July 10, 2019

Federal Election Commission
Lisa J. Stevenson, Acting General Counsel
Office of General Counsel
1050 First Street NE
Washington, DC 20463

Re: REG 2011-02: Internet Communication Disclaimers

Dear Ms. Stevenson:

The Campaign Legal Center ("CLC") and Issue One applaud the Commission for its progress on this long-overdue rulemaking.

Proposed rules A and B, dated June 19, 2019, would each offer more clarity than the status quo, particularly in ensuring that statutorily required disclaimer information is displayed on the face of applicable internet advertising. The June 2019 proposals are also substantially less different from one another than were the two alternative proposals in the March 26, 2018 notice of proposed rulemaking ("NPRM").[1]

These comments will address two differences between the new proposals.

First, the proposals differ in the standard used to determine when an abbreviated disclaimer—meaning a statement containing the full name of, or a recognized acronym for, each person who paid for the communication—may be substituted for a full disclaimer. Proposal A would provide that the Commission's existing "impracticability" exception does not apply to internet ads, but it would allow for an abbreviated disclaimer when a full disclaimer is "impracticable" to include "due to factors inherent in the technology."

[1] 83 Fed. Reg. 12864 (Mar. 26, 2018).

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Proposal B would allow the current impracticability exception to apply to internet ads and would also allow for an abbreviated disclaimer if the communication "cannot reasonably provide a disclaimer on the face of the communication."

Rather than either of these proposals, CLC and Issue One recommend that the Commission adopt the bright-line standard proposed in the bipartisan Honest Ads Act, which would permit an abbreviated disclaimer only when display of the full disclaimer is "not possible."[2] But between Proposals A and B, we recommend adoption of Proposal A, which would at least make clear that the reasonableness standard is tied to the objective technological constraints of the advertising medium.

The second difference between the proposals is whether Commission regulations should expressly permit the complete omission *of all* disclaimer information, as long as the communication includes an indicator and technological mechanism. Proposal A would not permit such omission. Proposal B would allow for the omission of even an abbreviated on-ad disclaimer if the information "cannot reasonably be provided on the face of the communication because of character or space constraints."

CLC and IO appreciate that Proposal B expresses a preference for including on-ad disclaimer information, and that the exception from such requirements is tied to the technological constraints of the medium ("because of character or space constraints") rather than the subjective preferences of the advertiser. However, as noted in CLC's May 24, 2018 comments on the NPRM, FECA simply does not permit—and the Commission has no authority to promulgate—such a wholesale exemption from disclaimer requirements.[3] To do so would be arbitrary, capricious, and contrary to law.[4]

We encourage the Commission to proceed with this rulemaking and to reach consensus on these important regulations.

Respectfully,

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[2] Honest Ads Act, S. 1356, 116th Cong. § 7 (2019).

[3] Campaign Legal Center, Comments on Notice 2018-06: "Internet Communications Disclaimers and Definition of "Public Communication" (May 24, 2018) at 13.

[4] 5 U.S.C. § 706(2)(A); *see also Shays v. Federal Election Com'n*, 528 F.3d 914, 919 (D.C. Cir. 2008) (courts "must reject administrative constructions of [a] statute . . . that frustrate the policy that Congress sought to implement."(quoting *Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1453 (D.C. Cir. 1988)).

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