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VIA ELECTRONIC SUBMISSION

November 13, 2017

Chair Steven T. Walther
Vice Chair Caroline C. Hunter
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: REG 2011-02, Internet Communication Disclaimers

Dear Chair Walther and Vice Chair Hunter:

The Brennan Center for Justice at New York University School of Law (the “Brennan Center”)¹ respectfully submits this Comment in response to the reopened Advance Notice of Proposed Rulemaking (“ANPRM”), first published October 13, 2011 (76 FR 63567), concerning disclaimers on certain internet communications.² We urge the Federal Election Commission (the “Commission”) to update its rules to reflect the rapidly growing importance of the internet as a medium for election spending and the need for increased transparency regarding political expenditures online.

The internet disclaimer rule that is the subject of this ANPRM was promulgated in 2006, when the Commission revised the definition of “public communication” under the Bipartisan Campaign Reform Act. At that time, the Commission expanded the definition to include internet communications “placed for a fee on another person’s Web site.”³ This had the effect of requiring disclaimers on paid online ads. Advisory opinion requests in recent years have given the Commission opportunities to clarify the scope of the disclaimer rule, but there has been no further rulemaking since 2006.⁴

¹ The Brennan Center is a nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center’s Money in Politics project works to reduce the undue influence of money in our democracy. This comment does not purport to convey the position of New York University School of Law, if any.

² Internet Communication Disclaimers, 76 Fed. Reg. 63567-01, 63567 (proposed Oct. 13, 2011) (codified at 11 C.F.R. pt. 110).

³ 11 C.F.R. § 100.26.

⁴ Cynthia L. Bauerly, *The Revolution Will Be Tweeted and Tmbld and Txd: New Technology and the Challenge for Campaign-Finance Regulation*, 44 U. TOL. L. REV. 525, 530-35 (2013).

Yet the internet and its role in elections are profoundly different than in 2006. In the 2004 election, the last presidential cycle before the disclaimer rulemaking, political spending online reached only \$29 million—just 1 percent of expenditures on media for that election.⁵ When the rulemaking was published in April of 2006, Twitter was less than one month old, and Facebook was not yet available to the general public.

Today, the internet has become both a central part of modern life and a key focus of political advertising. The \$1.4 billion spent online in the 2016 election was almost 50 times higher than in 2004.⁶ Americans today are more inclined to get their news online, with 43 percent looking to the internet for news.⁷ And the most popular websites attract hundreds of millions of visitors; 52 percent of the adult U.S. population visits Facebook every day,⁸ and 54 percent of American adults use Google several times a day.⁹

The internet's popularity has made it a ripe target for foreign adversaries seeking to meddle in elections. Major internet companies have recently revealed a widespread effort by Russian state proxies to influence American politics that included covert expenditures on political ads online.¹⁰ Although it has received a great deal of attention in the press, the effort's full scope is not yet known—millions of Americans have seen Russia-linked ads without knowing it. This ignorance about the scope of deceptive foreign interference efforts may cause Americans to be overly distrustful of all political speech, suspecting that any message might secretly originate with a foreign adversary.

The ubiquity of online political spending, which is only likely to increase, makes effective regulation of internet expenditures vital. Voters have a right to know the source of spending on advertisements intended to persuade them, no less for the internet than any other mass medium. Knowing who is supporting a candidate can give voters information about “the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.”¹¹ And disclosure “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”¹²

⁵ Patrick Quinn & Leo Kivijarv, *US Political Media Buying 2004*, 24 INT'L J. ADVERTISING 131, 132, 134 (2005).

⁶ Sean J. Miller, *Digital Ad Spending Tops Estimates*, CAMPAIGNS & ELECTIONS, Jan. 4, 2017, <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates>.

⁷ Jeffrey Gottfried & Elisa Shearer, *Americans' Online News Use Is Closing in on TV News Use*, PEW RESEARCH CENTER, Sept. 7, 2017, <http://www.pewresearch.org/fact-tank/2017/09/07/americans-online-news-use-vs-tv-news-use/>.

⁸ Shannon Greenwood, Andrew Perrin & Maeve Duggan, *Social Media Update 2016*, PEW RESEARCH CENTER, Nov. 11, 2016, <http://www.pewinternet.org/2016/11/11/social-media-update-2016/>.

⁹ Morning Consult, *National Tracking Poll #170923*, Sept. 29 – Oct. 1, 2017, 192, https://morningconsult.com/wp-content/uploads/2017/10/170923_crosstabs_Brands_v1_AP.pdf.

¹⁰ Craig Timberg *et al.*, *Russian ads, now publicly released, show sophistication of influence campaign*, WASH. POST, Nov. 1, 2017.

¹¹ *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976).

¹² *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

Despite the importance of disclosure, the Commission has not updated its regulations to reflect the current realities of internet use. To be sure, Congress has also failed to modernize campaign finance rules. And there are limits to the Commission's ability to improve the regime without legislative changes. Nevertheless, the Commission has significant authority to improve transparency for online expenditures. We urge consideration of the following options.

Strengthen disclaimer requirements for online ads. In 2011, the Commission deadlocked on a request from Facebook for an advisory opinion to the effect that certain character-limited advertisements be exempt from disclaimer requirements.¹³ The Commission should issue regulations that clarify reasonable disclaimer requirements for online ads. Unlike bumper stickers and buttons, online ads have no inherent space limitations, and technological innovations allow disclaimer methods that do not impinge on ad space. For example, Google has announced plans to mark all political ads with a special icon that leads users who click on it to information about the advertiser.¹⁴

Expand the definition of “public communication” to cover significant expenditures on messages posted to the web for free. Social media websites allow free dissemination to vast audiences of any type of message. Political operatives can make large expenditures to produce content—whether production costs for filming a video, or polling costs for messaging research—but pay nothing to distribute the content to millions. Under the current regime, none of those productions costs must be reported if the content is posted for free.¹⁵ The Commission should include within the definition of public communication messages on the internet that were *either* posted for a fee or had significant production costs. The rules for electioneering communications provide an analogous example of a requirement to count production costs toward a regulatory spending threshold.¹⁶

* * *

Voters are entitled to know who is trying to influence their votes and, correspondingly, who is most likely to try to influence the votes of their representatives after the election. Nothing about the internet makes this principle any less compelling. On the contrary, the increasing prominence of online election expenditures makes the failure to update campaign finance laws to adequately cover the internet more dangerous with every cycle.

And in light of revelations about Russia's campaign to influence the 2016 election, the need for reasonable regulation of online spending is all the more pressing. As a District of Columbia court opinion affirmed by the Supreme Court put it, keeping foreign money out of elections is warranted

¹³ Cynthia L. Bauerly, *The Revolution Will Be Tweeted and Tmbld and Txted: New Technology and the Challenge for Campaign-Finance Regulation*, 44 U. TOL. L. REV. 525 (2013).

¹⁴ Richard Salgado, Senior Counsel, Law Enforcement and Information Security, Google, Testimony to the Senate Judiciary Subcommittee on Crime and Terrorism, October 31, 2017, 4.

¹⁵ 11 C.F.R. § 100.26 (excepting from the definition of public communication “communications over the Internet, except for communications placed for a fee on another person's Web site”).

¹⁶ 52 U.S.C. § 30104(f)(1) (providing that “direct costs of producing and airing electioneering communications” count toward \$10,000 threshold for reporting electioneering communications).

as “part of a common international understanding of the meaning of sovereignty and shared concern about foreign influence over elections.”¹⁷ The specter of foreign agents masquerading as Americans weighing in on political issues threatens to engender distrust and cynicism in political debates, as voters do not even know what country messages are coming from.

To face this threat, the Commission should work to expand transparency for all political spending regardless of whether it is online, as well as strengthen the ban on spending by foreign nationals. There is clear room for improvement by the Commission in the areas of ensuring donor disclosure for organizations that engage in politics without registering as political committees,¹⁸ and in bringing foreign-owned and controlled corporations within the foreign spending ban.¹⁹ Of course, Congress has an obligation to address these problems as well, but that should not stop the Commission from doing what it can.

The rapid development of the internet and the failure of regulation to keep up have created a massive loophole in the federal disclosure regime. Covert Russian meddling is an especially disturbing example of the mischief that can result, but it is certainly not the only cause for concern. Election spending will continue to shift away from traditional media and toward the internet. Our campaign finance regulations must be strengthened to improve disclosure and keep voters confident that they know who is trying to sway their votes online.

Respectfully submitted,

/s/

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¹⁷ *Bluman v. FEC*, 800 F. Supp. 2d 281, 292 (Dist. D.C. 2011), *aff'd*, 565 U.S. 1104 (2012).

¹⁸ Daniel I. Weiner & David Earley, Brennan Center for Justice, Comment Re: FEC REG 2014-01, Aggregate Biennial Contribution Limits, Jan. 15, 2015, <https://www.brennancenter.org/analysis/comment-fec-wake-supreme-court-decisions-fix-disclosure-and-coordination-rules-and-enforce>.

¹⁹ Memorandum from Ellen L. Weintraub, Commissioner, Federal Elections Commission, September 28, 2016, https://beta.fec.gov/resources/about-fec/commissioners/weintraub/statements/Foreign_National_2_Memo_28_Sept_2016.pdf; Memorandum from Ellen L. Weintraub, Commissioner, Federal Elections Commission, September 9, 2016, 4, http://www.fec.gov/members/weintraub/statements/Weintraub-Foreign_Political_Spending_Rulemaking.pdf.