CLC
ADVANCING DEMOCRACY THROUGH LAW

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Submitted electronically to www.fec.gov/fosers

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Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: Comments on Notice 2018-06: Internet Communication Disclaimers and Definition of "Public Communication"

Dear Mr. Stipanovic,

Campaign Legal Center ("CLC") respectfully submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") on "Internet Communications Disclaimers."[1]

Since 2011, CLC has implored the Commission to initiate a rulemaking to clarify how disclaimer requirements apply to digital political advertising.[2] As has been well documented, America's foreign adversaries took advantage of the growth in online political advertising[3] and the Commission's regulatory failures to reach

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

2 *See* Campaign Legal Center & Democracy 21, Comments on Draft Advisory Opinions 2011-9 A and B at 2 (June 14, 2011), http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3250&START=1176178.pdf; Campaign Legal Center & Democracy 21, Comments on REG 2011-02 (Nov. 14, 2011), http://sers.fec.gov/fosers/showpdf.htm?docid=98749; Campaign Legal Center & Democracy 21, Comments on Draft Advisory Opinions 2013-18 (Revolution Messaging) (Feb. 25, 2014), https://www.fec.gov/files/legal/aos/79752.pdf.

3 Kip Cassino, *What Happened to Political Advertising in 2016 (and forever)*, BORRELL ASSOCIATES, INC. (2017); *see also* Kate Kaye, *Data Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast Down 20%, Cable and Digital Way Up*, ADAGE (Jan. 3, 2017) http://adage.com/article/media/2016-political-broadcast-tv-spend-20-cable-52/307346/.

potentially hundreds of millions of American voters with digital advertising meant to influence the 2016 U.S. elections. None of these ads had effective disclaimers, but that fact did not raise eyebrows at the time because many (if not most) online advertisements lacked such disclaimers. Had the Commission acted upon this rulemaking earlier, the controversy surrounding foreign-funded digital political advertising during the 2016 elections might have been avoided and its effects largely mitigated.

Nevertheless, CLC applauds the Commission's current efforts to ensure that voters who view digital political advertisements that meet the statutory criteria will know who is trying to influence them. CLC strongly believes that any regulation pursuant to this rulemaking must reflect the statutory mandate Congress imposed on the Commission, which itself reflects the importance of disclaimers to the integrity of American elections and self-government. As described in greater detail below, while each Alternative proposed in the NPRM has some commendable elements, each falls short of fulfilling Congress's mandate and ensuring that voters are informed about the persons or groups who seek to influence them.

The Importance of Disclaimers

The U.S. Supreme Court has noted that disclaimers "insure that the voters are fully informed" about the person or group who is speaking,"[4] and allow voters "to evaluate the arguments to which they are being subjected";[5] they "provid[e] the electorate with information"[6] and "avoid confusion by making clear" whether ads are funded by a candidate, a political party, a political committee, or some other person.[7] Given these important interests, the Court in *Citizens United* expressly rejected an argument that requiring a four-second spoken disclaimer on a ten-second broadcast ad "decreases both the quantity and effectiveness of the group's speech."[8] Instead, such disclaimer requirements protect and advance the people's right to self-government.

"[U]ninhibited, robust, and wide-open" public debate is a central aim of the First Amendment.[9] The Supreme Court has criticized arguments that disclaimers burden speech rights for "ignor[ing] the competing First Amendment interests of individual citizens seeking to make informed choices in the political marketplace."[10] Indeed, if voters are inundated with political messaging but cannot easily access information about who funds those messages, they are deprived of the opportunity

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4 *Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (quoting *Buckley v. Valeo* 424 U.S. 1, 76 (1976)).

5 *Id*. (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 792 (1978)).

6 *Id*. (quoting *McConnell v. FEC,* 540 U.S. 93, 196 (2003)).

7 *Id*.

8 *Id*.

9 *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

10 *McConnell,* 540 U.S. at 197.

to fully evaluate the messages and weigh them against countervailing arguments. Moreover, the uninhibited debate promoted by the First Amendment does not exist in a vacuum: the heart of the First Amendment protects speech as a mechanism for ensuring effective self-government.[11] As the Supreme Court explained nearly nine decades ago, "[a] fundamental principle of our constitutional system" is the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people."[12] Disclaimers vindicate this fundamental First Amendment principle by allowing voters to make informed choices regarding self-government.

The Court has also long recognized disclosure as important to enforcing campaign finance rules by bringing violations to light.[13] Had Russia's ads run before the 2016 presidential election clearly identified their sponsors, voters would have been better able to assess the messages for what they actually were—invasive and illegal attempts by a hostile foreign government to divide Americans.[14]

Effective disclaimers serve other important purposes, too. Professor Abby Wood's comments on the ANPRM offer an excellent overview of the empirical research on disclaimers.[15] Among other findings, the research demonstrates that disclaimers can help voters identify the groups that "endorse" a candidate by spending to support the candidate's election, which has an important heuristic effect that benefits voters.[16]

For each of the reasons articulated above, it is hard to overstate the importance of an effective disclaimer regime, both generally and in the precipitously growing realm of digital political advertising.

The Commission's Statutory Mandate to Require Disclaimers

The starting point for the Commission's consideration in this rulemaking, as in all of its rulemakings, must be FECA. Congress has spoken clearly on the issue of disclaimers, and the laws it has adopted bound the Commission's discretion.

FECA requires disclaimers "*[w]henever* a political committee makes a disbursement for the purpose of financing *any communication* through . . . any . . .

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11 "[T]he Free Speech Clause helps produce *informed* opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate." *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246, 192 L. Ed. 2d 274 (2015) (emphasis added) (citing *Stromberg v. California,* 283 U.S. 359, 369 (1931)).

12 *Stromberg v. California*, 283 U.S. 359, 369 (1931).

13 *Buckley*, 424 U.S. at 67-68.

14 *See* 52 U.S.C. § 30121.

15 *See generally* Comments of Abby Wood on Reg. 2011-02 (Nov. 9, 2017).

16 *Id*. at 1.

type of general public political advertising," and "*whenever any person* makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate . . . through . . . any . . . type of general public political advertising . . . or makes a disbursement for an electioneering communication."[17] To that end, the foremost goal of the Commission's rulemaking should be to clarify that FECA's disclaimer provisions apply to digital advertising, just as they apply to any non-internet form of general public political advertising. Any final rule must ensure that all digital advertisements that meet the statutory criteria include disclaimers, with only the narrowest of exemptions—at most—for circumstances when the inclusion of such disclaimers is objectively impossible.

When an advertisement meets the aforementioned statutory criteria, FECA requires that it include a disclaimer that "clearly state[s]" the source of the advertising,[18] and that, among other criteria, the information be presented in a "clearly readable"[19] or "clearly spoken manner,"[20] depending on the medium. In other words, FECA mandates disclaimers that are displayed clearly on the face of the communication and include specific information.[21]

Accordingly, Congress's clear direction here must control the Commission's final rule. Voters who see, read, or hear political advertising that meets the statutory criteria for disclaimers must be able to receive those disclaimers, with all of their statutorily prescribed information, on the face of the advertising.

As discussed in more detail below, we recognize that in the future narrow categories of digital advertisements might arise that are inherently incompatible with passive receipt of a disclaimer that includes all statutorily required information. Such advertisements might be eligible for an abbreviated disclaimer that requires a viewer to select a link or icon to receive full disclaimer information. However, such exceptions must be defined based on the objective constraints of the advertising medium, and not on an advertiser's subjective view of whether the inclusion of a disclaimer is desirable.

Moreover, even when such exceptions are necessary, (1) a viewer must still be able to determine who paid for the ad on its face, and (2) the statutorily required information must be available to viewers with minimal effort to the viewer. Thus, any final rule should require that the website, pop-up, or other mechanism through which the viewer accesses the additional disclaimer information provide that information immediately, undiluted by other messages, advertisements, or banners.

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17 52 U.S.C. § 30120(a) (emphases added).
18 *Id.* §§ 30120(a)(1)-(3).
19 *Id.* §§ 30120(c)(1), (d)(1)(B)(ii).
20 *Id.* § 30120(d)(2).
21 *Id.* § 30120.

It would be entirely counterproductive—and violative of both the letter and the spirit of FECA—to force the viewer to navigate additional messaging from an advertiser just to see a full disclaimer for the original advertisement.[22]

We urge the Commission to adopt a final rule that reflects these important principles. As discussed in detail below, neither Alternative proposed in the NPRM fully achieves what FECA requires.

Proposed Revision to 11 C.F.R. § 100.26

As a preliminary matter, the Commission seeks comment on proposed updates to the definition of "public communication" at 11 C.F.R. § 100.26. Under current law, FECA defines "public communication" to include "any other form of general public political advertising,"[23] and Commission regulations define "general public political advertising" to include "communications placed for a fee on another person's Web site."[24]

We have previously supported the Commission clarifying that a public communication subject to regulation includes not only paid communications posted on a "Web site," but also those posted on an "internet enabled device or application."[25] We reiterate that support here.

Proposed Revisions to 11 C.F.R. § 110.11: the Two Alternatives

The NPRM seeks comment on two alternative proposals that would clarify the application of statutory disclaimer requirements to digital political advertising.

We support certain elements of each of the Alternatives proposed in the Commission's NPRM, but stress that each Alternative falls short of what this rulemaking should accomplish. We also note that key aspects of the Alternatives seem to be based on untested assumptions rather than on empirical evidence. For example, Alternative B would provide that disclaimers need not appear if their inclusion would use over 10% of available advertising space.[26] The NPRM

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22 For potential text, *see* S. 1989, 115th Cong. § 7(b) (2017), https://www.congress.gov/115/bills/s1989/BILLS-115s1989is.pdf (viewers must be able to "obtain the [disclaimer] with minimal effort and without receiving or viewing any additional material other than [the] required [disclaimer] information").

23 52 U.S.C. § 30101(22) ("The term 'public communication' means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, *or any other form of general public political advertising*.") (emphasis added).

24 11 C.F.R. § 100.26.

25 Campaign Legal Center & Democracy 21, Comments on REG 2013-01 (Dec. 1, 2016), http://sers.fec.gov/fosers/showpdf.htm?docid=354002; *see also* NPRM, *supra* note 1, at 12865.

26 *See* NPRM, *supra* note 1, at 12875.

articulated only one basis for this seemingly arbitrary number: a comment from one organization expressing its opinion that a disclaimer using 15% of available advertising space is too much.[27] It is not clear how the Commission, relying on that single statement of opinion, then settled on a 10% figure rather than, say, 12.5% or 14%. Well-reasoned rulemaking—rulemaking consistent with the APA's bar on arbitrary and capricious action—demands more: it requires the Commission to use available data to ensure that the eventual rule is evidence-based.[28]

1. Proposed Disclaimer Requirements for Communications Distributed Over the Internet—Organization

Each Alternative proposed by the Commission reflects a commendable attempt to provide guidance for how FECA's disclaimer requirements apply to the entire range of digital political advertising. This inclusive approach is important, as digital advertising will almost certainly change faster than the Commission's ability to react to these changes. During the 2016 elections, for example, Russian operatives ran political advertising on the internet-based augmented reality gaming app Pokémon Go,[29] a development that would have been difficult to predict just a few years earlier. As internet-enabled technologies such as alternative reality and artificial intelligence continue to progress, so, too, will the opportunities for political advertising on such platforms.[30] To provide sufficient guidance going forward, the final rule's definitions must address not only current forms of digital advertising, but also advertising that the Commission cannot yet anticipate.

Alternative A would rely on the underlying definition of a "public communication" (as updated to account for "internet enabled device[s] or application[s]"); Alternative B would create a new definition for "internet public communication" that includes "any communication placed for a fee on another

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27 *Id.* at 12875 n. 60. Specifically, the NPRM cites comments from Cause of Action, which asserted that California's disclaimer requirement, "while minimal, still takes around 15% of a Google advertisement," which in Cause of Action's opinion "carr[ies] a high cost of character space, even to the point of overshadowing the communication itself." Cause of Action, Comment at 4– 5 (Nov. 14, 2017), http://sers.fec.gov/fosers/ showpdf.htm?docid=98750. Cause of Action does not cite any evidence for these claims.

28 *See, e.g.*, *Motor Vehicle Mfrs Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42-43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made' . . . Congress . . . intended that agency findings under the Act would be supported by 'substantial evidence on the record considered as a whole.'" (internal citations omitted)).

29 *See* Rebecca Savransky, *Russian-Linked Campaign Uses Pokemon Go to Meddle in Election*, THE HILL (Oct. 12, 2017), http://thehill.com/policy/technology/355189-russianlinked-campaign-used-pokemon-go-to-meddle-in-election.

30 *See, e.g.,* Lindsay Rowntree, *AI & Advertising: Measurement of the Future*, EXCHANGEWIRE (Aug. 14, 2017), https://www.exchangewire.com/blog/2017/08/14/ai-advertising-measurement-future/; Julia Tokareva, *How Augmented Reality Is Changing the Advertising Game*, HUFF. POST (Dec. 5, 2017), https://www.huffingtonpost.com/entry/how-augmented-reality-is-changing-the-advertising-game_us_5a2626bfe4b0b1dc3502ab68.

person's website or internet-enabled device or application," and also would create a new definition for "internet communication" that includes an "internet public communication" as well as "internet websites of political committees available to the general public" and certain emails sent by political committees.

Neither Alternative presents any obvious problems. However, Alternative A's approach seems preferable for simplicity's sake: the use of existing, known terms provides more clarity to those seeking to comply with the regulations than do creating and defining new terms. Alternative A is sufficiently clear in defining the scope of this rule as applying to "public communication distributed over the internet."

2. Disclaimer Requirements for Video and Audio Communications Distributed Over the Internet

Alternative A, unlike Alternative B, would require internet advertising that includes a video or audio component to mirror more traditional television and radio advertising in including so-called "Stand by Your Ad" disclaimers.[31] These disclaimers require that advertising run by a candidate's committee include an audio message from the candidate to the effect of: "I'm John Doe and I approve this message," accompanied by an equivalent on-screen text disclaimer for video ads. Advertising run by non-candidate committees must include an audio statement that the payer "is responsible for the content of this advertising," similarly accompanied by an on-screen text disclaimer for video ads. These statements would benefit voters by clearly and audibly identifying who is behind a particular ad.

Consumers are increasingly viewing television through streaming services on the internet—for example, 61%of young people aged 18 to 29 primarily use streaming to watch television[32]—where they view many of the same ads aired on broadcast stations. It would be anomalous if a Stand by Your Ad disclaimer were required when an ad was viewed on a television station distributed through a cable television network but not when the same ad on the same station was received from the station's streaming feed online.

The Commission's NPRM asks whether FECA provides a legal basis for such a requirement online. Section 30120 does provides such a basis. Specifically, subsection 30120(a) provides that a communication subject to statutory disclaimer requirements and paid for by a candidate's authorized committee "shall clearly state that the communication has been paid for by such authorized political committee," 52 U.S.C. § 30120(a)(1), and if paid for by another person, "shall clearly

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31 *See* 52 U.S.C. § 30120(d)(1).

32 Lee Raine, *About 6 in 10 Young Adults in U.S. Primarily Use Online Streaming to Watch T.V.,* PEW RESEARCH CENTER (Sept. 13, 2017), http://www.pewresearch.org/fact-tank/2017/09/13/about-6-in-10-young-adults-in-u-s-primarily-use-online-streaming-to-watch-tv/.

state the name . . . of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee," *id.* § 30120(a)(2). The Commission can reasonably interpret these provisions as requiring that "clearly stat[ing]" whether a digital video or audio communication was authorized (or not authorized) by a candidate requires an advertiser to expressly disclose the candidate's approval of or the committee's responsibility for the ad via an audio statement and on-screen text.[33]

Moreover, the Supreme Court has endorsed such disclaimers as a means of "avoid[ing] confusion by making clear" whether ads are funded by a candidate, a political party, a political committee, or some other person.[34] Given that the so-called naming restriction at 11 C.F.R. § 102.14(a) is currently enjoined, *see Pursuing America's Greatness v. FEC*, 831 F.3d 500 (D.C. Cir. 2016), the importance of alleviating voter confusion about the source of an ad is augmented. A digital video ad may appear to come from a candidate or committee but actually be from a third party group with a similar name or project name. This concern becomes even more acute in light of new technologies that allow for the creation of fake, but highly convincing, videos of candidates and public officials.[35]

With regard to the NPRM's concern about requiring Stand by Your Ad disclaimers in a context where audio- or video-based advertising may be shorter than on radio or television, it must be noted that the Supreme Court in *Citizens United* upheld the application of BCRA's four-second disclaimers to a ten-second advertisement,[36] and the length of internet-based advertising is not nearly as rigid as the length of radio- or television-based advertising.[37] Moreover, where the cost of an advertisement on television or radio is often tied to its duration, the cost of a digital advertisement is often untethered to the length of the ad.[38]

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[33] That the Honest Ads Act, *supra* n.22 at § 7, would explicitly require such disclaimers on internet-based advertising should be understood as congressional impatience with the Commission's foot-dragging in detecting and deterring foreign interference and in matching BCRA's intent to the reality of modern political advertising; it should not be understood as indicating that the Commission lacks a basis in existing law to require such disclaimers.

[34] *Citizens United*, 558 U.S. at 368.

[35] *See, e.g.*, John Brandon, *How AI-Generated Videos Could Be the Next Big Thing in Fake News*, FOX NEWS (Mar. 12, 2018), http://www.foxnews.com/tech/2018/03/12/how-ai-generated-videos-could-be-next-big-thing-in-fake-news.html; Ali Breland, *Lawmakers Worry About Rise of Fake Video Technology*, THE HILL (Feb. 19, 2018), http://thehill.com/policy/technology/374320-lawmakers-worry-about-rise-of-fake-video-technology.

[36] *Citizens United*, 558 U.S. at 368.

[37] *See, e.g.*, Facebook, Video Facebook Feed Ad, https://www.facebook.com/business/ads-guide/video (last visited May 22, 2018) (noting that videos in Facebook ads can last up to 240 minutes).

[38] Facebook video ads, for example, are priced based on the cost per impression, or based on viewers watching the video for at least 10 seconds, regardless of the video length. Facebook, About Video Ad Bid Types, https://www.facebook.com/business/help/653592524740644?helpref=search&sr=17&query=video%20length (last visited May 22, 2018). Twitter video ads are priced based on a video being watched at

We recognize that digital advertising is diverse and evolving, and there are multiple ways in which video or audio components can be integrated into a digital ad that may not be analogous to broadcast advertising. However, the appropriate way to handle concerns about relative short-length digital audio or visual advertising is to set forth the general requirement by regulation and to address individual formats on a case-by-case basis, rather than via Alternative B's approach of entirely exempting digital advertising from Stand by Your Ad requirements.

To clarify that the inclusion of a one-second GIF in a text or graphic ad does not trigger Stand by Your Ad requirements, Alternative A's proposed paragraph (c)(5)(ii) might be amended to only apply to a "public communication distributed over the internet with a *significant* video component."[39] Regulated parties can then avail themselves of the Commission's advisory opinion process to seek clarification on the application of this rule to new types of advertising as they arise.

At a minimum, even if the Commission does not require a Stand by Your Ad statement, any final rule should clearly mandate that digital advertisements with a significant video component or an audio component deliver any required disclaimer in the same formats as the communicative content.

Alternative B would require that digital ads in any format satisfy the "clear and conspicuous" requirement of 11 C.F.R. § 110.11(c)(1), but would not specify that a standard digital video advertisement, for example, must provide disclaimer information through an audio statement and on-screen text. It does not specify that a digital audio advertisement must deliver a disclaimer via an audio statement, rather than via text accompanying the podcast or audio file.

Video advertisements generally communicate content through a combination of audio, text, and video; the Commission should spell out that statutorily required disclaimer information is not "clearly state[d]" if the disclaimer is not delivered in each format used by the rest of the message.[40]

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least 50% and playing at least 2 seconds, regardless of the video length. Twitter, Twitter Ads Pricing, https://business.twitter.com/en/help/overview/ads-pricing.html (last visited May 22, 2018). YouTube TrueView ads are priced based on a viewer watching 30 seconds of a video, regardless of the video's full length. Google, About TrueView Video Campaigns, https://support.google.com/adwords/answer/6381008?hl=en&ref_topic=3119118 (last visited May 22, 2018).

[39] However, a "significant" requirement would be appropriate only for determining whether a video component is sufficiently substantial so as to require a separate Stand by Your Ad disclaimer in digital advertising; such a qualifier would not be appropriate for the disclaimer information required by section 30120(a), which is statutorily mandated for all advertising covered by that provision, including digital advertising.

[40] A video advertisement with no audio would only be required to include a text disclaimer, since the communicative content was only delivered via text and graphics.

This would be consistent with the numerous other provisions of FECA and with Commission regulations that establish format-specific guidelines for video, audio, and print disclaimers.[41]

3. Disclaimer Requirements for Text and Graphic Communications Distributed Over the Internet

FECA requires that a disclaimer on any text or graphic advertisement that meets its statutory criteria "clearly state" the relevant information.[42] We therefore generally support Alternative A because it would implement FECA's mandate by requiring that qualified digital ads "contain a disclaimer that is of sufficient type size to be clearly readable by the recipient of the communication," with a safe harbor if the "letters [are] at least as large as the majority of the other text in the communication satisfies the size requirement."

However, we are skeptical of the interaction between Alternative A's proposed paragraphs (c)(5)(i) and (c)(5)(ii); under these proposed rules, an internet communication that contains both text and video components would be subject *only* to the broadcast disclaimer rules, meaning a viewer would have to watch the video component to obtain disclaimer information. The website *BuzzFeed*, for example, sold "native advertising" to candidates and political committees in the 2016 election that included text, graphic, and video components,[43] often in the form of a list (see, for example, this ad from the super PAC Next Gen Climate Action, https://www.buzzfeed.com/nextgenclimate/surprising-things-about-democracy-you-wont-remember-from). If an advertiser were to embed a video in a text- and graphic-focused advertisement and include the required disclaimer information only at the end of that video, the many viewers who focus on the ad's text and graphics might never see the disclaimer (nor even know where to look for it).

Moreover, it is common practice for videos in an advertisement to have been embedded from a video originally posted to Facebook or YouTube.[44] A video on a *BuzzFeed* advertisement, for example, may not be hosted on or be passing through *BuzzFeed's* servers; instead, the video might be coming directly from Facebook. If

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41 *See, e.g.*, 52 U.S.C. §§ 30120(c), (d)(1)(A), (d)(1)(B), (d)(2); 11 C.F.R. §§ 110.11(c)(2), (c)(3), (c)(4).

42 *Id*. §§ 30120(a)(1)-(3)

43 *See, e.g.* Andrew Kerr, *How Buzzfeed's Data Monster Leveraged User Data to Fuel Super PACs, Target Voters*, DAILY CALLER (May 6, 2018), http://dailycaller.com/2018/05/06/buzzfeeds-data-political-advertisements/; Abby Phillip, *Pro-Clinton Groups Launch New Ads Targeted at Female Millenials*, WASH. POST (Aug. 22, 2016), https://www.washingtonpost.com/politics/pro-clinton-groups-launch-new-ads-targeted-at-millennial-women/2016/08/21/4bd2a638-6740-11e6-8b27-bb8ba39497a2_story.html?noredirect=on&utm_term=.bd8a3d562676.

44 *See, e.g.*, Facebook Help Center, *How Do I Embed a Video From Facebook Onto a Website?*, Facebook, https://www.facebook.com/help/1570724596499071?helpref=uf_permalink (last visited May 14, 2018); YouTube help, *Embed Videos and Playlists*, Google Support, https://support.google.com/youtube/answer/171780?hl=en (last visited May 14, 2018).

Alternative A were adopted in its current form and a user's browser failed to load an embedded Facebook video, or an advertiser removed the underlying Facebook video, then viewers would lose all disclaimer information in the advertisement that is seeking to influence their vote. For example, one 2016 *BuzzFeed* ad from the super PAC Women Vote included text expressly advocating for Hillary Clinton's election alongside a video embedded from Facebook.[45] Under Alternative A, if the underlying video were removed, or if it failed to load in a user's browser, a viewer would be left with a post that reads "To avoid a Trump America, vote for Hillary on November 8," without any disclaimer information.

To this end, as noted above, the rules should require disclaimers for each component of an advertisement that independently satisfies the statutory criteria. Moreover, any Alternative proposed in the NPRM must consider how its rules for such text and graphic disclaimers interact with other potential rules.

4. Adapted Disclaimers for Public Communications Distributed Over the Internet

Both Alternatives legitimately anticipate that new forms of internet-based advertising might arise that are incompatible with a full disclaimer on the face of the advertisement. The Commission must tread cautiously, as FECA itself is clear in requiring disclaimers and does not provide for exceptions. A final rule must therefore exempt advertisers from providing a full disclaimer on the face of an advertisement *only* when including the statutorily proscribed information would be truly *impossible*. It would be an inappropriate interpretation of FECA to exempt full disclaimers due to an advertiser's subjective interpretation of "difficulty" or desire to not purchase sufficient advertising space to provide the required information.

Alternative A would establish an objective standard for determining when adapted disclaimers—*i.e.*, disclaimers that fall short of FECA's mandate—are appropriate, and would appropriately focus on the intrinsic nature of the advertising medium. Specifically, Alternative A would accomplish this through proposed paragraph (c)(5)(i)(A) allowing an adapted disclaimer when a full disclaimer "cannot" fit "due to external character or space constraints."[46]

Alternative B, in contrast, proposes a 10% threshold—whereby if a "clear and conspicuous" disclaimer takes up more than 10% of an advertisement, the advertiser may use an adapted disclaimer. Although at first glance 10% appears to be an objective standard, in reality it is largely within the control of the advertiser. For example, a person seeking to avoid disclaimers might form an independent

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[45] Women Vote (brand publisher), *A Day In the Life of Trump's America*, BUZZFEED (Nov. 2, 2016), https://www.buzzfeed.com/womenvote/a-day-in-the-life-in-president-trumps-america.

[46] CLC interprets "cannot" in Alternative A's proposed paragraph (c)(5)(i)(A) to only allow for an adapted disclaimer when the inclusion of a full disclaimer is not possible.

expenditure-only committee or a 501(c)(4) nonprofit with an intentionally overlong name that would exceed 10% of many digital advertisements. Or an advertiser might claim that the only way to create a "clear and conspicuous" disclaimer would be to make it large enough to take up 10.1% of the advertisement, therefore exempting it from the requirement altogether.

As noted above, FECA requires full disclaimers, so any approach that permits advertisers to intentionally design ads that escape this requirement would be flatly inconsistent with the statute.

5. How Adaptations Must Be Presented on the Face of the Advertisement

Reflecting its anticipation that some internet-based advertisements may not allow for full disclaimers, the Commission has proposed two Alternatives for how adapted disclaimers may be permissibly displayed. Both Alternatives provide that, when an advertisement that otherwise meets the statutory criteria for disclaimers falls under a regulatory exception (as discussed in the preceding section), an "abbreviated disclaimer" may appear on the face of the advertisement with an "indicator" providing a means to obtain full disclaimer information through a technological mechanism.

Of the two Alternatives, Alternative A best complies with FECA. Proposed paragraph (c)(5)(i) would require that an "adapted disclaimer" accompanying an advertisement include, at the very least, 1) an indicator through which viewers could access full disclaimer information, and 2) an abbreviated disclaimer stating the name of the "person or persons who paid for the communication."

Alternative B, in contrast, offers a two-tiered approach. Tier one (proposed paragraph (c)(5)(iii)) is similar to Alternative A in that an adapted disclaimer includes 1) an indicator and 2) an abbreviated disclaimer that "identif[ies] the person who paid for" the communication, but in contrast with Alternative A, provides that such an identification could be satisfied by including "the person's full name or by a clearly recognized abbreviation, acronym, or other unique identifier by which the person is commonly known." The abbreviation, acronym, or unique identifier exception-within-an-exception is an acceptable option as long as the Commission clarifies that this is a narrow exception and enforces it diligently. For example, if an average voter would have to Google the acronym or abbreviation used in a disclaimer to learn the true identity of the advertiser, it is not a "clearly recognized" or "commonly known" acronym or abbreviation.[47]

[47] The abbreviation or acronym option would do little to address the gamesmanship described above, where advertisers might form committees or corporations with long names whose inclusion would exceed the 10% threshold. Alternative B would not *require* that committees or corporations with long names use an abbreviation or acronym—and those seeking to evade disclaimers would not

Alternative B's second tier (proposed paragraph (c)(5)(iv)) falls short of FECA's minimum requirements. Alternative B provides that if a tier-one indicator exceeds a certain percentage of the communication, then the advertisement need only include an indicator, and can omit *any* information about the advertiser on the face of the ad. No plausible reading of FECA authorizes such a result. Providing advertising recipients with the identity of the advertiser on the face of the ad is the bare minimum required to ensure that disclaimers serve their purpose of helping voters "evaluate the arguments to which they are being subjected" and make informed choices.

Nothing in the proposed Alternatives suggests that the Commission has consulted technical or social science data to determine how viewers would interact with indicators. At the very least, the Commission must determine the extent to which viewers presented with an "indicator" accompanying an ad would recognize what that indicator is and how to use it to obtain the information to which they are legally entitled.

6. Adaptations Utilizing One-Step Technological Mechanism

Each of the Alternatives provides for a technological mechanism through which viewers of ads with adapted disclaimers can receive all disclaimer information required by the statute. We agree with both Alternatives that such action must require only "one step" – *i.e.*, that once a viewer selects an indicator to receive the full disclaimer, she need not take any additional steps to receive the statutorily required information.

In other words, if the Commission adopts a "one-step" rule, the Commission should make clear that selecting an indicator is that one step. Being forced to scroll through, click, or otherwise navigate other material to find the disclaimer is a *second* step and should be expressly barred by any one-step rule that the Commission implements. For example, a viewer should not have to scroll to the bottom of a landing page to obtain the statutorily required disclaimer information.

The importance of the one-step disclaimer requirement is illustrated by an example from the 2016 elections. In the months before the 2016 elections, voters were targeted with Facebook ads from a page called "Trump Traders."[48] These ads urged third-party voters in swing states, and Hillary Clinton voters in other states, to "trade" their votes to help defeat Donald Trump. Neither the Facebook ads nor

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do so—and, in any case, few newly formed committees or corporations with long names will be "commonly known" by their acronyms.

[48] *See* R4C16, Committee Overview, 2015-2016 https://www.fec.gov/data/committee/C00625509/ (reflecting $913,619 in independent expenditures in support of Hillary Clinton, which included payments to Facebook and Talbot Digital for ad buys).

the Facebook page told viewers that this was a project of an independent expenditure-only political committee called R4C16 (ID:C00625509).

The Trump Traders Facebook ads directed users either to its Facebook page or to the website TrumpTraders.org. The "about" section of the Facebook page only stated "Trade votes. Defeat Trump. Find a vote trading partner at http://TrumpTraders.org #NeverTrump."[49] It did not say it was a project of the R4C16 super PAC. Visitors to the TrumpTraders.org website[50] first viewed a form where they could select their preferred candidate and sign up the vote-trading system. Scrolling down, a viewer could click a link for "more info on trading." A viewer would have to scroll to the very bottom of the page, below the privacy policy and the "© 2016 TrumpTraders.org. All rights reserved." language, before seeing a disclaimer stating the page was "Paid for by R4C16.org."[51]

In sum, viewers seeking information about a political advertisement that they have seen—information to which they are statutorily entitled—should not be forced to navigate *more* political messages to obtain it.

The Commission must also consider how such "one step" functionality would work on mobile devices. As several comments on the Commission's ANPRM noted, Americans are increasingly using their mobile devices to receive information on the internet,[52] and often view political ads on mobile applications. To this end, the Commission's final rule and E&J should generally prohibit advertisers from forcing mobile users to leave the application in which they see an advertisement to view a disclaimer.

For example, a voter who sees a political ad inside the Facebook app or Pokémon Go app should not have to open or be redirected to another application—for example, to a web browser like Safari or Chrome—to obtain the statutorily-required disclaimer information. Many viewers would not follow such a link, lest they lose their place in a game or their position in a newsfeed, and in almost every instance doing so would violate the one-step requirement.[53] A voter who views an ad that meets the statutory criteria should be able to see a full disclaimer housed within the relevant application.

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[49] Trump Traders, *About*, FACEBOOK, https://www.facebook.com/pg/trumptraders/about/ (last visited May 23, 2018). *See* Exhibit A.

[50] TRUMP TRADERS, https://web.archive.org/web/20161102161910/https://trumptraders.org/trade/ (archived Nov. 2, 2016). *See* Exhibit B.

[51] *Id*.

[52] *See* NPRM, *supra* note 1, at 12868 n. 21 (citing several of these comments).

[53] For example, clicking a hyperlink to a political committee's website from inside an app may result in a notification that a user is being redirected to a page outside of the application, and require affirmative or passive consent to do so; this clearly constitutes more than one step.

Advertisers have obvious incentives to force viewers to see as many of their political messages as possible. When a viewer clicks on an advertisement and is redirected to an advertiser's website, the advertiser has the opportunity to track the viewer's internet browsing, receive data from the viewer, collect the viewer's email address, and more. If the Commission allows the use of an adapted disclaimer based on an advertiser's subjective assessment of convenience, rather than an objective impossibility standard, the result is easy to foresee: advertisers will use adapted disclaimers as frequently as possible, undermining FECA, depriving voters of their statutory rights, and creating opportunities to track the online behavior of unsuspecting voters who merely wanted to access the information to which they are legally entitled. This is an area where the rule should be as specific as possible to avoid forcing viewers to look at myriad other content just to see who funded the initial advertisement.

7. Examples of Technological Mechanisms in Adapted Disclaimers

Both Alternatives offer examples of "technological mechanisms" for full disclaimers, "including, but not limited to," hover-over mechanisms, pop-up screens, scrolling text, rotating panels, or hyperlinks to a landing page (Alternative A), as well as mouse-over, voice-over, roll-over, or click-through to a landing page (Alternative B).

None of the illustrative examples raise obvious problems, although given that digital technology is constantly changing and its use as an advertising medium will continue to evolve in ways that few can predict, the "including, but not limited to" language is likely to do a lot of work. The evolving nature of digital technology highlights both the need for creativity in anticipating mechanisms for disclaimers and the importance of a rule that reinforces that advertisements must include full disclaimers whenever they meet FECA's statutory criteria, subject only to the narrowest of exceptions.

Congress has directed that advertisements meeting FECA's statutory criteria must "clearly state" the required disclaimer information. Any adapted disclaimers and alternative mechanisms should be used only as a last resort and, regardless of the precise technological mechanism, provide voters with immediate and clearly stated information about who paid for the advertisement, unadulterated by additional messaging.

8. Proposed Exceptions to Disclaimer Rules for Internet Public Communications

As discussed above, and as acknowledged in the NPRM, the Commission has long struggled with how to apply the 20th-century "small items" and "impracticable" disclaimer exceptions to 21st-century forms of political advertising. Alternative A

does not create any wholesale exceptions from disclaimer requirements. Alternative B's proposed paragraph (f)(1)(iv), in contrast, invites problems by creating a new exception from disclaimer requirements for communications "that cannot provide a disclaimer on the face of" the communication itself.

Does the determination of whether a communication "cannot" include a disclaimer hinge on the subjective assessment of the advertiser, the technological constraints of the medium, or the willingness of an advertising platform to offer an indicator to its users? Alternative B does not say. This ambiguity invites manipulation and abuse of the exception, and fails to provide clarity to regulated parties who want to comply with the law.

The creation of this exception appears to be another example of the Commission crafting rules based on its own assumptions, rather than evidence. Tellingly, the NPRM notes that this exception is designed for ads such as "static banner ads on small internet-enabled mobile devices that cannot link to a landing page controlled by the person paying for the communication"—ads that the NPRM acknowledges might not even exist.[54] To create a categorical regulatory exemption for conduct that the Commission admits it knows nothing about would be arbitrary and capricious.

Even if such ads currently do not exist, the Commission could will them into existence if it adopts such an exception. The unfortunate reality is that there are political advertisers, including some foreign entities, who would rather not reveal their identities to voters. If the Commission creates needless and unlawful exceptions, advertising platforms will create a market for them,[55] and advertisers will take advantage.

CLC is grateful for the Commission's consideration of these comments, and would appreciate the opportunity to testify at a hearing on this matter.

Sincerely,

/s/

Brendan Fischer
Director, Federal Reform
Campaign Legal Center

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[54] *See* NPRM, *supra* note 1, at 12879.

[55] For example, a digital advertising platform might sell one form of advertising that can accommodate disclaimers, and sell another form that it claims "cannot" accommodate disclaimers or adapted disclaimers.

EXHIBIT A

Trump Traders, *About*, FACEBOOK, https://www.facebook.com/pg/trumptraders/about/ (last visited May 23, 2018).

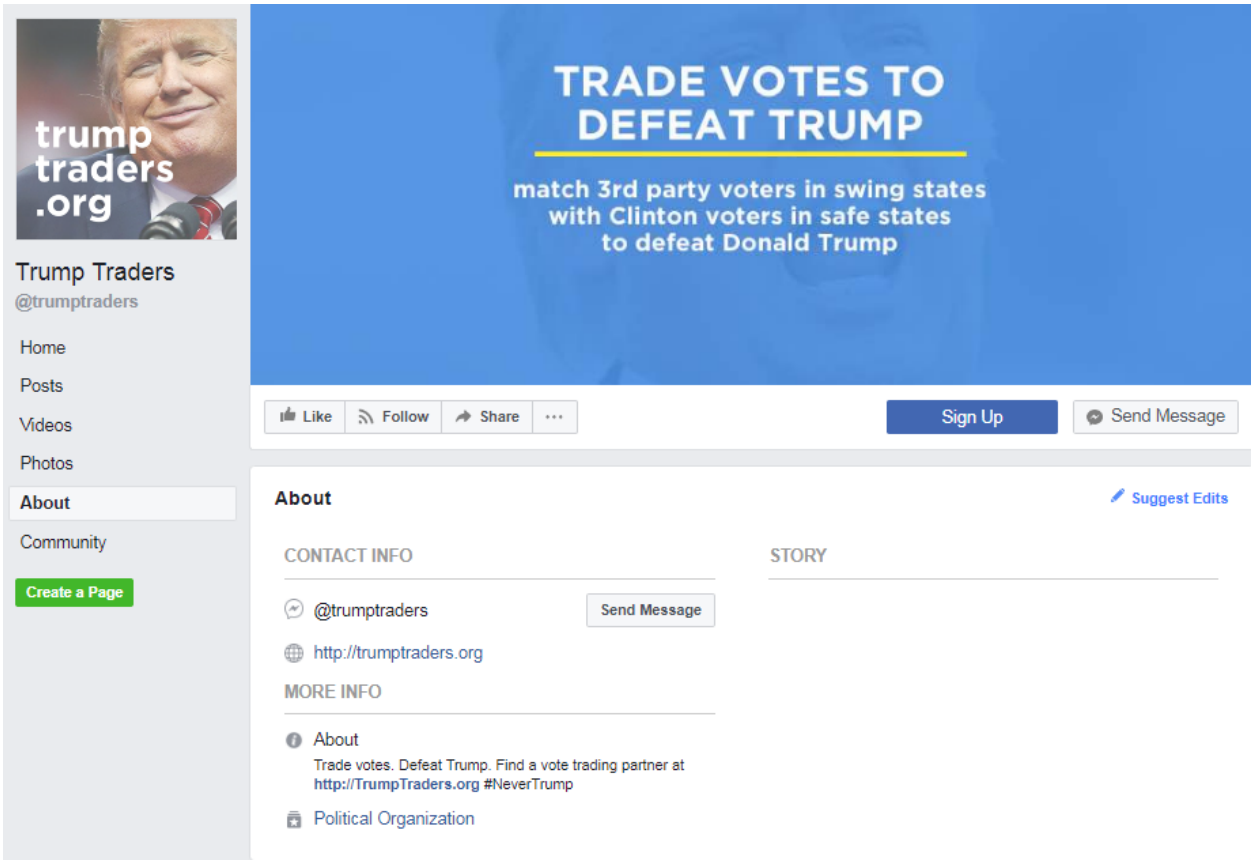

EXHIBIT B

TRUMP TRADERS, https://web.archive.org/web/20161102161910/https:/trumptraders.org/trade/ (archived Nov. 2, 2016).