



25 May 2018

Neven F. Stopanovic
Acting Assistant General Counsel
Federal Election Commission
1050 First St. NE
Washington, DC 20463

RE: Comments of the Center for Democracy & Technology on REG 2011-02 -- Internet Communications Disclaimers

Dear Mr. Stopanovic:

The Center for Democracy & Technology (CDT)¹ respectfully submits these comments in response to the Federal Election Commission's (FEC) request for comment on two alternative proposals to amend its regulations concerning disclaimers on public communications on the Internet.

CDT has highlighted challenges with regulating online political activity in previous comments to the Commission.² We have cautioned against imposing complicated and burdensome disclosure requirements on ordinary Internet users, but if the Commission intends to pursue new rules about Internet communications disclaimers, standardized and easily accessible mechanisms to help signal the political nature of an advertisement can, at minimum, advance public transparency. Both proposals put forward by the FEC are not explicit on this point. CDT's comments focus specifically on the definitions of "indicators" and "technological mechanisms" in both proposals, and CDT requests the opportunity to testify further about technical and policy developments in online advertising disclosures.

As the FEC evaluates the feasibility of both alternative proposals, CDT recommends that the FEC should (1) be mindful of the potential lessons learned from creating disclosures around online behavioral advertising and (2) prioritize machine-readability for any advertising disclosures mandated by the FEC. Both recommendations will help the FEC advance the interests in transparency for both individual internet users and the public.

¹ CDT is a nonprofit technology advocacy organization dedicated to promoting democratic values online, including digital privacy, free expression, and individual liberty.

² Letter from the Electronic Frontier Foundation and Center for Democracy & Technology to the Federal Election Commission on Advance Notice of Proposed Rulemaking 2014-01 (Jan. 15, 2015) (available at <https://cdt.org/insight/letter-to-the-federal-election-commission-on-advance-notice-of-proposed-rulemaking-2014-01/>); see also Comments of the Center for Democracy & Technology on Notice of Proposed Rulemaking 2005-10, The Internet: Definitions of "Public Communication" and "Generic Campaign Activity" and Disclaimers (June 3, 2005) (available at <https://cdt.org/files/speech/political/20050603cdtcomments.pdf>).

Symbols and Icons Must Be Consistent and Well-Designed

Both Alternative A and Alternative B have broad and non-exclusive lists of what constitutes an “indicator” that can be used as a shorthand so that persons can learn more information via some technological mechanism. Both proposals include reference to symbols or icons, and the FEC has solicited comment on the advantages and disadvantages of the FEC designing and promulgating a single indicator for use across different online platforms and media.

Developing a standardized political disclosure icon or symbol may be a worthwhile endeavor, but it will be difficult. A standardized symbol, such as the recycling symbol or wheelchair icon, can be an ideal form of notice, but success requires industry-wide adoption and public education. However, major technology platforms have already begun to devise new notification mechanisms for online political communications,³ and the FEC should play an important role in facilitating indicator standardization, encouraging industry adoption, and educating the public. Because such an indicator would be used across different types of digital media, the FEC should consider lessons learned in the creation -- and resulting criticism -- of the online behavioral advertising industry’s “AdChoices” program.⁴

Responding to pressure from the Federal Trade Commission (FTC) and advocacy organizations,⁵ a group of advertising trade associations created a self-regulatory program to provide additional notice with regard to online behavioral advertising in 2010.⁶ Compliance with the program is enforced via separate programs run by the Council of Better Business Bureaus and the Data & Marketing Association.⁷

The centerpiece of the program is a common text and icon for linking many online advertisements to a portal to learn more information about behavioral advertising and opt-out of certain limited uses of data. While initially designed for desktop browser-based advertisements, the program has expanded to include the mobile⁸ and video ecosystems.⁹

³ As the FEC has highlighted, both Twitter and Google are introducing special designations for ads, and Facebook has expressed support for political ads “to include an icon or other obvious indicator that more information about an ad is available via quick navigation (like a single click) would give clear guidance on how to include disclaimers in new technologies as they are developed.” Fed. Reg. 12877.

⁴ YourAdChoices.com, <https://www.youradchoices.com/> (last visited May 23, 2018).

⁵ Ctr. for Democracy & Tech., Online Behavioral Advertising (Dec. 2009), available at <https://cdt.org/files/pdfs/CDT%20Online%20Behavioral%20Advertising%20Report.pdf>.

⁶ Early discussion of the effort first appeared in 2009. Saul Hansell, *Seeking a Symbol for ‘This Ad Knows About You’*, N.Y. Times (Dec. 3, 2009),

<https://bits.blogs.nytimes.com/2009/12/03/seeking-a-symbol-for-this-ad-knows-about-you/>.

⁷ A separate, but largely parallel self-regulatory program is run by the Network Advertising Initiative, which is a part of the Digital Advertising Alliance that runs “AdChoices.”

⁸ DAA Ad Marker Implementation Guidelines for Mobile (Apr. 2014), available at https://digitaladvertisingalliance.org/sites/aboutads/files/DAA_files/DAA_Ad_Marker_Guidelines_Mobile.pdf.

⁹ IAB, New DAA AdChoices Icon Implementation Guidelines for Video Ads (Nov. 03, 2015), <https://www.iab.com/news/digital-advertising-alliance-unveils-new-daa-adchoices-icon-implementation-guidelines-for-video-ads/>.

“AdChoices” demonstrates both the potential of standardized icons and the potential drawbacks to industry-led self-regulatory process. While the program shows how a standardized icon can be displayed at scale on online advertising, it also illustrates how design can be deployed to minimize users’ engagement with disclosures. The program’s initial proposal for “enhanced notice” consisted of a “Power I” icon alongside descriptive phrases such as “interest based ads” and “Why did I get this ad?”¹⁰ An industry-sponsored study from the Future of Privacy Forum tested a variety of different phrases and icons, concluding that substantial consumer education would be necessary and that the “Power I” icon actually tested worse than a competing design.¹¹ Unfortunately, the final form of “enhanced notice” included an alternative “Forward I” icon and, in some instances, the text “AdChoices.”¹²

Moreover, the necessary education component was limited. A 2015 industry study found that only 26% of internet users recognized the AdChoices icon and only 9% of those users understood what it meant.¹³ More recent studies have continued to find major usability problems with the existing icon.¹⁴

That said, “AdChoices” does convey useful information through a standardized icon system on different types and formats of digital advertising that the FEC has previously found difficult to regulate. But, it also highlights the limitations of an exclusively self-regulatory approach. The advertising industry, whose expertise is in creating noticeable messages, has not created an option that the public either understands or of which it is aware.¹⁵ This dynamic is important to recognize as the “AdChoices” program recently announced that it would roll out a new “Political Ad” variation of its existing icon.¹⁶ The DAA has already announced that it hopes its new initiative will be able to work in conjunction with the FEC’s final outcome here.¹⁷ Translating this program to the political advertising ecosystem requires

¹⁰ Jonathan Mayer, *Tracking the Trackers: The AdChoices Icon* (Aug. 18, 2011), <http://cyberlaw.stanford.edu/blog/2011/08/tracking-trackers-adchoices-icon>.

¹¹ Future of Privacy Forum, *Online Behavioral Advertising “Icon” Study* (Feb. 2010), <https://fpf.org/2010/02/15/online-behavioral-advertising-icon-study/>; see also Stephanie Clifford, *A Little ‘i’ to Teach About Online Privacy*, N.Y. Times (Jan. 26, 2010), <https://www.nytimes.com/2010/01/27/business/media/27adco.html>.

¹² Implementing the DAA Icon -- An Ad Creative Primer, available at http://www.aboutads.info/resource/download/DAA-Icon_Ad-Creative-Primer.pdf (last visited May 23, 2018).

¹³ Alina Tugend, *Key to Opting Out of Personalized Ads, Hidden in Plain View*, N.Y. Times (Dec. 20, 2015), <https://www.nytimes.com/2015/12/21/business/media/key-to-opting-out-of-personalized-ads-hidden-in-plain-view.html>. It is also worth acknowledging that over this period, the NAI’s code of conduct also weakened its consumer education requirements, shifting from requiring members to individually and collectively educating users to recommending educational efforts.

¹⁴ Stacia Garlach & Daniel D. Suthers, ‘I’m supposed to see that?’ AdChoices Usability in the Mobile Environment (2018), available at <https://scholarspace.manoa.hawaii.edu/bitstream/10125/50364/1/paper0477.pdf>.

¹⁵ *Id.*

¹⁶ Press Release, Digital Advertising Alliance Launches Initiative to Increase Transparency & Accountability in Political Ads (May 22, 2018), <https://www.prnewswire.com/news-releases/digital-advertising-alliance-launches-initiative-to-increase-transparency--accountability-in-political-ads-300652727.html>.

¹⁷ Wendy Davis, *DAA Creates Icon To Disclose Political Opposition Ads*, DigitalNewsDaily (May 22, 2018), <https://www.mediapost.com/publications/article/319560/digital-advertising-alliance-creates-new-icon-prog.html>.

ample FEC oversight and involvement by the public, political transparency experts, and user interface designers.

Machine-Readability Is Necessary for Transparency

Putting aside disclosure design considerations, the FEC must also consider and promote online disclosures that are sufficiently machine readable. Both proposals speak to “technological mechanisms” that will provide easy access to a full disclaimer via hover-over mechanisms, pop-up screens, and hyperlinks. While machine readability can be distinguished from digitally accessible information,¹⁸ regulations that aim to improve transparency must recognize the importance of making information available such that it can be processed easily by a computer system.

A further requirement should be that the information provided in a disclaimer be made accessible to web scraping technologies. This is important for multiple reasons. First, such functionality is needed to make disclaimers accessible to screen readers and internet users with disabilities, which are often neglected when it comes to online advertising.¹⁹

Second, ensuring disclaimer text is fully machine readable facilitates automated review of political advertising. Effective political advertising transparency requires the public to have insight to political advertisers at scale, a process which is challenged by the sheer number of online advertisements.²⁰ ProPublica has endeavored to provide users and the public with tool to learn more information by creating a browser plug-in to collect and analyze political ads on Facebook.²¹ The information collected by the plug-in includes the substance of the ad, information provided by Facebook about the ad’s target audience, date and time the ad was delivered, and the number of times the ad has been seen. While online platforms such as Facebook present unique opportunities and challenges for understanding ad delivery, machine readability requirements will facilitate creative approaches to evaluating political advertising across the internet and other digital platforms. For example, researchers at Princeton have explored how standardized disclosures and the architecture of web browsers can be used to detect and block ads, even where advertisers and platforms attempt to obfuscate ads.²²

¹⁸ Jim Hendler, *A Primer on Machine Readability for Online Documents and Data*, Data.gov (Sept. 24, 2012), <https://www.data.gov/developers/blog/primer-machine-readability-online-documents-and-data> (“An important starting point is to understand that “machine readable” is not synonymous with “digitally accessible” information. Scanning a report, the text, graphics, or even rows and columns of numbers, makes it digitally accessible, but a computer still is not really able to “understand” the information.”).

¹⁹ Rose Eveleth, *Popup Ads Are Terrible, and They're Even Worse for the Blind*, Motherboard (Oct. 5, 2016), https://motherboard.vice.com/en_us/article/bmvpb5/you-think-popup-ads-are-bad-theyre-even-worse-for-the-blind.

²⁰ Upturn, *Leveling the Platform: Real Transparency for Paid Messages on Facebook 13* (May 2018), <https://www.teamupturn.org/static/reports/2018/facebook-ads/files/Upturn-Facebook-Ads-2018-05-08.pdf>.

²¹ ProPublica, *Political Ad Collector*, <https://projects.propublica.org/political-ad-collector/> (last visited May 23, 2018).

²² Arvind Narayanan, *The future of ad blocking*, Freedom to Tinker (Apr. 14, 2017), <https://freedom-to-tinker.com/2017/04/14/the-future-of-ad-blocking/>.



The point is not that machine readability alone ensures the goals of political ad transparency but rather could help facilitate creative approaches to help the public better understand the political ads they are being delivered.

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Improving public transparency about online advertising has proven historically challenging. If the FEC wishes to improving disclosures around political advertising, it should consider decision designs, both in terms of visual aesthetics and machine readability, that will help to meaningfully inform the public.

Thank you for the opportunity to comment. Please contact me at 202.407.8812 if you have any questions.

Sincerely,

Joseph Jerome
Policy Counsel
Center for Democracy & Technology