

May 25, 2018

Submitted Electronically (<http://sers.fec.gov/fosers/rulemaking.htm?pid=74739>)

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

Re: NPRM 2018-06

Dear Mr. Stipanovic:

These comments are submitted by Common Cause and XX,XXX members and supporters (see Appendix A) in response to the Commission's Notice of Proposed Rulemaking (NPRM) 2018-06, published at 83 Fed. Reg. 12864 (March 26, 2018), requesting comments on two alternative proposals (Alternatives "A" and "B") to amend its regulations concerning disclaimers on certain public communications disseminated via the Internet. *Id.*

Common Cause and XX,XXX members and supporters urge the Commission to *adopt Alternative A*, which would apply the "full disclaimer requirements that now apply to radio and television communications to public communications distributed over the internet with audio or video components." *Id.* at 12869. Alternative A would also "apply the type of disclaimer requirements that now apply to printed public communications to text and graphic public communications distributed over the internet." *Id.* Finally, Alternative A would permit a less informative "adapted disclaimer" to be used in limited circumstances: when technological constraints intrinsic to a particular advertising platform (e.g., character or space limitations) prevent inclusion of the full disclaimer.

Common Cause and XX,XXX members and supporters urge the Commission to *reject Alternative B*, which, even absent technological constraints intrinsic to a particular online advertising platform, would permit advertisers to use less informative, watered-down versions of the disclaimers presently required for political advertising. For example, under Alternative B, an advertiser could choose to buy a short/small ad on a platform that can readily accommodate longer/larger ads with a full disclaimer and, as a result of the choice to buy a short/small ad, be exempt from the full disclaimer requirement.

The Supreme Court has for more than 40 years consistently and repeatedly upheld federal law disclaimer requirements because they "provid[e] the electorate with information" and "'insure that the voters are fully informed' about the person or group who is speaking." *Citizens United v. FEC*, 558

U.S. 310, 368 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 196 (2003) and *Buckley v. Valeo*, 424 U.S. 1, 76 (1976)).

The Commission has been considering whether to revise and clarify its existing disclaimer rules since 2011. More than half a decade later, as technology continues to evolve, the grave consequences of inaction are clear. Approximately \$1.415 billion was spent on online political advertising in the 2016 election cycle, with the shift from traditional media to digital media accelerating rapidly and social media sites like Facebook receiving \$2 out of every \$5 spent on digital ads.¹ With the 2018 midterm elections underway, the use of online platforms for political advertising has continued to grow rapidly.

According to the Center for Responsive Politics, citing data from advertising research group Borrell Associates, “digital ads made up less than 1 percent—or \$71 million—of political ad spending” in 2014.² “In the 2018 midterms, spending on digital ads is expected to make up around 22 percent—or \$1.9 billion—of overall political advertising[,]” which would “mark a 2,539 percent growth in spending on digital political advertising while other advertising mediums are projected to take a large dip[.]”³

Notwithstanding the fact that the Federal Election Campaign Act requires disclaimers for certain types of “general public political advertising,” 52 U.S.C. § 30120(a), and the Commission has defined this term to include “communications placed for a fee on another person’s website,” 11 C.F.R. § 100.26, the overwhelming majority of online political ads in recent years *have not* contained the required “paid for by” disclaimer—and the Commission has failed to effectively interpret and enforce the law.

U.S. Department of Justice (DOJ) Special Counsel Robert S. Mueller has, however, taken seriously undisclosed spending in the 2016 election. On February 16, 2018, the DOJ charged 13 Russians and three companies, including the Russian “troll farm” Internet Research Agency, with violations of U.S. law related to undisclosed spending in the 2016 elections.⁴ According to the indictment, by September 2016, the Russian influence operation had a budget of \$1.25 million per month.⁵ And

¹ Sean J. Miller, *Digital Ad Spending Tops Estimates*, CAMPAIGNS & ELECTIONS, Jan. 4, 2017, available at <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates>.

² Megan Janetsky, *Low transparency, low regulation online political ads skyrocket*, CENTER FOR RESPONSIVE POLITICS, March 7, 2018, <https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/>.

³ *Id.*

⁴ Matt Apuzzo and Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, NEW YORK TIMES, February 16, 2018, <https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html>.

⁵ *U.S. v. Internet Research Service et al.*, Indictment ¶112b, February 16, 2018, <https://assets.documentcloud.org/documents/4380504/The-Special-Counsel-s-Indictment-of-the-Internet.pdf>.

earlier this month Democrats on the House Intelligence Committee “published more than 3,500 Facebook and Instagram ads linked to the Russian propaganda group Internet Research Agency, making it the largest trove of these ads the public has seen to date.”⁶

Presently, Common Cause has three complaints pending with the Commission alleging violations of FECA disclosure and disclaimer requirements by Facebook advertisers, *Common Cause v. Unknown [Russian] Respondents*, September 7, 2017 (MUR 7274), *Common Cause v. Unknown Owner of “Trump 2020” Facebook Page*, September 26, 2017 (MUR 7279) and *Common Cause v. Michael Waddell*, September 26, 2017 (MUR 7280).

It is long past time for the Commission to promulgate clear disclaimer rules for online political advertising that the Commission will enforce. Common Cause urges adoption of Alternative A, which sensibly applies disclaimer requirements for TV, radio and print advertisements to their online analogues of video, audio and text/graphic advertisements—while allowing use of a less informative “adapted disclaimer” only when a full disclaimer cannot be included in the advertisement due to technological constraints.

Common Cause opposes Alternative B, which would *not* require online advertisers to include “stand by your ad” disclaimer language presently required for TV and radio advertisements—even though such disclaimer language could easily be included in most online video and audio advertisements—and which would permit the use of a less informative “adapted disclaimer” even when no intrinsic technological constraints prevent the inclusion of a full disclaimer. While it is indeed true that Internet communications are different than traditional media, the difference does not warrant an automatic default to less informative disclaimers. On the contrary, a principal virtue of the Internet is its ability to deliver information—and the Commission’s disclaimer rules should capitalize on this virtue, not undercut it.

Common Cause requests the opportunity to testify at the June 27, 2018 hearing noticed in the NPRM. We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Karen Hobert Flynn
President

/s/ Paul S. Ryan
Vice President, Policy & Litigation

And XX,XXX Common Cause members and supporters listed in Appendix A.

⁶ Issie Lapowsky, *House Democrats Release 3,500 Russia-Linked Facebook Ads*, WIRED, May 10, 2018, <https://www.wired.com/story/house-democrats-release-3500-russia-linked-facebook-ads/>.

Appendix A

