

**Committee on House Oversight and Government Reform,
Subcommittee on Information Technology
United States House of Representatives**

**Statement of Ian Vandewalker
Senior Counsel, Democracy Program,
Brennan Center for Justice at NYU School of Law**

October 24, 2017

“Oversight of Federal Political Advertisement Laws and Regulations”

On behalf of the Brennan Center for Justice, I thank the Subcommittee on Information Technology for holding this hearing. We appreciate the opportunity to share with you our studies and recommendations concerning federal political advertisement laws and regulations, particularly as they relate to foreign spending and the ability of foreign powers to interfere in American elections. The Brennan Center for Justice is a nonpartisan think tank and advocacy organization that focuses on democracy and justice. We work to ensure that our elections are conducted in a way that ensures all Americans can participate in a self-governing democracy. The Brennan Center has studied campaign finance issues for 20 years, working to develop effective and constitutionally sound policies and advocating for them in the courts, legislatures, and administrative bodies across the nation.

Political advertising is experiencing a shift toward spending on the internet,¹ which makes it easy and inexpensive to disseminate messages widely or with pinpoint audience targeting. Yet our laws have not been updated for this new era, leaving much political spending on the internet unregulated. Investigations into the 2016 election have revealed a widespread, multipronged effort by the Russian government to alter the course of public debate by injecting propaganda and divisive messages into the American political discussion. Russian operatives bought thousands of ads discussing political issues here, reportedly including messages advocating the election of candidates. And they did so while disguising their identity with fake profiles designed to look like they were controlled by Americans.

The potential for online ads to enable agents of a foreign government to pose as Americans while spreading propaganda creates risks for our democracy. American audiences can be misled about how popular an idea is with their compatriots and make decisions about which candidate to support, whether to vote, or even which facts to believe, all under false premises.

¹ Sean J. Miller, “Digital Ad Spending Tops Estimates,” *Campaigns & Elections*, January 4, 2017, <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates> (noting \$1.4 billion in digital ad spending in the 2016 election, which signifies a shift toward online spending).

The intelligence community is confident that Russia will attempt to meddle in our elections again.² And of course, the threat is not limited to Russia. Moscow's efforts in 2016 may serve as a blueprint, enabling an unknown number of copycats interested in meddling in American affairs, whether it's China, Iran, North Korea, or ISIS. As former Homeland Security Secretary Jeh Johnson put it, "the Russians will be back, and possibly other state actors, and possibly other bad actors."³

There are actions that Congress can immediately take to limit the opportunities for foreign governments to spend on election ads, and to ensure that Americans have the information they need to make informed decisions about what to believe and how to vote.⁴ We recommend legislation to accomplish the following:

1. Require the same disclosure and disclaimers for online ads that the law currently requires for other mass media, and require that information about political ads online is preserved in a database available to the public.
2. Eliminate "dark money" spending by organizations that do not disclose their donors, which can be used to hide foreign expenditures on elections.
3. Expand the ban on election spending by foreign nationals to include domestic corporations with substantial foreign ownership or control.
4. Reform the Federal Election Commission to reduce the likelihood of deadlock by providing for an odd number of commissioners, at least one of whom is nonpartisan.

I. THE POWER OF THE INTERNET AND RUSSIA'S INTERFERENCE

The internet has rapidly become a key focus of political advertising as it has become a bigger part of modern life. The \$1.4 billion spent online in the 2016 election was almost eight times higher than in 2012.⁵ Yet the internet poses unique challenges for open political discourse. Online, messages are cheap to produce and disseminate instantly to vast potential audiences across great distances without regard for political boundaries.⁶ Anonymity is easy online, allowing deception about who is paying for ads.

Moreover, many Americans have sorted themselves into political echo chambers, receiving their news online only from sources who share the same partisan allegiance. This, along with sophisticated ad targeting tools, makes it easier for political operatives to direct messages

² Office of the Director of National Intelligence (ODNI), "Assessing Russian Activities and Intentions in Recent US Elections," Intelligence Community Assessment ICA 2017-01D (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf.

³ Andrew Rafferty, "Former DHS Chief Warns Russians Will Continue to Target U.S. Elections," *NBC News*, June 21, 2017, <https://www.nbcnews.com/politics/politics-news/former-dhs-chief-warns-russians-will-continue-target-u-s-n775116>.

⁴ Knowing who is supporting a candidate gives voters information about what the candidate stands for. *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976). And disclosure informs the public's decisions about how much trust to place in a message. *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

⁵ Sean J. Miller, "Digital Ad Spending Tops Estimates," *Campaigns & Elections*, January 4, 2017, <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates>.

⁶ See Nathaniel Persily, "Can Democracy Survive the Internet?" *Journal of Democracy* 28 (2017): 72.

intended to foment discord to susceptible audiences, for example by attacking a candidate from the left in ads targeted to progressive users and from the right in messages aimed at conservatives.⁷

Micro-targeted advertising online has given rise to the “dark ad,” which is seen only by a narrowly targeted audience, threatening to remove much of the political debate around elections from public view. Contrast dark ads with television commercials, which reach wide audiences and are subject to transparency rules, allowing journalists to fact-check claims and the wider public to hold speakers accountable for false or inflammatory rhetoric.⁸

A. What Happened in 2016

Russia’s attempts to influence the 2016 election took advantage of all these features of online media. They bought ads and promoted content through fake accounts pretending to be Americans. They crafted different messages for different audiences and used platforms’ sophisticated audience targeting tools to increase the chances that propaganda would reach receptive audiences more likely to be swayed and to share posts.⁹ So far, internal investigations by Facebook, Twitter, and Google have found Russian activity on the most popular platforms—and no doubt the full story has yet to be told.¹⁰

The Kremlin’s messages included attacks on and praise for specific candidates in the presidential election, although many seemed designed mostly to harm the political establishment, which Russian agents attacked from both left and right.¹¹ Most of the ads Facebook discovered to have originated from Russian operatives “appeared to focus on amplifying divisive social and political messages across the ideological spectrum—touching on topics from LGBT matters to race issues to immigration to gun rights.”¹²

⁷ Rand Waltzman, *The Weaponization of Information: The Need for Cognitive Security*, RAND Corporation, 2017, 3, <https://www.rand.org/pubs/testimonies/CT473.html>.

⁸ See Christopher S. Elmendorf, Ann Ravel and Abby Wood, “Open up the black box of political advertising,” *San Francisco Chronicle*, September 22, 2017, <http://www.sfchronicle.com/opinion/openforum/article/Open-up-the-black-box-of-political-advertising-12221372.php>.

⁹ See Massimo Calabresi, “Inside Russia’s Social Media War on America,” *Time*, May 18, 2017, <http://time.com/4783932/inside-russia-social-media-war-america/>.

¹⁰ Elizabeth Dwoskin, Adam Entous, and Craig Timberg, “Google uncovers Russian-bought ads on YouTube, Gmail and other platforms,” *Washington Post*, October 9, 2017, <https://www.washingtonpost.com/news/the-switch/wp/2017/10/09/google-uncovers-russian-bought-ads-on-youtube-gmail-and-other-platforms/>; Carol D. Leonnig, Tom Hamburger, and Rosalind S. Helderman, “Russian firm tied to pro-Kremlin propaganda advertised on Facebook during election,” *Washington Post*, September 6, 2017.

¹¹ Dylan Byers, “Exclusive: Russian-bought Black Lives Matter ad on Facebook targeted Baltimore and Ferguson,” *CNN*, September 28, 2017, <http://money.cnn.com/2017/09/27/media/facebook-black-lives-matter-targeting/index.html>; Josh Dawsey, “Russian-funded Facebook ads backed Stein, Sanders and Trump,” *Politico*, September 26, 2017, <http://www.politico.com/story/2017/09/26/facebook-russia-trump-sanders-stein-243172>; Adam Entous, Craig Timberg, and Elizabeth Dwoskin, “Russian operatives used Facebook ads to exploit America’s racial and religious divisions,” *Washington Post*, September 25, 2017, https://www.washingtonpost.com/business/technology/russian-operatives-used-facebook-ads-to-exploit-divisions-over-black-political-activism-and-muslims/2017/09/25/4a011242-a21b-11e7-ade1-76d061d56efa_story.html.

¹² Alex Stamos, Chief Security Officer, Facebook, “An Update On Information Operations On Facebook,” September 6, 2017, <https://newsroom.fb.com/news/2017/09/information-operations-update/>.

It appears that Russia-linked accounts bought political advertising on every major platform. Facebook found ad buys totaling \$150,000 linked to fake accounts suspected to be controlled by Russian operatives, encompassing some 3,300 spots, although most of the times the ads were displayed occurred after Election Day.¹³ Twitter determined that accounts controlled by the Kremlin-linked network RT spent \$274,100 on ads in 2016.¹⁴ Google has yet to announce a price tag for the ads it found on YouTube, Gmail, and other services.

This may seem like a drop in the bucket of sky-high presidential election spending, but Facebook's powerful ad targeting tools and the possibility for messages to be shared organically by users—or even go viral—can vastly expand ads' reach.¹⁵ Facebook estimated that its Russia-linked ads were seen by 10 million people, and the ads were buttressed by related content organically shared by the same pages that may have reached tens or hundreds of millions more.¹⁶ Moreover, it's possible that the Russian ad buys reported so far are merely the tip of the iceberg—investigations are ongoing.¹⁷

Some of these ad buys were likely illegal, since they recommended voting for presidential candidates, and foreign nationals are banned from engaging in “express advocacy” that tells the public how to vote.¹⁸ But, based on what Facebook has reported, many of the ads stopped short of express advocacy and so may not have run afoul of current law.¹⁹

¹³ Carol D. Leonnig, Tom Hamburger, and Rosalind S. Helderman, “Russian firm tied to pro-Kremlin propaganda advertised on Facebook during election,” *Washington Post*, September 6, 2017 (reporting \$100,000 worth of ads linked to Russian operatives and another \$50,000 suspected); Elliot Schrage, “Hard Questions: Russian Ads Delivered to Congress,” Facebook, October 2, 2017, <https://newsroom.fb.com/news/2017/10/hard-questions-russian-ads-delivered-to-congress/>.

¹⁴ Elizabeth Dvoskin and Adam Entous, “Twitter finds hundreds of accounts tied to Russian operatives,” *Washington Post*, September 28, 2017, https://www.washingtonpost.com/business/economy/twitter-finds-hundreds-of-accounts-tied-to-russian-operatives/2017/09/28/6cf26f7e-a484-11e7-ade1-76d061d56efa_story.html.

¹⁵ Ben Collins, Kevin Poulsen, and Spencer Ackerman, “Russia's Facebook Fake News Could Have Reached 70 Million Americans,” *The Daily Beast*, September 8, 2017, <http://www.thedailybeast.com/russias-facebook-fake-news-could-have-reached-70-million-americans>; Kevin Bingle, “I Ran Digital For A 2016 Presidential Campaign. Here's What Russia Might Have Got For \$100,000,” *BuzzFeed*, September 8, 2017, <https://www.buzzfeed.com/kevinbingle/how-far-did-russias-100000-go>.

¹⁶ Craig Timberg, “Russian propaganda may have been shared hundreds of millions of times, new research says,” *Washington Post*, October 5, 2017, <https://www.washingtonpost.com/amphtml/news/the-switch/wp/2017/10/05/russian-propaganda-may-have-been-shared-hundreds-of-millions-of-times-new-research-says/>. Although the upper bound of the number of interactions with the Russian pages estimated by that study is in the billions, it likely overcounts due to the fact that the Russians also created many fake accounts to follow their pages, inflating their apparent influence. David Karpf, “People are hyperventilating over a study of Russian propaganda on Facebook. Just breathe deeply.” *Washington Post*, October 12, 2017.

¹⁷ A political marketing expert told CNN that \$100,000 spent on about 3,000 ads looks like a testing budget for a larger ad campaign. Donie O'Sullivan, “What Russian trolls could have bought for \$100,000 on Facebook,” *CNN*, September 7, 2017, <http://money.cnn.com/2017/09/07/media/what-russian-troll-army-could-buy-facebook-ads/index.html>.

¹⁸ 52 U.S.C. § 30121 (banning foreign nationals from election spending); 11 C.F.R. § 100.22 (defining express advocacy).

¹⁹ Alex Stamos, Chief Security Officer, Facebook, “An Update On Information Operations On Facebook,” September 6, 2017, <https://newsroom.fb.com/news/2017/09/information-operations-update/> (“The vast majority of ads run by these accounts didn't specifically reference the US presidential election, voting or a particular candidate.”).

B. The Post-2016 Response of Social Media Companies

In recent months, in response to pressure from Congress and the public, social media platforms like Facebook and Twitter have conducted internal investigations and promised changes to blunt the ability of foreign powers to spend in American elections. For instance, Facebook is building an “ad transparency” tool that will require additional human review and approval of ads that are targeted with reference to “politics, religion, ethnicity or social issues.”²⁰ In addition, when users see an ad run by a page, they will also be able to see other ads run by that page. Ads have to meet certain authenticity requirements (deprioritizing “clickbait” and ads that mask the true origins of the link) and industry best practices.²¹

Meanwhile, Twitter released a statement in September on their efforts to strengthen the site against “bots and networks of manipulation.”²² First, they collaborated with Facebook to identify corresponding Twitter accounts from the list of 470 accounts Facebook shared as spam and suspending them. They also tracked spending by the Russian state-controlled news network RT on ads targeting U.S. audiences. They removed tweets that were deemed attempts to suppress the vote.²³

Nevertheless, almost a year after the election, there is much we do not know about the Russian ads, including what all of them said, who bought them, how much they cost, and how they were targeted. And platforms’ voluntary efforts are not enough. Platforms are likely to adopt varying policies, with some worse than others. Platforms may not put enough effort into implementation or enforcement, or may apply rules inconsistently across users. And voluntary efforts can be abandoned as soon as a scandal blows over. Instead, Congress should act to craft effective policies that will be enforced across the board.

II. IMMEDIATE STEPS CONGRESS SHOULD TAKE

Congress can strengthen America’s defenses against foreign governments’ covert use of massive social media campaigns to try to influence our politics. The threat is multifaceted and constantly evolving, so our solutions must be the same. Some key pieces of the puzzle are already on the table in existing legislation. To be sure, this problem demands a whole-of-society approach where government and private actors continually monitor the threat and craft effective solutions, but crucial safeguards are available now. Below we describe four actions Congress can take right away.

²⁰ Sara Fisher and David McCabe, “Facebook tells advertisers more scrutiny is coming,” *Axios*, October 7, 2017, <https://www.axios.com/scoop-facebook-tells-advertisers-more-scrutiny-is-coming-2493827891.html>; see also Joel Kaplan, Vice President of Global Policy, Facebook, “Improving Enforcement and Transparency of Ads on Facebook,” October 2, 2017, <https://newsroom.fb.com/news/2017/10/improving-enforcement-and-transparency/>.

²¹ Alex Stamos, Chief Security Officer, Facebook, “An Update On Information Operations On Facebook,” September 6, 2017, <https://newsroom.fb.com/news/2017/09/information-operations-update/>.

²² “Update: Russian Interference in 2016 US Election, Bots, & Misinformation,” Twitter, September 28, 2017, https://blog.twitter.com/official/en_us/topics/company/2017/Update-Russian-Interference-in-2016--Election-Bots-and-Misinformation.html.

²³ *Ibid.*

A. Update Campaign Finance Law to Cover Paid Internet Ads

It's clear that the trend toward more political activity being conducted on social media—whether by foreign powers or the campaigns themselves—will continue.²⁴ But our campaign finance regime got its last significant update in 2002, an eternity ago in the online world. Much of the activity intended to influence elections on the internet today is untouched by key regulations. These include the requirement to report spending on mass media ads that mention candidates in the period before an election, the ban on foreign nationals buying such ads, and the requirement that broadcasters retain public files of political ads.

As described below, Russian operatives seeking to influence last year's election spent money in the largely unregulated world of online political ads. To address this problem, the Brennan Center recommends increasing transparency and strengthening the ban on foreign spending. The most significant mechanisms to accomplish this are discussed below, in turn: (1) extending the definition of "electioneering communications" to paid internet ads, (2) requiring a public file of political ads online, and (3) requiring online platforms to make reasonable efforts to prevent foreign nationals from buying political ads. Together, these efforts would make more of what Russia did in 2016 illegal. They would also increase public disclosure, giving the public and law enforcement more information to catch illegal foreign spending.

1. *Include Paid Internet Ads in the Regulation of Electioneering Communications*

Congress should extend the rule to online ads by including paid ads on the internet in the definition of "electioneering communications." During the 1990s, "sham issue ads" that attack or praise a candidate on some salient issue without explicitly mentioning the election became an increasingly popular way of attempting to influence elections while avoiding the regulatory requirements imposed on express advocacy. The 2002 McCain-Feingold law responded by creating the category of "electioneering communications," requiring disclosure of expenditures above \$10,000 on ads that mention candidates in certain mass media like TV and radio within a specified window, such as 60 days before an election.²⁵ The problem today is that the internet was not one of the media included.

Extending the rule to the internet would require expenditures on online ads mentioning candidates before an election to be reported, along with the name of the spender. Electioneering communications rules require reporting both the cost of ad placement and the cost of production when they together exceed \$10,000. That could ensure transparency about the sources of spending on social media content where a significant amount was spent on production or targeting, even if the resulting message was placed for a very small fee. It would not stop any messages from being shared, only require financial disclosure. And because of the spending threshold, it would not affect the typical social media user at all.

²⁴ Sean J. Miller, "Digital Ad Spending Tops Estimates," *Campaigns & Elections*, January 4, 2017, <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates> (noting \$1.4 billion in digital ad spending in the 2016 election, which signifies a shift toward online spending).

²⁵ 52 U.S.C. § 30104(f). The definition excludes news stories. 52 U.S.C. § 30104(f)(3)(B)(i).

Expanding the electioneering communications rule to paid internet ads would clarify that foreign nationals are banned from buying such ads. Currently, the law prohibits foreign nationals from spending money “for the purpose of influencing any election for Federal office.”²⁶ That ban has been interpreted to prohibit only express advocacy or its functional equivalent, leaving issue advocacy out.²⁷ A bright-line rule like the electioneering communications definition would clarify and broaden the foreign national ban.

Of course, agents of foreign governments willing to create fake social media profiles cannot be counted to refrain from spending merely because the law is clearer, or the ban on foreign spending expanded. Fortunately, an expansion of the electioneering communications definition would also make it easier to spot and prevent such spending. Electioneering communications reports require identifying information about the spender, like name and address, and they are made available to the public. Even if agents of foreign governments provide false information on an FEC filing, the public record would be valuable, and would provide the American government, media and public with an opportunity to investigate suspicious spending. In combination with other measures noted below, this could be an important countermeasure against illegal foreign spending.

A bill that would accomplish much of what is recommended above has been introduced by a bipartisan group of Senators: the Honest Ads Act, sponsored by Sen. Amy Klobuchar (D-Minn.), Sen. John McCain (R-Ariz.), and Sen. Mark Warner (D-Va.).²⁸ The House companion, H.R. 4077, was introduced by Rep. Derek Kilmer (D-Wash.). The bill would extend the definition of electioneering communications to cover paid internet and digital ads.²⁹

2. *Require a Public File of Political Ads Online*

Congress should also require more transparency about political ad buys online, beyond disclosing who paid for electioneering communications. To that end, as new media expert Daniel Kreiss of the U.N.C. School of Media and Journalism has proposed, online platforms should be required to maintain repositories of political ads that include the content of the ad as well as information about how it was targeted and who paid for it.³⁰

This would address the problem of “dark ads” in political advertising. It would give the public the ability to hold politicians and the interests active in elections accountable if they say different

²⁶ 52 U.S.C. § 30101(9)(A)(i) (defining “expenditure”); § 30121 (prohibiting foreign nationals from, inter alia, making expenditures).

²⁷ See *Bluman v. Federal Election Commission*, 800 F. Supp. 2d 281, 292 (D.D.C. 2011), *aff’d*, 565 U.S. 1104 (2012) (interpreting the foreign national ban to prohibit express advocacy or its functional equivalent, leaving out issue advocacy).

²⁸ Byron Tau, “Proposed ‘Honest Ads Act’ Seeks More Disclosure About Online Political Ads,” *Wall Street Journal*, October 19, 2017, <https://www.wsj.com/articles/proposed-honest-ads-act-seeks-more-disclosure-about-online-political-ads-1508440260>. The House companion, H.R. 4077, was introduced by Rep. Kilmer.

²⁹ The bill also strengthens requirements for disclaimers on the face of online messages to reveal to viewers who paid for the ad.

³⁰ This requirement would be analogous to existing rules government television ads regulated by the Federal Communications Commission. See 47 C.F.R. § 73.1943 (requiring broadcasters to keep a publicly available file of requests for air time for political ads).

things to different groups of voters, or spread inflammatory rhetoric or falsehoods.³¹ And, in combination with electioneering communications disclosures, could provide information to regulators or law enforcement seeking out covert foreign spending.

The Honest Ads Act, mentioned above, would require digital platforms to maintain public files of ad buys that discuss elections or legislative issues. The provision adopts the definition of political ads currently used for television broadcasters' obligation to maintain public files. The database created by the bill would publish the content of the ad, the audience targeted, the timing, and payment information.

Ad placements online can be very inexpensive. Facebook reported that half of the Russian ads it found cost less than \$3. To account for this, the criteria for including an ad buy in the public file must have a very low spending threshold, perhaps even requiring the inclusion of any purchase, no matter how low the price.

3. Require Platforms to Work to Stop Foreign Political Ad Buys

Companies that sell online political ads have a responsibility to try to keep foreign powers from using their services to interfere in American elections. Congress should require companies to make reasonable efforts to avoid selling political ads to foreign nationals. The Honest Ads Act includes a provision that would do this as well.

In their retrospective investigations of the 2016 election, Facebook, Twitter, and Google have shown they have the ability to find foreign government activity. One key piece of the puzzle, no doubt, is tracing financial transactions. For example, companies can use credit card verification protocols to examine whether money originates in the U.S.³²

Despite the availability of clues, the platforms were apparently sufficiently caught off guard by Russia's unprecedented boldness that they didn't conduct systematic searches for covert foreign activity before the election. A prospective requirement, especially in combination with the added transparency required by the provisions recommended above, would help prevent activity like Russia's 2016 election meddling.

B. Eliminate Dark Money

Unfortunately, the lack of regulation on the internet isn't the only place our campaign finance regime is vulnerable to foreign interference. Holes in disclosure rules allow "dark money" organizations to spend on politics without revealing their donors, potentially hiding foreign sources of funds. In order to close the holes, Congress should require any organization that spends on politics disclose its donors, as explained below.

³¹ Daniel Kreiss and Shannon McGregor, "Forget Russian Trolls. Facebook's Own Staff Helped Win The Election." *BuzzFeed*, October 3, 2017, <https://www.buzzfeed.com/danielkreiss/forget-russian-trolls-facebooks-own-staff-did-more>; see also Siva Vaidhyanathan, "Facebook Wins, Democracy Loses," *New York Times*, September 8, 2017, <https://www.nytimes.com/2017/09/08/opinion/facebook-wins-democracy-loses.html>.

³² There is legislation that would require candidate campaigns to use credit card verification systems. *E.g.*, Stop Foreign Donations Affecting Our Elections Act, H.R. 1341, S. 1660, 115th Cong. (2017). Congress should consider an analogous requirement for platforms' political ad sales.

In recent years, Congress and the FEC have failed to update disclosure laws in response to Supreme Court decisions that expanded the opportunities for groups to spend on elections. This has given the green light to shadowy nonprofit organizations to spend as much as they want on politics without complying with transparency and source limitations imposed on political committees.³³ Secret spending has exploded, with more than \$900 million in dark money spent on the last five federal elections, highly concentrated in competitive elections with the chance of affecting party control of a chamber of Congress or the presidency.³⁴ Secret spending has also increased in recent state elections, where a single big spender may be able to achieve especially great influence due to lower overall election costs.³⁵ It is unknown how much dark money derives from foreign sources.

Dark money is possible because, under current law, disclosure requirements are pegged to the form an organization takes: if a group calls itself a political committee, it has to report the identity of all donors of more than \$200. Groups that are organized as nonprofits under the tax code, however, are not required to report their donors, even when they engage in substantial political spending. These organizations can be formed with little more than a post office box and a meaningless name like “Americans for Reform.” Donors can give these dark money groups unlimited amounts out of public view. Then the group can give to political committees, or it can pay directly for ads, polling, voter mobilization activities, or other political expenditures.

Fortunately, solutions are on the table. The DISCLOSE Act, versions of which have been introduced in Congress since 2010, would eliminate dark money as we know it.³⁶ At its core, the legislation would require any group that spent above a threshold amount on elections to disclose its major donors of \$10,000 or more. This would fix the problem that the law currently allows groups to choose to register as nonprofits rather than political committees in order to hide their donors. Under the DISCLOSE Act, the way a group organizes itself under the tax code is irrelevant; rather, it is the act of engaging in political spending that triggers disclosure requirements.

In addition, the bill would crack down on the use of intermediary organizations to hide funding sources. Current law allows donors to hide their identity by funneling money through a secretive organization before it ends up in the account of the group that actually spends on politics. The DISCLOSE Act addresses this problem by providing that certain transfers of funds to political spending groups trigger donor disclosure. If one group gives funds to another with

³³ Daniel I. Weiner, *Citizens United Five Years Later*, Brennan Center for Justice, 2015, 7, <https://www.brennancenter.org/publication/citizens-united-five-years-later>.

³⁴ “Political Nonprofits (Dark Money),” Center for Responsive Politics, accessed April 5, 2017, https://www.opensecrets.org/outsidespending/nonprof_summ.php; Ian Vandewalker, *Election Spending 2014: Outside Spending in Senate Races Since Citizens United*, Brennan Center for Justice, 2015, 13-14, <https://www.brennancenter.org/publication/election-spending-2014-outside-spending-senate-races-citizens-united> (finding significant percentages of money spent in competitive Senate races coming from secret spending groups: 28 percent in 2014 and 21 percent in 2016).

³⁵ Chisun Lee, Katherine Valde, Benjamin T. Brickner, and Douglas Keith, *Secret Spending in the States*, Brennan Center for Justice, 2016, <http://www.brennancenter.org/publication/secret-spending-states>.

³⁶ See, e.g., Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act of 2017, H.R. 1134, S. 1585, 115th Cong. (2017).

reason to know they will be spent on elections, the donor group is required to reveal the major sources of its funding.

C. Ensure Corporate Spending Is Funded Domestically

Another blind spot in campaign finance results from corporations' ability to spend in elections, since corporate assets can include vast amounts of money originating in foreign countries or controlled by foreign nationals.³⁷ To address this problem, Congress should expand the ban on foreign election spending to domestic corporations substantially owned or controlled by foreign nationals.

Although corporations currently can't give directly to candidates or parties, thanks to *Citizens United* and other court decisions, they can give to super PACs and make their own independent expenditures.³⁸ Under the federal foreign money ban, *foreign* corporations that are organized or based in other countries are banned from spending money in American elections, including by giving to super PACs. Yet current law allows foreign-owned companies incorporated in the United States, even wholly-owned subsidiaries, to make political expenditures as long as the money derives from business in the U.S. and the spending decision is not made by a foreign national.³⁹

And corporations may be acting on behalf of foreign governments. Russia is known to use non-state proxies, as with the Kremlin's use of the Internet Research Agency to conduct much of its campaign to influence the election through social media.⁴⁰

In order to address the possibility that corporate contributions may be used as an avenue for foreign influence, Congress should develop policies to restrict the ways that corporations with foreign ownership or control can spend on American elections.

Federal Election Commissioner Ellen Weintraub has proposed requiring corporations that spend on politics to certify that their share of foreign ownership is below some threshold percentage.⁴¹

³⁷ Jon Schwarz and Lee Fang, "Cracks in the Dam: Three Paths Citizens United Created for Foreign Money to Pour into U.S. Elections," *The Intercept*, August 3, 2016, <https://theintercept.com/2016/08/03/citizens-united-foreign-money-us-elections/>; John C. Coates IV *et al.*, "Quantifying Foreign Institutional Block Ownership at Publicly Traded U.S. Corporations," Discussion Paper No. 888, John M. Olin Center for Law, Economics, and Business, Harvard University, 2016, 11, http://www.law.harvard.edu/programs/olin_center/papers/pdf/Coates_888.pdf (finding that corporations with majority ownership by foreigners controlled more than \$12 trillion in assets in 2012, and the share of corporate equity owned by foreigners has increased fourfold in the last three decades).

³⁸ Super PACs, made legal by a lower court decision interpreting *Citizens United* in 2010, are allowed to take contributions of any amount, including from corporations and unions, in contrast to the contribution limits imposed on other political committees, including candidate committees. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). They are supposed to operate independently of candidates and parties.

³⁹ "Foreign Nationals," FEC, June 23, 2017, <https://www.fec.gov/updates/foreign-nationals/>; Federal Election Commission, Advisory Opinion 2006-15, May 19, 2006.

⁴⁰ Office of the Director of National Intelligence (ODNI), "Assessing Russian Activities and Intentions in Recent US Elections," Intelligence Community Assessment ICA 2017-01D (2017), https://www.dni.gov/files/documents/ICA_2017_01.pdf.

⁴¹ 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; see also Memorandum from Ellen L. Weintraub, Commissioner, Federal Elections Commission, September 28, 2016,

The FEC deadlocked on the proposal, so it was not developed further.⁴² Several existing state laws prohibit either direct contributions or independent expenditures by foreign-controlled corporations. Factors that can trigger a designation that a firm is foreign-controlled include having a greater than 50 percent ownership interest held by foreign nationals.⁴³

Bills introduced in Congress this year are also designed to address this issue. Rep. Jamie Raskin (D-Md.) introduced H.R. 1615, the Get Foreign Money Out of U.S. Elections Act this year, which would extend the ban on spending on elections by foreign nationals to domestic corporations that are owned, controlled, or influenced by foreigners.⁴⁴ Similar provisions can be found in the Senate version of the DISCLOSE Act of 2017, S. 1585, and the We the People Democracy Reform Act of 2017, H.R.3848.

D. Reform the Federal Election Commission

The FEC has contributed to the secret spending problem by failing to vigorously enforce transparency rules and the foreign spending ban. Congress should make the agency more effective by reforming its structure, as discussed below, including providing for an odd number of commissioners and a nonpartisan appointment process for at least one commissioner.

FEC disclosure requirements apply to groups that are organized as political committees, but as noted above, some nonprofits refuse to register as political committees despite apparently existing solely to engage in political activities. In recent elections, the FEC has not done enough to police the border, failing to pursue investigations into several groups where there are strong indications that the group has a political purpose.⁴⁵

In response to revelations about Russian operatives buying ads on social media, one member of the FEC, Ellen Weintraub, has called for revisiting the agency's regime governing election activity on the internet.⁴⁶ It has been more than 10 years since the FEC fully grappled with the regulation of internet spending. The commission has reopened a rulemaking concerning the scope of rules for disclaimers about who's paying for online election ads. But the recent history

https://beta.fec.gov/resources/about-fec/commissioners/weintraub/statements/Foreign_National_2_Memo_28_Sept_2016.pdf (elaborating further on issues concerning potential FEC regulation of foreign-owned corporations).

⁴² Kenneth P. Doyle, FEC Deadlocks on Curbing Foreign Campaign Money, *Bloomberg BNA*, September 23, 2016, <https://www.bna.com/fec-deadlocks-curbing-n57982077471>. Commissioner Weintraub pushed the issue again in June. Memorandum from Ellen L. Weintraub, Commissioner, Federal Elections Commission, June 20, 2017, <https://www.insidepoliticallaw.com/wp-content/uploads/sites/8/2017/06/2017-06-Memo-to-FEC-on-Foreign-Money-Discussion-FINAL.pdf>.

⁴³ E.g., COLO. REV. STAT. §§ 1-45-103(10.5), 1-45-107.5(1).

⁴⁴ Democracy Is Strengthened by Casting Light On Spending in Elections (DISCLOSE) Act of 2017, H.R. 1585 115th Cong. (2017); Get Foreign Money Out of U.S. Elections Act, H.R. 1615, 115th Cong. (2017).

⁴⁵ See, e.g., Robert Maguire, "FEC deadlocks, won't investigate dark money group that spent all its funds on an election," OpenSecrets, November 18, 2016, <https://www.opensecrets.org/news/2016/11/fec-deadlocks-wont-investigate-dark-money-group-that-spent-all-its-funds-on-an-election>; Daniel I. Weiner, "The FEC Deadlocks (Again) on Dark Money," Brennan Center for Justice, August 1, 2014, <http://www.brennancenter.org/blog/fec-deadlocks-again-dark-money>.

⁴⁶ Ellen L. Weintraub, "Our elections are facing more threats online. Our laws must catch up." *Washington Post*, September 14, 2017, https://www.washingtonpost.com/opinions/our-elections-are-facing-more-threats-online-our-laws-must-catch-up/2017/09/14/dd646346-99a0-11e7-b569-3360011663b4_story.html.

of deadlocks and lax enforcement at the FEC leaves little cause for optimism that the agency is up to the task of addressing foreign influence.⁴⁷

And as noted, the FEC declined to strengthen the foreign national ban as needed to cover foreign-owned firms after *Citizens United* freed corporations to spend on politics.⁴⁸

The FEC's problems are structural. The agency has an even number of commissioners, no more than three of whom may be from the same party.⁴⁹ Any significant action requires a majority. This leads to partisan deadlocks. Declining FEC enforcement in recent years has coincided with lockstep voting by a bloc of Republican commissioners ideologically opposed to aggressive enforcement or stronger rules. Although the commissioners are appointed by the president, presidents traditionally defer to party leaders in Congress, allowing partisan battle lines to infect the agency's decision making.

Reforming the agency to break partisan deadlock could greatly benefit transparency regarding money in politics.⁵⁰ Even under the current regime, the president can make appointments in a nonpartisan fashion, basing decisions on expertise or leadership rather than party loyalty. But structural reforms are warranted.⁵¹ Most important, Congress could make the number of commissioners odd and require at least one member to be nonpartisan. There could also be ways to strengthen enforcement, such as empowering the Commission's Office of General Counsel or another designated nonpartisan enforcement official within the agency to conduct investigations, subject to override by the commission.

* * *

To be sure, the possibilities for foreign governments meddling in our elections in the future go beyond the financing of political advertisements. Reports of Russia's activities last year include unpaid posts on social media and the use of automated accounts, or "bots," to amplify messages. There are likely benefits of increasing transparency on social media to make it harder for foreign governments to engage in coordinated, covert attempts to sway American elections, and there may be steps for the social media companies, the public, and even Congress to take to improve transparency.

⁴⁷ See Ann Ravel, "How the FEC Turned a Blind Eye to Foreign Meddling," *Politico*, September 18, 2017, <http://www.politico.com/magazine/story/2017/09/18/fec-foreign-meddling-russia-facebook-215619>.

⁴⁸ The agency also declined to pursue a case of foreign nationals spending to influence a local ballot initiative, with the Republican commissioners arguing that the foreign spending ban applies only to candidate elections. Michelle Conlin and Lucas Iberico Lozada, "FEC decision may allow more foreign money in U.S. votes, critics say," *Reuters*, April 24, 2015, <http://www.reuters.com/article/us-usa-election-fec/fec-decision-may-allow-more-foreign-money-in-u-s-votes-critics-say-idUSKBN0NF1V420150424>.

⁴⁹ R. Sam Garrett, *The Federal Election Commission: Overview and Selected Issues for Congress*, Congressional Research Service, 2015, <https://fas.org/sgp/crs/misc/R44318.pdf>.

⁵⁰ Meredith McGehee, "How Congress can reform campaign finance for the American people," *The Hill*, April 14, 2017, <http://thehill.com/blogs/pundits-blog/campaign/328759-congress-has-a-chance-to-reform-campaign-finance-for-the-american>.

⁵¹ "Reform the FEC to Ensure Fair and Vigorous Law Enforcement," Brennan Center for Justice, February 4, 2016, <https://www.brennancenter.org/analysis/reform-fec-ensure-fair-and-vigorous-law-enforcement>.

Regardless, it is clear that there are essential measures, recommended here, that Congress can and should enact now in order to keep foreign powers from secretly spending as much as they want on political ads in the next election.