



November 30, 2022

Federal Election Commission  
1050 First St. NE  
Washington, DC 20463

**Re: REG 2011-02 (Final Rule and Explanation and Justification for Internet Communication Disclaimers) – Drafts A and B**

Dear Commissioners:

Campaign Legal Center (“CLC”) is pleased to see the Commission moving toward implementing a final rule in its long-languishing rulemaking on internet communication disclaimers, but we write to express our concerns with Draft B of the final rule and, relatedly, the lack of sufficient time provided to fully consider the implications of Draft B’s approach to the final rule.

As we have expressed in prior comments, the increasing prevalence of electoral communications disseminated over digital media and internet-powered devices and services, combined with the uniquely important transparency interests that disclaimers serve in the electoral context, make this an extraordinarily important issue. A revised regulation requiring disclaimers on paid digital communications, regardless of their size or length, has been sorely needed for years, and it is heartening that the Commission is finally taking a major step toward protecting voters by modernizing its regulations in this regard.

Nevertheless, the eleventh-hour introduction of an alternative version of the final rule, Draft B, raises several concerns. For starters, it is unusual for there to even be multiple versions of a proposed final rule; at this stage, the Commission has typically considered public comments and reached agreement on a final proposal. But that does not appear to be the case here. There are now competing proposed regulations, and because the Commission publicly released Draft B — a nearly 50-page document — just 3 days before the meeting where it plans to discuss and vote

on a final rule, the public is being denied the opportunity to meaningfully consider the two alternatives and offer informed reactions to them.<sup>1</sup>

Moreover, a cursory review reveals multiple concerning issues with Draft B that require the Commission's attention and consideration.

For example, Draft A's definitions of "public communication" and "internet public communication" include communications placed for a fee "on another person's website, digital device, application, *service*, or advertising platform."<sup>2</sup> However, Draft B omits the term "service" from the definitions,<sup>3</sup> which raises significant questions — and likely future confusion for the regulated community — about whether communications disseminated by a "service" that arguably does not fit into the categories of a "website, digital device, application, or advertising platform" would require a disclaimer. In short, the implications of this omission in Draft B are unclear and will likely raise questions as to the revised regulation's reach.

Similarly, Draft A applies the new disclaimer requirements to "communications placed *or promoted* for a fee," while Draft B would only cover "communications placed for a fee."<sup>4</sup> Here again, the implications of omitting "promoted" from the disclaimer requirements are unclear and concerning. The removal of the term "promoted" could be read to suggest that disclaimers would not be required for the paid promotion of content, but Draft B's Explanation and Justification ("E&J") nevertheless discusses allowing advertisers to pay to promote content so that it reaches broader or different audiences, and arrangements whereby advertisers pay influencers to share content on free platforms.<sup>5</sup> Draft B also notes that the Commission does not believe there is a constitutional issue with regulating "those who adopt others' political speech as their own by paying to place that speech on the internet (such as by paying a social media platform to ensure more advantageous treatment of a third party's advertisement in the platform's search or prioritization algorithm)."<sup>6</sup> Draft B's breadcrumb trail of statements regarding the Commission's intent muddies the water, and it is unclear what these statements in the E&J mean in light of the omission of "promoted" from Draft B's final rule.

For a rulemaking intended to improve transparency, the Commission's unexplained, last-minute release of an alternative draft "final" rule that omits two key terms has ironically been entirely opaque. The unexplained exclusion of two categories of digital advertising from Draft B leaves unanswered, serious questions about which

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<sup>1</sup> The Commission did not even publish a document with redlines comparing Drafts A and B or offer an explanation of how the drafts differ, as it did when updating its Draft Notice of Proposed Rulemaking on Candidate Salaries for the same meeting. *See* REG 2021-01 Draft Notice of Proposed Rulemaking on Candidate Salaries – Revised (Nov. 28, 2022).

<sup>2</sup> REG 2011-02 (Draft Final Rule and Explanation and Justification for Internet Communication Disclaimers), Draft A (Nov. 10, 2022) ("Draft A") at 45-46 (emphasis added).

<sup>3</sup> REG 2011-02 (Draft Final Rule and Explanation and Justification for Internet Communication Disclaimers), Draft B (Nov. 28, 2022) ("Draft B") at 45-46.

<sup>4</sup> *Compare* Draft A at 45-46 (emphasis added), *with* Draft B at 45-46.

<sup>5</sup> Draft B at 15.

<sup>6</sup> *Id.* at 26.

paid, online election advocacy would be regulated under Draft A but not Draft B, and why.

The internet disclaimer rulemaking has been an extraordinarily long process that finally appears to be nearing completion. It presents a real opportunity for the FEC to meaningfully advance transparency about who is spending money to influence our elections and thus offer greater protections for the right of the voting public to make informed electoral decisions. We urge the Commission to approve Draft A, or, at a minimum, to avoid hastily approving Draft B without further explanation for its changes and a reasonable opportunity for public consideration of and input regarding its terms.

Respectfully submitted,

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