



FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 110

[Notice 2018-06]

Internet Communication Disclaimers and Definition of “Public Communication”

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission requests comment on two alternative proposals to amend its regulations concerning disclaimers on public communications on the internet that contain express advocacy, solicit contributions, or are made by political committees. The Commission is undertaking this rulemaking in light of technological advances since the Commission last revised its rules governing internet disclaimers in 2006, and questions from the public about the application of those rules to internet communications. The Commission’s goal is to promulgate a rule that in its text and interpretation recognizes the paramount importance of providing the public with the clearest disclosure of the payor or sponsor of these public communications on the internet.

Both proposals are intended to give the American public easy access to information about the persons paying for and candidates authorizing these internet communications, pursuant to the Federal Election Campaign Act. Both proposals would continue to require disclaimers for certain internet communications, and both would allow certain internet communications to provide disclaimers through alternative technology. The proposals differ, however, in their approach. The Commission requests comment on all elements of both proposals. The two proposals need not be considered as fixed alternatives; commenters are encouraged to extract the best elements of each, or suggest improvements or alternatives, to help the Commission fashion

the best possible rule. The Commission also requests comment on proposed changes to the definition of “public communication.” The Commission has not made any final decisions on any of the issues or proposals presented in this rulemaking.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. The Commission will hold a public hearing on this notice on June 27, 2018. Anyone wishing to testify at such a hearing must file timely written comments and must include in the written comments a request to testify.

ADDRESSES: All comments must be in writing. Commenters are encouraged to submit comments electronically via the Commission’s website at <http://sers.fec.gov/fosers/rulemaking.htm?pid=74739>. Alternatively, commenters may submit comments in paper form, addressed to the Federal Election Commission, Attn.: Neven F. Stipanovic, Acting Assistant General Counsel, 1050 First St. NE, Washington, DC 20463.

Each commenter must provide, at a minimum, his or her first name, last name, city, and state; comments without this information will not be accepted. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the Commission’s website and in the Commission’s Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social security number, or driver’s license number, or any information that is restricted from disclosure, such as trade secrets or commercial or financial information that is privileged or confidential.

FOR FURTHER INFORMATION CONTACT: Mr. Neven F. Stipanovic, Acting Assistant General Counsel, or Ms. Jessica Selinkoff, Attorney, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is proposing to revise its regulations at 11 CFR 100.26 and 110.11 regarding disclaimers on communications placed for a fee on the internet. The Commission may provide illustrative examples on the Commission’s website during the comment period.

A. Rulemaking History

1. Definition of “Public Communication”

The Commission published a Notice of Proposed Rulemaking (“Technology NPRM”) in the Federal Register on November 2, 2016.¹ The Technology NPRM comment period ended on December 2, 2016. The Commission received four comments in response to the Technology NPRM.²

One of the proposals in the Technology NPRM was to update the definition of “public communication” at 11 CFR 100.26. Section 100.26 currently defines “public communication” as excluding all internet communications, “other than communications placed for a fee on another person’s Web site.” When the Commission promulgated this definition in 2006, it focused on websites because that was the predominant means of paid internet advertising at the time. The Commission analogized paid advertisements on websites to the forms of mass communication enumerated in the definition of “public communication” in the Federal Election Campaign Act, 52 U.S.C. 30101-46 (“the Act”), because “each lends itself to distribution of content through an entity ordinarily owned or controlled by another person.” Internet Communications, 71 FR 18589, 18594 (Apr. 12, 2006) (“2006 Internet E&J”); 52 U.S.C. 30101(22).

¹ Technological Modernization, 81 FR 76416 (Nov. 2, 2016).

² The Commission also received four comments in response an earlier stage of the technology rulemaking. See Technological Modernization, 78 FR 25635 (May 2, 2013). To review those proposals and other Commission rulemaking documents, including comments received, visit <http://sers.fec.gov/fosers/rulemaking.htm?pid=84652>.

The Commission proposed to update the definition by adding communications placed for a fee on another person’s “internet-enabled device or application.” The purpose of the proposed change was to reflect post-2006 changes in internet technology³ — such as the development of mobile applications (“apps”) on smartphones and tablets, smart TV devices, interactive gaming dashboards, e-book readers, and wearable network-enabled devices such as smartwatches and headsets — and to make the regulatory text more adaptable to the development of future technologies. The Commission asked several questions about its proposed change, including whether the term “internet-enabled device or application” is a sufficiently clear and technically accurate way to refer to the various media through which paid internet communications can be sent and received; whether there is a better way to refer to them; and whether it would help to provide examples of such paid media.

The Commission received only one comment in response to this aspect of the Technology NPRM.⁴ The comment generally supported the proposed revision to the definition of “public communication” in section 100.26.⁵

³ See Amy Schatz, In Hot Pursuit of the Digital Voter, Wall St. J., Mar. 23, 2012, www.wsj.com/articles/SB10001424052702303812904577299820064048072 (showing screenshots of 2012 presidential committee advertisements on Hulu and noting another campaign’s purchase of advertisements on Pandora internet radio); Tanzina Vega, The Next Political Battleground: Your Phone, CNN (May 29, 2015, 6:44 AM), www.cnn.com/2015/05/29/politics/2016-presidential-campaigns-mobile-technology (noting that “voters should expect more political ads as they scroll through their phones next year – much as they’ll be bombarded with ads on television,” including ads using geolocation to target “potential voters who may have downloaded the candidate’s app”). Indeed, a recent study has shown that 19% of Americans access the internet exclusively or mostly through their smartphones as opposed to desktop or laptop computers. See Pew Research Ctr., U.S. Smartphone Use in 2015, at 3 (2015), www.pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf.

⁴ See Campaign Legal Center and Democracy 21, Comment on REG 2013-01 (Technological Modernization) (Dec. 2, 2016), <http://sers.fec.gov/fosers/showpdf.htm?docid=354002>.

⁵ The comment also urged the Commission to amend 11 CFR 100.26 “to make clear that any expenditure beyond a de minimis amount for Internet communications is not exempt from the definition of ‘public communication.’” Id. at 2.

The Commission has decided to reintroduce the proposed change to the definition of “public communication” in this rulemaking for the limited purpose of determining whether the term “internet-enabled device or application” is a sufficiently clear and technically accurate way to refer to the various media through which paid internet communications can be sent and received. The term is closely tied to the internet communication disclaimer requirements.⁶

2. Internet Communication Disclaimers

On October 13, 2011, the Commission published in the Federal Register an Advance Notice of Proposed Rulemaking (“ANPRM”) soliciting comment on whether to modify disclaimer requirements at 11 CFR 110.11 for certain internet communications, or to provide exceptions thereto, consistent with the Act.⁷ The Commission received eight comments in response. Six of the commenters agreed that the Commission should update the disclaimer rules through a rulemaking, though commenters differed on how the Commission should do so.

On October 18, 2016, the Commission solicited additional comment in light of legal and technological developments during the five years since the ANPRM was published.⁸ The Commission received six comments during the reopened comment period, all but one of which supported updating the disclaimer rules. Commenters, however, differed on whether the Commission should allow modified disclaimers for all online advertisements or exempt paid advertisements on social media platforms from the disclaimer requirements.

⁶ The definition of “public communication” is also relevant to the coordination rules, 11 CFR 109.21(c), and financing limitations, e.g., 11 CFR 100.24(b)(3), 300.32(a)(1)-(2), 300.71.

⁷ See Internet Communication Disclaimers, 76 FR 63567 (Oct. 13, 2011).

⁸ See Internet Communication Disclaimers; Reopening of Comment Period and Notice of Hearing, 81 FR 71647 (Oct. 18, 2016). The Commission postponed the hearing announced in that notice because few commenters expressed interest in participating. As noted above, the Commission will hold a hearing on the proposals in this notice on June 27, 2018.

On October 10, 2017, the Commission again solicited additional comment in light of recent legal, factual, and technological developments.⁹ During this reopened comment period, the Commission received submissions from 149,772 commenters (including persons who signed on to others' comments), of which 147,320 indicated support for updating or strengthening the disclaimer rules or other government action; 2,262 indicated opposition to such efforts; and 190 did not indicate a discernable preference.¹⁰

After considering the comments from all three comment periods and additional deliberation, the Commission now seeks comment on the proposed changes described in this notice. Other than the issues specified in this notice, the Commission does not, in this rulemaking, propose changes to any other rules adopted by the Commission in the Internet Communications rulemaking of 2006.

B. Current Statutory and Regulatory Framework Concerning Disclaimers

A “disclaimer” is a statement that must appear on certain communications to identify who paid for it and, where applicable, whether the communication was authorized by a candidate. 52 U.S.C. 30120(a); 11 CFR 110.11; see also Disclaimers, Fraudulent Solicitations,

⁹ See Internet Communication Disclaimers; Reopening of Comment Period, 82 FR 46937 (Oct. 10, 2017); see also Internet Communication Disclaimers; Extension of Comment Period, 82 FR 52863 (Nov. 15, 2017) (explaining Commission’s extension of comment period for one business day due to technological difficulties).

¹⁰ Commission staff read and categorized each comment in one of three broad categories: support, oppose, or neutral. “Support” included comments supporting more stringent disclaimer rules; favoring “transparency”; opposing application of the small items or impracticable exceptions to online advertisements; opposing advertising by foreign nationals; opposing Russian interference in the 2016 election; or supporting the “Honest Ads Act” or any of its components. See S. 1989, 115th Cong. (2017). “Oppose” included comments opposing any rulemaking; opposing more stringent disclaimer rules; supporting application of the small items or impracticable exceptions to online advertising; supporting modified disclaimers in lieu of full disclaimers; opposing any restriction of speech, “infringement” of constitutional rights, or “censorship”; or reminding the Commission to read the Constitution. “Neutral” included comments recognizing the value of disclaimers, but noting the difficulty of providing disclaimers online; recommending modified disclaimers in some, but not all, circumstances; appearing to make contradictory statements in support or opposition; presenting unclear statements of preferred action, such as “do the right thing”; or commenting off topic, such as on net neutrality. Comments addressing specific aspects of the current or proposed rules are discussed below, as appropriate.

Civil Penalties, and Personal Use of Campaign Funds, 67 FR 76962, 76962 (Dec. 13, 2002) (“2002 Disclaimer E&J”). The Supreme Court has recognized that disclaimer requirements may burden political speech, and thus must bear a substantial relation to a sufficiently important governmental interest. See Citizens United v. FEC, 558 U.S. 310, 366-67 (2010) (“Citizens United”) (citing Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976) (“Buckley”).

The Court has found that the government’s interest in mandating such disclaimers justifies the accompanying burden on political speech. For example, in approving the disclaimers at issue in Citizens United, the Court explained, “[d]isclaimer and disclosure requirements may burden the ability to speak, but they impose no ceiling on campaign-related activities and do not prevent anyone from speaking. The Court has subjected these requirements to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.” Id. (internal quotation marks and alterations removed). The Court also held that disclaimers “provide the electorate with information and insure that the voters are fully informed about the person or group who is speaking,” and stated that identifying the sources of advertising enables people “to evaluate the arguments to which they are being subjected.” Id. at 368 (internal quotations and alterations removed).

With some exceptions, the Act and Commission regulations require disclaimers for public communications: (1) made by a political committee; (2) that expressly advocate the election or defeat of a clearly identified federal candidate; or (3) that solicit a contribution. 52 U.S.C. 30120(a); 11 CFR 110.11(a). Under existing regulations, the term “public communication” does not include internet communications other than “communications placed for a fee on another person’s Web site.” 11 CFR 100.26. In addition to these internet public communications, “electronic mail of more than 500 substantially similar communications when

sent by a political committee . . . and all Internet websites of political committees available to the general public” also must have disclaimers. 11 CFR 110.11(a).

The content of the disclaimer that must appear on a given communication depends on who authorized and paid for the communication. If a candidate, an authorized committee of a candidate, or an agent of either pays for and authorizes the communication, then the disclaimer must state that the communication “has been paid for by the authorized political committee.” 11 CFR 110.11(b)(1); see also 52 U.S.C. 30120(a)(1). If a public communication is paid for by someone else, but is authorized by a candidate, an authorized committee of a candidate, or an agent of either, then the disclaimer must state who paid for the communication and that the communication is authorized by the candidate, an authorized committee of the candidate, or an agent of either. 11 CFR 110.11(b)(2); see also 52 U.S.C. 30120(a)(2). If the communication is not authorized by a candidate, an authorized committee of a candidate, or an agent of either, then the disclaimer must “clearly state the full name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication, and that the communication is not authorized by any candidate or candidate’s committee.” 11 CFR 110.11(b)(3); see also 52 U.S.C. 30120(a)(3).

Every disclaimer “must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity” of the communication’s sponsor. 11 CFR 110.11(c)(1). While the Act and Commission regulations impose specific requirements for communications that are “printed” or that appear on radio or television, they do not specify additional requirements for disclaimers on internet advertisements. Compare 11 CFR 110.11(c)(1) (general “clear and conspicuous” requirement for all disclaimers), with 11 CFR 110.11(c)(2)-(4) (additional requirements for printed, radio, and television disclaimers) and 52

U.S.C. 30120(c)-(d) (specifications for printed, radio, and television disclaimers).

Commission regulations set forth limited exceptions to the general disclaimer requirements. For example, disclaimers are not required for communications placed on “[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed.” 11 CFR 110.11(f)(1)(i) (“small items exception”). Nor are disclaimers required for “[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.” 11 CFR 110.11(f)(1)(ii) (“impracticable exception”).

C. Application of the Disclaimer Requirements to Internet Communications

1. Development of Current Rule that Paid Internet Advertisements Require Disclaimers

The Commission first addressed disclaimers on internet communications in two 1995 advisory opinions regarding the application of the Act to internet solicitations of campaign contributions. See Advisory Opinion 1995-35 (Alexander for President); Advisory Opinion 1995-09 (NewtWatch PAC).¹¹ The Commission determined that internet solicitations are “general public political advertising”¹² and, as such, they “are permissible under the [Act] provided that certain requirements, including the use of appropriate disclaimers, are met.” Advisory Opinion 1995-35 (Alexander for President) at 2 (characterizing conclusion in Advisory Opinion 1995-09 (NewtWatch PAC)). Later that year, the Commission stated in a rulemaking

¹¹ Documents related to Commission advisory opinions are available on the Commission’s website at www.fec.gov/data/legal/advisory-opinions/.

¹² At the time, 11 CFR 110.11 explicitly applied to “general public political advertising.” The current rule uses the term “public communication” as defined at 11 CFR 100.26, which includes “general public political advertising.”

that “Internet communications and solicitations that constitute general public political advertising require disclaimers,” adding that “[t]hese communications and others that are indistinguishable in all material aspects from those addressed in [Advisory Opinion 1995-09 (NewtWatch PAC)] will now be subject to” the disclaimer requirement. See Communications Disclaimer Requirements, 60 FR 52069, 52071 (Oct. 5, 1995).

The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (“BCRA”), added specificity to the disclaimer requirements (including “stand by your ad” requirements for certain radio and television communications), expanded the scope of communications covered by the disclaimer requirements, and defined a new term, “public communication,” that did not reference the internet. See 52 U.S.C. 30101(22), 30120; see also 2002 Disclaimer E&J, 67 FR at 76962. The Commission promulgated rules to implement BCRA’s changes to the disclaimer provisions of the Act and the new statutory definition of “public communication.” See 2002 Disclaimer E&J, 67 FR at 76962; Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49111 (July 29, 2002) (“Non-Federal Funds E&J”). The 2002 rules incorporated the term “public communication” to describe the general reach of the disclaimer rules and applied the disclaimer requirements to political committees’ websites and distribution of more than 500 substantially similar unsolicited emails. Other than these two specific types of internet-based activities by political committees, however, internet communications were excluded from the regulatory definition of “public communication” and, therefore, outside the scope of the disclaimer requirements that apply to public communications. See 2002 Disclaimer E&J, 67 FR at 76963-64; Non-Federal Funds E&J, 67 FR at 49111.

In 2006, after a court challenge to the regulatory definition of “public communication,” the Commission revised its rules to include internet communications “placed for a fee on another person’s Web site” in the definition of “public communication” and, therefore, within the scope of the disclaimer rule. See 2006 Internet E&J, 71 FR at 18594; see also Shays v. FEC, 337 F. Supp. 2d 28 (D.D.C. 2004) (holding, among other things, that Commission could not wholly exclude internet activity from the definition of “public communication”). The Commission explained that, under the revised definition, “when someone such as an individual, political committee, labor organization or corporation pays a fee to place a banner, video, or pop-up advertisement on another person’s website, the person paying makes a ‘public communication.’” 2006 Internet E&J, 71 FR at 18593-94. Furthermore, the Commission explained that “the placement of advertising on another person’s website for a fee includes all potential forms of advertising, such as banner advertisements, streaming video, popup advertisements, and directed search results.”¹³ Id.; see also id. at 18608 n.52 (noting that, as used in a different context, “terms ‘website’ and ‘any Internet or electronic publication’ are meant to encompass a wide range of existing and developing technology” including “social networking software”). Thus, since 2006, Commission regulations have required disclaimer information to be included in certain paid internet advertisements.

2. Application of Disclaimer Rule to “Small” Internet Communications

The Commission has been asked on a number of occasions about the application of the disclaimer requirement to internet communications, including small, character- or space-limited

¹³ But “when the search results are displayed as a result of the normal function of a search engine, and not based on any payment for the display of a result, the search results are not forms of ‘general public political advertising,’” and “where a search engine returns a website hyperlink in its normal course, and features the same hyperlink separately as the result of a paid sponsorship arrangement, the latter is a ‘public communication’ while the former is not.” 2006 Internet E&J, 71 FR at 18594 n.28.

internet communications such as banner advertisements; social media text, video, or image advertisements; and directed search results. The queries center on whether the communications are exempt from the disclaimer requirements under the impracticable or small items exceptions at 11 CFR 110.11(f)(1) or whether they may incorporate technological modifications to satisfy the disclaimer requirements.¹⁴

The Commission has applied the small items exception to the general disclaimer requirements in situations where there are “technological limitations on both the size and the length of information” that can be contained based on the small physical size of the item or an external technological constraint. Advisory Opinion 2007-33 (Club for Growth PAC) at 3 (declining to extend small items exception to spoken disclaimer requirement); see also Advisory Opinion 1980-42 (Hart for Senate Campaign Committee) (applying the exception to concert tickets); Advisory Opinion 2002-09 (Target Wireless) (applying the exception to character-limited “short message service,” or SMS, communications distributed through a non-internet-based wireless telecommunications network); 11 CFR 110.11(f)(1)(i). In the Target Wireless advisory opinion, the Commission considered whether disclaimers were required on paid content distributed via SMS communications through a non-internet-based wireless telecommunications network. At the time the Commission issued that advisory opinion, technology limited SMS content to 160 text-only characters per message; SMS messages could not include images; wireless telephone carriers contractually required consumers to pay a flat fee for a certain

¹⁴ See Advisory Opinion 2017-12 (Take Back Action Fund); Advisory Opinion 2010-19 (Google); see also Advisory Opinion Request, Advisory Opinion 2013-18 (Revolution Messaging) (Sept. 11, 2013); Advisory Opinion Request, Advisory Opinion 2011-09 (Facebook) (Apr. 26, 2011). In addition to the advisory opinion requests concerning internet advertisements, another advisory opinion request asked the Commission to apply the impracticable exception in support of truncating a political committee’s name in disclaimers on its mass emails and on its website. See Advisory Opinion 2013-13 (Freshman Hold’em JFC et al.) at n.4.

number of SMS messages that consumers could receive; and content longer than 160 text characters would be sent over multiple messages, which might not be received consecutively. Advisory Opinion 2002-09 (Target Wireless) at 2. The Commission concluded that the small items exception applied to paid SMS messages, noting “that the SMS technology places similar limits on the length of a political advertisement as those that exist with bumper stickers.” Id. at 4.

The Commission has not exempted any disclaimers under the small items exception in the 15 years since it issued the Target Wireless advisory opinion. The Commission discussed the small items exception in Advisory Opinion 2007-33 (Club for Growth PAC), which concerned whether an advertiser could “dispense with” or “truncate” the required disclaimers in 10- and 15-second television advertisements. The Commission concluded that the advertisements did not qualify for the small items exception.

The related impracticable exception at 11 CFR 110.11(f)(1)(ii) exempts from the disclaimer requirement advertisements displayed via skywriting, water towers, and wearing apparel, as well as “other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable.” The list of communications in the rule is not exhaustive. The Commission has not, however, applied the impracticable exception to a situation beyond those listed in section 110.11(f)(1)(ii). See Advisory Opinion 2007-33 (Club for Growth PAC) (determining that “physical or technological limitations” in 10- and 15-second television advertisements do not qualify for impracticable exception); Advisory Opinion 2004-10 (Metro Networks) (determining that “live read” traffic report sponsorship messages, delivered by reporters from mobile units and aircraft, did not present “specific physical and technological limitations” to qualify for impracticable exception); see also Advisory Opinion 2013-13

(Freshman Hold'em JFC et al.) at n.4 (concluding that “emails and webpages . . . are not electronic communications in which the inclusion of disclaimers may be inherently impracticable.”).

Nonetheless, in Advisory Opinion 2004-10 (Metro Networks), the Commission recognized that, although the “physical and technological limitations” of a communication medium may “not make it impracticable to include a disclaimer at all,” technological or physical limitations may extend to “one particular aspect of the disclaimer” requirements. Advisory Opinion 2004-10 (Metro Networks) at 3. In such circumstances, the Commission concluded that a disclaimer was required but permitted modifications or adaptations of the technologically or physically limited aspects of the communication medium. See id. at 3-4 (concluding that reporters reading sponsorship message live from aircraft or mobile units could read stand by your ad language, rather than candidate who was not physically present).

The Commission was first asked to apply the small items exception or impracticable exception to text-limited internet advertisements in 2010. Google proposed to sell AdWords search keyword advertisements limited to 95 text characters; the proposed advertisements would not include disclaimers but would link to a landing page (the purchasing political committee’s website) on which users would see a disclaimer. See Advisory Opinion 2010-19 (Google). The Commission concluded that Google’s proposed AdWords program “under the circumstances described . . . [was] not in violation of the Act or Commission regulations,” but the advisory opinion did not answer whether Google AdWords ads would qualify for the small items or impracticable exception. Id. at 2.

In response to two subsequent advisory opinion requests concerning the possible application of the small items exception or impracticable exception to small internet

advertisements, the Commission was unable to issue advisory opinions by the required four affirmative votes. See Advisory Opinion Request, Advisory Opinion 2011-09 (Facebook) (Apr. 26, 2011) (concerning application of exceptions to zero-to-160 text character ads with thumbnail size images); Advisory Opinion Request, Advisory Opinion 2013-18 (Revolution Messaging) (Sept. 11, 2013) (concerning application of exceptions to mobile banner ads).

Finally, the Commission considered an advisory opinion request in 2017 asking whether paid image and video ads on Facebook “must . . . include all, some, or none of the disclaimer information specified by 52 U.S.C. 30120(a).” Advisory Opinion Request at 4, Advisory Opinion 2017-12 (Take Back Action Fund) (Oct. 31, 2017). The Commission issued an opinion concluding that the proposed Facebook image and video advertisements “must include all of the disclaimer information” specified by the Act, but, in reaching this conclusion, Commissioners relied on two different rationales, neither of which garnered the required four affirmative votes. Advisory Opinion 2017-12 (Take Back Action Fund) at 1.

D. Proposed Revision to the Definition of “Public Communication” at 11 CFR 100.26

As discussed above, the Commission proposed in the Technology NPRM to revise the definition of “public communication” in 11 CFR 100.26 to include communications placed for a fee on another person’s “internet-enabled device or application,” in addition to communications placed for a fee on another person’s website. Disclaimers are required for any “public communication” that contains express advocacy or solicits a contribution, and for all public communications by political committees. The Commission wants to make sure that any change to the definition of “public communication” in 11 CFR 100.26 is appropriate as applied in the disclaimer rule, given the complexities of internet advertising and the rapid pace of technological change.

Commenters in this rulemaking have offered insight into, as one described it, the “myriad of options for advertising via different media and different platforms online.”¹⁵ Since the Commission’s 2006 internet rulemaking, the focus of internet activity has shifted from blogging, websites, and listservs¹⁶ to social media networks (Facebook, Twitter, and LinkedIn), media sharing networks (YouTube, Instagram, and Snapchat), streaming applications (Netflix, Hulu), and mobile devices and applications. Other significant developments include augmented and virtual reality¹⁷ and the “internet of things”: wearable devices (smart watches, smart glasses), home devices (Amazon Echo), virtual assistants (Siri, Alexa), smart TVs and other smart home appliances.¹⁸ One commenter noted, “[a]s consumers move toward virtual and augmented reality services, wearable technology, screenless assistants, and other emerging technologies, there is every reason to predict that advertisers will demand the ability to reach voters and customers on those technologies, and, in turn, new advertising configurations that have not yet been imagined will be developed.”¹⁹

Accordingly, the Commission is reopening the definition of “public communication” in 11 CFR 100.26 for the limited purpose of determining whether revising the definition to include communications placed for a fee on another person’s “internet-enabled device or application,” in

¹⁵ Computer & Communications Industry Association, Comment at 9 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358503>.

¹⁶ 2006 Internet E&J at 18590-91; see also Asian Americans Advancing Justice, et al., Comment at 5 (Nov. 13, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=371144> (“In 2006, blogging was at its height, and it seemed as if everyone would have his or her own blog.”).

¹⁷ See Computer & Communications Industry Association, Comment at 9.

¹⁸ See Asian Americans Advancing Justice, et al., Comment at 7 (also noting potential for political advertising on “smart refrigerators”).

¹⁹ Google, Comment at 4-5 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358482>.

addition to communications placed for a fee on another person’s website, would be a clear and technically accurate way to refer to the various media through which paid internet communications can be and will be sent and received. The Commission invites comment on this proposal. Is it clear from the proposed language that both the placement-for-a-fee requirement and the third-party requirement would apply to websites, internet-enabled devices, and internet applications? In this rulemaking, the Commission is not considering any change to the definition of “public communication” other than the terminology that should replace “Web site” as used in the definition.

E. Proposed Revision to the Disclaimer Rules at 11 CFR 110.11

Technological developments over the past 15 years have rendered much current internet advertising distinguishable from the non-internet-based SMS advertisements to which the Commission applied the small items exception in Advisory Opinion 2002-09 (Target Wireless) and from the internet advertisements the Commission considered in promulgating the disclaimer regulations in 2002. As Facebook explained in a comment on this rulemaking, “[w]hen Facebook submitted its request for an advisory opinion in 2011, ads on Facebook were small and had limited space for text. Ad formats available on Facebook have expanded dramatically since that time.”²⁰ Indeed, many internet advertisements today include video, audio, and graphic components in addition to the text components considered in the Target Wireless advisory opinion. See, e.g., Advisory Opinion Request, Advisory Opinion 2017-12 (Take Back Action

²⁰ Facebook noted that some of its ads “continue to be limited in size, with text limitations or truncations based on format and placement of the ad,” but that other formats “allow for additional creative flexibility.” Facebook, Comment at 3 (Nov. 13, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358468> (citing Facebook, Facebook Ads Guide, <https://www.facebook.com/business/ads-guide> (last visited Mar. 15, 2018)); see also Fidji Simo, An Update on Facebook Ads, Facebook Newsroom (June 6, 2013), <https://newsroom.fb.com/news/2013/06/an-update-on-facebook-ads/> (announcing reconfiguration of ad products); Google, Comment at 3 (noting that the “types and varieties of digital advertisements that political advertisers create and place throughout the web has grown exponentially since 2011.”).

Fund) (Oct. 31, 2017). Moreover, today, commercial internet advertisements are subject to other federal regulatory disclosure regimes.²¹ Are the different degrees of First Amendment protection afforded political speech as opposed to commercial speech relevant to any consideration of other agencies' disclosure regimes?²²

As noted above, the Commission's regulations have required disclaimer information to be included in certain paid internet advertisements since 2006. Spending on digital political advertising grew almost eightfold just between 2012 and 2016, from \$159 million to \$1.4 billion.²³ Many commenters expressed the view that the need for internet communication disclaimers has grown along with spending on internet political advertising.²⁴ As one commenter wrote, "[T]he increasing prominence of online election expenditures makes the failure to update campaign finance laws to adequately cover the internet more dangerous with every cycle."²⁵ The dramatic growth in political advertising on the internet highlights the need

²¹ See CMPPLY, Comment at 2 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358493> (noting that regulatory disclaimer and disclosure requirements "have been addressed in similar contexts for marketing, financial and pharmaceutical, without those regulators exempting disclosures in social media channels").

²² See Buckley, 424 U.S. at 14 ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'") (citation omitted); Sorrell v. IMS Health Inc., 564 U.S. 552, 579 (2011) ("[G]overnment's legitimate interest in protecting consumers from 'commercial harms' explains 'why commercial speech can be subject to greater governmental regulation than noncommercial speech'" (citations omitted); Citizens United, 558 U.S. at 329 ("[P]olitical speech . . . is central to the meaning and purpose of the First Amendment.").

²³ See Borrell Associates, The Final Analysis: Political Advertising in 2016, <https://www.borrellassociates.com/industry-papers/free-summaries/borrell-2016-political-advertising-analysis-exec-sum-jan-2017-detail> (subscription required).

²⁴ See, e.g., Sunlight Foundation, Comment at 1 (Nov. 13, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=360854> ("The FEC and Congress should act to ensure disclosures and disclaimers are neither discretionary nor uneven... [D]isclaimers and disclosures don't mean renouncing business or chilling speech, any more than has been the case for TV or radio stations.").

²⁵ Brennan Center for Justice, Comment at 3 (Nov. 13, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358487>.

for regulatory clarity in this area. As one commenter noted, “[w]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary when a new and different medium for communication appears.”²⁶ Other commenters noted that the importance and value of political advertising disclaimers do not vary when new forms of communication emerge.²⁷

Thus, the Commission is proposing to add regulatory provisions clarifying, for various types of paid internet public communications, the disclaimers required and, in certain circumstances, when a paid internet communication may employ a modified approach to the disclaimer requirements.

As explained below, the Commission offers two proposals. They differ in approach.

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. Alternative A also proposes to apply the type of disclaimer requirements that now apply to printed public communications to text and graphic public communications distributed over the internet. Finally, Alternative A would allow certain small text or graphic public communications distributed over the internet to satisfy the disclaimer requirements through an “adapted disclaimer.”

²⁶ Institute for Free Speech, Comment at 3 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358495> (quoting Brown v. Entm’t Merchs. Ass’n, 564 U.S. 786, 790 (2011)).

²⁷ See, e.g., BMore Indivisible, Comment at 5 (Nov. 9, 2017) <http://sers.fec.gov/fosers/showpdf.htm?docid=358504> (stating that “[p]roviding disclaimers o[n] internet and app advertising is an extension of the role the FEC has historically performed for traditional media. Online media advertising transparency is increasingly essential as Americans turn to the internet as their primary source of information”).

Alternative B proposes to treat internet communications differently from communications in traditional media. Alternative B would require disclaimers on internet communications to be clear and conspicuous and to meet the same general content requirement as other disclaimers, without imposing the additional disclaimer requirements that apply to print, radio, and television communications. Alternative B also proposes to allow certain paid internet advertisements to satisfy the disclaimer requirements through an adapted disclaimer, depending on the amount of space or time necessary for a clear and conspicuous disclaimer as a percentage of the overall advertisement. In the event that an advertisement could not provide a disclaimer even through a technological mechanism, Alternative B proposes to create an exception to the disclaimer requirement specifically for paid internet advertisements.

The Commission requests comment on all elements of both proposals. The two proposals need not be considered as fixed alternatives; commenters are encouraged to extract the best elements of each, or suggest improvements or alternatives, to help the Commission fashion the best possible rule.

1. Proposed Disclaimer Requirements for Communications Distributed over the Internet — Organization

Both Alternative A and Alternative B propose to add new paragraph (c)(5) to 11 CFR 110.11. New paragraph (c)(5) in each proposal would provide specific disclaimer requirements for internet communications. This approach would be consistent with the current structure of the disclaimer rule at 11 CFR 110.11, which categorizes disclaimer requirements by the form of communication on which they appear.

In the first paragraph of Alternative B's proposed section (c)(5), Alternative B proposes to define the term "internet communications." Alternative A does not propose to introduce or

define this term. Alternative B’s proposed paragraph (c)(5)(i)(A) defines “internet communications” as email of more than 500 substantially similar communications when sent by a political committee; internet websites of political committees available to the general public; and “internet public communications” as defined in paragraph (c)(5)(i)(B). Alternative B’s proposed paragraph (c)(5)(i)(B) defines “internet public communication,” in turn, as any communication placed for a fee on another person’s website or internet-enabled device or application. Alternative B’s proposed definition of “internet communication” is intended to capture all communications distributed via the internet that are subject to the disclaimer requirement. See 11 CFR 110.11(a)(1)-(3). Alternative B’s proposed definition of “internet public communication” is intended to capture all online “public communications,” as defined in 11 CFR 100.26. Are the proposed definitions sufficiently broad to encompass new technologies? Are they platform-neutral? Should the definition of “internet public communication” include a reference to virtual reality, social networking, or internet platforms?

Both Alternative A and Alternative B propose to define additional terms: “adapted disclaimer,” “technological mechanism,” and “indicator.” These terms are discussed below.

2. Disclaimer Requirements for Video and Audio Communications Distributed over the Internet

As described below, Alternative A proposes to extend the specific requirements for disclaimers on radio and television communications to public communications distributed over the internet with audio or video components. Under Alternative A, such audio and video internet public communications would also be required to satisfy the general requirements that apply to all public communications requiring disclaimers. Alternative B likewise proposes to require that radio and television communications distributed over the internet must satisfy the general

requirements that apply to all public communications requiring disclaimers. Alternative B would not extend any additional disclaimer requirements to such communications.

a. Alternative A — Proposed 11 CFR 110.11(c)(5)(ii)

As noted above, the Act and Commission regulations impose specific requirements for disclaimers on radio and television communications. See 52 U.S.C. 30120(d); 11 CFR 110.11(c)(3)-(4). These requirements vary, depending on whether a candidate or another person pays for or authorizes the communication.

Radio communications paid for or authorized by a candidate must include an audio statement spoken by the candidate, identifying the candidate and stating that the candidate has approved the communication. 11 CFR 110.11(c)(3)(i). Radio communications that are not paid for or authorized by a candidate must include an audio statement identifying the person paying for the communication and that that person “is responsible for the content of this advertising.” 11 CFR 110.11(c)(4)(i).

Television, broadcast, cable, or satellite communications paid for or authorized by a candidate must include a statement by the candidate, identifying the candidate and stating that the candidate has approved the communication, either through a full-screen view of the candidate making the statement or by a voice-over accompanied by a “clearly identifiable photographic or similar image” of the candidate; these communications must also include a similar statement “in clearly readable writing” at the end of the communication. 11 CFR 110.11(c)(3)(ii)-(iii).

Television, broadcast, cable, or satellite communications that are not paid for or authorized by a candidate must include the audio statement required by 11 CFR 110.11(c)(4)(i) and conveyed by a “full-screen view of a representative” of the person making the statement or in a voice-over by

such person; these communications must also include a similar statement “in clearly readable writing” at the end of the communication. 11 CFR 110.11(c)(4)(ii)-(iii).²⁸

As noted above, internet advertisements may be in the form of audio or video communications, or may incorporate audio or video elements.²⁹ Alternative A is based on the premise that these 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.³⁰ Moreover, because the audio and video components of internet communications with these elements do not contain “character” restrictions, Alternative A proposes to apply parameters to such communications akin to the parameters in which disclaimers must appear on radio and television advertisements rather than the conditions that may constrain “printed” materials on which a disclaimer must appear.

²⁸ The Commission previously extended the “stand by your ad” requirements to communications transmitted through broadcast, cable, or satellite transmission. See 2002 Disclaimer E&J, 67 FR at 76963 (referring to “the Commission’s judgment that it would be unsupportable to require a disclaimer for a television communication that was broadcast, while not requiring a disclaimer for the same communication merely because it was carried on cable or satellite”).

²⁹ See, e.g., 5 Advertising Trends from the 2016 Presidential Election, Pandora for Brands (Dec. 8, 2016), <http://pandoraforbrands.com/insight/5-advertising-trends-from-the-2016-presidential-election> (urging readers “[t]o learn how Pandora can help amplify your next political campaign”); Amy Schatz, In Hot Pursuit of the Digital Voter, Wall St. J., Mar. 23, 2012, www.wsj.com/articles/SB10001424052702303812904577299820064048072 (showing screenshots of 2012 presidential committee advertisements on Hulu and noting another campaign’s purchase of advertisements on Pandora internet radio); see also Advisory Opinion Request at 4, Advisory Opinion 2017-12 (Take Back Action Fund) (Oct. 31, 2017).

³⁰ See, e.g., Electronic Privacy Information Center, Comment at 3 (Nov. 3, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358477> (urging extension of broadcast communication disclaimer requirements to “analogous” communication online); Rep. John Sarbanes et al., Comment at 2 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358505> (noting belief of 18 Members of Congress that “it is past time for the Commission to take action to harmonize disclaimer requirements for paid internet communications, regardless of size, on internet platforms with advertisements served on other media, such as broadcast television or radio”); accord 2006 Internet E&J, 71 FR at 18609 (“The Commission has consistently viewed online, Internet-based dissemination of news stories, commentaries, and editorials to be indistinguishable from offline television and radio broadcasts, newspapers, magazines and periodical publications for the purposes of applying the media exemption under the Act”); but see Software and Information Industry Association, Comment at 3 (Nov. 13, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358508> (“Digital advertising is inherently more diverse than a simple transition of similar content from print or broadcast television.”).

Accordingly, in Alternative A, the Commission proposes to provide that public communications distributed over the internet with audio or video components are treated, for purposes of the disclaimer rules, the same as “radio” or “television” communications. The Commission, in Alternative A, proposes to do so in proposed paragraph (c)(5)(ii), which would incorporate the existing requirements at 11 CFR 110.11(c)(3) and (4) that apply to radio, television, broadcast, cable, and satellite communications, because those provisions have been in operation for 15 years and are, therefore, familiar to persons paying for, authorizing, and distributing communications. Moreover, by 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.

Alternative A’s proposed paragraph (c)(5)(ii) would provide that a “public communication distributed over the internet with audio but without video, graphic, or text components” must include the statement described in 11 CFR 110.11(c)(3)(i) and (iv) if authorized by a candidate, or the statement described in 11 CFR 110.11(c)(4) if not authorized by a candidate.

Alternative A’s proposals concerning audio communications (like Alternative A’s proposals for video, text, and graphic internet communications discussed below) incorporate the term “public communication,” as it exists or may be amended, to make clear that these provisions neither expand nor contract the scope of the disclaimer rules set forth at 11 CFR 110.11(a). The proposed reference to “a public communication distributed over the internet with an audio component but without video, graphic, or text components” (like the reference to the “internet” in Alternative A’s proposals for video, text, and graphic internet communications

discussed below) is intended to encompass advertisements on websites as well as those distributed on other internet-enabled or digital devices or applications; for audio internet advertisements, these would include communications on podcasts, internet radio stations, or app channels.³¹ The proposed reference to a “public communication distributed over the internet” is not intended to alter the definition of “public communication,” as defined in 11 CFR 100.26. Is this clear, or should the Commission include a cross-reference in the regulatory text? Moreover, so as to hew most closely to the “radio” provisions that Alternative A incorporates, the proposed amendments regarding “audio” internet communications are intended to apply to those communications with only an audio component. The Commission proposes to address communications with any “video, graphic, or text components” separately, as explained below.

Alternative A’s proposed paragraph (c)(5)(ii) would also provide that a “public communication distributed over the internet with a video component” must include the statement described in 11 CFR 110.11(c)(3)(ii)-(iv) if authorized by a candidate, or the statement described in 11 CFR 110.11(c)(4) if not authorized by a candidate.

Because this proposal is intended to encompass video public communications on websites, apps, and streaming video services, Alternative A’s proposed new paragraph (c)(5)(ii) would apply to a video that a political committee pays to run as a “pre-roll” video on the YouTube app or appear in a promoted YouTube.com search result, but would not apply to the same video posted for free on YouTube.com (since a communication not placed for a fee would not be a “public communication”).³² Unlike traditional television, broadcast, cable, or satellite

³¹ See Software and Information Industry Association, Comment at 3 (“in-app advertising has become one of the fastest-growing mobile ad mediums”).

³² See Google, Comment at 3 (describing Google ad products on YouTube).

ads, however, video advertisements placed online may include non-video components such as separate text, or graphic fields. The proposed rule regarding internet video ads thus would differ from the existing television, broadcast, cable, and satellite provisions in that the proposed rule would apply even if the communication also included non-video components.

This aspect of Alternative A would not explicitly address small audio or video internet ads. The Commission proposes to take this approach to how Alternative A's proposed rules on audio and video ads as closely as possible to the existing disclaimer provisions for advertisements transmitted by radio, television, broadcast, cable, and satellite, which do not, in paragraphs (c)(3) or (4), account for "small" advertisements. Should new technology develop that would render the provision of a disclaimer on a particular type of audio or video internet communication impracticable, the Commission anticipates that, as with current TV and radio ads, such circumstances could be addressed in an advisory opinion seeking to exempt such a communication from the disclaimer requirements.³³

The Commission seeks comment as to whether these proposals accurately describe audio and video communications over the internet, regardless of the electronic or digital platforms on which they may be distributed. For example, does the Commission need to clarify or expand the term "internet"? Similarly, does the Commission need to clarify the term "video" to address whether an advertisement with a GIF is a communication "with a video component" or one with a "graphic" component? Similarly, should the Commission expressly include or exclude from the term "video" static (*i.e.*, non-moving) paid digital advertisements in dynamic (*i.e.*, moving)

³³ See 11 CFR 112.1 (describing advisory opinion requests); see also Advisory Opinion 2007-33 (Club for Growth PAC) (considering and rejecting request to apply small items exception to disclaimers in 10- and 15-second television advertisements).

environments such as “billboard” ads inside interactive gaming systems, or virtual-reality and augmented-reality platforms?³⁴

The Commission also welcomes comment on any aspect of these proposals, including the approach towards the exceptions and, more generally, the advisability of treating audio and video internet communications in the manner that radio, television, broadcast, cable, and satellite communications are treated.

b. Alternative B — Proposed paragraph (c)(5)(ii)

The proposals in Alternative B are premised on the internet as a “unique medium of . . . communication[]”³⁵ that poses “unique challenges with respect to advertising disclosures.”³⁶ Although advertisements on the internet may often look or sound like television or radio advertisements, several commenters focused on the differences between internet advertising and advertising on more traditional forms of media. As one stated, “[d]igital advertising is inherently more diverse than a simple transition of similar content from print or broadcast television. It comes in many different formats presented across a wide range of technology platforms with screen size ranging from large to very small.”³⁷ Another commenter noted that, “[i]n addition to character-limited ads that just feature text, there are banner ads with images and text, video ads with text, and audio ads that also feature a corresponding interactive image or video on an

³⁴ See, e.g., Steve Gorman, Obama Buys First Video Game Campaign Ads, Reuters, Oct. 17, 2008, <https://www.reuters.com/article/us-usa-politics-videogames/obama-buys-first-video-game-campaign-ads-idUSTRE49EAGL20081017> (showing example of static court-side ad in dynamic basketball gaming environment).

³⁵ Public Citizen and Free Speech for People, Comment at 3 (Nov. 1, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358485> (expressing the view that “disclaimers on all forms of on-line paid campaign advertising are practical and pose little inconvenience” to sponsors or recipients); see also id. at 1 (referring to “the unique medium of Internet communications” in urging Commission to proceed with rulemaking).

³⁶ Software & Information Industry Association, Comment at 3.

³⁷ Id.

app.”³⁸ A third commented on the “nearly infinite range . . . of possible combinations of hardware, software, add-ons, screen sizes and resolutions, individualized settings, and other factors . . . can affect the display of a political communication” on the internet.³⁹ “Content that is optimized for viewing on phones, tablets, and other mobile devices is distinct from content that appears on a desktop or laptop computer.”⁴⁰ The “ways people physically interact with content also vary by medium (e.g., a user can ‘rollover’ content on a desktop screen to see more information, but may not use a mouse or view rollovers on a mobile device).”⁴¹ In addition, internet advertisements can vary significantly in duration. Internet ads can last for as little as “fifteen seconds . . . or even shorter,” and entire ad campaigns can last for as little as “a few days or just a few hours for events like flash sales.”⁴² Moreover, “[p]aid advertising on the Internet is constantly evolving in nature.”⁴³

Given the rapid pace of technological change and an inability to forecast the future, the revisions to the disclaimer rules proposed in Alternative B are intended to recognize the differences between the internet and traditional forms of media like newspapers, radio, and

³⁸ Computer & Communications Industry Association, Comment at 9.

³⁹ Coolidge-Reagan Foundation, Comment at 5 (Nov. 8, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358499>.

⁴⁰ Facebook, Comment at 2.

⁴¹ Id.

⁴² Computer & Communications Industry Association, Comment at 11.

⁴³ Public Citizen and Free Speech for People, Comment at 3; see also American Federation of Labor and Congress of Industrial Organizations, et al., Comment at 2 (Dec. 19, 2016), <http://sers.fec.gov/fosers/showpdf.htm?docid=354341> (“Since the technology of the Internet is rapidly changing, and will likely continue to do so indefinitely, the Commission’s rules in this area must be sufficiently flexible and principle-focused so they do not become obsolete in short order.”).

television.⁴⁴ Thus, Alternative B’s proposed paragraph (c)(5)(ii) would require disclaimers on internet communications to meet the general content requirements in 11 CFR 110.11(b) and the general “clear and conspicuous” requirement of 11 CFR 110.11(c)(1), but not the additional “stand by your ad” requirements for radio and television communications.⁴⁵

The Act requires all disclaimers to provide payment and authorization information, regardless of the form that the communication may take, but imposes additional “stand by your ad” requirements only on television and radio communications.⁴⁶ Does the Commission have the legal authority to extend those requirements to internet communications?⁴⁷ If so, should the Commission exercise that authority? Or, as a practical matter, do the differences between internet advertising and radio and television advertising make the “stand by your ad” requirements a poor fit for audio and video public communications on the internet? Some commenters in this rulemaking indicated that the internet is a continuously evolving advertising

⁴⁴ See Center for Competitive Politics, Comment at 3 (Dec. 19, 2016), <http://sers.fec.gov/fosers/showpdf.htm?docid=354344>; see also Campaign Solutions, Comment at 1 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=365826> (“As new and disruptive technologies change the way we interact with technology and consume media, we are sometimes unable to anticipate the format of political advertising.”); Computer & Communications Industry Association, Comment at 13 (“Campaigns are constantly trying new methods to appeal to new voters, and political campaign communication and advertising methods change with every election cycle. As technology develops, new forms of advertising could become available.”).

⁴⁵ See Electronic Frontier Foundation, Comment at 2 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358498>; see also Google, Comment at 4 (“unlike broadcast advertising, which involves an advertiser providing a static advertisement to the broadcaster that is the same ad every time it airs, digital ads can be dynamic”); Coolidge-Reagan Foundation, Comment at 4 (“Any Internet-related regulations should afford speakers maximum flexibility in satisfying any applicable disclaimer requirements, rather than being tied to specific forms of communication that may become superseded or outmoded.”). But see supra n.30 and comments cited therein.

⁴⁶ Compare 52 U.S.C. 30120(d) (imposing “stand by your ad” requirements on radio and television communications only) with 30104 (requiring Commission to make disclosure reports publicly available on internet), 30112 (requiring Commission to maintain central site on internet).

⁴⁷ The recently introduced Honest Ads Act would amend the Act by requiring, among other things, disclaimers on internet communications to comply with the same “stand by your ad” requirements as radio and television communications. See S. 1989, 115th Cong. § 7(b) (2017).

medium with a wide range of platforms, formats, displays, duration, and interactivity. Are the “stand by your ad” requirements for television and radio communications overly inflexible by comparison?⁴⁸ For example, television advertisements must have both spoken and written disclaimers. One commenter estimated that the spoken disclaimer can take five or more seconds to deliver,⁴⁹ and the Act requires the written disclaimer to appear “in a clearly readable manner ... for a period of at least 4 seconds.”⁵⁰ Is it reasonable to impose these requirements on paid internet advertisements?⁵¹ Should audio or video internet ads that are very short be required to provide full “stand by your ad” disclaimer information, as the Commission has decided in the television advertising context?⁵² Does requiring a candidate or other individual representing the payor to claim responsibility for a communication by image or voice-over (as is currently required for radio and television communications) impose an additional burden on the person making the communication? Is this the type of obligation that courts have approved in television

⁴⁸ See, e.g., 52 U.S.C. 30120(d)(1)(B) (requiring television advertisement authorized by candidate to provide disclaimer through “unobscured, full-screen view of the candidate making the statement, or the candidate in voice-over, accompanied by a clearly identifiable photographic or similar image of the candidate,” and “in writing at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds”), 30120(d)(2) (requiring television advertisement not authorized by candidate to provide disclaimer “conveyed by an unobscured, full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over, and shall also appear in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period of at least 4 seconds”).

⁴⁹ See Computer & Communications Industry Association, Comment at 11.

⁵⁰ 52 U.S.C. 30120(d)(1)(B)(ii), (d)(2) (emphasis added); see also 11 CFR 110.11(c)(3)(iii)(B), (c)(4)(iii)(B).

⁵¹ See Computer & Communications Industry Association, Comment at 11 (stating that audio advertisements on internet “could be fifteen seconds in length or even shorter” and urging Commission to “avoid rigidly extending broadcast radio spoken-word disclaimer requirements for radio to online platforms”).

⁵² See Advisory Opinion 2007-33 (Club for Growth PAC) (requiring full stand-by-your-ad disclaimers in 10- and 15-second television advertisements).

and radio advertising? What additional information, if any, does this requirement convey to a reader, viewer, or listener about the source of the communication?

3. Disclaimer Requirements for Text and Graphic Communications Distributed over the Internet

As described below, Alternative A proposes to extend to text and graphic public communications distributed over the internet that lack any video component the specific requirements for disclaimers on printed public communications. Under Alternative A, such text and graphic public communications would also be required to satisfy the general requirements that apply to all public communications requiring disclaimers. Alternative B proposes to require all public communications distributed over the internet, including text and graphic public communications, to satisfy the general requirements that apply to all public communications requiring disclaimers, and does not propose to extend any additional disclaimer requirements to such communications.

a. Alternative A

i. Proposed 11 CFR 110.11(c)(5)(i)

Internet advertisements may be in the form of text, image, and other graphic elements with audio but without video components; such advertisements come “in all shapes and sizes.”⁵³

Alternative A proposes to adapt the existing requirements at 11 CFR 110.11(c)(2) that apply to printed communications because they have been in operation for 15 years and are, therefore, familiar to persons paying for, authorizing, and distributing communications.

⁵³ Google, Comment at 5 (describing ad products on the Google Display Network); see also Advisory Opinion Request 2017-12 (Take Back Action Fund) at 4.

Alternative A's proposed new paragraph (c)(5)(i) would provide that a "public communication distributed over the internet with text or graphic components but without any video component" must contain a disclaimer that is of "sufficient type size to be clearly readable by the recipient of the communication," a requirement adapted from 11 CFR 110.11(c)(2)(i). Alternative A's proposed paragraph (c)(5)(i) would further specify this "text size" requirement by providing that a "disclaimer that appears in letters at least as large as the majority of the other text in the communication satisfies the size requirement." Finally, Alternative A's proposed paragraph (c)(5)(i) would require that a disclaimer be displayed "with a reasonable degree of color contrast between the background and the text of the disclaimer," a requirement the proposal indicates would be satisfied if the disclaimer "is displayed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest text used in the communication." These proposals are adapted from 11 CFR 110.11(c)(2)(iii).

ii. Text or Graphic Internet Communications with Video or Audio Components

The proposal in Alternative A regarding a public communication distributed over the internet "with text or graphic components but without any video component" is intended to work in conjunction with Alternative A's video proposal discussed above; under the operation of both of these parts of Alternative A, an internet communication that contains both text or graphic elements and a video component would be subject only to the specific disclaimer rules applicable to television, broadcast, cable, and satellite communications that are incorporated into Alternative A's proposed paragraph (c)(5)(ii). The Commission seeks comment on this proposal. In particular, the Commission seeks comment regarding how users interact with internet

advertisements that contain both text or graphic and video elements. Is it common for users to view only the printed or video components of an internet advertisement that contains both? Should the Commission require that such communications include at least an adapted disclaimer, see below, on the face of the text or graphic element? Do such adapted disclaimers provide adequate transparency? How important is it for adapted disclaimers to provide information sufficient to identify the communication's payor on the communication's face? Would a hyperlink in a communication be a reliable way to identify the payor or could hyperlinks prove to be transient? Could an indicator be used to defeat disclosure by linking to, for example, goo.gl/nRk1H1 at publication and then, once a complaint is filed with the Commission, to an actual political committee's website? Should the Commission consider other approaches, such as allowing political committees to identify themselves in adapted disclaimers with their FEC Committee ID numbers? Should or could the Commission require the hyperlinks on the adapted disclaimers of political committees to connect to the committees' fec.gov pages?⁵⁴ Should the Commission adopt rules that require a disclaimer to be included on either the text and graphic portion or the video portion of an internet advertisement, or on both portions, depending on the proportion of the advertisement that contains each type of content? Alternatively, should the rules allow an advertiser the choice between the "television" or "text and graphic" communication disclaimer rules for an internet communication that contains both video and text or graphic components?

Similarly, under the operation of the "text or graphic" and audio proposals in Alternative A, an internet communication that contains both text and graphic elements and an audio, but not

⁵⁴ For example: <https://www.fec.gov/data/committee/C00580100/?tab=about-committee>, where "C00580100" is the organization's Committee ID.

a video, component, would be subject to the specific disclaimer rules applicable only to text or graphic communications. Alternative A does not propose to include such communications in the proposed “audio” rules because such advertisements appear more like text or graphic communications than “radio” ones. The Commission seeks comment on this proposal. In particular, and as with the proposal above, the Commission seeks comment regarding how users interact with internet advertisements that contain both text or graphic and audio elements. Is it common for users only to view the printed components or listen to the audio components of an internet advertisement that contains both? Should the Commission instead consider such advertisements under the “audio” proposals discussed above? Should the Commission require that such communications include both “radio” and text or graphic disclaimers? Should the Commission adopt rules that require disclaimer to be included in either the “text or graphic” or audio portion of an internet advertisement, or on both portions, depending on the proportion of the advertisement that contains each type of content? Alternatively, should the rules allow an advertiser the choice between the “radio” or “text or graphic” communication disclaimer rules for an internet communication that contains both audio and text or graphic components?

iii. Text and Graphic Internet Communication Disclaimer Text Size

Safe Harbor

Alternative A proposes to establish a “safe harbor” provision identifying disclaimer text size — “letters at least as large as the majority of the other text in the communication” — that clearly satisfies the rule. This would track the current approach for “printed” materials. See 2002 Disclaimer E&J, 67 FR 76965 (describing current 12-point type safe harbor for printed communication disclaimers); cf. Advisory Opinion 1995-09 (NewtWatch PAC) at 2 (approving disclaimer on political committee’s website that was “printed in the same size type as much of

the body of the communication”). The Commission recognizes that some text or graphic internet communications may not have a “majority” text size. The possible diversity of text sizes in internet text and graphic communications is, in this respect, similar to text size diversity in printed communications currently addressed in 11 CFR 110.11(c)(2)(i). As the Commission explained when adopting the current safe harbor in lieu of a strict size requirement, “the vast differences in the potential size and manner of display of larger printed communications would render fixed type-size examples ineffective and inappropriate.” 2002 Disclaimer E&J, 67 FR 76965. Thus, for internet communications with text or graphic components that are not included in the proposed text-size safe harbor, the intent behind Alternative A is that questions of whether a disclaimer is of sufficient type size to be clearly readable would be “determined on a case-by-case basis, taking into account the vantage point from which the communication is intended to be seen or read as well as the actual size of the disclaimer text,” as they are under the current rule for printed materials. Id. Would the use of metrics minimize the need for case-by-case determinations?

b. Alternative B — Proposed 11 CFR 110.11(c)(5)(ii)

Alternative B proposes to treat graphic, text, audio, and video communications on the internet equally for disclaimer purposes. Under proposed paragraph (c)(5)(ii) in Alternative B, disclaimers for all such communications would have to meet the general content requirement of 11 CFR 110.11(b) and be “clear and conspicuous” under 11 CFR 110.11(c)(1), including disclaimers for graphic and text communications on the internet. Thus, the disclaimers would have to be “presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication,” 11 CFR 110.11(c)(1). Under Alternative B,

disclaimers could not be difficult to read or hear, and their placement could not be easily overlooked. Id. Is Alternative B’s proposal to treat internet communications differently from print, radio, and TV communications for disclaimer purposes a reasonable approach to address current internet advertisements and future developments in internet communications?

Alternative B does not propose to create any safe harbors. The intent behind Alternative B is to establish objective criteria that would cover all situations and minimize the need for case-by-case determinations. Would safe harbors nonetheless be helpful in interpreting and applying the proposed rule? Or do safe harbors tend to become the de facto legal standard applied in advisory opinions and enforcement actions?

4. Adapted Disclaimers for Public Communications Distributed over the Internet

Alternatives A and B both propose that some public communications distributed over the internet may satisfy the disclaimer requirement by an “adapted disclaimer,” which includes an abbreviated disclaimer on the face of the communication in conjunction with a technological mechanism that leads to a full disclaimer, rather than by providing a full disclaimer on the face of the communication itself. Some aspects of both proposals are similar, and some are different, in ways highlighted below.

The discussion in this section explains the Commission’s alternative proposals for when a public communication distributed over the internet may utilize an adapted disclaimer.

Alternative A allows the use of an adapted disclaimer when a full disclaimer cannot fit on the face of a text or graphic internet communication due to technological constraints. Alternative B allows the use of an adapted disclaimer when a full disclaimer would occupy more than a certain percentage of any internet public communication’s available time or space. Under Alternative B, the first tier of an adapted disclaimer would require the identification of the payor plus an

indicator on the face of the communication. Alternative B’s second tier adapted disclaimer would require only an indicator on the face of the communication.

a. Alternative A — Proposed 11 CFR 110.11(c)(5)(i)(A): When a Communication May Use Technological Adaptations

While current text and graphic internet advertisements are akin in many respects to analog printed advertisements, material differences between them remain. Most significant among these differences are the availability of “micro” sized text and graphic internet advertisements and the interactive capabilities of advertisements over the internet.⁵⁵ To ensure the disclaimer rules remain applicable to new forms of internet advertising that may arise, while also reducing the need for serial revisions to Commission regulations in light of such developments, Alternative A proposes adopting a provision specifically addressing those text and graphic internet advertisements that cannot, due to external character or space constraints, practically include a full disclaimer on the face of the communication. See Advisory Opinion 2004-10 (Metro Networks) at 3 (concluding that modifications or adaptations to disclaimers may be permissible in light of technologically or physically limited aspects of a communication).

Accordingly, under Alternative A’s proposed paragraph (c)(5)(i)(A), a “public communication distributed over the internet with text or graphic components but without any video component” that, “due to external character or space constraints,” cannot fit a required disclaimer must include an “adapted disclaimer.” This provision would explain the

⁵⁵ See Public Citizen and Free Speech for People, Comment at 3 (noting that paid online communications by “bots” “can be very short and seamlessly integrated into social conversations. Absent disclaimers, such messages are not likely to be perceived as paid messages”); see also Spot-On, Comment at 8 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358480> (noting that “all [online] ads link to some sort of web page or presence”).

circumstances under which a communication may use technological adaptations, describe how the adaptations must be presented, and provide examples of the adaptations.

Under Alternative A, the determination of whether a public communication distributed over the internet with text or graphic components but without any video component cannot fit a full disclaimer is intended to be an objective one. That is, the character or space constraints intrinsic to the technological medium are intended to be the relevant consideration, not the communication sponsor's subjective assessment of the "difficulty" or "burden" of including a full disclaimer. As the Supreme Court has held in the context of broadcast advertisements, the government's informational interest is sufficient to justify disclaimer requirements even when a speaker claims that the inclusion of a disclaimer "decreases both the quantity and effectiveness of the group's speech." Citizens United, 558 U.S. at 368. Alternative A is built upon the proposition that the informational interest relied upon by the Supreme Court with respect to broadcast communications is equally implicated in the context of text and graphic public communications distributed over the internet.

Alternative A's reference to "external character or space constraints" is intended to codify the approach to those terms as the Commission has discussed them in the context of the small items and impracticable exceptions discussed above. See, e.g., Advisory Opinion 2007-33 (Club for Growth PAC) at 3 (contrasting lack of "physical or technological limitations" constraining 10- and 15-second television advertisements with "overall limit" and "internal limit" on size or length of SMS ads); Advisory Opinion 2004-10 (Metro Networks) at 3 (discussing "physical and technological limitations" of ad read live from helicopter). This approach to determining when a communication cannot fit a required disclaimer — rather than by the particular size of the communication as measured by pixels, number of characters, or

other measurement — is intended to minimize the need for serial revisions to Commission regulations as internet technology may evolve. Should existing or newly developed internet advertising opportunities raise questions as to whether a particular communication may fit a disclaimer, the intent behind Alternative A is that such questions may be addressed in an advisory opinion context.⁵⁶ Would this approach provide sufficient clarity about the application of the disclaimer requirement, and the disclaimer exceptions, to particular communications? Should Alternative A, if adopted, preclude the use of the small items and impracticable exceptions for internet public communications?

Does the “external character or space constraints” approach provide sufficiently clear guidance in light of existing technology or technological developments that may occur? Is it clear what “cannot fit” means in the proposed rule? Should the Commission adopt a safe harbor indicating that ads with particular pixel size, character limit, or other technological characteristic may use adapted disclaimers? Or do safe harbors tend to become the de facto legal standard in advisory opinions and enforcement actions? If the Commission were to adopt either a bright-line rule or a safe harbor based on pixel size, character limit, or other technological characteristic, what should those technological limits be? Does the “external character or space constraints” wording make clear that business decisions to sell small ads that are not constrained by actual technological limitations do not justify use of an adapted disclaimer? Are there circumstances under which requiring a full disclaimer to appear on the face of an internet ad would cause the speaker to curtail his or her message, or purchase a larger ad, or run the ad on a different platform? Are there circumstances under which such a requirement would discourage the speaker from running the ad at all? Is there anything about advertising on the internet that would

⁵⁶ See 11 CFR 112.1.

warrant a different conclusion than courts have reached in upholding the Act’s disclaimer requirements on political advertising in other media?

b. Alternative B — Proposed 11 CFR 110.11(c)(5)(ii)-(iv): When a Communication May Use Technological Adaptations

In applying the disclaimer rules to internet public communications, Alternative B proposes to allow any form of paid internet advertisement — including audio and video ads — to utilize an adapted disclaimer under certain conditions.⁵⁷ Alternative B proposes to establish a bright-line rule to help speakers determine for themselves when they may utilize an adapted disclaimer.⁵⁸ The “bright line” is determined by the amount of time or space necessary to provide a full disclaimer in an internet public communication as a percentage of the overall communication.⁵⁹ Proposed paragraph (c)(5)(iii) in Alternative B suggests “ten percent of the time or space in an internet communication” as the appropriate amount. If the amount of time or space necessary for a clear and conspicuous disclaimer exceeds ten percent, then the speaker may, under Alternative B, provide an adapted disclaimer. Is ten percent a reasonable figure, or is

⁵⁷ Neither Alternative proposes to allow political committees to provide disclaimers through a technological mechanism for their email of more than 500 substantially similar communications or their internet websites available to the general public.

⁵⁸ See, e.g., Facebook, Comment at 3 (encouraging “a regulatory approach that provides advertisers flexibility to meet their disclaimer obligations in innovative ways that take full advantage of the technological advances in communication the Internet makes possible”); Campaign Legal Center and Democracy 21, Comment at 2 (Nov. 14, 2011), <http://sers.fec.gov/fosers/showpdf.htm?docid=98749> (“Innovation, not exemption, is the answer.”); American Federation of Labor and Congress of Industrial Organizations et al., Comment at 2 (“[R]ules in this area must be . . . flexible and principle-focused The challenge is to achieve both public informational goals and provide sufficient clarity to speakers about the rules so there is both informed compliance and predictable enforcement”); Computer & Communications Industry Association, Comment at 14 (“CCIA cautions against regulatory action that does not allow for flexible solutions”); Software & Information Industry Association, Comment at 4 (urging “a flexible and diverse set of transparency practices that evolve and innovate as digital content offerings and advertising profiles continue to evolve”).

⁵⁹ Commission regulations also apply a time-space approach to attributing expenditures for publications and broadcast communications to more than one candidate. See 11 CFR 106.1(a).

it too high or too low?⁶⁰ Should the Commission adopt a different benchmark for allowing political speakers to use available technology to provide disclaimers for their internet public communications? Is Alternative B’s proposed approach sufficiently clear to enable speakers to administer it for themselves rather than seek advisory opinions before engaging in political advertising online?

To provide clarity in determining whether a speaker may utilize an adapted disclaimer, proposed paragraph (c)(5)(ii) in Alternative B also proposes objective standards for use in measuring time and space. For internet public communications consisting of text, graphics, or images, Alternative B proposes to use characters or pixels. For internet public communications consisting of audio and video, Alternative B proposes to use seconds. These proposals are based on the Commission’s experience with such communications in the advisory opinion context.⁶¹ The Commission has limited expertise in the technical aspects of internet advertising, however. Are the proposed metrics of characters, pixels, and seconds a reasonable way to measure space and time in paid internet advertisements? If they are, then are they sufficiently flexible to remain

⁶⁰ Some commenters suggested different levels at which providing a disclaimer becomes unduly burdensome. See Cause of Action, Comment at 4-5 (Nov. 14, 2017) <http://sers.fec.gov/fosers/showpdf.htm?docid=98750> (explaining that California’s disclaimer requirement, “while minimal, still takes around 15% of a Google advertisement,” which “carr[ies] a high cost of character space, even to the point of overshadowing the communication itself”); Center for Competitive Politics, Comment at 4 (urging the Commission to “excuse disclaimers in any Internet advertising product where the number of characters needed for a disclaimer would exceed 4% of the characters available in the advertising product, exclusive of those reserved for the ad’s title”) (internal quotations omitted); Institute for Free Speech, Comment at 4 (same); see also American Federation of Labor and Congress of Industrial Organizations, et al., Comment at 2 (“In no case should the disclaimer rules compel a diminution of the speaker’s message itself in order to accommodate the disclaimer; and, that principle should determine whether or not an Internet advertisement . . . may omit the full, statutorily required language, and instead link to a disclaimer as the routine solution.”). Certain aspects of Federal Communications Commission rules employ a bright line for certain political advertisement sponsorship statements. See e.g., 47 CFR 73.1212 (requiring sponsors of political advertising broadcast via television to be identified with letters that are equal to or greater than 4% of the vertical picture height).

⁶¹ See Advisory Opinion 2017-12 (Take Back Action Fund); Advisory Opinion Request 2013-18 (Revolution Messaging), Advisory Opinion Request 2011-09 (Facebook); Advisory Opinion 2010-19 (Google).

relevant as technology changes, or are they likely to become obsolete? Should the rule, instead, specify a percentage of space or time without identifying the units of measurement? Would that provide sufficient clarity for speakers to be able to determine for themselves when they can utilize an adapted disclaimer? The Commission also seeks comment on how it should measure the time and space that a disclaimer occupies on an internet advertisement containing both text or graphic and audio or video elements. Should the Commission's disclaimer regulations explicitly address such advertisements? If so, how? Additionally, how should the Commission measure pixels, characters, and seconds in an advertisement that may expand or change, such as those with scrolling, frame, carousel, or similar features? Should the Commission incorporate in the rule specifications for these internet advertisement features?

5. How Adaptations Must be Presented on the Face of the Advertisement

The discussion in this section explains the Commission's alternative proposals for what information must be included on the face of an advertisement that utilizes an adapted disclaimer. Both Alternatives A and B propose that an internet public communication that provides an adapted disclaimer must provide some information on the face of the advertisement, and both alternatives require such information to be clear and conspicuous and to provide notice that further disclaimer information is available through the technological mechanism. Alternative A proposes one method of presenting an adapted disclaimer, and Alternative B proposes two methods, in a tiered approach.

Alternative A's approach would require, on the face of the advertisement, the payor's name plus an "indicator" that would give notice that further information is available. Alternative B proposes a two-tiered approach. Under its first tier, Alternative B would require, on the face of the advertisement, identification of the payor plus an "indicator." Tier one of Alternative B

differs from Alternative A in only one material aspect: Alternative B would allow, in lieu of a payor’s full name, for a payor to be identified by a clearly recognized identifier such as an abbreviation or acronym. Under its second tier, Alternative B would require, on the face of the advertisement, only an “indicator”; neither the payor’s name nor an identifier would be required under tier two of Alternative B. Alternatives A and B use similar definitions of “adapted disclaimer” and “indicator.”

a. Alternative A — One Tier: Name Plus Indicator

Alternative A’s proposed rule would explain that an “adapted disclaimer” means “an abbreviated disclaimer on the face of a communication in conjunction with an indicator through which a reader can locate the full disclaimer required” under 11 CFR 110.11(c)(5)(i). The proposal would further clarify that the adapted disclaimer “must indicate the person or persons who paid for the communication in letters of sufficient size to be clearly readable by a recipient of the communication.”

Alternative A is proposing that adapted disclaimers include a payor’s name on the face of the communication for several reasons. First, the inclusion of such information would signal to a recipient that the communication is, indeed, a paid advertisement. This is especially important on the internet where paid content can be targeted to a particular user and appear indistinguishable from the unpaid content that user views, unlike traditional media like radio or television, where paid content is transmitted to all users in the same manner and is usually offset in some way from editorial content.⁶² Second, the inclusion of the payor’s name would allow

⁶² See, e.g., Center for Digital Democracy, Comment at 2 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358502> (noting that “native advertising” online “purposefully blurs the distinctions between editorial content and advertising”); Twitter, Comment at 2 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358496> (noting that, absent paid “Promoted” tag, Promoted Tweets

persons viewing the communication on any device, even if the recipient does not view the full disclaimer, to know “the person or group who is speaking” and could, therefore, assist voters in identifying the source of advertising so they are better “able to evaluate the arguments to which they are being subjected.” Citizens United, 558 U.S. at 368 (internal quotations and alterations removed). Alternative A is based on the premise that a technological mechanism to reach a full disclaimer provided by shortened URL and without the payor’s name would not provide, on the face of the communication, the same informational value.⁶³ Third, some commenters suggested that the Commission and the public not rely on social media platforms’ voluntary efforts⁶⁴ to identify paid communications (such as by a tag that a communication is “paid,” “sponsored,” or “promoted”).⁶⁵ As a preliminary matter, the Commission lacks any enforcement mechanism to ensure compliance with such voluntary efforts, which, by definition, may be modified or abandoned at any time. In addition, tags that identify whether an advertisement is “paid,”

“look and act just like regular Tweets”); Electronic Privacy Information Center, Comment at 4 (“Online platforms use algorithms to target ads with a level of granularity that has not been possible before”).

⁶³ See Electronic Privacy Information Center, Comment at 3 (explaining that “URL shortening tools such as goo.gl and bit.ly can take lengthy hyperlinks and reduce them to just a few characters. This would allow an ad with character limitations to provide a URL that linked to a full disclaimer.”).

⁶⁴ See, e.g., BMore Indivisible, Comment at 5 (stating that “Given the history of technology and social media companies — and their nearly total reliance on advertising for corporate profits — the American people and the FEC cannot rely on them to regulate themselves when it comes to disclosing the source of political advertisements. Legislative action is uncertain and may be incomplete. The FEC must act to fully regulate internet political advertising disclaimers”); Center for American Progress, Comment at 2-3 (Nov. 9, 2017) <http://sers.fec.gov/fosers/showpdf.htm?docid=358489> (stating that “To some extent, these companies have already taken steps toward proving more transparency for online political ads. While we commend those efforts, they are no substitute for action by the FEC. Such efforts vary from one company to another, with no consistent mechanism for enforcement and no meaningful guidance for new entrants. Clear and consistent rules should be in place for all technology companies, to ensure adequate transparency both now and in the future”).

⁶⁵ See, e.g., Twitter, Comment at 2 (describing “promoted” tweet label); Rob Goldman, 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-andauthenticity-efforts/> (indicating that, starting in summer 2018, Facebook “advertisers will have to include a disclosure in their election-related ads, which reads: ‘Paid for by.’”).

“sponsored,” or “promoted,” do not necessarily identify who paid, sponsored, or promoted the advertisement,⁶⁶ and even that limited information may disappear when a paid communication is shared with other social media users.

To further help voters evaluate the message, Alternative A proposes to require that information about the payor be of a size to “be clearly readable.” As with the size requirements for text and graphic internet communications described above, Alternative A intends that questions of whether a disclaimer is of sufficient type size to be clearly readable would be “determined on a case-by-case basis, taking into account the vantage point from which the communication is intended to be seen or read as well as the actual size of the disclaimer text,” as they are under the current rule. 2002 Disclaimer E&J, 67 FR 76965. Would a case-by-case “clearly readable” standard provide sufficient guidance to advertisers regarding the necessary size of an adapted disclaimer?

As a component of adapted disclaimers, Alternative A proposes to require the use of an “indicator,” which it defines in proposed paragraph (c)(5)(i)(B) as “any visible or audible element of an internet communication that is presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice that further disclaimer information is available by a technological mechanism. An indicator is not clear and conspicuous if it is difficult to see, read, or hear, or if the placement is easily overlooked.” Alternative A adds in proposed paragraph (c)(5)(i)(B): “[a]n indicator may take any form including, but not limited to, words, images, sounds, symbols, and icons.” What are the advantages and disadvantages of this

⁶⁶ See Electronic Frontier Foundation, Comment at 4 (noting current ability to “publish anonymous election related advertisements on Facebook via an advertising account linked to a pseudonymous Facebook page”).

approach? What would be the advantages and disadvantages of the Commission’s designing and promulgating a single indicator to be used across all media and platforms?

b. Alternative B — Two Tiers: Indicator Plus Payor Identification or Indicator-Only

Alternative B’s proposed paragraph (c)(5)(ii) would explain that an “adapted disclaimer” means “an abbreviated disclaimer on the face of the communication in conjunction with a technological mechanism by which a reader can locate the disclaimer satisfying the general requirements” of 11 CFR 110.11(b) and (c)(1).

Alternative B proposes a two-tiered approach to the information that must be presented on the face of an internet public communication utilizing an adapted disclaimer. Under Alternative B’s first tier, in proposed paragraph (c)(5)(iii), an adapted disclaimer consists of an abbreviated disclaimer that includes an “indicator” and identifies the payor by full name or by “a clearly recognized abbreviation, acronym, or other unique identifier by which the payor is commonly known,” in lieu of the full name. Under Alternative B’s second tier, in proposed paragraph (c)(5)(iv) described below, an adapted disclaimer consists of an abbreviated disclaimer that need include only an “indicator.” Under both tiers — indicator-plus-payor identification and indicator-only — the internet public communication would have to provide a full disclaimer through a technological mechanism, described below.⁶⁷

Under the first tier, described in proposed paragraph (c)(5)(iii), an advertisement could identify the payor by the payor’s full name or by a clearly recognized abbreviation, acronym, or other unique identifier by which the payor is commonly known. Thus, for example, if the

⁶⁷ Given that Alternative B would allow payors to use a technological mechanism to provide disclaimers for any form of paid public communication on the internet, including audio and video communications, it proposes to require the payor’s name to be “clear and conspicuous” rather than “clearly readable,” as under Alternative A.

Democratic Senatorial Campaign Committee were to pay for a Facebook advertisement, the advertisement could state that it was paid for by the DSCC, @DSCC, or DSCC.org, while providing the committee's full name in a disclaimer through a technological mechanism, as described below. This flexibility is intended to address internet public communications that might not otherwise conveniently or practicably accommodate the payor's name, such as character-limited ads, or where the payor's name is unusually lengthy, or where the payor wishes to use the ad to promote its social media brand.⁶⁸

This proposal is modeled after a longstanding provision in the Commission's regulations that allows a separate segregated fund to include in its name a "clearly recognized abbreviation or acronym by which [its] connected organization is commonly known." 11 CFR 102.14(c). The Commission seeks comment on whether the proposal provides sufficient clarity for a payor to determine whether there is a "clearly recognized" abbreviation, acronym, or other unique identifier by which the payor is "commonly known." Should the Commission prescribe standards for use in making that determination? Is there a risk of confusion if two groups are commonly known by the same acronym, or does ready access to a full disclaimer (no more than one technological step away) help to alleviate any potential for confusion? Does the potential for confusion increase if the person viewing or listening to a political advertisement is unfamiliar with the person or group sponsoring the ad? If so, does ready access to the full disclaimer through a technological mechanism help to alleviate any such risk?

⁶⁸ See, e.g., Advisory Opinion Request, Advisory Opinion 2010-19 (Google) (Aug. 5, 2010) (asking to include URL to payor's website in lieu of disclaimer in severely character-limited internet ads, with disclaimer on landing page); Advisory Opinion Request, Advisory Opinion 2013-13 (Freshman Hold'Em JFC et al.) (Aug. 21, 2013) (asking to use shortened form of name and URL in disclaimer, where joint fundraising committee-payor's name included names of 18 participating committees); Advisory Opinion Request, Advisory Opinion 2017-05 (Great America PAC, et al.) (June 2, 2017) (asking to use payor's Twitter handle in disclaimers).

Under the second tier, described in proposed paragraph (c)(5)(iv), Alternative B would allow a speaker to include only an “indicator” on the face of an internet public communication, if the space or time necessary for a clear and conspicuous tier-one adapted disclaimer under proposed paragraph (c)(5)(iii) would exceed a certain percentage of the overall communication, and provide the full disclaimer through a technological mechanism. Under Alternative B, the term “indicator” has the same meaning under both the first and second tiers, as described further below. Again, Alternative B’s second tier proposes to use ten percent as the determining figure and to measure “time or space” in terms of characters, pixels, and seconds. Is ten percent a reasonable figure, or is it too high or too low? Are characters, pixels, and seconds reasonable metrics? How should characters, pixels, or seconds be determined when an internet public communication combines text, graphic, and video elements, such as an ad with text fields surrounding a video or a GIF?

Alternative B’s proposed paragraph (c)(5)(ii)(B) clarifies the “abbreviated disclaimer” information aspect of the “adapted disclaimer” definition in proposed paragraph (c)(5)(ii). It would require the abbreviated disclaimer on the face of a communication to be presented in a clear and conspicuous manner. An abbreviated disclaimer would not be clear and conspicuous if it is difficult to see, read, or hear, or if the placement is easily overlooked.

Proposed paragraph (c)(5)(i)(D) provides that an “indicator” is any visible or audible element of an internet public communication that gives notice to persons reading, observing, or listening to the communication that they may read, observe, or listen to a disclaimer satisfying the general requirements of 11 CFR 110.11(b) and (c)(1) through a technological mechanism.⁶⁹

⁶⁹ The proposed reference to the person “observing” an internet communication derives from the existing requirement that “[a] disclaimer . . . must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identify of the person or political committee that paid for and . . .

Under Alternative B, an indicator may take any form, including words (such as “paid for by” or “sponsored by”), a website URL, or an image, sound, symbol, or icon. For example, under Alternative B a severely character-limited public internet communication could include an indicator stating “Paid for by,” “Paid by,” “Sponsored by,” “Ad by,” or providing the URL to the payor’s website, if a reader could move his or her cursor over the words or link to a landing page and see the full disclaimer.⁷⁰ Would this proposal promote disclosure and transparency by addressing extremely space- or time-constrained paid internet ads? Does an indicator alone provide sufficient guidance that the full disclaimer is available through a technological mechanism? Would this proposal help to ensure that voters have easy access to the full statutorily prescribed disclaimer for more online communications, while providing greater flexibility to political advertisers on the internet? Or would an indicator that takes the form of a hyperlink, for example, be prone to manipulation? Should the Commission require an indicator to take a specific form or to include specific language?

In their comments on the ANPRM, Google and Twitter said that they intend to require each political advertisement on their platforms to bear a special designation that will allow viewers to obtain additional information about the sponsor of the ad.⁷¹ Should the Commission allow sponsors of extremely space- or time-limited paid internet advertisements to use platform-

authorized the communication.” 11 CFR 110.11(c)(1) (emphasis added). As used in Alternative B, it is intended to be synonymous with “viewer.”

⁷⁰ This provision is similar to the existing regulatory allowance for disclaimers on printed communications, which generally provides that “[t]he disclaimer need not appear on the front or cover page of the communication as long as it appears within the communication.” 11 CFR 110.11(c)(2)(iv).

⁷¹ Google, Comment at 1, 6-7, 11-12 (explaining “Why This Ad” icon for election-related advertisements on Search, YouTube, and Display); Twitter, Comment at 4 (explaining “political ad indicator” for “electioneering ads” on Twitter); see also Facebook, Comment at 3 (“[A]llowing ads to include an icon or other obvious indicator that more information about an ad is available via quick navigation (like a single click) would give clear guidance on how to include disclaimers in new technologies as they are developed.”).

provided designations as their indicators, if such disclaimers meet all of the requirements for providing a disclaimer through a technological mechanism? Or do the limitations inherent in platform-provided designations, discussed above, argue against doing so? In any event, under Alternative B, the responsibility for ensuring that the disclaimer provided through a technological mechanism complies with the disclaimer requirement would remain with the person paying for the communication, and would not fall on the internet platform hosting it.

6. Adaptations Utilizing One-Step Technological Mechanism

Alternatives A and B both propose that a technological mechanism used to provide access to a full disclaimer must do so within one step.

a. Alternative A — Associated with “Indicator” in Advertisement

Because the provision of an ad payor’s name is necessary but not always sufficient to meet the Act’s disclaimer requirement,⁷² Alternative A requires a mechanism to provide the additional required information. Alternative A’s proposed paragraph (c)(5)(i)(A) would specify that the technological mechanism used to provide the full disclaimer must be “associated with” the indicator and allow a recipient of the communication to locate the full disclaimer “by navigating no more than one step away from the adapted disclaimer.” This means that the additional technological step should be apparent in the context of the communication and the disclaimer, once reached, should be “clear and conspicuous” and otherwise satisfy the full requirements of 11 CFR 110.11(c). Moreover, this proposed requirement is intended to notify a

⁷² See, e.g., 52 U.S.C. 30120(a) (requiring payment and authorization statements and, if not authorized by a candidate, a payor’s street address, telephone number, or “World Wide Web” address); Hearing Before the Subcomm. on Privileges and Elections of the S. Comm. on Rules and Admin., 94th Cong. 141 (1976) (testimony of Antonin Scalia, Asst. Att’y Gen’l) (testifying, in response to question about proposal to amend Act to require payor name and authorization statement, that “[t]he principle seems to me a good one” that “seems to me like a sensible provision” to minimize risk that “candidate’s campaign can be run by somebody other than the candidate”).

recipient of the communication that further information about or from the payor is available and that the recipient may find that information with minimal investment of additional effort.⁷³ Thus, for example, a hyperlink underlying the “paid for” language would be “associated with” the full disclaimer at the landing page located one step away from the communication and to which the link leads. One commenter suggested that “the Commission should allow people and entities subject to disclaimer requirements to satisfy them through any reasonable technological means” rather than through a particular technology.⁷⁴ Should the Commission explicitly include a requirement that a technological mechanism be “reasonable” or can the reasonableness requirement for such mechanisms be assumed?

b. Alternative B — Associated With Adapted Disclaimer

Alternative B’s proposed paragraph (c)(5)(i)(C) defines the term “technological mechanism” as any use of technology that enables the person reading, observing, or listening to an internet public communication to read, observe, or listen to a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) without navigating more than one step away from the internet public communication, and is associated with an adapted disclaimer as provided in proposed 11 CFR 110.11(c)(5)(ii). Thus, by definition, the technological mechanism must be “associated with” the abbreviated disclaimer on the face of the internet communication itself, and must not require the person reading, observing, or listening to an internet communication to navigate more than one step away to read, observe, or listen to the disclaimer. The additional technological step under Alternative B should be apparent in the context of the communication,

⁷³ See, e.g., MCCI, Comment at 2 (Nov. 12, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=360063> (asking, rhetorically, “Who doesn’t know how to click a link in an ad?” in arguing for short word like “ad” or “paid” with hyperlink by which readers “will ultimately be able to track material back to its source”).

⁷⁴ Coolidge-Reagan Foundation, Comment at 4.

and the disclaimer provided through alternative technical means must be “clear and conspicuous” under 11 CFR 110.11(c)(1). Should a technological mechanism be deemed to be “associated with” the abbreviated disclaimer on the face of an internet public communication if the person reading, observing, or listening to the communication can read, observe, or listen to a disclaimer by clicking anywhere on the communication? If a person can access the full disclaimer by clicking anywhere on a communication, should the abbreviated disclaimer even be required on the face of the communication? Are there circumstances where an adapted disclaimer would be preferable to a full disclaimer, even if the full disclaimer would take up ten percent or less of the time or space in the internet public communication?

7. Examples of Technological Mechanisms in Adapted Disclaimers

Alternatives A and B provide similar lists of possible technological mechanisms.

a. Alternative A — Illustrative List of Mechanisms

Alternative A provides a list of examples of “technological mechanisms for the provision of the full disclaimer” including, but not limited to, “hover-over mechanisms, pop-up screens, scrolling text, rotating panels, or hyperlinks to a landing page with the full disclaimer.” This illustrative list incorporates examples of one-step technological mechanisms the Commission has seen utilized by advisory opinion requestors and other federal and state agency disclosure regulations.⁷⁵ The list is intended to provide guidance while retaining flexibility for advertisers

⁷⁵ See, e.g., Advisory Opinion 2010-19 (Google) (addressing proposal to provide disclaimer by hyperlink to landing page containing full disclaimer); Fed. Trade Comm’n, .com Disclosures: How to Make Effective Disclosures in Digital Advertising 10 (2013), <https://www.ftc.gov/system/files/documents/plain-language/bus41-dot-com-disclosures-information-about-online-advertising.pdf> (permitting disclosure to “be provided by using a hyperlink”); *id.* at 12 (allowing “mouse-over” display if effective on mobile devices); *id.* at 13-14 (allowing disclosures by pop ups and interstitial pages); *id.* at 16 (allowing scrolling text or rotating panels in space-constrained banner ad to present required disclosures); Cal. Code Regs. tit. 2, sec. 18450.4(b)(3)(G)(1) (permitting “link to a webpage with disclosure information”); *id.* at (b)(3)(G)(1) (allowing disclaimer “displayed via rollover display”); Md. Code. Regs. 33.13.07(D)(2)(b)(i) (permitting “viewer to click” and be “taken to a landing or home page” with disclaimer); see also First Gen. Counsel’s Report at 5 n.19, MUR 6911 (Frankel) (noting respondent

to utilize other existing technological mechanisms or new mechanisms that may arise in the future.

Should the Commission allow advertisers to include different parts of a full disclaimer in different frames or components of text or graphic internet advertisements (such as a disclaimer split between two character-limited text fields, one above an image and one below)? Several commenters noted the importance of ensuring that disclaimers are visible across devices or platforms and expressed concern that some technological mechanisms may not be functional across all devices or platforms.⁷⁶ Should the Commission incorporate into the rule a requirement that any technological mechanism used must be accessible by all recipients of that communication, including those accessing the communication on mobile devices?

b. Alternative B — Illustrative List of Mechanisms

Alternative B's proposed paragraph (c)(5)(i)(C) provides the same examples of technological mechanisms as Alternative A, with two exceptions. First, because Alternative B does not limit the use of technological mechanisms to internet communications with text or graphic components and anticipates that technology will develop to enable speakers to provide future disclaimers in ways that might not be available today, it includes "voice-over" as an example. Second, Alternative B proposes to refer to "mouse-over" and "roll-over" as examples,

committee's claim that "its Twitter profile contains a link to the campaign's website that contains a disclaimer"); Interactive Advertising Bureau, Comment at 3 (Nov. 10, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358484> (advocating a rule allowing for flexibility in disclaimer provision, such as by click through links); CMPLY, Comment at 2-3 and 9-11 (describing several "short-form" disclosure solutions within character-limited social media platforms).

⁷⁶ See, e.g., Asian Americans Advancing Justice, *et al.*, Comment at 9-11 (presenting statistics showing that persons of color are more likely to consume information on internet than television and are more likely to do so via mobile devices than display (desktop) platforms); CMPLY, Comment at 2 (noting that "'roll over' or 'hover' disclosures . . . have significant limitations in social media platforms and . . . do not function within the user interfaces of mobile devices, where the majority of social media engagement takes place and where we have seen the largest increases in Internet and broadband usage").

in addition to “hover-over.” Are these additional references useful, or are they already subsumed under “hover-over”? Should the list of examples be further expanded or refined?

8. Proposed Exceptions to Disclaimer Rules for Internet Public Communications

a. Alternative A

No Proposal.

b. Alternative B

Alternative B proposes to codify a preference for including full disclaimers in paid internet advertisements, with alternative approaches available utilizing technological mechanisms. Although Alternative B is intended to make it easier for internet communications to meet the disclaimer requirement, some internet public communications might not be able to comply with the disclaimer requirement, either now or as technology and advertising practices change. Thus, Alternative B proposes to exempt from the disclaimer requirement any internet public communication that can provide neither a disclaimer in the communication itself nor an adapted disclaimer as provided in proposed paragraph (c)(5).

The proposed exception in Alternative B is intended to replace the small items and impracticable exceptions for internet public communication, so that the small items and impracticable exceptions would no longer apply to such communications. The small items and impracticable exceptions both predate the digital age, and the Commission has faced challenges in applying them to internet communications. Despite several requests, the Commission has issued only one advisory opinion in which a majority of Commissioners agreed that a disclaimer exception applied to digital communications. See Advisory Opinion 2002-09 (Target Wireless).

Statements by individual Commissioners indicate a difference of opinion regarding the application of the exceptions to internet communications.⁷⁷

Alternative B's proposed paragraph (f)(1)(iv) exempts from the disclaimer requirement any paid internet advertisement that cannot provide a disclaimer in the communication itself nor an adapted disclaimer under proposed paragraph (c)(5). Is the exception as currently proposed sufficiently clear? The proposed exception provides as an example static banner ads on small internet-enabled mobile devices that cannot link to a landing page controlled by the person paying for the communication.⁷⁸ Do such ads exist? Should Alternative B's proposed exception apply to advertisements that technically can link to a website with a full disclaimer but do not do so? Does the Commission have statutory authority to adopt exceptions to the disclaimer requirements?

If the Commission adopts either the single-tier adapted disclaimer approach of Alternative A or the two-tier approach of Alternative B, would there be a need to exempt any internet public communications from the disclaimer requirement? Or would the adaptations adequately address any technological limitations? Would adopting any new exception to the disclaimer requirement for internet public communications lead to manipulation and abuse of the

⁷⁷ See Advisory Opinion 2017-12 (Take Back Action Fund), Concurring Statement of Commissioner Ellen L. Weintraub (Dec. 21, 2017), Concurring Statement of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen (Dec. 14, 2017); Advisory Opinion Request 2013-18 (Revolution Messaging), Statement for the Record by Vice Chair Ann M. Ravel, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub (Feb. 27, 2014); Advisory Opinion 2010-19 (Google), Concurring Statement of Chairman Matthew S. Petersen (Dec. 30, 2010), Statement for the Record by Commissioner Caroline C. Hunter (Dec. 17, 2016), and Concurring Statement of Vice Chair Cynthia L. Bauerly, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub (Dec. 16, 2010).

⁷⁸ The Commission considered static banner ads on small internet-enabled mobile devices in Advisory Opinion Request 2013-18 (Revolution Messaging). In that advisory opinion request, the requestor asked the Commission to recognize small (320 x 50 pixels) static banner ads on smartphones as exempt from the disclaimer requirement under the "small items" exception. The Commission did not approve a response by the required four affirmative votes.

exception? If so, what can the Commission do to minimize the risk of manipulation and abuse, and enhance disclosure? Conversely, if the Commission decides not to adopt a new exception for internet public communications, what effect would that decision have on political discourse on the internet? Could such a decision, coupled with uncertainty over the application of the existing exceptions to internet public communications, potentially chill political speech on the internet?

F. Conclusion

The Commission welcomes comment on any aspect of Alternatives A and B. Additionally, the Commission seeks comment addressing how differences between online platforms, providers, and presentations may affect the application of any of the proposed disclaimer rules for text, graphic, video, and audio internet advertisements in Alternative A, or for internet public communications generally in Alternative B. Among other topics, the Commission seeks comment on whether the ability to zoom or otherwise expand the size of some digital communications affects any of these proposals. Similarly, the Commission seeks comment on the interaction between the proposed definition of “public communication” and the proposed disclaimer rules in Alternatives A and B. The Commission is particularly interested in comment detailing the challenges and opportunities persons have experienced in complying with (and receiving disclosure from) similar state and federal disclaimer or disclosure regimes. Given the development and proliferation of the internet as a mode of political communication, and the expectation that continued technological advances will further enhance the quantity of information available to voters online, the Commission welcomes comment on whether the proposed rules allow for flexibility to address future technological developments while honoring the important function of providing disclaimers to voters.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached proposed rules, if adopted, would not have a significant economic impact on a substantial number of small entities. The proposed rules would clarify and update existing regulatory language, codify certain existing Commission precedent regarding internet communications, and provide political committees and other entities with more flexibility in meeting the Act's disclaimer requirements. The proposed rules would not impose new recordkeeping, reporting, or financial obligations on political committees or commercial vendors. The Commission therefore certifies that the proposed rules, if adopted, would not have a significant economic impact on a substantial number of small entities.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 110

Campaign funds, Political committees and parties.

For the reasons set out in the preamble, the Federal Election Commission proposes to amend 11 CFR parts 100 and 110, as follows:

PART 100—SCOPE AND DEFINITIONS (52 U.S.C. 30101)

1. The authority citation for part 100 continues to read as follows:

Authority: 52 U.S.C. 30101, 30104, 30111(a)(8), and 30114(c).

§ 100.26 [Amended]

2. Amend § 100.26 by removing “Web site” and adding in its place “website or internet-enabled device or application”.

PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

3. The authority citation for part 110 continues to read as follows:

Authority: 52 U.S.C. 30101(8), 30101(9), 30102(c)(2), 30104(i)(3), 30111(a)(8), 30116, 30118, 30120, 30121, 30122, 30123, 30124, and 36 U.S.C. 510.

Alternative A

4. In § 110.11, add paragraph (c)(5) to read as follows:

§ 110.11 Communications; advertising; disclaimers (52 U.S.C. 30120).

* * * * *

(c) * * *

(5) Specific requirements for internet communications. In addition to the general requirements of paragraphs (b) and (c)(1) of this section, a disclaimer required by paragraph (a) of this section that appears on a public communication distributed over the internet must comply with the following:

(i) A public communication distributed over the internet with text or graphic components but without any video component must contain a disclaimer that is of sufficient type size to be clearly readable by the recipient of the communication. A disclaimer that appears in letters at least as large as the majority of the other text in the communication satisfies the size requirement of this paragraph. A disclaimer under this paragraph must be displayed with a reasonable degree of color contrast between the background and the text of the disclaimer. A disclaimer satisfies the color contrast requirement of this paragraph if it is displayed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest text used in the communication.

(A) A public communication distributed over the internet with text or graphic components but without any video component that, due to external character or space constraints, cannot fit a required disclaimer must include an adapted disclaimer. For purposes of this paragraph, an adapted disclaimer means an abbreviated disclaimer on the face of a communication in conjunction with an indicator through which a reader can locate the full disclaimer required by paragraph (c)(5)(i). The adapted disclaimer must indicate the person or persons who paid for the communication in letters of sufficient size to be clearly readable by a recipient of the communication. The technological mechanism in an adapted disclaimer must be associated with the indicator and must allow a recipient of the communication to locate the full disclaimer by navigating no more than one step away from the adapted disclaimer. Technological mechanisms for the provision of the full disclaimer include, but are not limited to, hover-over mechanisms, pop-up

screens, scrolling text, rotating panels, or hyperlinks to a landing page with the full disclaimer.

(B) As used in paragraph (c)(5), an indicator is any visible or audible element of an internet communication that is presented in a clear and conspicuous manner to give the reader, observer, or listener adequate notice that further disclaimer information is available by a technological mechanism. An indicator is not clear and conspicuous if it is difficult to see, read, or hear, or if the placement is easily overlooked. An indicator may take any form including, but not limited to, words, images, sounds, symbols, and icons.

(ii) A public communication distributed over the internet with an audio component but without video, graphic, or text components must include the statement described in paragraphs (c)(3)(i) and (iv) of this section if authorized by a candidate, or the statement described in paragraph (c)(4) of this section if not authorized by a candidate. A public communication distributed over the internet with a video component must include the statement described in paragraphs (c)(3)(ii)-(iv) of this section if authorized by a candidate, or the statement described in paragraph (c)(4) of this section if not authorized by a candidate.

* * * * *

Alternative B

5. Amend § 110.11 as follows:

- a. Add paragraph (c)(5).
- b. Add paragraph (f)(1)(iv).

The additions read as follows:

§ 110.11 Communications; advertising; disclaimers (52 U.S.C. 30120).

* * * * *

(c) * * *

(5) Specific requirements for internet communications. (i) For purposes of this section:

- (A) The term internet communication means electronic mail of more than 500 substantially similar communications when sent by a political committee; all internet websites of political committees available to the general public; and any internet public communication as defined in paragraph (c)(5)(i)(B) of this section;
- (B) The term internet public communication means any communication placed for a fee on another person's website or internet-enabled device or application;
- (C) The term technological mechanism refers to any use of technology that enables the person reading, observing, or listening to an internet public communication to read, observe, or listen to a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section without navigating more than one step away from the internet public communication, and is associated with an adapted disclaimer as provided in paragraph (c)(5)(ii) of this section. A technological mechanism may take any form including, but not limited to, hover-over; mouse-over; voice-over; roll-over; pop-up screen; scrolling text; rotating panels; and click-through or hyperlink to a landing page; and
- (D) The term indicator refers to any visible or audible element of an internet public communication that gives notice to persons reading, observing, or listening to the internet public communication that they may read, observe, or listen to a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section through a technological mechanism. An indicator may take any form

including, but not limited to, words such as “Paid for by,” “Paid by,” “Sponsored by,” or “Ad by”; website URL; image; sound; symbol; and icon.

(ii) Every internet communication for which a disclaimer is required by paragraph (a) of this section must satisfy the general requirements of paragraphs (b) and (c)(1) of this section, except an internet public communication may include an adapted disclaimer under the circumstances described in paragraphs (c)(5)(iii)-(c)(5)(iv) of this section. For purposes of this paragraph, an adapted disclaimer means an abbreviated disclaimer on the face of the communication in conjunction with a technological mechanism by which a reader can locate the disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section. Any internet public communication that includes an adapted disclaimer must comply with the following:

- (A) The internet public communication must provide a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section through a technological mechanism as described in paragraph (c)(5)(i)(C) of this section.
- (B) The internet public communication must present the abbreviated disclaimer on the face of the communication in a clear and conspicuous manner. An abbreviated disclaimer is not clear and conspicuous if it is difficult to read, hear, or observe, or if the placement is easily overlooked.
- (C) For an internet public communication consisting of text, graphics, or images, time or space must be measured in [characters or pixels].
- (D) For an internet public communication consisting of audio or video, time or space must be measured in [seconds].

(iii) If the time or space required for a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section would exceed [ten] percent of the time or space in an internet public communication, then the abbreviated disclaimer on the face of the communication must include an indicator and identify the person who paid for the internet public communication by the person's full name or by a clearly recognized abbreviation, acronym, or other unique identifier by which the person is commonly known.

(iv) If the time or space required for an abbreviated disclaimer under paragraph (c)(5)(iii) of this section would exceed [ten] percent of the time or space in the internet public communication, then the abbreviated disclaimer on the face of the communication must include an indicator.

* * * * *

(f) Exceptions. (1) * * *

(iv) Any internet public communication that cannot provide a disclaimer on the face of the internet public communication itself nor an adapted disclaimer as provided in paragraph (c)(5) of this section, such as a static banner ad on a small internet-enabled device that cannot link to a landing page of the person paying for the internet public communication. The provisions of paragraph (f)(1)(i)-(iii) of this section do not apply to internet public communications.

* * * * *

On behalf of the Commission,

Caroline C. Hunter,
Chair,
Federal Election Commission.

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