

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER to the
FEDERAL ELECTION COMMISSION

Internet Communication Disclaimers and Definition of “Public Communication”

[Notice 2018-06]

May 24, 2018

The Electronic Privacy Information Center (“EPIC”) submits these written comments in response to the Federal Election Commission’s (“FEC”) notice of proposed rulemaking.¹ EPIC requests to testify at the Commission’s hearing on June 27, 2018.

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.² EPIC is also a leading advocate for civil liberties and democratic values in the information age. EPIC is currently pursuing numerous Freedom of Information Act matters to learn more about Russian interference in the 2016 Presidential election.³ EPIC is pursuing these matters because the public has a right to know the details when a foreign government attempts to influence the outcome of a U.S. presidential election. The transparency of those companies whose services were used by Russian operatives is essential to understand the extent of interference in the 2016 election.⁴ And to be certain, companies that sell commercial advertising to political campaigns have long been required to reveal the source of the advertising

¹ FEC, *Internet Communication Disclaimers and Definition of “Public Communication,”* 82 Fed. Reg. 12864 (March 26, 2018), <https://www.federalregister.gov/documents/2018/03/26/2018-06010/internet-communication-disclaimers-and-definition-of-public-communication> (hereafter “Notice”).

² See *About EPIC*, EPIC, <https://epic.org/epic/about.html>.

³ *EPIC v. ODNI*, No. 17-163 (D.D.C. Jan. 25, 2017); *EPIC v. FBI*, No. 17-121 (D.D.C. Jan. 18, 2017).

⁴ Marc Rotenberg, *Americans have a right to know what intel community knows on Russia*, The Hill (March 27, 2017), <http://thehill.com/blogs/pundits-blog/the-administration/325862-americans-have-a-right-to-know-what-intel-community>.

purchase.

Some commenters argued that there is some fundamental difference between internet advertising and traditional advertising, and therefore online advertisers should not be required to meet the same disclosure requirements. There is a fundamental difference between online ads and traditional ads—online ads can be micro-targeted—but this requires more scrutiny from the FEC, not less. The targeted nature of online advertisements requires more disclosure requirements than traditional media. Online platforms use algorithms to target ads with a level of granularity that has not been possible before. Russian operatives bought ads from Facebook targeted at “professed gun lovers, fans of Martin Luther King Jr., supporters of Trump, supporters of Clinton, residents of specific states, and Southerners who Facebook’s algorithms concluded were interested in ‘Dixie.’”⁵ Moreover, digital platforms could provide more information to the recipient of a political message about the source, period, and targeting of the ad than would be possible with traditional media.

At the very least, FEC rules should require at least as much transparency for Internet-based advertising and they do for traditional print and broadcast advertising. In Part I, EPIC proposes that the FEC create a centralized directory of advertisers to increase public transparency of online political advertisements. Part II addresses the expanded definition of “public communication” proposed by the FEC. Part III addresses the proposed revisions to the disclaimer rules for online public communications (following the numbering and subtitles used in the notice for ease of reference).

I. FEC Should Create a Centralized Directory of Advertiser Data

The FEC should create a centralized directory of advertisers similar to the database it

⁵ Craig Timberg, Elizabeth Dvoskin, Adam Entous and Karoun Demirjian, *Russian ads, now publicly released, show sophistication of influence campaign*, Washington Post (Nov. 1, 2017), https://www.washingtonpost.com/business/technology/russian-ads-now-publicly-released-show-sophistication-of-influence-campaign/2017/11/01/d26aead2-bf1b-11e7-8444-a0d4f04b89eb_story.html?utm_term=.20b50dbb6554.

maintains for campaign finance records. In response to pressure from Congress and the public, online platforms have announced plans to create public databases of advertiser information.⁶ This is a good step but an industry-managed database lacks both accountability and independence. It is also less convenient because it allows the public to examine advertisers on a single platform and would not enable the public to examine a single advertiser across multiple platforms. Also, a public database, maintained by the agency, will allow the public to use the data in ways that a private company would most likely not allow. For example, ProPublica created a campaign finance API using the FEC’s raw data to enable research.⁷ Furthermore, without mandatory rules companies can release data selectively or cease the practice when there is less public scrutiny.

The Commission’s disclosure requirements for internet communications should include full disclosure of all of the information related to the ad – to which demographic groups it was targeted, the period it appears, the number of views it received, the purchaser of the ad, and the amount that was paid. This transparency obligation should include a requirement that online platforms fully disclose how an advertiser used its tools to create a target audience for that advertisement, including what data the platform collected about the user that caused the user to be placed within that target audience. In other words, a platform should fully explain to the user why she was targeted with that particular ad. The Honest Ads Act introduced in the Senate contains several of these requirements. It would require online platforms to provide a public record that includes, “a description of the audience targeted by the advertisement, the number of views generated from the advertisement, and the date and time that the advertisement is first displayed or last displayed.”⁸

⁶ See, e.g., Selina Wang, *Twitter Is Making Its Political Advertising More Transparent*, Bloomberg, (Oct. 24, 2017), <https://www.bloomberg.com/news/articles/2017-10-24/twitter-adopts-advertising-transparency-rules-amid-russia-probe> (Twitter announced that it will create a “transparency center” for political ads – a database that allows the user to see how much each campaign spent on advertising, the identity of the organization funding the campaign, and what demographics the ad targeted).

⁷ ProPublica Data Store, *Campaign Finance API*, <https://www.propublica.org/datastore/api/campaign-finance-api>.

⁸ Honest Ads Act, S. 1989, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1989>.

These disclosures would establish accountability for the use of online political advertising. This would also help users evaluate the arguments to which they are being subjected. For example, a user who was shown an ad with a racially divisive message would be more likely to understand that the ad was meant to increase racial tension if the user knew she was targeted because of her race. We know that Russian ads were served to Facebook users in swing states.⁹ Transparency about the precise geographic regions being targeted would make clear whether a group was targeting an ad based on a voting district. Voters deserve to know why they are being targeted and by whom.

II. Definition of “Public Communication”

EPIC supports the FEC’s proposal to expand the definition of “public communication.” Currently the definition excludes all internet communications “other than communications placed for a fee on another person’s website.” The proposal would expand definition by including communications placed for a fee on another person’s “internet-enabled device or application.”¹⁰ This new definition is an appropriate change to keep pace with technological developments.

III. Proposed Revision to the Disclaimer Rules at 11 CFR 110.11

1. Proposed Disclaimer Requirements for Communications Distributed Over the Internet—Organization

EPIC supports the Alternative B definition of “internet communications” rather than the Alternative A option not to define the term. Alternative B defines “internet communications” as “email of more than 500 substantially similar communications when sent by a political committee; internet websites of political committees available to the general public; and any communication

⁹ Manu Raju, Dylan Byers and Dana Bash, *Exclusive: Russian-linked Facebook ads targeted Michigan and Wisconsin*, CNN (Oct. 4, 2017), <http://www.cnn.com/2017/10/03/politics/russian-facebook-ads-michigan-wisconsin/index.html>.

¹⁰ Notice at 12868.

placed for a fee on another person’s website or internet-enabled device or application.”¹¹ A definition would help provide clarity to advertisers and internet companies, which would help with compliance. If the FEC decides to include a reference to “virtual reality, social networking, or internet platforms”¹² it should make clear that the examples provided are a non-exhaustive list of internet communications.

2. *Disclaimer Requirements for Video and Audio Communications Distributed Over the Internet*

EPIC largely supports the Alternative A disclaimer requirements for video and audio communications distributed over the internet because they are consistent with the disclaimer requirements for video and audio communications distributed via radio and television. Alternative A is premised on the idea that there is not a meaningful difference between video and audio communications distributed over the internet and over traditional media, while Alternative B is premised on the idea that there is something fundamentally different about the internet as a content distribution medium. Alternative B does not apply the “stand by your ad” requirements for radio and television communications to internet communications. The rationale is that the “stand by your ad” requirements would be too burdensome for internet ads. But as acknowledged in the notice, in the context of broadcast advertisements the Supreme Court has held that the government's informational interest is sufficient to justify disclaimer requirements even when a speaker claims that the inclusion of a disclaimer “decreases both the quantity and effectiveness of the group's speech.”¹³ The government’s informational interest is equally strong for internet advertisements, and the FEC should not abrogate that interest.

¹¹ Notice at 12869.

¹² *Id.*

¹³ *Citizens United*, 558 U.S. at 368.

3. Disclaimer Requirements for Text and Graphic Communications Distributed Over the Internet

EPIC supports the Alternative A disclaimer requirements for text and graphic communications distributed over the internet because they correspond to the disclaimer requirements for printed communications. Alternative B only includes the general requirements that apply to all public communications requiring disclaimers while Alternative A includes those general requirements as well as disclaimers required for printed public communication.

4. Adapted Disclaimers for Public Communications Distributed Over the Internet

EPIC supports the Alternative A requirement that adapted disclaimers only be permitted when the full disclaimer does not fit because it is technology-neutral and would result in more ads including full disclaimers. While both alternatives propose that some can satisfy the disclaimer requirement with adapted disclaimers, Alternative B allows adapted disclaimers whenever a full disclaimer occupy more than 10% of the ad.¹⁴ It is not technology-neutral because a percentage must be measured in some unit (characters, pixels, or seconds). The 10% figure is arbitrary, and the technology-specific rule will become more outdated more quickly.

The FEC's rules for disclaimers in broadcast and radio ads are not dependent on the percentage of space or time the disclaimer occupies and the neither should the rules for internet ads. A broadcast ad must meet disclaimer requirements, regardless of the length of the ad in relation to the length of the disclaimer.

5. How Adaptations Must Be Presented on the Face of the Advertisement

EPIC supports Alternative A—that would require adapted disclaimers to include the name of

¹⁴ Notice at 12875.

the payor plus an indicator that further information is available—because it will be more effective in disclosing relevant information to viewers of the ads. Some clear form of the payor’s name should be visible on the face of every ad.

EPIC agrees with the premise of Alternative A that an indicator without the payor’s name will not provide the same informational value.¹⁵ It is likely that most people will not click the indicator to read the full disclosure. The average click-through rate, the number of times users saw an ad compared to the number of times users clicked on it, for Facebook ads across all industries is 0.90%.¹⁶ It would be unacceptable for less than 1% of viewers who saw a political ad to know who paid for it. Therefore, it is important for payor information to be on the face of the advertisement.

Alternative B is more complicated and would sacrifice clarity for expediency. Tier one would allow, in lieu of a payor’s full name, “a clearly recognized abbreviation, acronym, or other unique identifier by which the payor is commonly known.”¹⁷ Tier two would allow an ad to include only an indicator on the face of an ad “if the space or time necessary for a clear and conspicuous tier-one adapted disclaimer . . . would exceed a certain percentage of the overall communication.”¹⁸ Tier one is not as problematic as tier two because there would be some form of the payor’s name on the face of the ad. However, the FEC is assuming that people are familiar with acronyms. The example given is the Democratic Senatorial Campaign Committee could use the acronym “DSCC.”¹⁹ Most people would not know what “DSCC” stood for without using the indicator to read the full disclaimer.

Tier two of Alternative B is insufficient to inform viewers. If the payor’s name or abbreviation would occupy more than 10% of an advertisement, An indicator such as “a website

¹⁵ Notice at 12876.

¹⁶ Mark Irvine, *Facebook Ad Benchmarks for Your Industry [New Data]*, WordStream (April 9, 2018), <https://www.wordstream.com/blog/ws/2017/02/28/facebook-advertising-benchmarks>.

¹⁷ Notice at 12876.

¹⁸ *Id.* at 12877.

¹⁹ *Id.*

URL, or an image, sound, symbol, or icon”²⁰ would not reveal what type of information a viewer would find if she chose to click the indicator. This could make viewers even less likely to click the indicator and read the full disclosure. Alternative A ensures that all viewers would see the disclaimer, making it consistent with FEC rules for broadcast media.

6. Adaptations Utilizing One-Step Technological Mechanism

EPIC does not have a strong preference for Alternative A or B in this section. Under Alternative A, a technological mechanism must be “associated with the indicator and allow a recipient of the communication to locate the full disclaimer by navigating no more than one step away from the adapted disclaimer.”²¹ Under Alternative B, a technological mechanism is defined as “any use of technology that enables the person reading, observing, or listening to an internet public communication to read, observe, or listen to a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) without navigating more than one step away from the internet public communication, and is associated with an adapted disclaimer.”²²

Whether the FEC chooses Alternative A or B, it is essential that the Commission require an abbreviated disclaimer on the face of the advertisement. An ad that enables a user to access the full disclaimer by clicking anywhere on the communication does not negate this responsibility. A user would not be aware that clicking the ad would lead to a disclosure of the ad’s funding without an indicator and partial disclaimer.

7. Examples of Technological Mechanisms in Adapted Disclaimers

In EPIC’s view, the list set out in Alternative A is sufficient. The examples of technological

²⁰ Notice at 12877.

²¹ *Id.* at 12878.

²² *Id.*

mechanisms include but are not limited to “hover-over mechanisms, pop-up screens, scrolling text, rotating panels, or hyperlinks to a landing page with the full disclaimer.”²³ Alternative B has the same list but also includes “voice-over” “roll-over” and “mouse-over.”²⁴

Whatever technological mechanism is used, the FEC should require it to be accessible by all recipients of the communication, including those using mobile devices. Over one-in-ten American adults own smartphones but do not have access to broadband at home, meaning their smartphone is their primary method of accessing the internet.²⁵ Those dependent on smartphones for internet access are more likely younger adults, non-whites and lower-income Americans.²⁶ Without a requirement that the technological mechanism used for an adapted disclaimer be universally accessible, certain demographic groups would be less likely to access proper disclaimers.

8. *Proposed Exceptions to Disclaimer Rules for Internet Public Communications*

EPIC supports the Alternative A approach of not having exceptions to the disclosure rules. Alternative A adequately addresses concerns that certain forms of internet communications are ill-suited for traditional disclosures by providing for an adapted disclaimer. Alternative B “proposes to exempt from the disclaimer requirement any internet public communications that can provide neither a disclaimer in the communication itself nor an adapted disclaimer.”²⁷ It hypothesizes that even an adapted disclaimer could be too burdensome for future advertising methods, and would allow advertisers to evade the disclaimer requirements altogether if deemed too burdensome. This exception will discourage advertisers and internet companies from innovating new methods of disclosure, because if they have no requirement to include a disclaimer then they have no incentive

²³ Notice at 12878.

²⁴ *Id.* at 12879.

²⁵ Pew Research Center, *Mobile Fact Sheet* (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/mobile/>.

²⁶ *Id.*

²⁷ Notice at 12879.

to develop an indicator appropriate for the new technology. As companies innovate new forms of advertising, they should also be innovating new forms of disclosure. The adaptations provided for in Alternative A adequately address any technological limitations.

Conclusion

FEC rules should be technology-neutral and consistent across media platforms for functional equivalents. The FEC's job is not to promote innovation in the advertising industry. The FEC's job is to promote fair and transparent elections.

Sincerely,

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