



FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 110

[NOTICE 2022–22]

Internet Communication Disclaimers and Definition of “Public Communication”

AGENCY: Federal Election Commission.

ACTION: Final rule.

SUMMARY: The Commission is adopting final rules to amend its regulations concerning disclaimers on public communications on the internet. The Commission is implementing these amendments in light of technological advances since the Commission last revised its rules governing internet disclaimers in 2006, and to address questions from the public about the application of those rules to internet communications. The Commission’s purpose in promulgating these rules is to apply the Federal Election Campaign Act’s disclaimer requirements to general public political advertising on the internet. The Commission is also revising the definition of “public communication” to clarify how it applies to general public political advertising on the internet.

DATES: The effective date is March 1, 2023.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Ms. Joanna S. Waldstreicher, Attorney, 1050 First St. NE, Washington, DC 20463, (202) 694-1650 or (800) 424-9530. Documents relating to the rulemaking record are available on the Commission’s website at <http://sers.fec.gov/fosers/rulemaking.htm?pid=74739>.

SUPPLEMENTARY INFORMATION:

The Commission is revising its regulatory definition of “public communication” and requirements regarding disclaimers on certain public communications placed for a fee on the internet.

The new regulations are intended to give the American public improved access to information about the persons paying for and candidates authorizing certain internet communications, pursuant to the Federal Election Campaign Act (the “Act”). The regulations clarify how the disclaimer requirements apply to various types of internet communications and allow certain internet communications to provide disclaimers through alternative technological means.

Transmission of Final Rules to Congress

Before final promulgation of any rules or regulations to carry out the provisions of the Act, the Commission transmits the rules or regulations to the Speaker of the House of Representatives and the President of the Senate for a thirty-legislative-day review period. 52 U.S.C. 30111(d). The effective date of this final rule is March 1, 2023.

Explanation and Justification

I. Background

1. Current Statutory and Regulatory Framework

Under the Act and Commission regulations, a “disclaimer” is a statement that must appear on certain communications to identify the payor and, where applicable, whether the communication was authorized by a candidate. 52 U.S.C. 30120(a); 11 CFR 110.11; *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)).

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). In addition to public communications by political committees, “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)(1).

These final rules modify the definition of “public communication.” 11 CFR 100.26. Specifically, as explained below, the term “public communication” now includes “communications placed for a fee on another person’s website, digital device, application, or advertising platform.”

The content of the disclaimer that must appear on a given public communication depends on who authorized and paid for the advertisement. 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 it is authorized by the candidate, 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 person” that paid for the communication. 11 CFR 110.11(c)(1).

Commission regulations contain certain exceptions to the general disclaimer requirements. For example, under the “small items exception,” disclaimers are not required for public 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). Under the “impracticable exception,” disclaimers are not 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).

2. History of Disclaimers on Internet Communications

a. 1994 Rulemaking

The Commission first addressed internet disclaimers in its 1994 rulemaking regarding communications disclaimer requirements. The Commission’s initial proposal was silent as to internet communications. *See Communications Disclaimer Requirements*, 59 FR 50708 (Oct. 5, 1994). However, after publishing the Notice of Proposed Rulemaking, the Commission considered an advisory opinion request from a political committee that intended to “provide a forum for publicly available information on selected public officials” on its website. *Advisory Opinion 1995–09 (NewtWatch)* at 1. The Commission concluded that the committee’s use of a website was “a form of general public political advertising under 11 CFR 110.11”¹ that required a disclaimer. *Advisory Opinion 1995–09 (NewtWatch)* at 2. The Commission codified this interpretation in its final rule, explaining that “internet communications and solicitations that constitute general public political advertising require disclaimers” and 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” disclaimer requirements. *Communications Disclaimer Requirements*, 60 FR 52069, 52071 (Oct. 5, 1995).

b. BCRA and the 2002 Rulemaking

In 2002, Congress enacted the Bipartisan Campaign Reform Act of 2002, Public Law 107–155, 116 Stat. 81 (2002) (“BCRA”). In BCRA, Congress added new specificity to the disclaimer requirements, expanded the scope of communications covered by the disclaimer requirements, and enacted “stand-by-your-ad” requirements. Congress also added a new term,

¹ Commission regulations at the time did not define or otherwise reference “public communications.” Instead, in determining whether a communication required a disclaimer, the Commission considered whether the communication used a specific format (*i.e.*, any broadcasting station, newspaper, magazine, outdoor advertising facility, poster, yard sign, direct mailing), or if it otherwise constituted “general public political advertising.” *See* 11 CFR 110.11(a)(1) (1995).

“public communication,” which did not reference the internet: “The term ‘public communication’ means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” *See* 52 U.S.C. 30101(22).

In implementing BCRA, the Commission promulgated a new regulatory definition of “public communication” that mirrored the statutory language but added that “[t]he term public communication shall not include communications over the internet.” 11 CFR 100.26 (2002); Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49111 (July 29, 2002). The Commission also promulgated new rules to implement BCRA’s changes to the disclaimer provisions of the Act. *See* Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds, 67 FR 76962 (Dec. 13, 2002). The new disclaimer rules applied to “public communications” as well as political committee websites and the distribution by political committees of more than 500 substantially similar e-mails. Other than these two specific types of internet-based activities by political committees, however, internet communications were not subject to the disclaimer requirements. *Id.* at 76963–64 (explaining that “[t]his is the Commission’s only divergence from the 11 CFR 100.26 definition of ‘public communication’”).

c. The *Shays* Litigation and Subsequent Internet Communications

Rulemaking

In 2004, the U.S. District Court for the District of Columbia considered a case in which the plaintiffs alleged, *inter alia*, that the Commission had erred in requiring that a “coordinated communication” could only be a “public communication” or “electioneering communication” because this would mean that internet communications, “no matter how closely they are coordinated with political parties or a candidate’s campaign, cannot be considered ‘coordinated’ under the [Commission’s] regulations” by virtue of being specifically excluded from the

definition of “public communication.” *Shays v. FEC*, 337 F. Supp. 2d 28, 65 (D.D.C. 2004) (“*Shays*”), *aff’d*, 414 F. 3d 76 (D.C. Cir. 2005), *reh’g en banc denied* (Oct. 21, 2005). The court agreed with the plaintiffs, finding that “Congress intended all other forms of ‘general public political advertising’ to be covered by the term ‘public communication.’” *Shays* at 70. The court reasoned that “[w]hile all Internet communications do not fall within this descriptive phrase, some clearly do.” *Id.* at 67. The court concluded that “[w]hat constitutes ‘general public political advertising’ in the world of the Internet is a matter for the FEC to determine.” *Id.* at 70.

Following that ruling, the Commission amended the definition of “public communication” to include “internet communications placed on another person’s Web site for a fee.” 11 CFR 100.26; Internet Communications, 71 FR 18589 (Apr. 12, 2006) (“2006 Internet E&J”). Under the new 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 Web site, the person paying makes a ‘public communication.’” 2006 Internet E&J, 71 FR at 18593-94. Furthermore, “the placement of advertising on another person’s Web site for a fee includes all potential forms of advertising, such as banner advertisements, streaming video, popup advertisements, and directed search results.” *Id.* at 18594; *see also id.* at 18608 n.52 (noting that, as used in a different context, the “terms ‘website’ and ‘any internet or electronic publication’ are meant to encompass a wide range of existing and developing technology” including “social networking software”). The Commission explained that the revised definition of “public communication” also affects, among other provisions, “the requirement to include disclaimer statements on certain communications pursuant to 11 CFR 110.11.” *Id.* at 18589 n.2.

After the adoption of these regulations in 2006, the Commission considered several advisory opinion requests that concerned the application of disclaimers to internet communications. The queries centered on whether certain 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.²

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 2011-09 (Facebook) (Apr. 26, 2011) (concerning application of exceptions to zero-to-160 text character ads with thumbnail size images); Advisory Opinion Request 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 2017-12 (Take Back Action Fund) at 4. The Commission issued an opinion concluding that the proposed Facebook

² *See* Advisory Opinion 2017-12 (Take Back Action Fund); Advisory Opinion 2010-19 (Google); *see also* Advisory Opinion Request 2013-18 (Revolution Messaging) (Sept. 11, 2013); Advisory Opinion Request 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.

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. Current Rulemaking

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. 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. The Commission received six comments, 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.³

On October 10, 2017, the Commission again solicited additional comment in light of the ongoing legal, factual, and technological developments in this area. During this reopened comment period, the Commission received submissions from 149,772 commenters (including

³ On November 2, 2016, the Commission published in the Federal Register a Notice of Proposed Rulemaking in a separate rulemaking: Technological Modernization, 81 FR 76416 (Nov. 2, 2016); *see also* 87 FR 54915 (Sept. 8, 2022) (request for additional comment). That NPRM proposed changing the reference to “Web site” in the definition of “public communication” to “website or internet-enabled device or application.” The purpose of the proposed change was to reflect post-2006 changes in internet technology — such as the development of mobile applications (“apps”) on smartphones and tablets, smart TVs and 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 has decided to amend the definition of “public communication” in the instant rulemaking because the term is closely tied to the internet communication disclaimer requirements. *See* NPRM at 12865.

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.

On March 26, 2018, the Commission published in the Federal Register a Notice of Proposed Rulemaking in this rulemaking. *See* Notice of Proposed Rulemaking, Internet Communication Disclaimers and Definition of "Public Communication," 83 FR 12864 (Mar. 26, 2018) ("NPRM"). During the comment period, the Commission received submissions from 165,801 commenters (including persons who signed on to others' comments), of which a large majority supported one or the other of two alternative proposals or supported revising disclaimer rules generally. In addition, the Commission received three comments and twelve *ex parte* communications after the comment period.

As discussed above, this NPRM proposed to revise the definition of "public communication" 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. *Id.* In addition, the Commission requested comment on two proposed revisions to its disclaimer rules that were intended to clarify, for various types of paid internet public communications, the disclaimers required and, in certain circumstances, when a paid internet public communication could employ a modified approach to the disclaimer requirements. Alternative A proposed applying the full disclaimer requirements that apply to radio and television communications to public communications distributed over the internet with audio or video components. Alternative A also proposed applying the type of disclaimer requirements that apply to printed public communications to text and graphic public communications distributed over the internet. Finally, Alternative A proposed allowing certain small text or graphic public communications distributed over the internet to satisfy the disclaimer requirements through an "adapted disclaimer." Alternative B proposed to treat internet public communications differently from public communications disseminated via print and broadcast

media. Alternative B proposed a requirement that disclaimers on internet communications be clear and conspicuous and meet the same general content requirements as other disclaimers, without imposing the additional disclaimer requirements that apply to print, radio, and television communications. Alternative B also proposed 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 proposed to create an exception to the disclaimer requirement specifically for paid internet advertisements.

In May 2018, the Commission held a hearing on the regulatory changes proposed in the NPRM and received testimony from 18 witnesses over the course of two days. The witnesses included campaign finance reform organizations, experts in technology and advertising, and political party committees. The witnesses testified on issues relating to defining “public communications,” how internet advertising has evolved and how it is used, incorporating flexibility in the regulations to accommodate new technologies as well as business decisions, and how internet communications are different from print and broadcast media.

Finally, on June 20, 2019, the Commission made public two alternative proposals from Commissioners, seeking additional public comment on updated proposed revisions. Proposal A would have provided that “[t]he term general public political advertising shall not include communications over the internet, except for (1) communications produced for a fee and those placed or promoted for a fee on another person’s website or digital device, application, service, or platform, and (2) such communications included in section (1) that are then shared by or to a website or digital device, application, service, or platform.”⁴ It would have provided that internet public communications must include full disclaimers similar to those already required for print,

⁴ <https://sers.fec.gov/fosers/showpdf.htm?docid=402921>.

radio, and television communications, including the stand-by-your-ad requirements for radio and television advertisements. Proposal A also provided that the small items and impracticable exceptions would not apply to internet public communications, but that an adapted disclaimer may be used for a communication containing text or graphic components when it would be impracticable to include a full disclaimer “due to factors inherent to the technology.” Internet Ad Disclaimers Rulemaking Proposal (June 20, 2019) (“Proposal A”).⁵

Proposal B did not include a proposed revision to the definition of “public communication,” and provided that an adapted disclaimer may be used for “[a]ny internet public communication that cannot reasonably provide a disclaimer on the face of the communication.” Internet Communication Disclaimers, Proposed Rule (June 20, 2019) (“Proposal B”).⁶ In response to these proposals, the Commission received five comments, three of which did not express a preference for one of the alternative proposals, and two of which supported Proposal A.

II. Revised 11 CFR 100.26—Definition of “Public Communication”

As set forth below, the Commission is revising section 100.26, defining “public communication,” to clarify how it applies to general public political advertising over the internet, and—in light of the nuances of internet advertising and the rapid pace of technological change—to ensure that the disclaimer rule also applies appropriately to newer forms of general public political advertising over the internet.

Commission regulations require a disclaimer for any “public communication” that contains express advocacy or solicits a contribution, and for all public communications by political committees. 11 CFR 110.11(a). The current definition of “public communication” includes only those internet communications “placed for a fee on another person’s Web site.” 11 CFR 100.26. Since the Commission promulgated this definition in 2006, internet activity has

⁵ <https://sers.fec.gov/fosers/showpdf.htm?docid=402921>.

⁶ <https://sers.fec.gov/fosers/showpdf.htm?docid=403127>.

expanded from blogging, websites, and listservs to include social media networks (Facebook, Twitter, and LinkedIn), media sharing networks (YouTube, Instagram, TikTok, and Snapchat), streaming applications (Netflix, Hulu), and mobile devices and applications, as well as wearable devices (smart watches, smart glasses), home devices (Amazon Echo), virtual assistants (Siri, Alexa), and smart TVs and devices (home appliances, digital commercial billboards, and displays). As one commenter noted in response to the ANPRM, “[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.”

In the instant NPRM, the Commission cited its earlier proposal in the Technological Modernization rulemaking to update the definition of “public communication” to account for new technologies. NPRM at 12868 (citing Technological Modernization (“Technology NPRM”), 81 FR 76416 (Nov. 2, 2016)). In both NPRMs, the Commission proposed to revise the definition of “public communication” to clarify how the definition applies to newer forms of general public political advertising on the internet. NPRM at 12868 (citing Technology NPRM). Specifically, the Commission proposed to revise the definition to include communications placed for a fee on another person’s “internet-enabled device or application,” in addition to the existing inclusion of communications placed for a fee on another person’s website. *Id.*; Technology NPRM at 76433-34. In both NPRMs, the Commission highlighted the fact that when it promulgated the existing definition of “public communication” in 2006, it “focused on websites because that was the predominant means of paid internet advertising at the time,” and explained that in 2006 it “analogized paid advertisements on websites to the forms of mass communication enumerated in the definition of ‘public communication’ in the [Act] because ‘each lends itself to distribution of content through an entity ordinarily owned or controlled by another person.’”

NPRM at 12864 (citing 2006 Internet E&J, 71 FR at 18594); 52 U.S.C. 30101(22)); *see also* Technology NPRM at 76433.

The purpose of the change proposed in both NPRMs was “to reflect post-2006 changes in internet technology—such as the development of mobile applications (‘apps’) on smartphones and tablets, smart TVs and 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.” NPRM at 12864-65; *see also* Technology NPRM at 76433-34. In pursuit of its goal of updating the definition of “public communication” to reflect recent technological changes and to accommodate future changes, the Commission asked “whether revising the definition 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, 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.” NPRM at 12868. The Commission asked whether it was clear that both the placement-for-a-fee element and the third-party element would apply to websites, internet-enabled devices, and internet applications.

All but one commenter supported the revisions proposed by the Commission, though a subset of supporters suggested the Commission make additional revisions. For instance, one commenter stated that the proposed definition of “public communication” “is generally appropriate and will remain relevant as technology advances, but that it could be modified slightly to be clearer”—specifically, to “more accurately capture[] the requirement for payment and a website, platform or device other than the speaker’s own.” Several commenters argued that “placed for a fee” should be included in the definition to include any future communication methods. Others suggested revising the definition by adding the term “services” in order to make the term more expansive to include future technology, or to add the term “promoted for a fee” to capture individuals paid to share content in cases where no payment is made to a

platform. One commenter supported adding those who promote advertisements to the definition on the grounds that promotion multiplies the benefit of a given advertisement by widening its distribution to different audiences and all audiences should be aware of the sponsorship information. One commenter opined that the cost of producing content should trigger a disclaimer even if the content is posted for free. Other commenters proposed adding references to additional types of digital media, such as social media, platforms or video games.

Only one commentator opposed revision of the current definition, recommending instead that the Commission evaluate each new technology under the current definition on a case-by-case basis. In the alternative, this commenter suggested that if the definition is to be revised, it should apply only to communications above a specific monetary threshold, whether calculated on a per-communication basis, or based on an aggregate amount per speaker. The commenter also proposed that the term “internet-enabled device or application” be replaced with references to specific technologies.

Based on the comments received, the Commission has decided to revise the definition of “public communication” to better accommodate technological changes and reflect the range of “media through which paid internet communications can be and will be sent and received.” In doing so, it intends to regulate only communications placed for a fee “through an entity ordinarily owned or controlled by another person,” analogous to the forms of “public communication” already included in the definition. NRPM at 12868. The Commission is not otherwise altering its existing interpretation of the term “public communication” or “general public political advertising.”

The new definition of “public communication” includes “communications placed for a fee on another person’s website, digital device, application, or advertising platform.” This new definition implements the Commission’s goals of including the range of current internet media and being adaptable to the development of future technologies. It also reflects the Commission’s determination that—for purposes of the definition of “public communication”—there is no basis

to distinguish between paid advertising on a “website” and paid advertising via other internet-enabled technologies. The new definition therefore explicitly includes communications not only in the form of paid ads on websites, but also paid ads that otherwise meet the definition of “general public political advertising” and are disseminated via the internet or media that rely on the connectivity of the internet (including social media networks, streaming platforms, mobile applications, and wearable devices). This is because, like the more traditional forms of paid communications that are specifically listed in the existing definition of “public communication,” these forms of paid internet communications are inherently owned or controlled by third parties.

In response to the NPRM, the Commission received numerous comments stating that while the proposed additions to the definition were appropriate, they were not sufficient to cover the range of paid internet communications in current use or flexible enough to cover those yet to be developed. The Commission also received comments stating that in addition to “placing” a communication for a fee, internet advertising is generally understood to include “promoting” a communication for a fee to amplify its reach and that omitting paid promotion from the definition of “public communication” would similarly leave the definition incomplete.

The Commission is further revising the definition of “public communication” to clarify that it covers general public political advertising on various types of internet media that may not be captured by the existing definition (*i.e.*, communications on digital devices, applications, or advertising platforms). This is to ensure that the same disclaimer requirements apply to general public political advertising across the internet ecosystem. As one commenter stated, “[w]ebsites are only one type of digital communication that use the internet, and they are carrying a decreasing portion of internet traffic. Indeed, many, and perhaps most, political communications are not on websites.” This commenter also noted that smartphones, tablet apps and video streaming are better characterized as “devices,” “platforms,” or “applications,” rather than websites, and that the “internet of things” will likely become increasingly prevalent in the future. The Commission agrees and has revised the definition of “public communication” to include not

only communications on another person’s “website,” but also those on another person’s “digital device, application, or advertising platform.” *See* NPRM at 12865 (“[t]he 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 Commission does not agree with a commenter who opposed changing the definition on the theory that it “presumptively extend[s] federal regulation to all future technology indefinitely” and that the Commission instead should continue to assess emerging technologies on a case-by-case basis to see whether they are included in the definition. The definition does not extend to “all future technology,” but only to general public political advertising whose “placement” is “for a fee,” and which is distributed via a “website, digital device, application, or advertising platform” or analogous form of internet-enabled technology owned or controlled by a third party. Moreover, a system wherein the Commission would be called upon to determine whether a given technology falls within the definition on a case-by-case basis is inefficient and cumbersome for both regulated parties and the Commission. As internet communications continue to constitute greater proportions of political speech, revising the definition to explicitly encompass more than website communications provides clearer guidance to the public as to how the rule applies.

New 11 CFR 110.11—Disclaimer Requirement for Internet Public Communications and Adapted Disclaimers

1. New 11 CFR 110.11(c)(5)—Disclaimer Requirement for Internet Public Communications

The Act and Commission regulations impose specific requirements for disclaimers on printed, radio, and television communications. *See* 52 U.S.C. 30120(a), (d); 11 CFR 110.11(c)(2)–(4). For printed communications, requirements for type size, color contrast, and

placement on the page are designed to ensure that the disclaimers will be visible. 11 CFR 110.11(c)(2). Requirements for disclaimers on radio and television communications 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. 52 U.S.C. 30120(d)(1)(A); 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 stating that that person “is responsible for the content of this advertising.” 52 U.S.C. 30120(d)(2); 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. 52 U.S.C. 30120(d)(1)(B); 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. 52 U.S.C. 30120(d)(2); 11 CFR 110.11(c)(4)(ii)–(iii).

In the years since the definition of “public communication” was revised to include paid website advertising, technological developments have expanded the available formats and functionality of internet advertising. Many internet advertisements today include video, audio, and graphic components beyond the limited text available in earlier internet advertising

considered by the Commission, as well as beyond the text and audiovisual components of print and broadcast media.

Thus, the Commission proposed in the NPRM to add regulatory provisions clarifying, for various types of paid internet public communications, when and how the disclaimer requirements apply. The Commission sought comment on two alternative approaches, noting that “[t]he 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.” NPRM at 12864. Alternative A would have applied the full disclaimer requirements that now apply to radio and television communications, including the stand-by-your-ad content requirements, to public communications distributed over the internet with audio or video components, “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.” *Id.* at 12870. Further, the Commission noted that the disclaimer requirements for radio and television communications “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.” *Id.* at 12870. Alternative A also proposed to apply disclaimer requirements that now apply to printed public communications to text and graphic public communications distributed over the internet and proposed to establish a “safe harbor” for disclaimers appearing in “letters at least as large as the majority of the other text in the communication”—tracking the current approach for disclaimers in printed materials—without making it a requirement.

Alternative B proposed to treat internet communications differently from communications disseminated via print and broadcast media, on the basis that the internet is a

unique medium of communication and internet advertising is “inherently more diverse than a simple transition of similar content from print or broadcast television,” as it includes varying platforms, sizes, devices, individualized settings, interactivity, and duration. *Id.* at 12871.

Alternative B, therefore, would have required disclaimers on internet communications to be clear and conspicuous and to meet the same general content requirement as other disclaimers, but without imposing additional specific disclaimer requirements that apply to print, radio, or television communications, such as type sizes, duration, or specific content.

Both alternatives also proposed to allow alternative means of satisfying the disclaimer requirement for internet public communications that could not accommodate full disclaimers. These proposals, discussed further below, would have allowed for adapted disclaimers that provided the name of the person who paid for a communication and a technological means of accessing a full disclaimer.

The Commission received comments supporting and opposing aspects of both proposals. On the question of applying existing radio and television stand-by-your-ad requirements to their analogues in internet communications, commenters were roughly equally divided.

Commenters supporting Alternative A noted that under this alternative, more information would be available to the viewer, that it was flexible while promoting transparency, and that Alternative A was more likely to lead to disclaimer information appearing on the face of the communication, which, they argued, should be the default position. One commenter noted that where there is a divergence between the nature of online and traditional advertising, this difference supported more Commission scrutiny rather than less because of the availability of microtargeting for internet advertising.

One commenter argued that it would be anomalous to apply the stand-by-your-ad requirements to a television advertisement distributed through a cable television network, but not to apply those requirements to the same advertisement distributed on a streaming internet platform by the same television station. The commenter also argued that stand-by-your-ad

requirements do not impose any additional cost on the advertiser in the online space, and that if questions arise concerning their application to unusual formats, the Commission should address these scenarios case-by-case rather than afford digital communications a general exemption.

In support of requiring disclaimers to appear on the face of a communication, one commenter stated that the click-through rate for ads containing links is less than 1 percent. Some commenters expressed their conviction that technical innovation will increasingly enable the requisite information to appear on the face of the communication, and that Alternative B would remove an incentive for technology companies to innovate by exempting communications from disclaimer requirements even when technical constraints would not preclude a disclaimer. Some comments noted that under Alternative B it would be possible to manipulate the content of the ad, such as the name of the sponsor, in order to qualify for exemption from disclaimer requirements. One commenter stated that “[a]lthough at first glance 10% appears to be an objective standard, in reality it is largely within the control of the advertiser. For example, a person seeking to avoid disclaimers might form an independent-expenditure-only committee or a 501(c)(4) nonprofit with an intentionally overlong name that would exceed 10% of many digital advertisements.”

One commenter, expressing a preference for Alternative A, recommended modifying it to require ad sponsors to report their shortened as well as their full names (see discussion below for more detail) if they use their shortened names in the communication, and to require that disclaimers be placed in text as a title or headline of ads containing multimedia aspects. One commenter supported Alternative A’s rule for allowing an adapted disclaimer (discussed below) but opposed specific requirements for internet ads. One commenter recommended that the Commission require that disclaimers be made accessible to those with disabilities, who constitute, according to the commenter, nearly 20 percent of the population.

Commenters supporting Alternative B stated that they preferred its flexibility, with one commenter suggesting modifying Alternative B to allow audio disclaimers of no more than four

seconds. These commenters stated that Alternative B's greater flexibility would render it more readily applicable to potential future technologies.

Several commenters also questioned whether Alternative A's extension of current radio and television disclaimer specific requirements to internet communications is supported by statutory authority, noting that section 30120(a) applied to radio and television communications when originally enacted, and that it might be overbroad for the Commission to apply the law to internet activity. In response, other commenters argued that current statutory authority would support extending the current disclaimer regime to the internet, with one commenter noting that although section 30120(a) does not refer to the internet, it does not expressly preclude application to the internet either.

One commenter observed that Alternative B has parallels in existing regulatory exceptions for small and impracticable items. One commenter stated that "Alternative B's most important feature is its inclusion of a safe harbor provision, allowing speakers to use alternative disclaimers when the standard disclaimer would occupy more than 10% of the time or space of the underlying communication. Adopting this policy would ensure the Commission does not unduly burden speakers, interfere with their communications, or increase the cost of their communications." One commenter argued that Alternative B provides a bright line for advertisers that could be further enhanced by defining other phrases, such as "on the face of the communication" or "clear and conspicuous." The commenter stated that if the Commission were to adopt a more nuanced approach, the standards should be geared to the advertiser's chosen communication medium. Another commenter argued that, to the extent that it might render certain short-form advertisements too expensive or impractical, Alternative A might be unconstitutional. Several commenters stressed the degree to which the current communicative landscape differs from that contemplated when the stand-by-your-ad requirements were enacted. One commenter noted that the current disclaimer regime dates from a time when radio and television were prominent, while the Commission's 2006 Internet rulemaking contemplated

graphic website advertisements. This commenter opined that rules promulgated now, in an environment of social media and apps, need flexibility for future technical innovation. One commenter noted that the former advertising environment was simpler; there were radio, television, newspapers, magazines and billboards, in which there were one-to-one relationships between stations, companies and advertisers. The commenter stated that in the online environment, in contrast, different components of an advertisement might be delivered or mediated by different servers. Other commenters noted that the online advertisement differs from the traditional advertisement by virtue of its greater interactivity with the user.

Some commenters found aspects of both alternatives unsatisfactory. One commenter urged the Commission to allow the market to determine the appropriate threshold for when an adapted disclaimer would be appropriate. The commenter argued that disclaimers are not as important as the substance of the advertising, that individuals click on links in advertisements not so much to find disclaimers as to learn whether the advertisement is true, and that making assumptions based on an organization's name can be misleading. Another commenter stated a preference for not applying disclaimer rules to ordinary internet users and expressed the view that both alternatives are overbroad and need to incorporate more technical specifications. Other commenters argued that both alternatives could impose a burden on speech and that any disclaimer requirement would detract from the speaker's ability to communicate a message.

The Commission agrees with the commenters who generally support the establishment of a disclaimer rule specific to internet public communications. Some commenters also noted that private standards enforced by platforms vary widely and that some form of standardization is necessary to ensure consistency. One platform apprised the Commission of efforts it had undertaken in this regard, but as another commenter pointed out, these may change at any time for legitimate commercial reasons. The Commission disagrees with the argument that any application of disclaimer rules to general public political advertising on the internet would be unconstitutional.

Based on the comments received, the Commission is adding a new paragraph (c)(5) to section 110.11, setting forth specific disclaimer requirements for internet public communications. New section 110.11(c)(5)(i) first defines “internet public communication” as “any public communication over the internet that is placed for a fee on another person’s website, digital device, application, or advertising platform.” This language parallels the revised definition of “public communication” in section 100.26, and is similar to language proposed in Alternative B. The definition of “internet public communication” applies for the purposes of section 110.11 and serves to streamline references to this type of communication in the text of the regulations.

The Commission does not agree with one commenter’s argument that providing a definition of “internet public communication” that includes those who adopt others’ political speech as their own by paying to place that speech on the internet (such as by paying a social media platform to ensure more advantageous treatment of a third-party’s advertisement in the platform’s search or prioritization algorithm), rather than confining the definition to those who originally pay to place the speech, would present a “constitutional infirmity” under the final rule. Like the revised definition of “public communication,” the defined term “internet public communication” relies on the characteristics of the communication itself, not the role any persons may have had in its creation or distribution, and it encompasses only paid communications. Therefore, individuals who share someone else’s speech without paying to distribute it will not be affected by this revision.

New paragraph (c)(5)(ii) provides that “[a]n internet public communication must include a disclaimer that complies with the requirements of paragraphs (b) and (c)(1) of this section. The disclaimer requirement under this paragraph applies to any person that pays to place an internet public communication, regardless of whether that person originally created, produced, or distributed the communication.” This provision states the requirement that disclaimers must be included on internet public communications, and clarifies that, as with the existing disclaimer

requirements, the provision applies to any communication that meets the definition of an “internet public communication,” without examining who may have played various roles in the creation and dissemination of the communication beyond the identity of the payor and whether a candidate authorized the communication.

Finally, new 11 CFR 110.11(c)(5)(iii) sets forth the disclaimer requirements that are specific to particular types of internet public communications, in addition to the existing requirements of paragraphs (b) and (c)(1) that apply to all communications requiring disclaimers. Paragraphs (c)(5)(iii)(A)–(C) provide that a disclaimer required for an internet public communication must: (a) for such communications with text or graphic components, include the required written disclaimer, such that the disclaimer can be viewed without the viewer taking any action; (b) be of sufficient type size to be clearly readable by the recipient of the communication; and (c) be displayed with a reasonable degree of color contrast between the background and the disclaimer’s text. New paragraph (c)(5)(iii) also includes requirements specific to video and audio communications. The new provision at paragraph (c)(5)(iii)(D) requires that for an internet public communication in which the disclaimer is displayed within a video, the disclaimer must be visible for at least 4 seconds and appear without the recipient of the communication taking any action. For an internet public communication with an audio component and no video, graphic, or text components, paragraph (c)(5)(iii)(E) states that the disclaimer must be included within the audio component of the communication.

New paragraph (c)(5) therefore combines aspects of Alternatives A and B by treating internet public communications similarly to print, radio, and television communications insofar as it imposes specific requirements on particular types of communications that are analogous to those imposed on print and broadcast media, while also accounting for the ways in which internet public communications differ from print and broadcast media in other respects. The new internet disclaimer provisions do not impose the stand-by-your-ad requirements applicable to radio and television advertisements on internet public communications.

Paragraphs 110.11(c)(5)(iii)(A)-(C) do not apply to audio-only internet public communications. These provisions concern written disclaimers and set readability requirements for their text size and contrast, and thus are inapplicable to audio-only communications. In contrast, paragraph (c)(5)(iii)(E) applies solely to audio-only internet public communications, specifying that for such communications the disclaimer must be an audio statement contained within the audio communication.

One commenter stated that because disclaimers on video communications may appear only for four seconds, a viewer who does not watch the part of the ad with the statement would not see the disclaimer. The Commission acknowledges that not all recipients of internet public communications will necessarily see or hear required disclaimers, but does not consider this a sufficient reason to not require their inclusion. The new rule is similar to the longstanding rule for television communications, which likewise requires disclaimers to appear for at least four seconds. *See* 11 CFR 110.11(c)(3)(iii)(B), (c)(4)(iii)(B).

The new regulation follows aspects of Alternative A by treating internet public communications similarly to print and broadcast media depending on the type of communication: (1) type size and contrast of written disclaimers must meet readability requirements similar to those required of print media and television; (2) disclaimers for internet communications consisting solely of an audio component (that is, without video, graphics, or text) must be provided within the audio component of the communication, similar to the existing requirement that radio communications must include audio disclaimers; and (3) disclaimers within internet video communications must be visible for at least 4 seconds, similar to the existing duration requirement for disclaimers on television communications. *See* 11 CFR 110.11(c)(2), (3)(i), (3)(iii).

The new regulation retains the principle of Alternative B that internet public communications may differ from print and broadcast media. First, new paragraph (c)(5)(iii)(A) requires that “an internet public communication with text or graphic components must include

the written disclaimer required by this paragraph, such that the disclaimer can be viewed without taking any action.” Therefore, any internet public communication that contains text or graphic elements must include a written disclaimer, even if the communication also includes video or audio components. For example, an audio advertisement might be presented on a social media platform within a panel also containing a written description. Paragraph (c)(5)(iii)(A) requires that because the communication includes a text component, it must include a written disclaimer.

In addition, in some cases a viewer must take action to access some or all of the components of an internet public communication by, for example, clicking on a link or opening a pop-up window. New paragraphs (c)(5)(iii)(A) and (D) specify that disclaimers must be viewable without the recipient of the communication taking any additional action. For example, a graphic or video advertisement may be accompanied by a caption that contains a link to additional information. In the case of such a communication, new paragraph (c)(5) requires that the disclaimer be visible in the graphic or video, or in the caption, without the viewer having to take any additional action beyond viewing or watching the advertisement, such as clicking on or hovering over a link. Similarly, new paragraph (c)(5)(iii)(E) requires that for an internet public communication that contains an audio component but no video, graphic, or text component, the disclaimer must be included in that audio component, so that a recipient need not take any additional action beyond listening to the advertisement to obtain the disclaimer information.

New paragraph (c)(5)(iii) also accounts for the variability and flexibility of internet communications by setting forth requirements for text size and contrast that allow for varying platforms, formats, and devices. New paragraph (c)(5)(iii)(B) requires that a disclaimer on an internet public communication “must be 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 other text in the communication satisfies this requirement.” New paragraph (c)(5)(iii)(C) requires that the disclaimer “must be displayed with a reasonable degree of color contrast between the background and the disclaimer’s text. A disclaimer satisfies this

requirement if it is displayed in black text on a white background, or if the degree of color contrast is no less than the color contrast between the background and the largest text used in the communication.”

The safe harbor for disclaimer text size is similar to that proposed in Alternative A, which provided that the text size requirement is satisfied if the disclaimer appears in “letters at least as large as the majority of the other text in the communication.” NPRM at 12873.

In addition to the text size requirement, which parallels the text size requirement for print and television communications to ensure readability and prevent circumvention of the disclaimer requirement, the new rule also incorporates a color contrast requirement that similarly parallels the contrast requirement for print communications. Also, like the text size requirement, the color contrast requirement offers safe harbors: a disclaimer will satisfy the requirement if it is “displayed in black text on a white background, or if the degree of color contrast is no less than the color contrast between the background and the largest text used in the communication.” As with the text size requirement, the color contrast requirement is intended to ensure readability.

In adopting these provisions, the Commission is not applying the stand-by-your-ad requirements to internet communications. The statutory provision requiring stand-by-your-ad statements expressly applies only to radio and television ads. 52 U.S.C. 30120(d). Accordingly, the Commission does not have statutory authority to require stand-by-your-ad statements in internet public communications.

The Commission is not adopting two commenters’ suggestions that any required disclaimers be machine-readable. These commenters pointed out that having machine-readable disclaimers would provide certain advantages for users. One commenter suggesting this observed that with machine-readable disclaimers, users could opt to receive monthly reports of ads they receive over time. Smart disclosure, which this commenter recommended be adopted in conjunction with machine readability, could warn users of bad links and could allow groups of users using browser extensions to track malicious links and alert the Commission of these. The

Commission is not adopting this proposal because it is beyond the scope of the Commission's statutory authority.

2. New CFR 110.11(g)—Adapted Disclaimers

To clarify how the disclaimer requirements apply to internet public communications that are not capable of including a full disclaimer, the Commission is adding a new paragraph (g) to section 110.11, setting forth an alternative that applies specifically to internet public communications where a full disclaimer cannot be included due to character or space constraints intrinsic to the advertising product or medium. As discussed above, Commission regulations already contain certain exceptions to the general disclaimer requirements, namely the small items and impracticable exceptions. 11 CFR 110.11(f)(1).

Alternatives A and B both proposed that some internet public communications could satisfy the disclaimer requirement by means of an “adapted disclaimer,” which would include an abbreviated disclaimer on the face of the communication, and an indicator that a technological mechanism was available to access a full disclaimer. Both alternatives proposed 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.” NPRM at 12875.

The two alternatives differed as to when an adapted disclaimer could be used in place of a standard disclaimer. Alternative A would have allowed the use of an adapted disclaimer when a full disclaimer could not fit on the face of a text or graphic internet communication “due to external character or space constraints.” *Id.* at 12874. Under this alternative, the determination of whether an internet communication could use an adapted disclaimer was intended to be an objective one: “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.” *Id.*

Alternative B would have allowed the use of an adapted disclaimer when a full disclaimer would occupy more than a certain percentage of an internet public communication's available time or space. Further, under Alternative B, two tiers of adapted disclaimers would have been permissible, depending on the time or space available in the communication to accommodate the disclaimer. The proposed first-tier adapted disclaimer would have required the identification of the payor plus an indicator on the face of the communication, while the proposed second-tier adapted disclaimer would have required only an indicator on the face of the communication.

The two alternatives also differed as to what information must be presented on the face of the communication. Alternative A proposed that an "adapted disclaimer" would have consisted of "an abbreviated disclaimer on the face of a communication in conjunction with an indicator through which a reader can locate the full disclaimer" required. *Id.* at 12875. Alternative A would have further required that the adapted disclaimer identify the person or persons who paid for the communication, "in letters of sufficient size to be clearly readable by a recipient of the communication." *Id.* at 12875–76.

Under Alternative B's proposed two-tiered approach, the first tier would have allowed for an adapted disclaimer that included both the payor's name, either in full or by "a clearly recognized abbreviation, acronym, or other unique identifier by which the payor is commonly known," along with an indicator similar to that included in Alternative A. *Id.* at 12876. Under Alternative B, the flexibility to use either a payor's full name or a clearly recognized abbreviation or acronym was "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." *Id.* at 12877. If the space or time necessary for a clear and conspicuous tier-one adapted disclaimer would occupy more than ten percent of the communication, the proposed second tier would have required only an indicator on the face of the communication. *Id.*

Both alternatives proposed “that a technological mechanism used to provide access to a full disclaimer must do so within one step,” that the additional step be “apparent in the context of the communication,” and that the disclaimer, once reached, be clear and conspicuous. *Id.* at 12877-78. Both alternatives also provided similar illustrative lists of examples of technological mechanisms that could be used as part of an adapted disclaimer. For both alternatives these included, but were not limited to, “hover-over mechanisms, pop-up screens, scrolling text, rotating panels, or hyperlinks to a landing page with the full disclaimer.” *Id.* at 12878. Alternative B also proposed to include “voice-over,” “mouse-over,” and “roll-over” mechanisms. *Id.* at 12880.

Alternative B also proposed an exception to the disclaimer requirements for “any internet public communication that can provide neither a disclaimer in the communication itself nor an adapted disclaimer.” *Id.* at 12879. This exception was intended to replace, for internet public communications, the existing small items and impracticable exceptions.

Commenters were generally split on whether an adapted disclaimer should be available when a full disclaimer cannot fit due to external constraints, as proposed in Alternative A, or when a full disclosure would exceed a bright line in terms of space or time, as proposed in Alternative B. Several commenters felt that adapted disclaimers should only be used as a last resort when “character or space constraints intrinsic to the technological medium,” as opposed to self-imposed limitations merely reflecting the preferences of an online advertiser or platform, would not allow for a full disclaimer. One commenter noted that Alternative A’s “cannot fit” language references impossibility and is, therefore appropriate. Another commenter believed that permitting adapted disclaimers on “public communications with text or graphic features but without a video or audio component” that had character or space limits intrinsic to the medium was a “forward-thinking” approach applicable to all platforms.

Other commenters found Alternative A’s use of “technological constraints” that “cannot fit” too ambiguous, needing further clarification. Two commenters noted that rules or a

framework based on communication size are not practical or effective, because the same ad could be used “across different platforms.” Another found that Alternative A did not account for the “burden” experienced by the speaker and is too restrictive. One commenter noted that rules focused on pixels, characters, seconds, font size, contrast and other visual factors were “too inflexible to withstand future technological” advancements. Another commenter recommended allowing “business decisions” about ad size, made in the ordinary course of business by ad sellers, to justify the use of an adapted disclaimer. One commenter expressed strong support for adapted disclaimers, preferring Alternative B because it allows more flexibility, arguing that Alternative A is too oriented toward print and broadcast media. However, the commenter stated that both alternatives are insufficiently sensitive to future technological changes, predicting that speech recognition technology will one day be the primary means of interacting with the internet. At the same time, this commenter argued that both alternatives should develop an adapted disclaimer scheme for all audio, video and banner ad formats; Alternative A in particular did not do this for video and audio, according to the commenter.

At least two commenters suggested that the advisory opinion process could resolve when an adapted disclaimer was appropriate on a case-by-case basis and viewed the advisory opinion process as a way to handle questions surrounding digital advertisements’ continuing complexity and one commenter suggested that perhaps an expedited advisory opinion process could be designed for these questions. Another commenter expressed skepticism, however, about the utility of resorting to the advisory opinion process to resolve ambiguities in interpretation and expressed a preference for bright-line rules because of this while a second commenter opined that it would be difficult to resort to the advisory opinion process for this purpose close to an election; rather, if this situation were faced, the commenter would be inclined not to run the advertisement.

Commenters were also split on the 10% rule proposed in Alternative B. Several commenters noted that a 10% bright line would provide advertisers with the “opportunity to

game the rules to deny the public disclaimer information.” One commenter felt that the choice of 10% was based on untested assumptions rather than empirical data. Others described the 10% proposal as “arbitrary” and “not technologically neutral” or “impractical and confusing” and “hard to apply and enforce.” Two commenters opined that Alternative B’s two-step process was too complicated and unclear, and sacrificed clarity for expediency.

Some commenters found 10% to be a reasonable percentage that “provides for disclosure but does not infringe on the message of the ad.” Other commenters supported a “bright line” because it imposes less of a burden on speech. For example, one commenter stated that “[r]equiring potential speakers to spend the time and resources to seek an advisory opinion [] imposes burdens of a constitutional magnitude, especially in a medium conducive to speakers with limited resources.” Another commenter stated that “[w]hile the First Amendment does not require that a speaker’s message take a certain percentage of the advertisement space, taking 10% of the advertisement space for which a speaker has paid is far more reasonable than taking 33% of the space.” Other commenters worried that any bright line was arbitrary and a “one-click away rule” would be a better choice. Some commenters, while agreeing in principle with a defined percentage, suggested different percentages. One suggested 4%, while another, interpreting the *Citizens United* decision to tolerate 4-second disclaimers in 10-second advertisements, argued that any percentage up to 40% would be tolerable. Other commenters, however, argued against a 40% threshold.

Several commenters argued that even with an adapted disclaimer, the face of the advertisement should at a minimum contain a “paid for by” statement with the name of the sponsor. Certain commenters favoring this position cited empirical studies showing that only a small percentage of links in online advertisements are actually clicked by users. Commenters also stated their preference for having the full information appear only one click away if a technological mechanism were to be used. Two commenters in this category opined that in addition to these, the user should be able to learn why he or she received the advertisement – one

commenter referring to this as “algorithmic transparency,” signifying that advertisers should be required to disclose their targeting methods and that voters should be able to learn why they have been targeted.

One commenter argued that the Commission should adopt a provision that the disclaimer requirements could be satisfied by an icon it had developed in the online commercial advertising domain that would be adapted by the commenter’s organization to the realm of political advertising, and which it characterized as widely recognized and understood. Other commenters opined on this proposed self-regulatory approach, arguing that Commission oversight would still be needed, and noting that as a private entity, the commenter or any other provider of an online advertising medium could modify or rescind the program at any time based upon considerations unrelated to ensuring implementation of the Act.

After considering the comments received, the Commission has decided to provide an adapted disclaimer option for internet public communications. The new 11 CFR 110.11(g) provides that the disclaimer requirement may be satisfied with an adapted disclaimer when the full disclaimer “cannot be provided or would occupy more than 25 percent of the communication due to character or space constraints intrinsic to the advertising product or medium.” The Commission has previously allowed for a modified disclaimer under certain circumstances, recognizing 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). In the new 11 CFR 110.11(g), an “adapted disclaimer” is defined as “a clear statement that the internet public

communication is paid for, and that identifies the person or persons who paid for the internet public communication using their full name or a commonly understood abbreviation or acronym by which the person or persons are known, which is accompanied by: (1) an indicator and (2) a mechanism.” New 11 CFR 110.11(g)(1)(i). An “indicator” is defined as “any visible or audible element associated with an internet public communication that is presented in a clear and conspicuous manner and 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 requirements of paragraphs (b) and (c)(1) of this section through a mechanism.” New 11 CFR 110.11(g)(1)(ii). A “mechanism” is defined 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 requirements of paragraphs (b) and (c)(1) of this section after no more than one action by the recipient of the internet public communication.” New 11 CFR 110.11(g)(1)(iii).

The new 110.11(g) combines elements of both Alternative A and Alternative B in setting forth the threshold for use of an adapted disclaimer. An adapted disclaimer may be used instead of a full disclaimer when a standard disclaimer “cannot be provided or would occupy more than 25 percent of the communication due to character or space constraints intrinsic to the advertising product or medium.” This rule incorporates the concept of time and space constraints inherent to the advertising medium from Alternative A, and the proposal from Alternative B to permit an adapted disclaimer depending on the percentage of the communication that would be occupied by a full disclaimer. In doing so, the Commission has adopted an objective and bright-line standard that will give the sponsors of internet public communications clear guidance as to when an adapted disclaimer may be used.

The new rule’s reference to “character or space constraints intrinsic to the advertising product or medium,” similar to language proposed in Alternative A, is based on long-standing Commission precedent where the Commission allowed communications to include modified

disclaimers due to the technological or physical limitations of the communication medium. The language is intended to make clear that the time or space available for a disclaimer depends on the limitations of the medium or technology used in a particular advertisement.

The Commission has decided to also use a percentage of the communication as the threshold for use of an adapted disclaimer, as proposed in Alternative B, with the intention that this will serve as a bright-line rule that enables speakers to determine for themselves whether they may avail themselves of this provision, rather than seek advisory opinions before engaging in political advertising online. The Commission has chosen not to specify how to measure the percentage (*i.e.*, by pixels, seconds, characters, etc.), in order that the rule may remain flexible as new technologies are developed, and that speakers may use the most appropriate measurement for their communication. The Commission's proposal of 10% in Alternative B elicited several comments opposing this threshold. Although one commenter approved of this threshold, some commenters noted that such a threshold would be easy to evade by lengthening or shortening of the name of the sponsoring organization appearing in the ad. Some commenters also argued that this percentage approach would be hyper-technical. Nevertheless, the Commission agrees with one commenter's observation that a fixed-percentage approach is preferable to a potentially more complicated approach tailored to particular kinds of communications, which might then necessitate new definitions of the terms relating to the medium and additional revisions to the rule. The Commission has adopted a 25% threshold.

The definition of "adapted disclaimer" requires that the communication state on its face that it is a paid communication, as proposed in Alternative A. It is especially important to clearly identify paid communications on the internet, where paid content can be targeted to a particular user and appear indistinguishable from the unpaid content that user views, unlike print and broadcast media, where paid content is transmitted to all users in the same manner and is usually offset in some way from editorial content. As one commenter observed, "[w]ith many forms of social media, a political ad may be transmitted and retransmitted such that a viewer

would have no idea that it is paid advertising.” The Commission agrees with another commenter that “paid for” is necessary to ensure that the adapted disclaimer is easily interpreted by the viewer. An adapted disclaimer that includes an indicator but does not state that it is a paid communication would make it less likely that a viewer would understand the function of the indicator and access the mechanism to obtain the full disclaimer. As one commenter noted, “[t]he average click-through rate . . . for Facebook ads across all industries is .90%.”

The definition of “adapted disclaimer” requires that the payor be identified “using their full name or a commonly understood abbreviation or acronym by which the person or persons are known.” This is similar to language proposed in Alternative B, which would have permitted an adapted disclaimer to identify the payor by full name or by “a clearly recognized abbreviation, acronym, or other unique identifier by which the payor is commonly known.” NPRM at 12876. Including the payor’s name on the face of the communication ensures that even persons viewing the communication without accessing the full disclaimer will be able to know who is speaking and will be better able to evaluate the content of the advertisement. Allowing a payor to use an acronym or abbreviation will offer flexibility for 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. Most commenters supported allowing an acronym or abbreviated name of a payor organization. However, some questioned whether an abbreviated name or acronym would likely be recognized. The Commission opted not to constrain the use of abbreviated names or acronyms beyond the condition that any such abbreviation or acronym be commonly understood or be one by which the payor is known. The provision 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). Thus, many political speakers are already familiar with this standard and may have adopted abbreviations or acronyms for frequent use that are already “commonly understood.”

The Commission has decided not to adopt the second-tier adapted disclaimer proposed as part of Alternative B, which would have permitted a speaker to include only an indicator on the face of a communication, without the name of the payor, if the space or time necessary for a clear and conspicuous tier-one adapted disclaimer would exceed a certain percentage of the overall communication.

By requiring that an indicator be “clear and conspicuous,” the new rule will aid voters in evaluating the message they are viewing or hearing. As set forth in paragraph (c)(1), a disclaimer “is not clear and conspicuous if it is difficult to see, read, or hear, or if the placement is easy to overlook.” 11 CFR 110.11(c)(1). An indicator also must be presented in a clear and conspicuous manner and therefore must not be difficult to see, read, or hear, or have a placement that is easy to overlook. The definition further provides that “[a]n indicator may take any form including, but not limited to, words, images, sounds, symbols, and icons.” This provides flexibility to speakers in determining the type of indicator that best serves their needs and their communication so long as it also satisfies the requirements of the regulation. Because the final rules permit an adapted disclaimer to be used for audio and video communications as well as text and graphic communications, the Commission is adopting the “clear and conspicuous” requirement as proposed in Alternative B, rather than “clearly readable” as proposed in Alternative A, in order to afford further flexibility to speakers in determining how to satisfy the requirement. *See* NPRM at 12876.

Similar to the definition of an “indicator,” the definition of “mechanism” makes clear that a wide array of technologies may be used to provide access to full disclaimers, “including, but not limited to, hover-over text, pop-up screens, scrolling text, rotating panels, and hyperlinks to a landing page.” The Commission agrees with commenters who recommended that the adapted disclaimer be “tech-agnostic.” This non-exhaustive list of technologies affords speakers a great deal of flexibility in determining the best way to provide access to a full disclaimer depending on

the platform or type of message, as well as flexibility to accommodate changes in technology and types of mechanisms that have yet to be developed.

Alternatives A and B both proposed one of the key characteristics of a technological mechanism used in an adapted disclaimer: that the technological mechanism allow the person reading, observing, or listening to an internet public communication to read, observe, or listen to a full disclaimer “without navigating more than one step away” from the communication. NPRM at 12880; *see also* 12877–78. Both proposals explained that this meant “the additional technological step should be apparent in the context of the communication” and the disclaimer, once reached, should be “clear and conspicuous.” *Id.* at 12878. There was nearly universal agreement by commenters that the mechanism require no more than one action by the viewer in order to reach the full disclaimer information. The final rule incorporates this principle into the definition of a “mechanism,” providing that a mechanism used as part of an adapted disclaimer must enable access to a full disclaimer “after no more than one action by the recipient of the internet public communication.” The Commission is incorporating this requirement into the final rule to ensure that recipients of communications can access full disclaimer information with a minimum of additional effort beyond what would ordinarily be required to view a full disclaimer on the face of a communication.

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

The Commission certifies that the attached rules would not have a significant economic impact on a substantial number of small entities. The rules would clarify and update existing regulatory language to reflect changes in technology and would codify certain existing Commission precedent regarding disclaimers on internet communications. The rules would not impose new recordkeeping, reporting, or financial obligations on political committees or commercial vendors. The Commission therefore certifies that the rules 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

Political committees and parties.

For the reasons set out in the preamble, Subchapter A of Chapter I of Title 11 of the Code of Federal Regulations is amended 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), and 30114(c).

2. In § 100.26, revise the second sentence to read as follows:

§ 100.26 Public communications (52 U.S.C. 30101(22)).

* * * * *

The term general public political advertising shall not include communications over the internet, except for communications placed for a fee on another person’s website, digital device, application, or advertising platform.

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.

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

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

* * * * *

(c) * * *

(5) Specific requirements for internet public communications. (i) For purposes of this section, internet public communication means any public communication over the internet that is placed for a fee on another person's website, digital device, application, or advertising platform.

(ii) An internet public communication must include a disclaimer that complies with the requirements of paragraphs (b) and (c)(1) of this section. The disclaimer requirement under this paragraph applies to any person that pays to place an internet public communication, regardless of whether that person originally created, produced, or distributed the communication.

(iii) In addition to the requirements of paragraphs (b) and (c)(1) of this section, a disclaimer required by paragraph (a) of this section that appears on an internet public communication must comply with the following:

(A) Except as provided by paragraph (g) of this section, an internet public communication with text or graphic components must include the written disclaimer required by this paragraph, such that the disclaimer can be viewed without taking any action.

(B) The disclaimer must be 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 other text in the communication satisfies this requirement.

(C) The disclaimer must be displayed with a reasonable degree of color contrast between the background and the disclaimer's text. A disclaimer satisfies this requirement if it is displayed in black text on a white background, or if the degree of color contrast is no less than the color contrast between the background and the largest text used in the communication.

- (D) If the disclaimer is displayed within a video, the disclaimer must be visible for at least 4 seconds and appear without the recipient of the communication taking any action.
- (E) An internet public communication with an audio component but without video, graphic, or text components must include a disclaimer that satisfies the requirements of paragraphs (b) and (c)(1) of this section within the audio component.

* * * * *

(g) Adapted disclaimers—(1) Definitions. For purposes of this section:

- (i) Adapted disclaimer means a clear statement that the internet public communication is paid for, and that identifies the person or persons who paid for the internet public communication using their full name or a commonly understood abbreviation or acronym by which the person or persons are known, which is accompanied by: an indicator and a mechanism. An adapted disclaimer must satisfy the requirements of paragraph (c)(1) and paragraphs (c)(5)(ii) and (iii) of this section.
- (ii) Indicator means any visible or audible element associated with an internet public communication that is presented in a clear and conspicuous manner and 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 requirements of paragraphs (b) and (c)(1) of this section through a mechanism. An indicator may take any form including, but not limited to, words, images, sounds, symbols, and icons.
- (iii) Mechanism means 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 requirements of paragraphs

(b) and (c)(1) of this section after no more than one action by the recipient of the internet public communication. A mechanism may take any form including, but not limited to, hover-over text, pop-up screens, scrolling text, rotating panels, and hyperlinks to a landing page.

- (2) When a disclaimer described by paragraphs (b) and (c)(1) of this section cannot be provided or would occupy more than 25 percent of the communication due to character or space constraints intrinsic to the advertising product or medium, an adapted disclaimer may be used within the communication instead.

Dated: December 1, 2022.

On behalf of the Commission,

Allen J. Dickerson,

Chairman,

Federal Election Commission.

Note: The following statement will not appear in the Code of Federal Regulations.

**CONCURRING STATEMENT OF COMMISSIONER SEAN J. COOKSEY ON
THE FINAL RULE FOR INTERNET COMMUNICATION DISCLAIMERS**

I supported the Commission's final rule for internet communication disclaimers. While I opposed the Commission's initial draft for this rule—which would have dramatically expanded our agency's regulation of political speech online—subsequent revisions have substantially narrowed its scope. By limiting itself only to traditional paid advertising placed on the internet and providing sufficient flexibility for different kinds of ads, the revised regulation will not unduly burden freedom of speech. I believe the revised regulation also complies with the important procedural safeguards under the Administrative Procedure Act. Because of those significant improvements, I voted in favor of the revised final rule.

First, I am satisfied that this rulemaking meets the notice-and-comment requirements of the Administrative Procedure Act.⁷ Although I maintain the Commission would benefit from additional public review and comments, this revised final rule removes novel regulatory expansions and represents a logical outgrowth of the proposals put forth in the Commission's 2018 Notice of Proposed Rulemaking. I believe interested parties have therefore had adequate notice

⁷ See 5 U.S.C. 553; 52 U.S.C. 30107(a)(8).

and opportunity to offer feedback and criticism on the proposed amendments to the Commission's regulations, and a further comment period is not legally mandatory.⁸

Second, I believe that this revised regulation is tailored to address the distinct and often complex features of online communications without unnecessarily burdening political speech and association on the internet. The final rule permits small and unconventional online ads for which a full disclaimer is unreasonably cumbersome to instead include an "adapted disclaimer" that maintains the integrity of the advertisement. Similarly, Commission regulations will maintain exemptions from disclaimer requirements for small-item advertisements and communications for which disclaimers are impracticable, such as with exceptionally short video clips.⁹ Even with the revised regulation's limited purview, these safeguards are critical to maintaining regulatory flexibility for political campaigning online.

For more than two decades, the Commission has taken a light touch to regulating political activity online, in recognition of the fact that "the Internet is by definition a bastion of free political speech, where any individual has access to almost limitless political expression with minimal cost."¹⁰ I believe this revised regulation for internet communication disclaimers is in keeping with that approach and will preserve the internet's special capacity to foster the exchange of political speech, ideas, and values. I will continue to stand up for Americans' First Amendment freedoms across all platforms for as long as I am on the Commission.

Dated: December 1, 2022.

Sean J. Cooksey,
Commissioner.

[FR Doc. 2022-27132 Filed: 12/16/2022 8:45 am; Publication Date: 12/19/2022]

⁸ "A rule is deemed a logical outgrowth if interested parties 'should have anticipated' that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." *Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C.Cir.2004) (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 245 (D.C.Cir.2003)).

⁹ See 11 CFR 110.11(f).

¹⁰ Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule, 67 Fed. Reg. 49,063, 49,072 (July 29, 2002). See also, e.g., 11 CFR 100.155(a) (exempting an "individual's uncompensated personal services related to [] Internet activities" and an "individual's use of equipment or services for uncompensated Internet activities" from the meaning of "expenditure"); Explanation and Justification for the Regulations on Internet Communications, 71 Fed. Reg. 18,589, 18,589 (Apr. 12, 2006) (describing the internet as "a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach," due to its "accessibility, low cost, and interactive features").