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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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AGENDA ITEM

For meeting of November 16, 2017

SUBMITTED LATE

November 15, 2017

MEMORANDUM

TO: The Commission

FROM: Caroline C. Hunter
Vice Chair

Matthew S. Petersen
Commissioner

Lee E. Goodman
Commissioner

RE: Motion for Notice of Proposed Rulemaking on Disclaimers on Paid Internet and
Digital Communications

DATE: November 15, 2017

At tomorrow's Open Meeting, we intend to make the attached motion. We request that this memorandum and attachment be made public and placed on the Commission's Open Meeting agenda for November 16, 2017.

MOTION BY VICE CHAIR HUNTER
AND COMMISSIONERS GOODMAN AND PETERSEN

The Federal Election Commission is responsible for administering and enforcing the Federal Election Campaign Act, including FECA's disclaimer requirements and prohibition on electoral spending by foreign nationals. Foreign interference in U.S. elections is inimical to our nation's interests and democratic values. The need to prevent such interference is an issue that transcends partisan politics, and on which all Americans can agree.

Disclaimers on paid digital and internet-based advertisements are one tool identified as a mechanism for exposing foreign-paid advertisements. The Commission has revised its disclaimer regulations several times over the years in response to statutory changes and court decisions, and to reflect decisions in advisory opinions that address the application of the rules to changing technology, including online communications. With respect to online communications, the Commission's regulations require disclaimers on (1) political committees' mass emails and websites available to the general public; (2) any communication that a political committee pays to post on another person's website; and (3) any communication containing express advocacy or soliciting contributions that any person pays to post on another person's website.

Much of the recent discussion on this topic has focused on three advisory opinion requests involving the small items and impracticability exceptions to the general disclaimer requirement that the Commission considered several years ago – from Target Wireless in 2002, and from Google and Facebook in 2011. Advisory opinions, by their very nature, are fact specific, and those addressing technological issues necessarily are limited to the technology in existence at the time. With respect to paid online communications, technology has changed since 2011.

That same year, the Commission issued an advance notice of proposed rulemaking to obtain public input on whether to launch a rulemaking to revise its disclaimer rules for paid online communications. Last month, we opened the comment period for a third time, and received thousands of comments before the comment period closed on November 13, 2017. Many of them will be helpful in moving forward on this issue.

The Commission has a responsibility to review these comments, apply its regulatory expertise, and consider concrete regulatory proposals to address disclaimers on paid internet and digital communications. To this end, we support development of a notice of proposed rulemaking that responds to the comments and provides the public with clear and specific regulatory proposals. We favor holding a public hearing on this issue after the public has had a chance to consider our proposals.

MOTION: We hereby move to direct the Office of General Counsel to draft a notice of proposed rulemaking, as soon as is practicable, that proposes revisions to Commission rules governing disclaimers on paid internet and digital communications.