



November 9, 2017

VIA ONLINE SUBMISSION

Federal Election Commission
Attn.: Neven F. Stipanovic
Acting Assistant General Counsel
999 E Street NW
Washington, DC 20463

RE: ANPRM 2011-02: Internet Communication Disclaimers

Dear Mr. Stipanovic:

The Electronic Frontier Foundation (“EFF”) respectfully submits the following comments in response to the Commission’s Advance Notice of Proposed Rulemaking (“ANPRM”) 2011-02: Internet Communication Disclaimers. EFF is a member-supported non-profit civil liberties organization, with the support of more than 37,000 members, dedicated to protecting and fostering freedom of expression, privacy, and transparency in the online world. Since 1990, EFF had represented the interests of Internet users across the country in court cases and broader policy debates surrounding the application of law in the digital age.

As an organization dedicated to transparency, user autonomy, and freedom of speech online, EFF believes that the public should have more information about the mechanics of all online advertising. With sophisticated technology, advertisers surreptitiously follow users across the Internet, amass as much data as possible, and serve microtargeted ads in hyper-personalized feeds that no one else may ever see. Today’s fractured Internet was *designed* for manipulating users. Government-mandated disclaimers and disclosures about issue and election-related speech will not solve the systematic lack of transparency in any meaningful way. Rather, Internet companies should provide Internet users with more transparency regarding the mechanics of how and why all manner of advertisements are targeting them. And they should provide users with greater control over the data collected about them and how it is used.

To ensure that the Internet strengthens our democratic values, we need a solution that balances the need for transparency with the critical role that anonymous online political speech plays in our democracy.

The First Amendment’s protections for anonymous speech are vital to promoting a robust democratic society. This includes anonymous low-cost online advertisements published by ordinary Americans seeking to get their voices heard on the issues of the day. Regulations that intrude on anonymous speech will undermine our democracy by discouraging citizens from engaging in important public speech that could put them at personal risk for harassment, threats of violence, ostracism, employment termination, or worse.

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If the Commission elects to promulgate disclaimer rules for online advertisements, it should craft new disclaimer rules that are sensitive to the unique nature of the Internet, and it should not cut-and-paste the existing disclaimer rules for older and different communications mediums onto the Internet. Most importantly, any disclaimer rules for the Internet must enable users to anonymously post low-cost ads to promote their views on candidates, elections, and public issues.¹

As the Commission considers this rulemaking, in order to ensure that any rules promulgated are appropriate for the Internet and do not run afoul of the First Amendment, it should be guided by the four following realities of modern life:

I. On the Internet, it is easier than ever to participate in the national political debate—including via the purchase of low-cost online election ads.

The Internet does not have the same constraints as the offline world. Indeed, it does not present the resource scarcity problem that exists on the broadcast spectrum (*i.e.*, a limited number of available hours of airtime on a limited number of stations), and the cost of participation is far lower—even for advertisements. On radio or television, the cost and effort required to disseminate an election or issue ad in a major media market is prohibitive for nearly all Americans. But on the Internet, it is inexpensive and easy. With a few clicks and a few dollars, a user can promote a tweet or Facebook post—which transforms their original unpaid post into an ad that is then served to other users in their news feeds—or pay for the placement of a display advertisement on a website.

The low cost of online advertising is one of the ways the Internet can counter-balance the undue dominance that “big money” increasingly wields over the political process. The U.S. Supreme Court has long recognized the Internet’s “unlimited, low-cost capacity for communication of all kinds” and its corresponding potential to empower “any person . . . [to] become a town crier with a voice that resonates farther than it could from any soapbox.”² And earlier this year, the Court held that social media websites in particular today serve as “the most important places (in a spatial sense) for the exchange of views[.]”³ Election-related advertisements on these platforms—including both promoted content and display ads—are a critical component of this exchange of views. Ordinary Americans already use low-cost social media advertisements to make sure their voices are heard, which is good for our democracy. It is critical that the Commission takes care not to promulgate rules that would inadvertently chill or deter this form of participation in our nation’s online political debate.

¹ This comment uses “election ads” to refer to ads that expressly advocate the election or defeat of a clearly identified Federal candidate.

² *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

³ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (U.S. 2017).

II. Anonymous online political speech is vital for our modern democratic society.

Protecting anonymous online political speech is necessary to not only ensure that important speech is not chilled, but also to promote a well-functioning modern democracy.

As the Supreme Court has recognized, “Anonymity is a shield from the tyranny of the majority”⁴—a shield fundamental for any democracy. Anonymous speech is not only fully protected by the First Amendment,⁵ but it constitutes an “honorable tradition of advocacy and of dissent.”⁶ Indeed, anonymous speech played a critical role in this nation’s founding. In 1776, Thomas Paine anonymously published “Common Sense,” advocating independence from Great Britain at time when publicly doing so was dangerous. A decade later, Alexander Hamilton, James Madison, and John Jay, under the pseudonym “Publius,” wrote the Federalist Papers—a series of essays that is today considered one of the most important sources for interpreting the U.S. Constitution.

The First Amendment right to speak anonymously extends to the Internet.⁷ And the First Amendment’s protection for anonymous speech online—as in all mediums for speech—is strongest when speech touches on matters of public political life—the “core” or “essence” of the First Amendment.⁸ Courts have recognized that “Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas,”⁹ and that “the ability to speak one’s mind without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate.”¹⁰ Indeed, a 2015 report by U.N. Special Rapporteur for Freedom of Expression David Kaye identified online anonymity as one of “today’s leading vehicles for . . . provid[ing] individuals with a means to protect their privacy, empowering them to browse, read, develop and share opinions and information without interference and enabling journalists, civil society organizations, members of ethnic or religious groups, those persecuted because of their sexual orientation or gender identity, activists, scholars, artist and others to exercise the rights to freedom of expression and opinion.”¹¹

⁴ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

⁵ *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 200 (1999).

⁶ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995).

⁷ *Art of Living Foundation v. Does*, 2011 WL 3501830, at *2 (N.D. Cal., Aug. 10, 2011); *see also Reno*, 521 U.S. at 870 (finding “no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium”).

⁸ *See McIntyre*, 514 U.S. at 346–47.

⁹ *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001).

¹⁰ *Columbia Ins. Co. v. seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

¹¹ David Kaye, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (May 22, 2015), http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A.HRC.29.32_AEV.doc.

III. To protect the vital role of anonymous speech in our democracy, the Commission must preserve the ability of ordinary Internet users to publish low-cost election ads anonymously.

To preserve the vital role that anonymous speech plays in our political discourse, ordinary Americans must have the ability to anonymously publish low-cost online advertisements to amplify their views about a candidate or election—*i.e.*, without disclosing their identity via an ad disclaimer or reporting their identity to the government simply because they spent some money. An LGBTQ individual who is not “out” to their family or employer may wish to buy a small ad on Facebook advocating for a candidate who supports federal legislation banning discrimination on the basis of sexual orientation. A conservative person living in a small liberal community may fear social or professional harm if they openly spend a small sum to amplify on social media their support for a conservative local political candidate.

This anonymity is lawful under current federal election law. The LGBTQ individual from the previous paragraph could pseudonymously publish election related advertisements on Twitter, and the conservative individual living in the small liberal community could publish anonymous election related advertisements on Facebook via an advertising account linked to a pseudonymous Facebook page¹²—so long as they spent less than \$250 in the aggregate with respect to the election in the calendar year (when 11 CFR 104.4(e) requires reporting to the Commission). And either individual could publish anonymous issue ads unrelated to federal elections without limitation.

If the Commission issues rules regarding disclaimers for online election advertisements, the Commission must craft an exception that preserves the ability of ordinary Internet users to make their voices heard by anonymously publishing issue ads and low-cost election ads.

IV. Internet companies should better inform their users about how and why they are being targeted.

The solution to the lack of transparency surrounding online election advertising is not banning all anonymous online political speech. Rather, the solution is increased transparency surrounding the mechanics of *all online advertising*.

Electoral ads are disseminated and received on social media like other ads—through microtargeting and highly personalized news feeds. Social media networks mine websites across the Internet for data about their users’ browsing habits via sharing buttons and “widgets” integrated on websites all over the web, which set cookies on users’ browsers and tell the

¹² A Facebook page is a public profile specifically created for businesses, brands, celebrities, causes, and other organizations. Unlike a personal profile, you cannot “friend” a Facebook page. Instead, you can “like” it and thereby become a “fan.” See Margaret Rouse, “Facebook Page,” *WhatIs.com* (Aug. 2010), <http://whatis.techtarget.com/definition/Facebook-page>.

platforms where the users go online.¹³ This data is used to draw automated algorithmic inferences about users' interests, shopping habits, political views, media consumption patterns, health concerns, and more. The networks also collect vast amounts of data via direct user interactions on their own platforms. All of this data and all of the inferences drawn from it are used to serve increasingly customized content recommendations and increasingly targeted ads, including election ads, both on and off their platforms—using ever more sophisticated artificial intelligence techniques. As Mark Zuckerberg stated in 2014, Facebook's "goal is to build the perfect personalized newspaper for every person in the world."¹⁴

While the ultimate goal of media personalization may be to boost engagement on the platforms, there are serious downsides. Media personalization can create an "echo chamber" that "filters the information people receive so that it largely supports their existing opinions," resulting in polarized news and media consumption and an increasingly divided citizenry.¹⁵ It also makes it nearly impossible to understand "what other people are seeing and responding to"¹⁶—a problem exacerbated by "dark posts," ads that target a particular set of people and that no one else ever sees. Many political candidates and committees have made use of dark posts—the Trump campaign seemingly most successfully in 2016, reportedly using dark posts for automated A/B testing on 40,000 to 50,000 ad variants a day.¹⁷

In order to achieve meaningful transparency, social media platforms should better inform Internet users about how and why they are being targeted by all manner of advertising. Most Internet users do not know why they are being served certain ads, how these ads compare to what other users are seeing, or even how much data is being collected about them. This is true for all ads, including election ads. The problem is not the lack of transparency surrounding the mechanics of online election advertising—rather, the problem is the lack of transparency about social media platforms' advertising practices in general. And disclaimers from individual people who spend small sums to amplify their online voices will not help to solve this urgent transparency problem.

¹³ Alan Toner, "Twitter (and Others) Double Down on Advertising and Tracking," *Deeplinks* (Aug. 28, 2017), <https://www.eff.org/deeplinks/2017/08/twitter-and-others-double-down-advertising-and-tracking>.

¹⁴ Eugene Kim, "Mark Zuckerberg Wants To Build The 'Perfect Personalized Newspaper' For Every Person In The World," *Business Insider* (Nov. 6, 2014), <http://www.businessinsider.com/mark-zuckerberg-wants-to-build-a-perfect-personalized-newspaper-2014-11>.

¹⁵ Roheeni Saxena, "The social media 'echo chamber' is real," *Ars Technica* (Mar. 13, 2017), <https://arstechnica.com/science/2017/03/the-social-media-echo-chamber-is-real/>.

¹⁶ Alexis C. Madrigal, "What Facebook Did to American Democracy," *The Atlantic* (Oct. 12, 2017), <https://www.theatlantic.com/technology/archive/2017/10/what-facebook-did/542502/>.

¹⁷ Issie Lapowsky, "Here's How Facebook Actually Won Trump The Presidency," *Wired* (Nov. 15, 2016), <https://www.wired.com/2016/11/facebook-won-trump-election-not-just-fake-news/>.

V. Conclusion

EFF hopes that if the Commission develops new rules in this area, it will protect the critical role of anonymous speech in our online political discourse, and attend to the unique features of the Internet that distinguish it from other communications channels.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jamie Williams". The signature is fluid and cursive, with a large initial "J" and "W".

Jamie Williams
Lee Tien
Adam Schwartz
Camille Fischer
Electronic Frontier Foundation