

Comments of the
ELECTRONIC PRIVACY INFORMATION CENTER (EPIC)

FEDERAL ELECTION COMMISSION
Internet Communication Disclaimers; Reopening of Comment Period
[Notice 2017-12]
November 3, 2017

The need to protect democratic institutions from foreign adversaries has never been greater. Not only did the Russian government launch a “multi-pronged” attack against the United States during the 2016 presidential election, there is every reason to believe that Russia and other foreign adversaries will seek to disrupt future elections in the United States. Many federal agencies will need to do much more to safeguard democratic elections. But the FEC’s role is clear. The mission of the Federal Election Commission is “[t]o protect the integrity of the federal campaign finance process by providing transparency and fairly enforcing and administering federal campaign finance laws.”¹

To help ensure the integrity of U.S. elections, the Federal Election Commission should not exempt technology companies from notification requirements for Internet communications.² The FEC should also impose “algorithmic transparency” requirements whenever there is processing of personal data that generates targeted campaign advertising. Companies are hiding behind privacy claims to shield their business practices from scrutiny.³ A bright-line can be drawn between paid commercial advertising and user-generated content. EPIC is actively seeking to protect democratic institutions against cyber-attack and to promote greater accountability for government agencies tasked with safeguarding democratic institutions.⁴

EPIC is a public interest research center established in 1994 to focus public attention on emerging privacy and civil liberties issues.⁵ EPIC is also a leading advocate for civil liberties and democratic values in the information age. EPIC is currently pursuing numerous Freedom of

¹ Federal Election Commission, “Mission and History,” <https://www.fec.gov/about/mission-and-history/>

² We understand that the FEC typically refers to the “disclaimer” requirements, but EPIC proposes that “notification” requirements or “disclosure” requirements more accurately describe the purpose of the notice.

³ Marc Rotenberg, *Facebook’s Privacy Hokey-Pokey*, *Fortune* (Sept. 27, 2017), <http://fortune.com/2017/09/22/facebook-russian-ads-fake-news-zuckerberg/>; Alan Butler, *Top Experts: Can Facebook Legally Disclose Russian Ads—What does the Stored Communications Act say?*, *Just Security* (Oct. 27, 2017), <https://www.justsecurity.org/46347/expert-views-facebook-legally-disclose-russian-ads-stored-communications-act-1986/>

⁴ See EPIC, *Democracy and Cybersecurity: Preserving Democratic Institutions*, <https://epic.org/democracy/>.

⁵ See *About EPIC*, EPIC, <https://epic.org/epic/about.html>.

Information Act matters to learn more about Russian interference in the 2016 Presidential election.⁶ 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. Cooperation from tech companies whose platforms were used by Russian operatives is essential to understanding the extent of interference in the 2016 election.⁷

Back in October 2011, the Commission first published an Advance Notice of Proposed Rulemaking (“ANPRM”), seeking comment on whether to revise the disclaimer requirements for internet communications.⁸ The Commission has twice since reopened the ANPRM for comments, but to date has yet to decide whether to even open a rulemaking, much less whether to promulgate a regulation on this topic.⁹ In light of the recent revelations of unprecedented election interference by a foreign adversary, it is urgent that the FEC not delay its rulemaking. According to election experts, had such disclosure requirements been in place prior to the 2016 election, they may have deterred foreign meddling.¹⁰

Impose At Least the Same Requirements for Internet Communications as for Broadcast and Print Communications

Evolving technologies have changed how campaigns communicate with voters. Today, social media plays an enormous role in the dissemination of political communications. During the 2016 election, political ads were shared on Facebook hundreds of millions, perhaps billions of times.¹¹ New platforms allow advertisers to reach both a wider audience and a far more narrowly defined audience. Therefore, the current system is imbalanced: it makes little sense that voters know who paid for a mass advertising that appears on television or in a newspaper but are left in the dark about who paid for a targeted communication directed to them on their laptop or cellphone.

This imbalance frustrates the objectives served by the Commission’s rules for promoting transparency, accountability, and fairness in the election process. For example, we recently discovered during a Senate hearing that certain political ads were bought on Facebook using

⁶ *EPIC v. ODNI*, No. 17-163 (D.D.C. Jan. 25, 2017); *EPIC v. FBI*, No. 17-121 (D.D.C. Jan. 18, 2017).

⁷ 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>.

⁸ Fed. Election Comm’n, *Internet Communication Disclaimers*, 76 Fed. Reg. 63567, (Oct. 13, 2017), <https://www.fec.gov/updates/advance-notice-of-proposed-rulemaking-for-internet-communication-disclaimers/>.

⁹ See Fed. Election Comm’n, *Internet Communication Disclaimers; Reopening of Comment Period*, 82 Fed. Reg. 46937, (Oct. 10, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=357882>.

¹⁰ Kenneth P. Vogel & Cecilia Kang, *Senators Demand Online Ad Disclosures as Tech Lobby Mobilizes*, New York Times, (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/us/politics/facebook-google-russia-meddling-disclosure.html>.

¹¹ Craig Timberg, *Russian Propaganda May Have Been Shared Hundreds of Millions Of Times, New Research Says*, Washington Post, (Oct. 5, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/10/05/russian-propaganda-may-have-been-shared-hundreds-of-millions-of-times-new-research-says/?utm_term=.ebc2fd2aa6f9.

rules.¹² These concerns are not present in traditional print and broadcast platforms that are covered by the Commission’s disclosure rules. Although online platforms present unique regulatory challenges, the Commission must confront these challenges in order to uphold the objectives of its disclosure rules. Congress and members of the technology community have already proposed simple measures to address this problem that can be implemented through the Commission’s rulemaking process.

The Commission should, at a minimum, extend the notification requirements for print and broadcast political advertisements to analogous political ads disseminated on online platforms. Several senators recently proposed a bipartisan bill that would expand the Federal Election Campaign Act’s definition of “electioneering communication” to include paid political advertisements online.¹³ The Commission acknowledged in its most recent Advance Notice of Public Rulemaking that the term “public communication” already applies to “communications placed for a fee on another person’s website,” and therefore the disclaimer requirements apply to these communications.¹⁴ Accordingly, the Commission already has the legal authority to extend its transparency requirements to paid political advertisements on Facebook, Google, Twitter and other digital media platforms.

The Commission requested feedback on “any challenges in complying with the existing transparency rules as applied to Internet communications.”¹⁵ Facebook has already volunteered to go a step beyond the Commission’s transparency requirements and disclose not only who paid for a political advertisement, but also to provide a link to the advertiser’s page so that users can see what other political ads that advertiser is running on Facebook.¹⁶ Facebook’s pledge is evidence that technology companies can easily comply with the Commission’s disclosure obligations.

Some companies have pointed to the character limitations of their ads as a reason to be exempt from disclaimer requirements, but this is an invalid argument. The exceptions to the general disclaimer requirements for bumper stickers, buttons, and other small items is warranted because those items are limited by physical space. Character limitations of certain online advertisements are not equivalent to those physical limitations. There are already technological options that can resolve this issue. In addition to those methods noted in the ANPRM, URL shorteners could be used. URL shortening tools such as goo.gl and bit.ly can take lengthy hyperlinks and reduce them to just a few characters. This would allow an ad with character limitations to provide a URL that linked to a full disclaimer.

¹² Harper Neidig, *Franken Blasts Facebook for Accepting Rubles for U.S. Election Ads*, The Hill (Oct. 31, 2017), <http://thehill.com/policy/technology/358102-franken-blasts-facebook-for-accepting-rubles-for-us-election-ads>.

¹³ EPIC, *Senate Bill to Improve Transparency and Accountability for Online Political Ads*, (Oct. 19, 2017), <https://epic.org/2017/10/senate-bill-to-improve-transpa.html>.

¹⁴ Fed. Election Comm’n, *Advance NPRM on Internet Disclaimer Notices Reopened for Comment (2017)*, (Oct. 10, 2017), <https://www.fec.gov/updates/advance-nprm-internet-disclaimer-notices-reopened-2017/>.

¹⁵ 82 Fed. Reg. 46937.

¹⁶ Facebook, *Statement by Mark Zuckerberg*, (Sep. 21, 2017), <https://www.facebook.com/zuck/posts/10104052907253171>.

Impose Algorithmic Transparency Requirements for Targeted Political Advertisements

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.’”¹⁷

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. Additionally, a platform should provide a database that enables the user to determine what other ads the same advertiser has purchased, as well as all the other ads that have been directed to the user. Finally, digital platforms should disclose to the public the complete methodology they use to determine whether an advertisement is political or commercial.

The Honest Ads Act introduced recently 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.”¹⁸

Digital platforms have already pledged to voluntarily implement some of these reforms. 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.¹⁹ Similarly, Facebook has stated that its users will have access to: (1) all of the ads a particular advertiser is running on Facebook, (2) the amount the advertiser spent on the advertisement, (3) the number

¹⁷ Craig Timberg, Elizabeth Dwoskin, 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.

¹⁸ Honest Ads Act, S. 1989, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/1989>.

¹⁹ 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>.

of times the ad was viewed, and (4) demographics information (e.g. age, location, gender) about the audience the ads reached.²⁰ Facebook said it would require political advertisers to verify their identity, location, the business or organization they represent, and who paid for the ad.²¹ Finally, Google has stated that it will provide a public database for election ads that includes who paid for an election ad and how much they spent.²²

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.²³ Transparency about the precise geographic regions being targeted would make clear whether a group was targeting an ad based on a voting district.

Algorithmic transparency is necessary to understand the influence of Russian advertisers on the 2016 U.S. election. Algorithmic transparency should be a baseline requirement for FEC rules going forward, as micro-targeting now defines political communications in U.S. elections. Clear regulations must be established to provide precise details about all online advertising.

It is time to bring campaign finance laws into the Internet age. The FEC should extend disclosure rules to online political advertising. And the FEC should require “algorithmic transparency” to ensure that voters know as much about advertisers as advertisers know about voters.

Respectfully submitted,

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²⁰ Rob Goldman, *Update On Our Advertising Transparency and Authentication Efforts*, Facebook Newsroom, (Oct. 27, 2017), <https://newsroom.fb.com/news/2017/10/update-on-our-advertising-transparency-and-authenticity-efforts/>.

²¹ *Id.*

²² *Social Media Influence and the 2016 Elections: Hearing before the S. Select Comm. On Intelligence*, 115th Cong. 7 (2017) (written testimony of Kent Walker, Senior Vice President and General Counsel, Google), <https://www.intelligence.senate.gov/sites/default/files/documents/os-kwalker-110117.pdf>.

²³ 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>.