

May 25, 2018



VIA ELECTRONIC FILING

Mr. Neven F. Stipanovic
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Docket 2018-06; 83 Fed. Reg. 12,864
*Notice of Proposed Rulemaking on Internet Communication Disclaimers and
Definition of “Public Communication”*

Dear Mr. Stipanovic:

We are grateful for your reopening of the comment period with respect to the Federal Election Commission’s Notice of Proposed Rulemaking on Internet Communication Disclaimers and Definition of “Public Communication”¹ and affording us the opportunity to submit these comments. TechFreedom is a think tank dedicated to promoting the progress of technology that improves the human condition. To this end, we seek to advance public policy that makes experimentation, entrepreneurship, and investment possible, and thus unleashes the ultimate resource: human ingenuity. Wherever possible, we seek to empower users to make their own choices online.

Transparency transcends TechFreedom’s work across a range of Internet policy issues. These comments focus on how to provide transparency in Internet Communications delivered through banner ads and other, smaller display ad formats. We are concerned with the tradeoffs involved for the user in any regulation that requires ads to be redesigned — tradeoffs that are not present in significantly larger ad formats, such as full-page print ads or all but the very shortest videos (whether viewed online or offline).

We support the Amended Alternative A/B proposed in this comment round by Freedom Partners (“Alternative A/B”), which would recognize the “indicator” system proposed and

¹ Internet Communication Disclaimers and Definition of “Public Communication,” 83 Fed. Reg. 12,864 (March 26, 2018) (Notice of Proposed Rulemaking).

Facebook last year.² The “PoliticalAd” program announced this week by the Digital Advertising Alliance (“DAA”) as an “industry-wide initiative to increase transparency and accountability around digital political ads” represents a promising implementation of the indicator system contemplated by Alternative A/B. We write to address potential concerns raised by this implementation, and to suggest ways to address them.

Online privacy has been a key focus of my work over the last decade. I participated in the lengthy World Wide Web Consortium process that set standards governing how users could communicate a Do Not Track preference. The “AdChoice” icon developed by the DAA grew out of that process, and my familiarity with that system comes from that experience.

Any attempt to mandate full disclosures inside the text of small banner ads will be unworkable in practice. At best, for the larger ads, it will greatly reduce the overall effectiveness of the ads, which in turn raises serious First Amendment concerns: a required disclosure that took up so much space and interfered with the aesthetics of an ad to such a degree, as to significantly impair the effectiveness of the ad would impose a uniquely punitive burden on online political advertising. This would violate the First Amendment for the same reasons that a tax selectively imposed only on one kind of media violates the First Amendment.³

The question is not whether, for banner ads, disclosure should be made available via the kind of indicator implemented by the DAA. Rather, the question is precisely *how* such a system should be implemented. It seems that such a system is intended to answer two questions for the user: First, what is the nature of the ad? Second, who is behind the ad? Or, more broadly, where can the user find more information about the ad?

What is the Nature of the Ad? The DAA’s AdChoices system has been criticized because neither the “AdChoices” wording nor the icon featured next to it clearly communicate to the user, on their own, that the ad they’re seeing is a behaviorally targeted ad. While that fact is far from apparent for online ads, the exact opposite is true for ads that mention a specific candidate: it is obvious from the ad itself that it is a political ad. On the other hand, the definition of “Internet communication” also includes ads that do not mention a specific candidate, but are simply bought by a Political Action Committee, in which case it may not be apparent from the face of those ads that they are, in fact, political ads.

² Facebook, Comment Letter on Proposed Rule Internet Communication Disclaimers and Definition of “Public Communication” 3 (Nov. 13, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358468>.

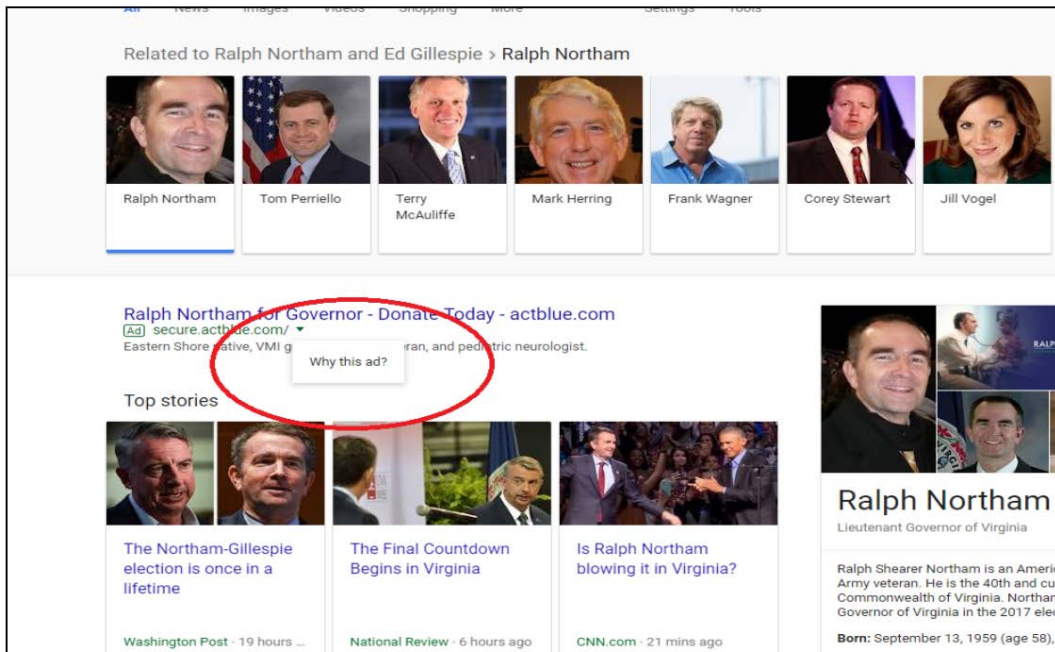
³ *Minneapolis Star Tribune Company v. Commissioner*, 460 U.S. 575 (1983) (overturning a use tax on paper and ink).

Thus, the wording associated with the indicator may matter. But where the “AdChoices” wording cannot, by itself, communicate the fact that an ad is behaviorally targeted, the “PoliticalAd” wording does precisely what it needs to. While font size, contrast, and other visual factors do matter, it is hard to imagine a clearer wording for this purpose,

Who is Behind the Ad? We are herein concerned with those ads for which trying to answer this question on the face of the ad would be counter-productive. As Twitter notes,

with Tweets character-limited to 280 characters, a full in-Tweet FEC 7 disclaimer could account for as much as 35 percent of the content of a Tweet. Even if the disclaimer was in a separate portion of the Tweet, cramming all of this information in the same space could significantly alter the way Users engage with the platform on mobile devices.⁴

Which ads fall into this category is highly contextual. Google’s is a considerably more flexible format: the company is not constrained by a small rectangle that must be placed on some publisher’s website. Instead, it can subtly redesign its search results to include the website associated with the purchaser of the ad, and a drop-down menu that produces the “Why this ad?” hover text depicted below. This would not be possible for the display ads served on third party websites.⁵



⁴ Twitter, Comment Letter on Proposed Rule Internet Communication Disclaimers and Definition of “Public Communication” 3 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358496>.

⁵ Google, Comment Letter on Proposed Rule Internet Communication Disclaimers and Definition of “Public Communication” Exhibit B (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358482>.

For small ads in more constrained formats, the important question is how to effectively present the user with a clear path to seeing more information about the ad — such that the user understands that the kind of “indicator” required by DAA is effective at clearly communicating to the user that clicking on the indicator (DAA’s icon) or the associated wording will take the user to a disclosure page that will answer their questions. As Twitter puts it, “character-constrained platforms [need a way] to fulfill the public disclosure in ways that reflect such constraints while providing disclosure consistent with the product, and elsewhere through links.”⁶

The DAA’s AdChoices icon has been criticized by some researchers, whose user survey data suggested that other wordings might be more effective at communicating to users why they should click on the indicator.⁷ Interestingly, that study found that “Configure ad preferences” would be exactly as effective, indicating that more information is not necessarily clearer. “Why did I get this ad?” would be, according to that study, either “definitely” or “probably” effective according to 80% of users, versus 58% for “AdChoices.” The advertising industry disputes these findings.

Regardless of the exact numbers, it is difficult to determine which wording is most appropriate, given the tradeoffs involved and the various contexts in which such language could be deployed. For instance, “Why did I get this political ad?” might or might not be more effective: it might more clearly communicate to the user why they might want to bother clicking on the indicator for more information, but be less effective at identifying the ad as a political ad, which, as noted above, could be important in the context of ads that do not expressly mention a candidate and thus are not obviously political ads on their face, but which qualify as Internet Communications because they were purchased by a PAC. Moreover, and critically, the longer the text of the wording, the less possible it will be to display it in a consistent format across the advertising ecosystem.

These are ultimately empirical questions, but it would be a mistake to try to maximize measures of user understanding of individual advertisements in isolation in test conditions, because in the real world, what matters is the recognition by real users of a consistent wording and indicator across contexts. That is, the success of DAA’s Political Ads system, and the particular implementation of that self-regulatory concept on leading advertising platforms, should be measured systemically, not in isolation.

⁶ *Id.*

⁷ Lorrie Cranor, Director, Carnegie Mellon University CyLab, Presentation to the Privacy Enhancing Technologies Symposium, Privacy Notice and Choice in Practice 61 (July 10, 2013), <http://lorrie.cranor.org/talks/notice-choice-pets2013.pdf>.

General Recommendation: Allow Experimentation

With the above in mind, we encourage the Commission to adopt Alternative A/B as a regulation. We understand that some Commissioners may have concerns about the effectiveness of the indicator-based system. This is no reason not to adopt Alternative A/B, but it *might* be a good reason for making that approval time-limited. The Commission could allow that system to operate for a trial period and use that period to evaluate the effectiveness of the indicator based on hard data collected in the interim. A one-year window would allow experimentation and data collection through the 2018 midterms, but would not allow the advertising industry the opportunity to learn from that experience, refine its implementation, or conduct additional awareness-building efforts to inform users about how the system works. Thus, we believe any trial period should run through the 2020 election.

What is important is that the Commission now reach a bipartisan consensus on adopting Alternative A/B as a regulation. Deadlocking along partisan lines now would simply perpetuate the current uncertainty about the Commission's intentions and could discourage effective implementation of the kind of system just launched by the DAA.

Recommendation #1: Collect Data on User Understanding

The decision, in 2021, about whether to simply renew, modify, or revoke Alternative A/B must be based on empirical evidence of user understanding. Ideally, the Commission should support its own independent research on this point. In other contexts, regulatory Commissions have funded two studies, with one researcher chosen by the Commissioners of each major party represented on the Commission. This would ensure a balanced assessment of the degree to which the kind of system proposed by the DAA is truly effective.

At a minimum, the Commission should facilitate research by hosting a workshop to discuss research conducted on this issue. A preliminary workshop could be held in 2019, based on the initial experience with the 2018 election, and to give the advertising industry feedback on how its implementations are performing.

Recommendation #2: Encourage Awareness-Building

The Commission should make clear now that the advertising industry has an obligation to educate consumers about the meaning of the wording and indicators they use — whatever their particular implementation looks like. The Commission should leave it to industry to craft such campaigns; after all, no one knows advertising better than the advertising industry. Instead, the Commission should focus on objective measures of how effective such campaigns are.

Some Commissioners may want to set benchmarks in advance. While it would be helpful to discuss other relevant benchmarks, it will ultimately be up to the Commissioners in 2021, under our proposal, to determine whether the system has been a success relative to other alternatives and given the way the advertising market has evolved by that time.

Recommendation #3: Require Machine-Readable Disclosures

We understand that some may be reluctant to leave implementation entirely to the advertising industry. Fortunately, adopting Alternative A/B doesn't have to mean trusting industry to get this right, nor would it deprive the Commission of the benefit of empirical data that compares industry's implementation with other alternatives in the real world. That is because, at least in the desktop environment, the user can, through their browser or extensions added to the browser, change the way they experience any aspect of browsing the web.

That is, the question before the Commission is not merely the default presentation of information to users in the way their browser draws webpages based on the code it receives, but the entirely separate question of what that code contains *even if is not implemented by default*. If advertising platforms, in addition to the standard implementation of their labeling for Internet Communications, included a standard set of machine-readable code containing the information required to be disclosed for Internet Communications, this would enable a wide range of experimentation. For example, a browser or extension maker could:

- Flag political ads by drawing a simple red line around them — to address concerns that the “PoliticalAds” label was not sufficiently visible;
- Provide a hover box (that would appear when the user's cursor hovered over the ad) that would display the disclosure information without the user needing to click through to go to the disclosure page;
- Change the appearance of the ads themselves, such as by putting a “political ad” label on top of the ad in any number of ways;
- Implement the disclosure for visually impaired users by ensuring that their browser can read the text aloud to them without their having to take additional action;
- Track the appearance of political ads, on a very granular level, allowing users to easily participate in large-scale studies of political advertising or to see summaries of how much political advertising they are shown, and from which sources; and
- Empower users to opt-out of receiving political ads from certain sources.

Some such implementations may be possible even without machine-readable disclosures: if the browser or extension can determine what is a political ad, for example, because the DAA's implementation includes an element that is consistent across multiple platforms, it could add additional labeling or modify the ad to make more clear that it is a political ad. But any implementation that attempts to convey to the user more clearly the information required to be disclosed for Internet Communications, or to study the appearance of political advertising based on such data fields, would require a machine-readable disclosure.

The cost of implementing a machine-readable disclosure would be near zero. It would simply mean that the data fields required to be presented in a second page (that the user can get to by clicking on the indicator) should also be presented in code delivered along with the ad. Because that code would be invisible to the user, absent some implementation by the browser or an extension maker, there is no cost in terms of the standard user experience. Users will see a difference only if they choose to install an extension that parses that machine-readable code, or if their browser maker chooses to do something similar. However ugly the implementation of an extension — imagine a flashing red “POLITICAL AD” overlay on top of an ad — that is a decision for the user, not the industry *or* the government.

Some might object that extensions will only be used by more sophisticated users who are outliers anyway, and will not help the less sophisticated users least likely to understanding the meaning of the “PoliticalAd” wording or that clicking on the indicator will take them to a disclosure page. This misunderstands the value created by machine-readable code in two ways. First, whether anyone bothers to create the kind of extensions hypothesized here, and the degree to which users adopt them (relative to other extensions), provides an important kind of feedback about the effectiveness of the standard implementation. Second, browser makers can always change the default implementation for a large class of users. Mozilla, the maker of the popular Firefox browser, has a long history of pushing the envelope on behalf of its users. Mozilla's ability to change implementation could provide a powerful counterweight to industry. Even if Mozilla chooses *not* to do so, the fact that it could, given the availability of machine-readable code, will likely pressure industry to implement the DAA system in a clearer, more user-friendly way, *and* to promote awareness of that system more heavily.

The concept of “Smart Disclosure” (putting disclosures into machine-readable code) was recognized in 2011 by an official memorandum issued to the heads of executive departments and agencies as follows:

Smart disclosure makes information not merely available, but also accessible and usable, by structuring disclosed data in standardized, machine readable formats. Such data should also be timely, interoperable, and adaptable to market

innovation, as well as disclosed in ways that fully protect consumer privacy. In many cases, smart disclosure enables third parties to analyze, repackage, and reuse information to build tools that help individual consumers to make more informed choices in the marketplace.⁸

Machine-readable disclosures are the best way to, as the Commission put it, “allow for flexibility to address future technological developments while honoring the important function of providing disclaimers to voters.”⁹

We would encourage Alternative A/B to be amended to include a requirement that the code for displaying political advertisements sent to users’ browsers also include the data fields required to be displayed for Internet Communications in a standardized, machine-readable format.

Conclusion

We urge the Commission to resolve this matter quickly, as the 2018 midterm elections are approaching, and both the advertising industry and the American people will benefit from certainty on this issue. That certainty can only be provided through a regulation, not an advice letter, which will not actually constrain the Commission in the exercise of its enforcement authority. We earnestly hope that the concepts we have proposed will help facilitate a bipartisan agreement on a regulation that can be issued well in advance of the midterm elections.

We would appreciate the opportunity to speak about our views at your public workshop on this proceeding.

Sincerely,

/s/

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⁸ OFFICE OF INFORMATION AND REGULATORY AFFAIRS, EXEC. OFFICE OF THE PRESIDENT, Memorandum for the Heads of Executive Departments and Agencies: Informing Consumers through Smart Disclosure (Sept. 8, 2011), <https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/for-agencies/informing-consumers-through-smart-disclosure.pdf>

⁹ Internet Communication Disclaimers and Definition of “Public Communication,” 83 Fed. Reg. at 12,879.