November 2, 2017

By electronic submission to *www.fec.gov/netdisclaimers*

Neven F. Stipanovic
Acting Assistant General Counsel
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

Re: Comments on REG 2011-02—Internet Communication Disclaimers

Dear Mr. Stipanovic:

Six years ago this week, Democracy 21 submitted comments to the Federal Election Commission on this same Advanced Notice of Proposed Rulemaking (ANPRM). In those comments, submitted jointly with the Campaign Legal Center, we reiterated our earlier call, made in comments we had previously filed in AOR 2011-09 (Facebook), for the Commission "to conduct a rulemaking to determine whether modified disclaimers are appropriate in the context of character-limited Internet communications and, if so, to establish specifications for such modified disclaimers."[1] We note that in separate comments filed in the 2011 ANPRM proceeding, Facebook also said that it "encourages [the Commission] to undertake the rulemaking considered in that Advanced Notice."[2]

In 2014, in comments submitted in response to AOR 2013-18 (Revolution Messaging), Democracy 21, joined again by the Campaign Legal Center, reiterated this call for a rulemaking:

> Given that 11 C.F.R. § 110.11 does not explicitly address the disclaimer requirements and specifications in the context of advertising via the Internet, mobile phones or other new electronic devices, and that this is undoubtedly a major growth area in political advertising, a rulemaking to consider the matter more fully is appropriate, necessary and overdue. A rulemaking on this matter would give all interested parties the opportunity to fully consider and comment on

[1] Comments on Notice 2011-14: "Internet Communications Disclaimers," submitted by Democracy 21 and the Campaign Legal Center (Nov. 14, 2011) at 1, quoting Comments on Draft Advisory Opinion 2011-09A and B by Democracy 21 and the Campaign Legal Center (June 14, 2011) at 2.

[2] Letter from Colin S. Stretch, Deputy General Counsel, Facebook, to Amy L. Rothstein, Assistant General Counsel, FEC, re "Advanced notice of Proposed Rulemaking; Internet Communication Disclaimers" (Nov. 14, 2011) at 1.

> the importance of disclaimers on paid political advertising, as well as viable, practical options for implementing the Act's disclaimer requirements in emerging-technology communication environments.[3]

This ANPRM has, however, sat dormant on the Commission's rulemaking docket for six years, briefly revived last year right before the 2016 election, when the Commission reopened the comment period "to receive additional comments in light of legal and technological developments since [the 2011] notice was published."[4] But apparently concluding that this subject did not merit the agency's further attention, the Commission cancelled a scheduled hearing on the proposed rulemaking and the matter returned to its state of dormancy.

As we now know, the world has changed entirely since last year. There has been a flood of revelations about what really happened in the 2016 U.S. presidential election, and it indicates that we experienced nothing less than a planned attack on our democracy by a hostile foreign power which, in large part, used the Internet as its weapon of choice to sabotage a presidential election. Whether, and how, we respond as a nation to this attack—and whether we take adequate steps to guard against its recurrence—will determine if our democracy can continue to make progress towards its ideal of providing free, fair and open elections that are protected against destabilizing foreign intervention.

The Commission has an important role to play in determining whether the nation will succeed in this crucial task. While the narrow and highly technical question posed in this ANPRM—of how the Commission will apply the law's disclaimer requirement to certain forms of Internet communications—is certainly a necessary part of any comprehensive response to the lessons of the 2016 election, it is far from sufficient.

The nation is facing a crisis in its need to restore the integrity of our democracy by safeguarding future elections from foreign interference, and it is the Commission which has primary civil jurisdiction to administer and enforce 52 U.S.C. § 30121, the primary statutory provision which prohibits foreign nationals from making expenditures to influence U.S. elections. 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 interpretation and enforcement, to help ensure that no foreign national, much less a hostile foreign government, again spends large sums for the purpose of influencing American elections.

We urge the Commission to undertake a comprehensive rulemaking directly on the foreign national issue, either by expanding the scope of the Internet disclaimer rulemaking proposed in this ANPRM, or by instituting a parallel rulemaking proceeding pursuant to a companion NPRM.

---

[3] Comments on Draft Advisory Opinions 2013-18 (Revolution Messaging) submitted by Democracy 21 and the Campaign Legal Center (Feb. 25, 2014), at 3.

[4] "Notice 2016-13; Internet Communication Disclaimers; Reopening of Comment Period and Notice of Hearing," 81 Fed. Reg. 71647 (Oct. 18, 2016).

In either event, we commend Commissioner Weintraub for her leadership on this issue. As she correctly stated in a June 21, 2017 Memorandum to the Commission with regard to reports of foreign attempts to influence the 2016 elections:

> 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."[5]

Calling this "an all-hands-on-deck moment for our democracy," *id.*, Commissioner Weintraub laid out a series of steps that the Commission should take to further explore how it could exercise the jurisdiction it already possesses to address the problem of foreign interference in our elections. One such step, she noted, is to "determine whether any additional rulemakings are warranted." *Id.* at 4. Indeed, Commissioner Weintraub in September 2016 proposed a specific agenda for a rulemaking to address the problem of foreign money.[6] And this followed several years of advocacy by Commissioner Weintraub for the Commission to undertake a comprehensive post-*Citizens United* rulemaking to address, in part, the need to strengthen the foreign national provision of the law in the wake of the *Citizens United* decision.[7]

Importantly, as Commissioner Weintraub has noted about the foreign national problem, "This issue need not be—and must not be—a partisan issue." 2017 Weintraub Mem. at 4. Regrettably however, it appears to have become so, and for that reason the Commission has failed to act on a matter of obvious and pressing national importance. The Commission has committed a serious error in failing to heed Commissioner Weintraub's many calls to action on this important matter.

The Internet disclaimer issue presented in this ANPRM is a piece, albeit a small piece, of the larger puzzle of how to address the threat of spending by foreign actors to influence national elections. To the extent that foreign nationals in 2016 used the Internet as a vehicle-of-choice to attempt 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 ANPRM also has importance as applied to entirely proper and lawful domestic spending on elections, completely apart from the question of

---

[5] 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 (quoting *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011)) (2017 Weintraub Mem.).

[6] Memorandum from Commissioner Ellen L. Weintraub to The Commission, "Revised Proposal to Launch Rulemaking to Ensure that U.S. Political Spending is Free from Foreign Interference" (Sept. 28, 2016).

[7] *E.g.*, Statement of Commissioner Ellen L. Weintraub on the 2014 *Citizens United* Rulemaking (Oct. 9, 2014), at 3.

spending by foreign nationals. 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. Large amounts of campaign spending for ads or other messages placed on the Internet (as opposed to spending for the more traditional avenues of radio and TV) did not develop until relatively recently, but since then such spending has exploded.[8] And it is likely to continue to grow.

If the Commission takes the position that all or much of campaign spending on the Internet is *per se* excluded from the disclaimer requirement by application of either the "small items" exception, 11 C.F.R. § 110.11(f)(i), or the "impracticable" exception, *id.* § (f)(ii), the Commission would, in practical effect, be unilaterally repealing the disclaimer law for a major and rapidly growing segment of all campaign activity, an action that would be arbitrary, capricious and contrary to law.

Any such wholesale evisceration of the disclaimer requirement for Internet communications would come at the expense of the public's right to know who is paying for political advertising on the Internet, and thus would greatly disserve the public interest.

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

And 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</u>

[8] *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.")

> their positions and supporters. . .. 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—and particularly ironic—if the Commission treated the Internet as a domain where transparency is uniquely suppressed, by broadly holding that basic disclaimer information about "who is speaking" is not required for campaign-related messages on the Internet.

Thus, any broad or across-the-board application to the Internet of the "small items" or "impracticality" exceptions would ignore the importance of the governmental interests recognized by the Supreme Court as supporting the disclaimer requirement. Further, such an approach would exceed the Commission's authority: the Commission has a legal obligation to implement and enforce the disclaimer requirement of 52 U.S.C. § 30120 which, as a statutory matter, includes no general exemption for Internet advertising.

Innovation, not exemption, is the answer. The ANPRM notes several possible ways to implement an effective disclaimer requirement that balances the need for transparency with the constraints of perceived space limitations which, in the limitless domain of the Internet, are often not constraints at all. Thus, the requirement for a "roll over" or "hover" message that contains the disclaimer information, or for a link to a landing page that contains the disclaimer, are just two practical ways to solve at least part of the problem. 82 Fed. Reg. 46937. So too, the Commission should closely examine the results of experiments by state governments which have addressed precisely this issue, and look there to see what works and what doesn't, incorporating best state practices into the Commission's own regulations. *Id.* at 46938 (citing California and Maryland regulations addressing disclaimers on Internet advertising).

Finally, in announcing a rulemaking, the Commission should solicit the advice of the Internet platform companies themselves as to how the problem can be addressed as a practical matter within the limits of existing technology. As Harvard Law School Professor Yochai Benkler, a prominent academic expert on digital matters, has written:

> The idea that the biggest and most sophisticated technology companies in the world can build driverless cars and optimize messaging and interface by running thousands of experiments a day, but cannot figure out how to include an economical marking that a communication is a political ad and construct a popup or other mechanism for letting users who want to figure out who is behind the [ad], is laughable.[9]

A rulemaking is clearly required. The disclaimer regulations at issue here were drafted in 1995 and have never been comprehensively updated to take account of the explosion since then in the use of the Internet for campaign communications. Indeed, the regulatory exceptions invoked here do not by their language address the Internet at all—they are framed around bumper stickers, pins and pens (§ 110.11(f)(i) ("small items" exception)) as well as skywriting,

---

[9] Prof. Yochai Benkler, "Election Advertising Disclosure: Part 1," HARVARD LAW REVIEW BLOG (Oct. 31, 2017) at https://blog.harvardlawreview.org/election-advertising-disclosure-part-1/

water towers and "wearable apparel" (§ 110.11(f)(ii) ("impracticable" exception)). With language that is largely meaningless in the context of the Internet (what does skywriting suggest about text messaging?), the past efforts by the Commission to use the advisory opinion process on a case-by-case basis to apply inapplicable regulatory language to Internet campaign communications have resulted in a grab-bag of inconsistent and inconclusive results which provide no meaningful guidance at all.[10]

The Commission has an obligation to provide guidance in this area, and to do so through updating its rules to properly take account of changes both in the nature of campaign activities and in technology. The status quo on how the disclaimer requirement applies to Internet campaign ads—a series of deadlocks on advisory opinion requests that resolve nothing—is an abdication of the Commission's responsibility to "administer, seek to obtain compliance with, and formulate policy with respect to" the law. 52 U.S.C. § 30106(b)(1). And as noted above, the disclaimer issue has taken on special urgency because it is one protection that can be deployed as a defense against the possible repetition of illegal spending by foreign nationals to influence federal elections.

Finally, some may argue that the Commission should not proceed with a rulemaking at this time because Congress itself might consider legislation regarding the disclaimer requirement as applied to Internet communications. *E.g.*¸ H.R. 4077, 115th Cong. 1st Sess. (2017) (Honest Ads Act) (introduced Oct. 19, 2017). We strongly urge the Commission not to wait. Although Congress should act in this area to strengthen the disclosure and disclaimer requirements, as well as the protections against foreign national spending, the prospect for congressional action on campaign finance issues is always dim. Indeed, Congress has enacted no significant campaign finance reform legislation in the last 15 years.

For that reason, the Commission should not miss an opportunity to exercise its existing statutory authority to improve its regulations while it waits to see if Congress might provide additional or different authority. The risk is that if the Commission waits, and if, as likely, Congress then does nothing, the Commission will have again failed to fix a serious problem, and the nation will then face a new election cycle in which there will have been no response at all to the problem. On the other hand, if the Commission does act now to exercise its existing authority, Congress can take those changes into consideration in the unlikely event it actually does enact new legislation. And if such legislation is enacted, the Commission can then adapt its new rules to incorporate any new regulatory authority that Congress might grant.

In short, there is a very serious problem before the Commission now, and the Commission already has tools to address it. The Commission should act.

---

[10] *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).

We appreciate the opportunity to present these comments.

Respectfully submitted,

/s/ Fred Wertheimer

Fred Wertheimer
President
Democracy 21
2000 Massachusetts Ave. NW
Washington, DC 20036
202-355-9600

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry
1425 K Street NW, Suite 600
Washington, DC 20005
202-682-0240
dsimon@sonosky.com

Counsel for Democracy 21