case basis or as a time or space percentage of the ad is not practicable, and will only lead to an influx in low-priority enforcement matters.
- Requiring disclaimers within an internet video and then using the advisory opinion process to approve exceptions to this rule would be inefficient for both the requestor and the Commission, and stuck in past practices.



- Many users may not even watch an entire online advertisement and access to the disclaimer through alternative methods will provide more robust access to information about the advertiser.

IV. Specific Comments Regarding Alternatives A and B

With the foregoing broad themes in mind, IA offers the following specific comments on alternatives A and B.

A. Video and Audio Communications Distributed Over the Internet

Alternative A would impose the television and radio disclaimer requirements on audio and video ads on the internet. IA does not believe this approach is practical, wise, or even lawful.

52 U.S.C. § 30120 includes specific disclaimer requirements when a communication is “transmitted through radio” or “transmitted through television.” The internet is neither of these media. Furthermore, many of the disclaimer requirements for television and radio ads stem from Sections 315 and 317 of the Communications Act of 1934, as amended.¹ Therefore, the Commission does not have the statutory authority to impose the television and radio disclaimers on internet communications. Thus, Alternative A would exceed the Commission’s authority and likely be found to be arbitrary and capricious.

Nor is the television and radio disclaimer framework practicable on the internet. Disclaimers typically appear at the end of an advertisement. Even if a user views or listens to the entire ad, he or she could switch it off before the disclaimer is read at the end of the ad. Because of a user’s ability to switch away from video and audio communications, video and audio internet ads are often much shorter than the typical thirty-second television spot. As a result, a television or radio disclaimer would take up far more of the time and space in an internet video or audio ad or be included at the end of an ad when people are less likely to watch or listen.

In reality, there is a much simpler option: require internet ads to include a one-click away disclaimer or a disclaimer within the frame of the ad itself. Hovering over a video, clicking text below the video, or providing a full print disclaimer below the ad would all provide more robust transparency than burying a disclaimer at the end of a web video. The series of questions the Commission asks about video ads (whether an animated GIF is a video, whether a billboard inside of a game platform is a video, etc.) demonstrate how complex such rules would be and why a simpler approach is superior.

Alternative B is a far more suitable approach with respect to audio and video on the internet. It recognizes the inherent differences between traditional television and radio, and it is

¹ See 47 U.S.C. §§ 315 and 317.



consistent with the Federal Election Campaign Act’s (“FECA”) requirements. As such, IA urges the Commission to adopt Alternative B’s approach to the various forms of internet communications. Indeed, Alternative B will allow the Commission’s regulations to remain relevant as technologies and innovations in content delivery evolve on the internet.

B. Text and Graphic Communications Distributed Over the Internet

Alternative A also looks to impose traditional printed disclaimer requirements on internet ads that do not contain audio or video. Recognizing these requirements have been in place for 15 years, there is some logic to this approach. Ultimately, however, it does not provide sufficient flexibility for technological advancements. Font sizes change depending on the platform on which an ad is served or the screen size of the device on which it runs. It may be easy to draw a box and include the text on a static picture or larger banner ad, but IA’s members provide content in so many different ways that it becomes impossible to ascertain exactly how these requirements would work in practice.

In this regard, Alternative B is again superior to Alternative A. One simple standard: “clear and conspicuous” with no safe-harbors (which often become a requirement rather than just a safe harbor) is a much better way to ensure that the Commission’s rules remain relevant and adaptable to new technology.

C. Adapted Disclaimers

The Commission’s proposals includes a new concept—the adapted disclaimer—which is welcome in the internet world and would simplify how disclaimers are used. IA urges the Commission to go further with the adapted disclaimer approach and allow it to be used more broadly than is contemplated in either Alternative A or B.

IA’s members are developing extensive disclaimer and disclosure rules for ads placed on their platforms. Industry groups such as the Digital Advertising Alliance are creating industry standards for political ads. All of these approaches include some form of an adaptive disclaimer—typically a symbol or word that allows users to obtain full disclaimer information and at times even additional information (such as a link to other ads by the same party or links to FEC reporting data). As the platforms and industry roll out these programs, users will become more and more familiar with the adaptive disclaimers, which will likely become standardized across platforms and content. This will allow users to obtain information more easily while allowing political advertisers more flexibility. Rather than trying to fit a “paid for by” notice on an ad that may change in size when delivered on different platforms or devices, the adaptive disclaimer would be inserted into the ad and be visible and accessible in all formats.

By not tying the adaptive disclaimer to the size of the ad or requiring additional information on the face of the ad, content can be created and distributed much more efficiently and consistently. It will also eliminate the need to try to judge whether an ad is too small for a



full disclaimer (the same ad may be large enough on a desktop browser but too small on a mobile phone app). It will allow for greater creative freedom when designing ads on the internet, while providing a more consistent basis for users to obtain information about who is sponsoring the ad.

Moreover, by adopting an industry standard, enforcement responsibility becomes easier for the Commission. IA's member companies will be policing their own platform requirements. The Digital Advertising Alliance will have a mechanism to enforce its industry self-regulatory program. They will be in a position to find noncompliance with their standards, remove such ads, and publicize advertisers who violate the standards. With that said, IA members and industry self-regulatory bodies cannot be in a position to police complicated Commission rules about whether an ad is too small or meets the size requirements. By allowing for adaptive disclaimers in all internet communications, the Commission would promote greater compliance and additional transparency.

Simply put, the Commission should include in its revised regulations a safe harbor for advertisers that comply with industry self-regulatory guidelines, as long as the adaptive disclaimers in those guidelines allow individuals to know:

- (1) That the advertisement is a paid ad;
- (2) Who the payor is; and,
- (3) How to find additional information (such as web site, phone number, or FEC reporting data).

As the Commission noted in the NPRM, it is possible for standards to change and for platforms to change their policies or rules. Advertisers could only rely on these standards to comply with the Commission's disclaimer rules if the underlying standards met those basic requirements. If the underlying standards do not comply, then advertisers would have to revert to the standard Commission disclaimer rules. Such rules should allow for an adaptive indicator, as long as it provides the necessary information.

IA's recommended approach is to allow for more flexibility given the variety of ways that internet content is consumed and to preserve the ability of IA's members to innovate and to allow users of those platforms to innovate. But it is more than that—it is an approach that makes it easy for end users to see that an advertisement is paid content and then to learn about who paid for the content, regardless of whether they are viewing an ad on a desktop computer, a mobile phone, a watch, or a display panel on a refrigerator.

One of the examples in the NPRM provides a good illustration for why IA's approach makes the most sense. The Commission asked about a paid billboard ad in the context of an online game. Having a "paid for by" box on the ad inside the game is not likely to be seen by players or provide the necessary information. But, an adaptive disclaimer in or around the game



would alert people to the fact that there is a paid ad in the game and would allow users to access the necessary information before, during, or after playing.

Finally, IA suggests that with broad allowance for an adaptive disclaimer, there are likely no ads that cannot satisfy these requirements. Small ads on mobile phones can contain an adaptive disclaimer. There may even be technology developed that will allow an ad on one device to display a full disclaimer on another device or send that information to a user. While IA does not like saying something will never happen, evolving technology should make disclaimers more easily accessible, not less. The key is having simple rules in place that require the necessary information to be provided, but allow great flexibility in how that information is conveyed.

V. Conclusion

In sum, IA is pleased that the Commission is considering new rules for the internet. Overall, the medium-neutral approach of Alternative B is better than the restrictive approach of Alternative A. In addition, although the flexibility of Alternative B is superior, the safe harbors set forth in Alternative B are too prescriptive and unlikely to foster long-term innovation. Lastly, in light of the numerous and varying proposals in the NPRM, which one could argue reads more like a Notice of Information, we would respectfully request that the Commission initiate an additional NPRM once the actual proposed rule is more concrete and finely tuned. An additional NPRM would also ensure that the ultimate final rule withstands judicial scrutiny under the D.C. Circuit's "logical outgrowth" standard.²

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Michael Beckerman', with a long horizontal flourish extending to the right.

Michael Beckerman
President and CEO

² *Envtl. Integrity Project v. E.P.A.*, 425 F.3d 992, 996 (D.C. Cir. 2005).

