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By electronic submission

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

Re: Comments on Reg. 2011-02 (Notice 2018-06)—Internet Communication Disclaimers

Dear Mr. Stipanovic:

Democracy 21 submits these comments in response to the Notice of Proposed Rulemaking (NPRM) on "Internet Communications Disclaimers and Definition of 'Public Communication'" published by the Commission at 83 Fed. Reg. 12864 (March 26, 2018).

i.

It is widely accepted by the American public that a hostile foreign power successfully launched a concerted attack on this Nation's 2016 presidential election.[1] While ongoing criminal and congressional investigations are likely to reveal additional details about the means and methods of that attack, a great deal is already known. And that knowledge leads to the indisputable conclusion that the laws designed to protect the integrity of federal elections against foreign interference, and the enforcement of those laws, were not adequate to prevent this attack in 2016, and are not adequate to prevent a repetition of this attack in the 2018 elections, and beyond.

[1] D. Sanger, "Putin Ordered 'Influence Campaign' Aimed at U.S. Election, Report Says," *The New York Times* (Jan. 6, 2017) ("American intelligence officials have concluded that the president of Russia, Vladimir V. Putin, personally 'ordered an influence campaign in 2016 aimed at the U.S. presidential election,' and turned from seeking to 'denigrate' Hillary Clinton to developing a 'clear preference for President-elect Trump.'"); M. Matishak and K. Cheney, "Senate intelligence leaders: Russians schemed to help Trump," *Politico* (May 16, 2017) ("Republican and Democratic leaders of the Senate Intelligence Committee on Wednesday endorsed the U.S. intelligence community's assessment that Russia intervened in the 2016 presidential election to help President Donald Trump and hurt Hillary Clinton.").

The Commission has played a major role in this failure. It is the Commission which has primary civil jurisdiction to administer and enforce 52 U.S.C. § 30121, the principal statutory provision which prohibits foreign nationals from making contributions and expenditures to influence U.S. elections. This prohibition was flouted by the activities of Russia and its agents in 2016, in what appears to have been a highly organized, well-funded, State-sanctioned plan to manipulate the American electorate by spending funds to use divisive wedge issues to promote or attack the presidential candidates. And though the precise electoral impact of this effort cannot be definitively measured, there is little doubt that it achieved at least some of the results that its foreign sponsors intended.

In part, the response to this attack will require congressional action to enact new laws to strengthen regulation of online social media platforms, which were the principal vehicles used by Russian actors to influence the 2016 election. Legislation with regard to such reforms is pending in both the House and the Senate. *E.g.,* S. 1989, 115th Cong. 1st Sess. (2017) (Honest Ads Act); H.R. 4077, 115th Cong. 1st Sess. (2017) (Honest Ads Act).

But whether the Congress acts or not, the Commission should. Even without any new legislation, the Commission has ample existing authority to improve regulation of campaign-related activity on the Internet, to bolster disclosure and disclaimer requirements and to strengthen the existing ban on campaign spending by foreign nationals. And the Commission has ongoing civil enforcement authority in all of these areas as well, and can aggressively exercise that authority to deter future violations.

Instead, the Commission's lethargic response to this crisis has been alarming. Almost a year ago, Commissioner Weintraub correctly called this "an all-hands-on-deck moment for our democracy," and laid out a series of steps that the Commission should take to explore how it could exercise the jurisdiction it already possesses to address the problem of foreign interference in our elections.[2] Taking note of the widely reported foreign attempts to influence the 2016 elections, Commissioner Weintraub said:

> It is this Commission's duty to respond, and to respond forcefully. Whether a hostile foreign power provided anything of value in connection with a federal, state or local election goes to the very heart of the Federal Election Commission's mission and jurisdiction. This Commission is sworn to fulfill "the sovereign's obligation to preserve the basic conception of a political community."[3]

To its lasting discredit, the Commission has largely ignored Commissioner Weintraub's call to action. Instead of responding "forcefully" to a threat that strikes at the heart of our democracy and that is squarely within its jurisdiction to address, the Commission has largely remained inert.

Two years after a full-fledged campaign by a hostile foreign power to influence the American presidential election, the sum total of the Commission's response has been this

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[2] Memorandum from Commissioner Ellen L. Weintraub to The Commission, "Discussion of Commission's Response to Alleged Foreign Interference in American Elections" (June 21, 2017) at 1.

[3] *Id.* (quoting *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011).

rulemaking to improve the disclaimer regime with regard to Internet communications—an appropriate step, although only a tiny step in the right direction. Even assuming that the current four-member agency can find unanimity to adopt one of the two competing regulatory approaches proposed in the NPRM—and there is little in the Commission's recent history of deadlock to give confidence on that—this rulemaking will be no more than a modest improvement on a collateral issue that is only indirectly related to the core problem.

The Commission continues to ignore how it could deploy or strengthen the most directly responsive tool at its disposal—the statutory ban on foreign national spending set forth in section 30121. Indeed, the agency's inexplicable passivity in the face of a national crisis was on display as recently as yesterday, when the Commission, by a 2-2 vote, again rejected Commissioner Weintraub's renewed motion for the agency simply to consider whether to initiate a rulemaking under section 30121 to strengthen the agency's administration of the statutory ban on foreign national spending in U.S. elections.

Were the Commission a fire department, this rulemaking on Internet disclaimers would be the equivalent of driving a firetruck equipped with a high-powered water cannon up to a blazing inferno, and then breaking into a debate about whether to use a small bucket or a leaky bucket to toss water onto the fire. Either bucket would be better than nothing, but neither would be as good as using the most directly effective firefighting equipment available to it.

In short, the Commission should be doing everything in its power with all deliberate speed to take steps to ensure that section 30121 is deployed with maximum effectiveness, through rulemaking, interpretation and enforcement, in order to ensure that no foreign national, much less a hostile foreign government, again spends large sums for the purpose of influencing American elections, as Russia did in 2016.

ii.

Improvement in the Commission's disclaimer rules relating to online campaign ads is one small part of addressing the threat posed by foreign interference in our elections. To the extent that foreign nationals in 2016 used the Internet as a vehicle-of-choice to influence federal elections, an effective disclaimer requirement for Internet campaign spending, had one been in place, might have helped to reveal that activity in a timely manner.

But the disclaimer issue presented in the NPRM also has importance as applied to entirely lawful domestic spending on elections, completely separate from the question of spending by foreign nationals. The current rules are not adequate to ensure timely and effective identification of domestic spenders either. The basic problem is that the current disclaimer laws are woefully outdated because they were adopted in the pre-Internet era and have never been modernized to take account of radically new technology.

When the disclaimer requirement was first enacted as part of FECA in 1976, *see* Pub. L. 94-283, § 323, 90 Stat. 493 (May 11, 1976), the Internet did not yet exist (and personal computers only barely so). The Commission's disclaimer regulations are crafted for a world where campaign ads are primarily disseminated by broadcast, cable and satellite technology, or

by direct mail. But the world today is vastly different, and a growing share of campaign spending takes place on the Internet.[4]

The particular problem addressed by this rulemaking is caused by the fact that the Commission adopted regulations in 1995—when the Internet was in its infancy—that provide an exemption from the disclaimer requirement for campaign ads on "small items," 11 C.F.R. § 110.11(f)(i), or on items where a disclaimer would be "impracticable." *Id.* § (f)(ii). These exemptions were expressly crafted with certain oddball and marginal kinds of message platforms in mind—skywriting, water towers, pens, baseball caps, etc. *See* 60 Fed. Reg. 52071 (Oct. 5, 1995). These exemptions, written in 1995, certainly were not designed to apply to the Internet—a platform that then barely existed, but now is rapidly developing into the most important and powerful message platform of all. Nor were the rules crafted for the wide variety of innovative technologies that are now available to convey online campaign messages, including websites, text messages, Facebook ads, Twitter posts, etc.

The Commission acknowledges, not surprisingly, that it has struggled mightily to apply its pre-Internet regulatory exemptions to the new kinds of online campaign messages that have exploded over just the last few election cycles. 83 Fed. Reg. at 12879 ("The small items and impracticable exceptions both predate the digital age, and the Commission has faced challenges in applying them to internet communications."). And also not surprisingly, the Commission's struggle has been notably unsuccessful. The Commission's repeated effort to use the advisory opinion process on a case-by-case basis to apply a skywriting-and-baseball-caps exemption to the wildly different context of the Internet has resulted in a grab-bag of inconsistent and inconclusive results which has provided no meaningful guidance at all.[5]

Accordingly, it is entirely appropriate for the Commission finally to address this problem directly, and to update its rules in order to squarely resolve how the statutory disclaimer requirement applies in the context of online campaign activity. It is very important that the

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[4] 88 Fed. Reg. at 12868 ("Spending on digital political advertising grew almost eightfold just between 2012 and 2016, from $159 million to $1.4 billion."); *see also, e.g.*, K. Kaye, "Data-Driven Targeting Creates Huge 2016 Political Shift: Broadcast TV Down 20%, Cable and Digital Way Up," AD AGE (Jan. 3, 2017) ("Digital advertising, which includes video ads, mobile, email, social and search, broke the billion-dollar mark, reaching $1.4 billion, and growing a staggering 789% from $159 million in 2012."); P. Kulp, "Record high spent on political ads despite Donald Trump," MASHABLE (Jan. 3, 2017) ("[D]igital media saw an explosion in spending last year. The medium grew more than sevenfold from a lowly 1.7-percent share in 2012 to 14.4 percent in 2016, jumping from the bottom tier to the second highest on the totem. Of that digital spending, targeted programmatic ads—those placed by automated software—and social network promotions got the biggest boost. The firm estimated that two out of every five dollars spent on digital went to social media with Facebook being the most popular destination.").

[5] *E.g.* A.O. 2010-19 (Google) (law is not violated by a proposal to include a disclaimer through clicking on a search ad of 95 characters, but no controlling Commission opinion agreed to by four members); A.O. 2011-09 (Facebook) (no Commission opinion agreed to by four members with regard to character-limited Facebook ads); A.O. 2013-18 (Revolution Messaging) (no Commission opinion agreed to by four members with regard to mobile phone ads); A.O. 2017-05 (Great America PAC) (answering certain questions but no Commission opinion agreed to by four members with regard to other questions concerning Twitter disclaimers).

Commission bring this rulemaking to fruition with the promulgation of new rules that provide clear guidance on this matter, and that the Commission not allow internal disagreements or partisan disputes to thwart the timely completion of this effort.

iii.

The Commission should also ensure that it implements the statutory disclaimer requirement in the most robust fashion possible, because of the important public purposes that disclaimers serve in furthering the electorate's right to know who is paying for political advertising, including campaign messaging on the Internet.

The Supreme Court has consistently upheld FECA's disclaimer requirements against First Amendment challenge because the Court has recognized that disclaimers "provid[e] the electorate with information" and "'insure that the voters are fully informed' about the person or group who is speaking." *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 196 (2003) and *Buckley v. Valeo*, 424 U.S. 1, 76 (1976)) (internal citations omitted). And, the Court has said, disclaimers, like disclosure, "impose no ceiling on campaign-related activities' . . . 'and do not prevent anyone from speaking.'" *Id.* at 914.

Specifically with regard to campaign spending on the Internet, the Court in *Citizens United* expressly commented on how the Internet provides a means to <u>improve</u>, not frustrate, the important informational interests served by disclaimer and disclosure requirements:

> A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today. . .. <u>With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with information needed to hold corporations and elected officials accountable for their positions and supporters</u>. . .. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Id. at 916 (emphasis added). In light of the Court's view that the Internet is a tool to facilitate timely and effective transparency, it would be especially inappropriate for the Commission to fail to provide the broadest and strongest form of a disclaimer requirement for campaign-related messages on the Internet.

iv.

We have the following comments on specific proposals and questions in the NPRM:

1. <u>Revision to the definition of "public communication</u>."

The disclaimer requirement applies, *inter alia,* to "public communications" by any person which contain express advocacy. 11 C.F.R. § 110.11(a)(2). The definition of "public communications" excludes "communications over the Internet" except for "communications placed for a fee on another person's Web site." *Id.* § 100.26. The Commission asks whether the definition of "public communications" should be enlarged to include "communications placed

for a fee on another person's 'internet-enabled device or application'" in addition to those placed for a fee on another person's website. 83 Fed. Reg. at 12868.

We support the proposed language.[6] When the current definition of "public communications" was adopted in the Commission's 2006 Internet rulemaking, websites were the principal means of placing campaign-related messages on the Internet. In the intervening 12 years, there has been enormous growth, development and innovation of Internet technology and in the use of the Internet for campaign purposes. As the NPRM correctly points out, "[T]he focus of Internet activity has shifted from blogging, website and listservs to social media networks … media sharing networks … streaming applications … and mobile devices and applications." *Id.*

The Commission's rules need to keep pace with the technological expansion of the online vehicles that are now available for running campaign-related messages, and be flexible enough to encompass those that will become available in the future. The Commission's disclaimer regulation should be worded broadly enough to ensure that the disclaimer requirement applies to <u>any</u> mode or means of online communication, so long as it satisfies the other applicable tests—*i.e.*, that it contains express advocacy (or its functional equivalent), that it is placed for a "fee" and that it is on "another person's" website, device or application. We think the language proposed in the NPRM satisfies this standard and we urge the Commission to adopt it.

2. <u>Revisions to 11 C.F.R. 110.11</u>.

A. <u>Relevance of commercial disclaimer requirements.</u> The NPRM begins its discussion of specific modifications to the disclaimer rules by noting that online commercial speech is subject to other federal regulatory disclaimer regimes. The Commission then poses a question of constitutional law: are the different degrees of First Amendment protection afforded political speech as opposed to commercial speech relevant to the Commission's consideration of those other disclaimer requirements? 83 Fed. Reg. 12868.

While it is true that political speech enjoys a stronger form of First Amendment protection than does commercial speech, the Supreme Court has already confronted the First Amendment issues posed by a disclaimer requirement for campaign-related speech. As noted above, the Court has held that disclaimers do not infringe a spender's speech rights, both because such requirements serve an important governmental interest in ensuring "that voters are fully informed" and because disclaimer requirements "do not prevent anyone from speaking." *Citizens United*, 130 S.Ct. at 914-915. Accordingly, the disclaimer requirement is constitutional even under the more demanding scrutiny that applies to political speech. The fact that online

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[6] As the NPRM notes, the Commission originally proposed this regulatory change in a rulemaking initiated in 2016, *see* "Technological Modernization," 81 Fed. Reg. 76416 (Nov. 2, 2016). Democracy 21, joined by the Campaign Legal Center, were the only persons to comment on this proposed change to the definition of "public communication." 83 Fed. Reg. at 1285 at n. 4 <u>citing</u> Comments of Democracy 21 and Campaign Legal Center on REG 2013-01 (Dec. 2, 2016) at 1 ("[W]e support the Commission's proposed updates to 11 C.F.R. §§ 100.26 and 110.11 to encompass not only 'Web sites,' but also 'internet applications.'"); *id.* at 3 ("The Commission's proposed clarification is particularly important because paid digital political advertisements are increasingly viewed on mobile apps rather than websites.").

advertisers are already required to provide disclaimers for commercial speech under other regulatory regimes simply adds evidence to support the conclusion that technological adaptations are available to make the use of online disclaimers feasible and practical. The Commission should avail itself of the experience that other agencies have had in requiring online disclaimers in the context of commercial speech. There is no constitutional impediment to doing so.

B. Requirement for expanded disclaimers. With regard to the various proposals advanced in this NPRM to modify section 110.11, we generally support Alternative A, which provides for a stronger and more robust set of rules to implement the disclaimer requirement than does Alternative B. The core difference between the two approaches is that Alternative A treats a video ad transmitted online the same as a video ad transmitted by broadcast. Thus, for instance, it requires an online video ad to include not only the basic "Paid by" disclaimer under § 110.11(c)(1), but also the additional "specific requirements" for television communications under § 110.11(c)(4). Alternative B, by contrast, would require the online video ad to "satisfy the general requirements that apply to all public communications requiring disclaimers" but "would not extend any additional disclaimer requirements to such communications." 83 Fed. Reg.12869.

The approach taken by Alternative A is clearly correct: that the same disclaimer requirements that apply to the various formats of traditional media (radio, television and print) should equally apply, and apply in the same way, when those same formats (audio, video and text) are conveyed on the Internet. The NPRM states, "Alternative A proposes to apply the full disclaimer requirements that now apply to radio and television communications to public communications distributed over the internet with audio or video components." 83 Fed. Reg. at 12869. In this sense, the platform itself is not the relevant consideration—whether a video ad is distributed by broadcast or via the Internet does not materially change the viewer's experience of the video ad. Thus, according to the NPRM, "Alternative A is based on the premise that [audio or video] advertisements are indistinguishable from offline advertisements that may be distributed on radio or television, broadcast, cable, or satellite in all respects other than the medium of distribution." 83 Fed. Reg. 12870.

A further point in support of the approach in Alternative A is that it fosters administrative and practical convenience by unifying the disclaimer requirement for a form of ad, no matter what the platform. As the NPRM states, "[B]y applying the specifications for radio and television communications to audio and video communications distributed over the internet, the proposed regulations would ensure that internet audio ads could air on radio, and internet video ads could air on television without having to satisfy different disclaimer requirements." *Id.* Sponsors of campaign ads would not have to prepare separate versions of an ad, depending on whether it was going to be transmitted by broadcast or by the Internet. This unification of the disclaimer requirement for, *e.g.*, all video ads or all audio ads, will be administratively convenient for sponsors, as well as less confusing for the public.

The principal argument advanced in support of Alternative B is that online ads are presented "on screen sizes ranging from large to very small," *id.* at 12871, and that the enhanced disclaimers are not practical on small screens such as mobile phones. But so too, some personal televisions are made with "very small" screens. No one has suggested that broadcast ads should

be exempted from the disclaimer requirements for such ads because of the possibility that they might be viewed on screens too small to effectively convey the disclaimer. If an online video ad can be viewed on a small screen, then a disclaimer related to that ad can also be viewed on the same screen. There is nothing inherent in the disclaimer portion of a video ad that makes it uniquely unsuitable for a small screen where the screen is sufficient to view the ad itself.

C. Adapted disclaimers. We support a regulation that provides for the use of "adapted disclaimers" for online campaign-related ads that are too small to contain the full disclaimer, but again, we prefer the approach taken by Alternative A. Under that approach, there is an objective test of whether "external character or space constraints" make the use of a full disclaimer impracticable.

Alternative A requires the use of the spender's name that is "clearly readable" on the face of an ad, plus an "indicator" on how to obtain full disclaimer information. A substantial weakness of Alternative B is that it allows some ads (on "tier 2") to omit the name of the spender on the face of the ad and instead to include only an indicator that points to another location where all of the disclaimer information is located. Under this flawed approach, a reader who does not follow the indicator to the underlying information will not be made aware of who is sponsoring the ad, thus defeating much of the point of the disclaimer requirement.

Even worse, Alternative B proposes to re-promulgate a form of the existing "small items" exception—it "exempts from the disclaimer requirement any paid internet advertisement that cannot provide a disclaimer in the communication itself nor an adapted disclaimer. . . ." *Id.* This is exactly the wrong approach: the Commission should be expecting sponsors of political ads to find technological solutions to the problem of including disclaimers on small online ads, not offering an exemption of uncertain contours so that a sponsor is relieved of the obligation to comply with the disclaimer requirement at all. Absent very strong evidence that there are forms of online communication that simply cannot accommodate the use of even an adapted disclaimer—and no such evidence is suggested in the NPRM—the Commission should not open the door to a blanket exemption. No such blanket exemption is provided in Alternative A, which is the right approach.

Alternative A appropriately requires that the technological mechanism used to provide the full disclaimer information "associated with" the "indicator" to allow a viewer "to locate the full disclaimer 'by navigating no more than one step away from the adapted disclaimer.'" *Id.* at 12878. Further, the disclaimer, "once reached, should be 'clear and conspicuous' and otherwise satisfy the full requirements of 11 CFR 110.11(a)." *Id.* We suggest adding a requirement which specifies that the "landing page" or other site or screen containing the full disclaimer be free of advertisements or other material or clutter that would obscure or distract from the disclaimer information.

We appreciate the opportunity to present these comments.

Respectfully submitted,

/s/ Fred Wertheimer

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