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VIA ELECTRONIC SUBMISSION

May 25, 2018

Chair Caroline C. Hunter
Vice Chair Ellen L. Weintraub
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: REG 2011-02, Internet Communication Disclaimers

Dear Chair Hunter and Vice Chair Weintraub:

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 Notice of Proposed Rulemaking (“NPRM”), 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 need for transparency regarding political expenditures online. “Alternative A” in the NPRM, with some modification, best captures the needed changes to disclaimer rules.

We respectfully request to testify at the public hearing on this NPRM.

This Comment explains how changes in the use of the internet and the example of Russian interference necessitate updates to the Commission’s regulations. It articulates the role transparency generally—and disclaimers specifically—play in addressing election meddling by foreign powers. Finally, it provides recommendations as to how to strengthen disclaimer requirements.

Recent Developments Show the Need for Updated Rules

The internet disclaimer rule that is the subject of this NPRM was promulgated in 2006, and developments since then require an update. At that time, the Commission expanded the definition of “public communication” under the Bipartisan Campaign Reform Act to include internet

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).

communications “placed for a fee on another person’s Web site.”³ This had the effect of requiring disclaimers on paid web 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

Since that time, the internet has changed dramatically. Social media platforms have flourished and smartphone apps, streaming video, and the internet of things are increasingly popular ways of accessing the internet. Meanwhile, political advertising has exploded.⁵

The Commission has, through both advisory opinions and deadlocked votes resulting in nonenforcement, allowed much ad spending on the internet to be exempt from the disclaimer requirement. Advertisers have avoided putting disclaimers on small online ads, which are especially common on social media and increasingly important in campaigns.

The internet’s popularity and the opportunities to evade disclaimer requirements have made online ads an attractive avenue for foreign adversaries seeking to meddle in elections. Russia’s continuing effort to interfere in American politics through fake accounts on social media and paid ads online has been widely reported, and it illustrates the internet’s new potential as an avenue for mischief. Furthermore, there is no reason to think that Moscow is the only threat.

Disclaimers Are an Essential Part of Addressing Foreign Influence Efforts

Strong transparency rules are essential to the health of the democratic process, and particularly important in helping to prevent foreign attempts to influence American elections. Disclaimers on the face of political ads play a crucial role for a number of reasons.

Audiences have a right to know who paid for advertisements intended to influence their political activity, and to know it at the time they are exposed to ads. This “enables the electorate to make informed decisions and give proper weight to different speakers and messages.”⁶ Part of that decision-making requires knowing whether a message originated with a foreign power.

Although it has received a great deal of attention in the press, the full scope of Moscow’s influence effort 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. Robust disclaimer requirements on all political ads should help assuage this distrust by keeping spending on elections transparent.

³ 11 C.F.R. § 100.26.

⁴ 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, 530-35 (2013).

⁵ The \$1.4 billion spent online in the 2016 election was almost 50 times higher than in 2004. Sean J. Miller, *Digital Ad Spending Tops Estimates*, CAMPAIGNS & ELECTIONS, Jan. 4, 2017, <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates>.

⁶ *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

In addition, disclaimer requirements can enhance the deterrent effect of the foreign spending ban. Russian trolls proved willing to violate the ban in 2016, as at least some of their paid ads were undeniably bought “in connection with” an election.⁷ A disclaimer rule with broad enough scope to reach all forms of spending on online communications would leave fewer places for foreign agents to hide their identities while talking about elections, deterring illegal activity. A spender’s failure to include disclaimers is a red flag that can lead to investigation. Of course, foreign operatives could lie in a disclaimer. But even fictitious identities provide clues for law enforcement, as illustrated by the special counsel’s indictment of the Internet Research Agency and several of its employees.⁸

The Disclaimer Rule Should Be Changed to a Version of Alternative A

For all the above reasons, disclaimer rules should be robust, have broad application to the many ways of spending on the internet, and be vigorously enforced. The NPRM’s Alternative A is the best approach.

The Brennan Center has embraced three key principles for internet disclaimer rules.⁹ We recommend:

- The Commission should not apply exemptions like those for small items or impracticability to online ads; technological innovation by online ad sellers can facilitate disclaimers even for ads that are very small or of very short duration.¹⁰
- A substantial amount spent on the *production* of content (like production costs for filming a video or polling costs for messaging research) should trigger disclaimer requirements, even if the content is posted for free.¹¹
- Disclaimer rules should address social media users’ ability to “share” advertisers’ paid posts to ensure that disclaimers stay on messages even as they are disseminated through unpaid shares by other users.¹²

Turning to the specific proposals in the NPRM, the Brennan Center supports Alternative A, which strikes a balance between the flexibility necessary for the rapidly-changing world of the internet and clear and objective rules. Alternative A carries the essential feature of disclaimers — that information about who paid for an ad be clear and conspicuous — into the internet context, applying longstanding rules for television and radio.

⁷ 52 U.S.C. § 30121(a). Some of the ads included express advocacy about presidential candidates.

⁸ Indictment, *United States v. Internet Research Agency LLC, et al.*, No. 1:18-cr-00032-DLF, 2018 WL 914777 (Dist. D.C. Feb. 16, 2016), available at <https://www.justice.gov/file/1035477/download>. “The Russians used the same fake names and email addresses frequently, and Mueller’s team used the trolls’ online accounts to help track their various activities.” Ian Vandewalker & Lawrence Norden, *How the Internet Companies That Sold Ads to Russian Trolls Can Fix the Problem*, SLATE, Feb. 16, 2018, <https://slate.com/technology/2018/02/how-the-internet-companies-that-sold-ads-to-russian-trolls-can-fix-the-problem.html>.

⁹ IAN VANDEWALKER & LAWRENCE NORDEN, BRENNAN CENTER FOR JUSTICE, GETTING FOREIGN FUNDS OUT OF AMERICA’S ELECTIONS (2018), <http://www.brennancenter.org/publication/getting-foreign-funds-out-americas-elections>.

¹⁰ *Id.* at 10.

¹¹ *Id.* at 10-11.

¹² *Id.* at 11.

We prefer Alternative A in part because it does not include Alternative B’s exception for ads that “cannot provide a disclaimer on the face of the internet public communication itself nor an adapted disclaimer.” As noted above, we oppose the application of the small items exemption, or similar exemptions, to online communications. Businesses that sell ads on the internet have the incentive and technological expertise to ensure that ads can conform to disclaimer requirements. If some ad format truly cannot accommodate disclaimers, then that format is not appropriate for election spending. We support the standard set down in the Honest Ads Act, which provides that disclaimer exemptions do not apply to internet ads.¹³

We also support the proposed change to the definition of “public communication” that would incorporate paid ads on an “internet-enabled device or application,” ensuring the disclaimer rule applies to them. It is necessary to expand the scope of the term beyond its current limit to websites because so much of today’s online election expenditures are not made on website ads. The current definition does not capture ads that appear in social networking mobile apps (like Facebook or Twitter), streaming video or music apps for smartphones, or online video games for consoles, just to name a few examples. These media are important parts of the election advertising ecosystem, and they cannot be left out merely because no one predicted their existence or popularity in 2006.

* * *

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.

In light of revelations about Russia’s campaign to influence the 2016 election and its continuing efforts amidst the 2018 elections—which are already underway—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 as “part of a common international understanding of the meaning of sovereignty and shared concern about foreign influence over elections.”¹⁴ 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. Our campaign finance regulations must be strengthened to improve transparency and keep Americans confident that they know who is trying to sway their votes online.

Respectfully submitted,

/s/

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¹³ Honest Ads Act of 2017, S.1989, 115th Cong. (2017), sec. 7.

¹⁴ Bluman v. FEC, 800 F. Supp. 2d 281, 292 (Dist. D.C. 2011), *aff’d*, 565 U.S. 1104 (2012).