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

**Re: Comments on REG 2011-02: “Internet Communication Disclaimers”**

Dear Mr. Stipanovic,

These comments are submitted by the Campaign Legal Center (“CLC”) in response to the Advanced Notice of Proposed Rulemaking (“ANPRM”) on “Internet Communication Disclaimers.” 82 Fed. Reg. 46937 (Oct. 10, 2017).

CLC reiterates the same calls that we have been making since 2011: the Commission must undertake a rulemaking to clarify the application of disclaimer requirements to online political advertising. In 2011, when the Commission was considering an Advisory Opinion Request from Facebook (AOR 2011-09), CLC and Democracy 21 filed comments urging the Commission to conduct such a rulemaking.<sup>1</sup> When the Commission first

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<sup>1</sup> Campaign Legal Center and Democracy 21, Comments on Draft Advisory Opinions 2011-9 A and B at 2 (June 14, 2011), available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3250&START=1176178.pdf>.

published this ANPRM in 2011, CLC and Democracy 21 again filed comments supporting a full rulemaking noting that “[i]nternet advertising is a major growth area in political campaigns” and that “we urge the Commission to conduct a rulemaking to consider the matter more comprehensively.”<sup>2</sup> In 2014, CLC and Democracy 21 again declared that “a rulemaking to consider the matter [of online political ad disclaimers] more fully is appropriate, necessary and overdue.”<sup>3</sup> And yet, the Commission has failed to move forward with a rulemaking, and has since twice reopened that same ANPRM for comments. *See* 82 Fed. Reg. 46937 (Oct. 10, 2017).

In the meantime, digital political advertising has grown rapidly. According to a report by Borrell Associates, only 1.7 percent of political ads were digital in 2012.<sup>4</sup> In 2016, 14.4 percent were.<sup>5</sup> In absolute terms, this translated into \$1.4 billion spent on digital ads in 2016, up from a mere \$159.8 million in 2012.<sup>6</sup>

And yet, the Commission’s failure to clarify the rules allowed both foreign- and domestic-sponsored digital political ads in 2016 to omit disclaimers—meaning that thousands of Russian political ads were allowed to circulate without information about who paid for them, and that voters, watchdog groups, and law enforcement could not identify which ads were funded by foreign sources.

According to multiple reports and tech companies’ ever-increasing estimates, Russia reached potentially hundreds of millions of Americans with thousands of digital advertisements aimed at influencing the 2016 U.S. elections. This included at least 3,000 political ads on Facebook that reached

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<sup>2</sup> Campaign Legal Center and Democracy 21, Comments on REG 2011-02 (Nov. 14, 2011), <http://sers.fec.gov/fosers/showpdf.htm?docid=98749>.

<sup>3</sup> Campaign Legal Center and Democracy 21, Comments on Draft Advisory Opinions 2013-18 (Revolution Messaging) (Feb. 25, 2014), <https://www.fec.gov/files/legal/aos/79752.pdf>.

<sup>4</sup> Kip Cassino, *What Happened to Political Advertising in 2016 (and forever)*, Borrell Associates, Inc. (2017); see also Kate Kaye, Data Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast Down 20%, Cable and Digital Way Up, AdAge (Jan. 3, 2017) <http://adage.com/article/media/2016-political-broadcast-tv-spend-20-cable-52/307346/>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

at least 10 million people,<sup>7</sup> 150 ads on Instagram,<sup>8</sup> and ads on Google, YouTube, Gmail,<sup>9</sup> Twitter,<sup>10</sup> and even Pokemon Go.<sup>11</sup>

Although many of the ads have not been made publicly available, those that have been released indicate that at least some of the communications constituted express advocacy or its functional equivalent, and thus would be subject to disclaimer requirements at 52 U.S.C. § 30120(a).<sup>12</sup> For example, one Facebook ad, which depicted an arm-wrestling match between Satan and Jesus, told viewers that “Hillary is a Satan” but that “Today Americans are able to elect a president with godly moral principles;” Trump is “at least an honest man and he cares deeply for this country. My vote goes for him!”<sup>13</sup> Another Facebook ad promoted an event titled, “Down with Hillary!” and told viewers that “Hillary Clinton is the co-author of Obama’s anti-police and anti-Constitutional propaganda.”<sup>14</sup> A page that named itself “Heart of Texas” promoted an event called “Get Ready to Secede!” and told “Fellow Texans” that “[i]t’s time to say a strong NO to the establishment robbers...The corrupt media does not talk about the crimes committed by Killary Rotten

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<sup>7</sup> Mike Isaac and Scott Shane, *Facebook’s Russia-Linked Ads Came in Many Disguises*, N.Y. TIMES (Oct. 2, 2017), <https://www.nytimes.com/2017/10/02/technology/facebook-russia-ads.html>.

<sup>8</sup> James Rogeres, *Facebook: 150 Russia-Linked Political Ads Showed Up On Instagram*, FOX NEWS (Oct. 9, 2017), <http://www.foxnews.com/tech/2017/10/09/facebook-says-150-political-ads-linked-to-russia-showed-up-on-instagram.html>.

<sup>9</sup> Elizabeth Dwoskin, Adam Entous, and Craig Timberg, *Google uncovers Russian-bought ads on YouTube, Gmail and other platforms*, WASH. POST (Oct. 9, 2017), [https://www.washingtonpost.com/news/the-switch/wp/2017/10/09/google-uncovers-russian-bought-ads-on-youtube-gmail-and-other-platforms/?utm\\_term=.8c7d310109cf](https://www.washingtonpost.com/news/the-switch/wp/2017/10/09/google-uncovers-russian-bought-ads-on-youtube-gmail-and-other-platforms/?utm_term=.8c7d310109cf).

<sup>10</sup> Lauren Gambino, *Democrats Rebuke Twitter for ‘Frankly Inadequate’ Response to Russian Meddling*, THE GUARDIAN (Sept. 28, 2017), <https://www.theguardian.com/technology/2017/sep/28/twitter-congress-russian-election-interference>.

<sup>11</sup> Rebecca Savransky, *Russian-Linked Campaign Uses Pokemon Go to Meddle in Election*, THE HILL (Oct. 12, 2017), <http://thehill.com/policy/technology/355189-russian-linked-campaign-used-pokemon-go-to-meddle-in-election>.

<sup>12</sup> See, e.g., Josh Sawsey, *Russian-Funded Facebook Ads Backed Stein, Sanders and Trump*, POLITICO (Sept. 26, 2017) <https://www.politico.com/story/2017/09/26/facebook-russia-trump-sanders-stein-243172>. (describing one ad that read “Choose peace and vote for Jill Stein”);

<sup>13</sup> Scott Shane, *These Are the Ads Russia Bought on Facebook in 2016*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/us/politics/russia-2016-election-facebook.html>.

<sup>14</sup> Dan Keating, Kevin Schaul, and Leslie Shapiro, *The Facebook ads Russians targeted at different groups*, WASH. POST (Nov. 1, 2017), [https://www.washingtonpost.com/graphics/2017/business/russian-ads-facebook-targeting/?utm\\_term=.82bf0a68476e](https://www.washingtonpost.com/graphics/2017/business/russian-ads-facebook-targeting/?utm_term=.82bf0a68476e).

Clinton...”<sup>15</sup> A page called Secured Borders appears to have posted on one of its platforms a message that said, “Like Obama, Hillary is totally unfit to be president, because she’s too corrupt and self-centered in her political ambition. Please support Donald Trump- he’s our last hope to stop this nation’s dissent (sic) into chaos.”<sup>16</sup> Another post by Secured Borders featured a mugshot of Clinton with the message: “Hillary Clinton is a liar and thief capable to steal just about anything from White House silverware to votes of the dead and illegals. I think we’ve had enough of criminals in the White House already!”<sup>17</sup> On the other side, a pro-Clinton ad promoted an event titled “Support Hillary. Save American Muslims!”<sup>18</sup>

Americans only learned of this online influence campaign *after* the election. Had effective online disclaimer rules been in place in 2016, Russia’s wide-ranging influence campaign might have been detected sooner, or Russia might have been deterred from engaging in the effort in the first place.

We urge the Commission to immediately open a rulemaking to shore up the vulnerabilities that were exploited by foreign actors in the 2016 elections.

## I. Disclaimers Can Help Identify and Deter Foreign Interference

According to the Supreme Court, political advertising disclaimers are intended to “insure that the voters are fully informed about the person or group who is speaking”<sup>19</sup> and to allow voters to “evaluate the arguments to which they are being subjected,”<sup>20</sup> and to “enable[] the electorate to make

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<sup>15</sup> *Id.*

<sup>16</sup> UsHadrons, *This space is a repository for content from the Russian social media group ‘Secured Borders,’* MEDIUM (Oct. 12, 2017), <https://medium.com/@ushadrons/this-space-is-a-repository-for-ads-from-the-russian-social-media-group-secured-borders-a62acfb7726>.

<sup>17</sup> Secured Borders, *Commander-in-thief meme*, <https://photos.google.com/share/AF1QipMVSsmRR2HxJbTwm4eytdv5VxDUqKheSiWseoIVuUC0h4qhJPLvh0githwYq1vRqig/photo/AF1QipPhcKM2bcgMeo15AfApwHeoqaROV7zInPlz5cqI?key=SnVYb1JNSEltTWtVWVNtaXROM3puelNIUWtPSnJn> (last visited Nov. 3, 2017).

<sup>18</sup> *Id.*

<sup>19</sup> *Citizens United v. FEC*, 558 U.S. 310, 368 (2010) (internal citations and quotation marks omitted).

<sup>20</sup> *Id.* at 368 (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, at 792).

informed decisions and give proper weight to different speakers and messages.”<sup>21</sup>

It should go without saying that voters would assess a political ad differently if they knew that Russia was behind it. And if disclaimers had been required for online political ads, journalists, watchdog groups, and law enforcement might have been able to uncover the Russian influence effort sooner.

The Campaign Legal Center, for example, regularly tracks political spending and advertising, and files complaints when there is reason to believe the law has been violated, including the law prohibiting foreign nationals from interfering in U.S. elections, 52 U.S.C. 30121. CLC filed three complaints in the 2016 cycle alleging violations of the foreign national ban: two alleging violations of the foreign national solicitation ban,<sup>22</sup> and one alleging a violation of the foreign national contribution ban.<sup>23</sup>

Or, if disclaimers had been included on Russia-sponsored ads in 2016, they may have constituted additional data points that would have allowed journalists, watchdog groups, or law enforcement to identify a network of foreign actors attempting to surreptitiously influence U.S. elections. Civil society networks in European countries, for example, have made use of a variety of publicly available data to uncover Russian online influence efforts in those countries.<sup>24</sup> Requiring all online political ads in the U.S. to include

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<sup>21</sup> *Id.* at 371.

<sup>22</sup> See Press Release, Donald Trump Super PAC Is Illegally Soliciting Money From a Chinese National to Influence U.S. Elections, Campaign Legal Center (Oct. 26, 2016), <http://www.campaignlegalcenter.org/news/press-releases/press-release-donald-trump-super-pac-illegally-soliciting-money-chinese-national>, and Press Release, Donald Trump Is Illegally Soliciting Money From Foreign Nationals to Fund His Presidential Campaign, Campaign Legal Center (Jun. 29, 2016), <http://www.campaignlegalcenter.org/news/press-releases/donald-trump-illegally-soliciting-money-foreign-nationals-fund-his-presidential>.

<sup>23</sup> Press Release, Chinese Money Flowing Into U.S. Elections Highlights Importance of Disclosure and FEC Enforcement, Campaign Legal Center (Aug. 10, 2016), <http://www.campaignlegalcenter.org/news/press-releases/chinese-money-flowing-us-elections-highlights-importance-disclosure-and-fec>.

<sup>24</sup> See Dana Priest and Michael Birnbaum, *Europe Has Been Working to Expose Russian Meddling for Years*, WASH. POST (June 25, 2017), [https://www.washingtonpost.com/world/europe/europe-has-been-working-to-expose-russian-meddling-for-years/2017/06/25/e42dcece-4a09-11e7-9669-250d0b15f83b\\_story.html?utm\\_term=.b9a8f6f209c5](https://www.washingtonpost.com/world/europe/europe-has-been-working-to-expose-russian-meddling-for-years/2017/06/25/e42dcece-4a09-11e7-9669-250d0b15f83b_story.html?utm_term=.b9a8f6f209c5).

statutorily required disclaimer information would provide another data point that could allow Americans to similarly identify foreign influence campaigns.

## **II. The Commission's 20<sup>th</sup> Century Regulations are a Poor Fit for 21<sup>st</sup> Century Political Advertisements**

52 U.S.C. § 30120(a) provides in relevant part that “whenever any person makes a disbursement for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate . . . such communication . . . if not authorized by a candidate . . . shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee.” 52 U.S.C. § 30120(a). Section 110.11 of the Commission's regulations narrows this requirement to “public communications, as defined in 11 CFR 100.26, by any person that expressly advocate the election or defeat of a clearly identified candidate.” 11 C.F.R. § 110.11(a)(2). Section 100.26, in turn, defines public communications to include “communications placed for a fee on another person's Web site,” meaning paid digital ads. *See* 11 C.F.R. § 100.26.

Accordingly, a paid digital advertisement that expressly advocates for or against a candidate is subject to FECA's disclaimer requirements. The failure of the Commission in recent years has been in its application of 20<sup>th</sup> century disclaimer *exceptions* to 21<sup>st</sup> century digital ads.

Longstanding Commission regulations establish two exceptions from disclaimer requirements. First, under the “small-items exception,” the disclaimer requirements do not apply to “[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed.” 11 C.F.R. § 110.11(f)(1)(i). Second, under the “impracticability exception,” disclaimers are not required on “[s]kywriting, water towers, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable.” *Id.* § 110.11(f)(1)(ii).

In a 2002 advisory opinion, the Commission determined that a paid text message of fewer than 160 characters qualified as a “small item”

analogous to a bumper sticker where no disclaimer was required.<sup>25</sup> At the time, text messages were technologically limited to 160 characters of text and could not include images.<sup>26</sup> The Commission reasoned that such “limits on both the size and the length of the information that [could] be conveyed” by text messages are “similar limits . . . as those that exist with bumper stickers.”<sup>27</sup> The Commission accordingly concluded that these text-message ads were exempt from disclaimer requirements under the small-items exception.<sup>28</sup>

In a 2010 advisory opinion, the Commission considered the application of disclaimer requirements to Google “AdWords” search ads.<sup>29</sup> These were paid, text-only internet advertisements that Google limited to 95 characters. The Commission approved Google’s proposal to sell AdWords ads that “would not display a disclaimer indicating who authorized or paid for the ad; rather, a full disclaimer would appear on the landing page that appears when a user click[ed]” a website link contained within the ad itself.<sup>30</sup>

Three Commissioners concluded that Google’s proposal satisfied the disclaimer requirements of section 110.11 because the ad linked to the advertiser’s website, where the landing page would include a disclaimer.<sup>31</sup> Two Commissioners concluded that no disclaimer was required, and that Google search ads were no different from text message ads; both were character-limited and could fall under the “impracticable” exception.<sup>32</sup>

Facebook submitted its own advisory opinion request in 2011 asking that Facebook ads and sponsored content also be exempted from disclaimer requirements under both the small-items exception and the impracticability exception.<sup>33</sup> Unlike Google, however, Facebook demanded an exemption

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<sup>25</sup> Advisory Opinion 2002-09 (Target Wireless).

<sup>26</sup> *See id.* at 2.

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* (citing 11 C.F.R. § 110.11(a)(6)(i) (2002)).

<sup>29</sup> Advisory Opinion 2010-19 (Google),

<sup>30</sup> *Id.* at 2.

<sup>31</sup> Concurring Statement of Vice Chair Cynthia L. Bauerly, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub, Advisory Opinion 2010-19 (Google), <https://www.fec.gov/files/legal/aos/76087.pdf>.

<sup>32</sup> *See* Statement for the Record by Commissioner Caroline C. Hunter, Advisory Opinion 2010-19 (Google), <https://www.fec.gov/files/legal/aos/76088.pdf>; Concurring Statement of Chairman Matthew S. Petersen, Advisory Opinion 2010-19 (Google), <https://www.fec.gov/files/legal/aos/76089.pdf>.

<sup>33</sup> Advisory Opinion Request 2011-09 (Facebook).



without offering to have its ads link to a page with disclaimer information.<sup>34</sup> Facebook argued that its ads constituted “small items” like bumper stickers, and that it was “impracticable” for the tech giant to provide viewers any sort of disclaimer information.<sup>35</sup>

The Commission did not issue an advisory opinion in response to Facebook’s request. Three Commissioners concluded that the ads at issue could only omit a disclaimer if the ads (like the Google search word ads) linked to a website or Facebook page that contained the relevant disclaimer information, or if the ads included a rollover display including the disclaimer.<sup>36</sup> Three Commissioners concluded that the ads were entirely exempt under the impracticability exception.<sup>37</sup>

It has now become exceptionally clear that the Commission’s application of its 20<sup>th</sup> century regulations providing exceptions for “impracticability” and “small items” are poor fits for 21<sup>st</sup> century political advertising.

Indeed, although Facebook in 2011 asserted that the inclusion of a disclaimer on its ads would be “inconvenient and impracticable,”<sup>38</sup> Facebook recently announced that advertisers “will have to disclose which page paid for an ad,”<sup>39</sup> and declared that starting in summer 2018, “advertisers will have to include a disclosure in their election-related ads, which reads: ‘Paid for by.’”

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See FEC Agenda Doc. No. 11-32-B, <https://www.fec.gov/files/legal/aos/77162.pdf>; Certification, Advisory Opinion Request 2011-09 (Facebook) (noting three Commissioners having voted to approve Doc. No. 11-32-B).

<sup>37</sup> See FEC Agenda Doc. No. 11-32-A, <https://www.fec.gov/files/legal/aos/77152.pdf>; Certification, Advisory Opinion Request 2011-09 (Facebook) (noting three Commissioners having voted to approve Doc. No. 11-32-A).

<sup>38</sup> See Advisory Opinion Request 2011-09 at 8-10.

<sup>39</sup> See Facebook Newsroom, *Facebook to Provide Congress with Ads Linked to Internet Research Agency*, (Sept. 21, 2017), <https://newsroom.fb.com/news/2017/09/providing-congress-with-ads-linked-to-internet-research-agency/> (quoting Facebook CEO Mark Zuckerberg as stating “we’re going to make political advertising more transparent. When someone buys political ads on TV or other media, they’re required by law to disclose who paid for them. But you still don’t know if you’re seeing the same messages as everyone else. So we’re going to bring Facebook to an even higher standard of transparency. Not only will you have to disclose which page paid for an ad, but we will also make it so you can visit an advertiser’s page and see the ads they’re currently running to any audience on Facebook.”).



When you click on the disclosure, you will be able to see details about the advertiser.”<sup>40</sup>

Even if during the early years of the Internet it may have been “impracticable” to include the statutorily required disclaimer on an online ad, it is now clear that this is no longer the case.

The concept of “small items” has even less relevance to online ads. A Facebook ad might be the same size as the pin or button referenced in the regulation’s “small items” exception, but is not subject to the same constraints: digital ads might fit only a limited number of characters on the ad itself, but unlike a lapel pin, can readily provide viewers with “paid for by...” information through other means, like the pop-up disclaimer that Facebook says it will implement.<sup>41</sup> Put another way, a digital ad in 2017 is not “small” like a pin or button because it can be easily and economically “expanded” to include statutorily-required disclaimer information.

The inapplicability of existing regulations to the digital age speaks to the importance of the Commission opening this long-overdue rulemaking.

### **III. Other Federal Agencies Have Addressed Digital Disclaimer Requirements**

The Commission may also take note of how other federal agencies have addressed the application of analogous disclaimer requirements to digital advertisements. One year after the Commission published its still-pending ANPRM for online ad disclaimers, the Federal Trade Commission (“FTC”) also sought to update its sponsorship disclaimer guidelines for digital ads in furtherance of the FTC Act’s prohibition on “unfair or deceptive acts or practices.”<sup>42</sup>

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<sup>40</sup> Rob Goldman, VP of Facebook Ads, *Update on Our Advertising Transparency and Authenticity Efforts*, Facebook Newsroom (Oct. 27, 2017), <https://newsroom.fb.com/news/2017/10/update-on-our-advertising-transparency-and-authenticity-efforts/>.

<sup>41</sup> See sample ad at *id.*

<sup>42</sup> See FTC Seeks Input for Revising Its Guidance to Businesses About Online Advertising, FTC Matter No. P114506 <https://www.ftc.gov/policy/public-comments/initiative-379>. Facebook filed comments with the FTC arguing that “[i]mposing obligations on social media platform providers to prescribe the permitted format and content of advertising disclosures could unintentionally chill users’ speech and stifle creativity and innovation.” Facebook, Public Comments on FTC Project No. P114506 (July 11, 2012),

The FTC issued its final disclosure guidelines for digital advertising in the spring of 2013.<sup>43</sup> Noting that “deception is unlawful no matter what the medium,” the FTC emphasized that “[r]equired disclosures must be clear and conspicuous.”<sup>44</sup> Further, the FTC implied that the importance of disclaimers should trump concerns about impracticability:

If a disclosure is necessary to prevent an advertisement from being deceptive, unfair, or otherwise violative of a Commission rule, **and it is not possible to make the disclosure clearly and conspicuously, then that ad should not be disseminated.** This means that **if a particular platform does not provide an opportunity to make clear and conspicuous disclosures, then that platform should not be used to disseminate advertisements that require disclosures.**<sup>45</sup>

Throughout its guidelines, the FTC emphasized this “clear and conspicuous” standard, which it clarified is not met by “[s]imply making the disclosure available somewhere in the ad, where some consumers might find it.”<sup>46</sup> With respect to technical details, the FTC advised that although hyperlinks were permissible for transmitting disclosures, hyperlinks should be avoided if it is possible to display the disclosure on the main ad page, especially if the disclosure is “an integral part of a claim or inseparable from it.”<sup>47</sup>

The Commission should take note of the FTC’s willingness to fulfill its statutory mandate in light of evolving technologies and practices. And, as described above, promulgating clear rules for online political ad disclaimers is crucial for protecting the integrity of U.S. elections and for deterring and detecting violations of the foreign national ban.

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[https://www.ftc.gov/sites/default/files/documents/public\\_comments/short-advertising-privacy-disclosures-digital-world-ftc-project-no-p114506-00009/00009-83165.pdf](https://www.ftc.gov/sites/default/files/documents/public_comments/short-advertising-privacy-disclosures-digital-world-ftc-project-no-p114506-00009/00009-83165.pdf).

<sup>43</sup> *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*, Federal Trade Commission (Mar. 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

<sup>44</sup> *Id.* at i.

<sup>45</sup> *Id.* at 5 (emphasis added).

<sup>46</sup> *Id.* at 5.

<sup>47</sup> *Id.* at 10.

We support the Commission's proposal to open a rulemaking that would update and clarify its rules.

Sincerely,

/s/

Brendan M. Fischer\*  
The Campaign Legal Center  
1411 K Street NW, Suite 1400  
Washington, DC 20005

Counsel to the Campaign Legal Center  
*\*Admitted in Wisconsin only;  
practice limited to U.S. courts and federal agencies*