



VICE CHAIR ELLEN L. WEINTRAUB
FEDERAL ELECTION COMMISSION
WASHINGTON, D. C. 20463

February 15, 2018

MEMORANDUM

TO: Commission Secretary

FROM: Ellen L. Weintraub *ELW*
Vice Chair

SUBJECT: Draft internet communications disclaimers NPRM

Attached is a draft Notice of Proposed Rulemaking regarding internet communications disclaimers. It contains constructive proposals for improving the FEC's rules. Other proposals may well be proffered. I expect that this draft will be a component of a larger NPRM that the Commission will consider. Due to the strong public interest in this topic, I want to get these ideas before the public as soon as possible.

The need for swift action on this rulemaking is ever more apparent. Earlier this week, Director of National Intelligence Dan Coats advised the U.S. Senate Select Committee on Intelligence: "There should be no doubt that Russia perceived its past efforts as successful and views the 2018 midterm elections as a potential target for Russian influence operations."

This rulemaking will not eliminate that threat, but it is a small step forward that the Commission must take, both to ensure that American citizens are informed about the sources of political advertising on the internet and to improve our means of deterring and detecting illegal conduct.

I request that this memorandum and the attached draft be made public immediately and placed on the Commission's next Open Meeting Agenda, for March 8, 2018.

FEDERAL ELECTION COMMISSION

11 CFR Part 110

[Notice 2018-XX]

Internet Communication Disclaimers

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission requests comment on proposed changes to its regulations concerning disclaimers on internet communications. The Commission proposes to apply the specific disclaimer requirements that now apply to radio and television communications to public communications distributed over the internet with audio or video components. The Commission also proposes to apply the specific disclaimer requirements that now apply to printed public communications to text and graphic public communications distributed over the internet. Finally, the proposed rules would allow small text or graphic public communications distributed over the internet to satisfy the full disclaimer requirements through flexible technological adaptations. Exceptions from the disclaimer requirements would not apply to a text or graphic public communication distributed over the internet that can accommodate an adaptation.

DATES: Comments must be received on or before [insert date 45 days after date of publication in the Federal Register]. The Commission will hold a public hearing on this notice [on [date]/at a date to be determined later]. [The Commission will publish a notice in the Federal Register announcing the date and time of the hearing.]

ADDRESSES: All comments must be in writing. Commenters are encouraged to submit comments electronically via the Commission’s website at <http://www.fec.gov/fosers>, reference

DRAFT

1 REG 2011-02. Alternatively, commenters may submit comments in paper form, addressed to the
2 Federal Election Commission, Attn.: Neven F. Stipanovic, Acting Assistant General Counsel,
3 999 E Street, NW., Washington, DC 20463.

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

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

15 **SUPPLEMENTARY INFORMATION:** The Commission is proposing to revise its
16 regulations at 11 CFR 110.11 regarding disclaimers on communications placed for a fee on the
17 internet.

18 A. Rulemaking History

19 On October 13, 2011, the Commission published in the Federal Register an Advance
20 Notice of Proposed Rulemaking (“ANPRM”) soliciting comment on whether to modify
21 disclaimer requirements at 11 CFR 110.11 for certain internet communications, or to provide
22 exceptions thereto, consistent with the Federal Election Campaign Act, 52 U.S.C. 30101-46 (“the

1 Act”).¹ The Commission received eight comments in response. Six of the commenters agreed
2 that the Commission should update the disclaimer rules through a rulemaking, though
3 commenters differed on how the Commission should do so.

4 On October 18, 2016, the Commission solicited additional comments in light of legal and
5 technological developments during the five years since the ANPRM was published.² The
6 Commission received six comments during the reopened comment period, all but one of which
7 supported updating the disclaimer rules. Commenters, however, differed on whether the
8 Commission should allow modified disclaimers for all online advertisements or exempt paid
9 advertisements on social media platforms from the disclaimer requirements.

10 On October 10, 2017, the Commission again solicited additional comments in light of
11 recent legal and technological developments.³ During this reopened comment period, the
12 Commission received submissions from 149,772 commenters (including persons who signed on
13 to others’ comments), of which 147,320 supported updating the disclaimer rules, 2,262 opposed
14 such an effort, and 190 did not express a discernable preference.⁴

¹ See Internet Communication Disclaimers, 76 FR 63567 (Oct. 13, 2011).

² See Internet Communication Disclaimers; Reopening of Comment Period and Notice of Hearing, 81 FR 71647 (Oct. 18, 2016). The Commission postponed the hearing announced in that notice because few commenters expressed interest in participating. As noted above, the Commission will hold a hearing on the proposals in this notice [on {date}/at a date to be announced later].

³ See Internet Communication Disclaimers; Reopening of Comment Period, 82 FR 46937 (Oct. 10, 2017); see also Internet Communication Disclaimers; Extension of Comment Period, 82 FR 52863 (Nov. 15, 2017) (explaining the Commission’s extension of the Comment period for one business day due to technological difficulties).

⁴ Commission staff read and categorized each comment in one of three broad categories: support, oppose, or neutral. “Support” included comments supporting more stringent disclaimer rules; favoring “transparency”; opposing application of the small items or impracticable exceptions to online advertisements; opposing advertising by foreign nationals; opposing Russian interference in the 2016 election; or supporting the “Honest Ads Act” or any of its components. See S. 1989, 115th Cong. (2017). “Oppose” included comments opposing any rulemaking; opposing more stringent disclaimer rules; supporting application of the small items or impracticable exceptions to online advertising; supporting modified disclaimers in lieu of full disclaimers; opposing any restriction of speech, “infringement” of constitutional rights, or “censorship”; or reminding the Commission to read the Constitution. “Neutral” included comments recognizing the value of disclaimers, but noting the difficulty of

1 After considering the comments from all three comment periods and additional
2 deliberation, the Commission now proposes the changes described in this notice. The
3 Commission seeks comment on these proposals.

4 B. Current Statutory and Regulatory Framework Concerning Disclaimers

5 A “disclaimer” is a statement that must appear on certain communications to identify
6 who paid for it and, where applicable, whether the communication was authorized by a
7 candidate. 52 U.S.C. 30120(a); 11 CFR 110.11; see also Disclaimers, Fraudulent Solicitations,
8 Civil Penalties, and Personal Use of Campaign Funds, 67 FR 76962, 76962 (Dec. 13, 2002)
9 (“2002 Disclaimer E&J”). The Supreme Court has explained that the disclaimers required by 52
10 U.S.C. 30120 “provide the electorate with information and insure that the voters are fully
11 informed about the person or group who is speaking” and assist voters in identifying the source
12 of advertising so they are better “able to evaluate the arguments to which they are being
13 subjected.” Citizens United v. FEC, 558 U.S. 310, 368 (2010) (internal quotations and
14 alterations removed).

15 With some exceptions, the Act and Commission regulations require disclaimers for
16 public communications: (1) made by a political committee; (2) that expressly advocate the
17 election or defeat of a clearly identified federal candidate; or (3) that solicit a contribution.
18 52 U.S.C. 30120(a); 11 CFR 110.11(a). Under existing regulations, the term “public
19 communication” generally does not include internet communications other than

providing disclaimers online; recommending modified disclaimers in some, but not all, circumstances; appearing to make contradictory statements in support or opposition; presenting unclear statements of preferred action, such as “do the right thing”; or commenting off topic, such as on net neutrality. Comments addressing specific aspects of the current or proposed rules are discussed below, as appropriate.

1 “communications placed for a fee on another person’s Web site.” 11 CFR 100.26.⁵ In addition
2 to these internet public communications, “electronic mail of more than 500 substantially similar
3 communications when sent by a political committee . . . and all Internet websites of political
4 committees available to the general public” also must have disclaimers. 11 CFR 110.11(a).⁶

5 The content of the disclaimer that must appear on a given communication depends on
6 who authorized and paid for the communication. If a candidate, an authorized committee of a
7 candidate, or an agent of either pays for and authorizes the communication, then the disclaimer
8 must state that the communication “has been paid for by the authorized political committee.”
9 11 CFR 110.11(b)(1); see also 52 U.S.C. 30120(a)(1). If a public communication is paid for by
10 someone else, but is authorized by a candidate, an authorized committee of a candidate, or an
11 agent of either, then the disclaimer must state who paid for the communication and that the
12 communication is authorized by the candidate, authorized committee of the candidate, or an
13 agent of either. 11 CFR 110.11(b)(2); see also 52 U.S.C. 30120(a)(2). If the communication is
14 not authorized by a candidate, an authorized committee of a candidate, or an agent of either, then
15 the disclaimer must “clearly state the full name and permanent street address, telephone number,
16 or World Wide Web address of the person who paid for the communication, and that the
17 communication is not authorized by any candidate or candidate’s committee.” 11 CFR
18 110.11(b)(3); see also 52 U.S.C. 30120(a)(3).

⁵ In a separate rulemaking, the Commission is currently proposing amendments intended to modernize terminology in a number of regulations, including 11 CFR 100.26. See Technological Modernization, 81 FR 76416, 76437 (Nov. 2, 2016) (proposing to replace the term “Web site” with “website or internet-enabled device or application” in definition of “public communication”). To review those proposals and other Commission rulemaking documents, visit <http://www.fec.gov/fosers>, reference REG 2013-01.

⁶ As part of its separate technological modernization effort, the Commission is also proposing to amend the reference to “websites” of political committees at 11 CFR 110.11(a) to read “websites and internet applications” of political committees and to revise the reference to “World Wide Web address” at 11 CFR 110.11(b)(3) to read “website address.” See Technological Modernization, 81 FR at 76440.

1 Every disclaimer “must be presented in a clear and conspicuous manner, to give the
2 reader, observer, or listener adequate notice of the identity” of the communication’s sponsor.
3 11 CFR 110.11(c)(1). While the Act and Commission regulations impose specific requirements
4 for communications that are “printed” or that appear on radio or television, they do not specify
5 additional requirements for disclaimers on internet advertisements. Compare 11 CFR
6 110.11(c)(1) (general “clear and conspicuous” requirement for all disclaimers), with 11 CFR
7 110.11(c)(2)-(4) (additional requirements for printed, radio, and television disclaimers) and 52
8 U.S.C. 30120(c)-(d) (specifications for printed, radio, and television disclaimers).

9 Commission regulations set forth limited exceptions to the general disclaimer
10 requirements. For example, disclaimers are not required for communications placed on
11 “[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot
12 be conveniently printed.” 11 CFR 110.11(f)(1)(i) (“small items exception”). Nor are disclaimers
13 required for “[s]kywriting, water towers, wearing apparel, or other means of displaying an
14 advertisement of such a nature that the inclusion of a disclaimer would be impracticable.”
15 11 CFR 110.11(f)(1)(ii) (“impracticable exception”).

16 C. Application of the Disclaimer Requirements to Internet Communications

17 1. Development of Current Rule that Paid Internet Advertisements Require 18 Disclaimers

19 The Commission first addressed disclaimers on internet communications in two 1995
20 advisory opinions regarding the application of the Act to internet solicitations of campaign
21 contributions. See Advisory Opinion 1995-35 (Alexander for President) and Advisory Opinion
22 1995-09 (NewtWatch PAC).⁷ The Commission determined that internet solicitations are

⁷ Documents related to Commission advisory opinions are available on the Commission’s website at www.fec.gov/data/legal/advisory-opinions/.

1 “general public political advertising”⁸ and, as such, they “are permissible under the [Act]
2 provided that certain requirements, including the use of appropriate disclaimers, are met.”
3 Advisory Opinion 1995-35 (Alexander for President) (characterizing conclusion in Advisory
4 Opinion 1995-09 (NewtWatch PAC)). Later that year, the Commission stated in a rulemaking
5 that “Internet communications and solicitations that constitute general public political advertising
6 require disclaimers.” See Communications Disclaimer Requirements, 60 FR 52069, 52071 (Oct.
7 5, 1995).

8 In its 2002 rules implementing the Bipartisan Campaign Reform Act of 2002, Pub. L. No.
9 107-155, 116 Stat. 81 (2002) (“BCRA”), the Commission changed course on the necessity of
10 disclaimers on all internet communications. BCRA had added specificity to the disclaimer
11 requirements (including “stand by your ad” requirements) and expanded the scope of
12 communications covered by the disclaimer requirements, but had also defined a new term
13 “public communication” that did not reference the internet. See 52 U.S.C. 30101(22) and 30120;
14 see also 2002 Disclaimer E&J, 67 FR at 76962. The Commission promulgated rules to
15 implement BCRA’s changes to the disclaimer provisions of the Act and the new statutory
16 definition of “public communication.” See 2002 Disclaimer E&J, 67 FR at 76962; Prohibited
17 and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49111
18 (July 29, 2002) (“Non-Federal Funds E&J”). The 2002 rules applied disclaimer requirements to
19 political committees’ websites and distribution of more than 500 substantially similar unsolicited
20 emails. Other than these two specific types of internet-based activities by political committees,
21 however, internet communications were excluded from the regulatory definition of “public

⁸ At the time, 11 CFR 110.11 explicitly applied to “general public political advertising.” The current rule uses the term “public communication” as defined at 11 CFR 100.26, which includes “general public political advertising.”

1 communication” and, therefore, outside the scope of the disclaimer requirements that apply to
2 such communications. See 2002 Disclaimer E&J, 67 FR at 76963-64; Non-Federal Funds E&J,
3 67 FR at 49111.

4 In 2006, after a court challenge to the regulatory definition of “public communication,”
5 the Commission again changed course and revised its rules to include internet communications
6 “placed for a fee on another person’s Web site” in the definition of “public communication” and,
7 therefore, within the scope of the disclaimer rule. See Internet Communications,
8 71 FR 18589, 18594 (Apr. 12, 2006) (“2006 Internet E&J”); see also Shays v. FEC, 337 F. Supp.
9 2d 28 (D.D.C. 2004) (holding, among other things, that Commission could not wholly exclude
10 internet activity from the definition of “public communication”). The Commission explained
11 that, under the revised definition, “when someone such as an individual, political committee,
12 labor organization or corporation pays a fee to place a banner, video, or pop-up advertisement on
13 another person’s website, the person paying makes a ‘public communication.’” 2006 Internet
14 E&J, 71 FR at 18594. Furthermore, the Commission explained that “the placement of
15 advertising on another person’s website for a fee includes all potential forms of advertising, such
16 as banner advertisements, streaming video, popup advertisements, and directed search results.”
17 Id.; see also id. at 18608 n.52 (noting that term “website” is “meant to encompass a wide range
18 of existing and developing technology” including “social networking software”). Thus, since
19 2006, FEC regulations have required disclaimer information to be included in paid internet
20 advertisements.

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

22 Since revising the regulations in 2006 to require disclaimers on paid internet
23 advertisements, the Commission has been asked on a number of occasions whether small,

1 character- or space-limited internet communications — such as banner advertisements; social
2 media text, video, or image advertisements; and directed search results — may be exempt from
3 the disclaimer requirements under the impracticable or small items exceptions at 11 CFR
4 110.11(f)(1) or may incorporate technological modifications to satisfy the disclaimer
5 requirements.⁹

6 Historically, the Commission has applied the small items exception to the general
7 disclaimer requirements in situations where a disclaimer simply would not fit in the space
8 provided based on the physical limitations of the item or an external technological constraint.
9 See Advisory Opinion 1980-42 (Hart) (applying the exception to concert tickets); Advisory
10 Opinion 2002-09 (Target Wireless) (applying the exception to character-limited “short message
11 service,” or SMS, communications distributed through a wireless telecommunications network);
12 see also 11 CFR 110.11(f)(1)(i). In Advisory Opinion 2002-09 (Target Wireless), the
13 Commission considered whether disclaimers were required on paid SMS content. At the time
14 the Commission issued that advisory opinion, technology limited SMS content to 160 text-only
15 characters per message; SMS messages could not include images; wireless telephone carriers
16 contractually limited the number of “minutes” of SMS messages that consumers could receive;
17 and content longer than 160 text characters would be sent over multiple messages, which might
18 not be received consecutively. Id. at 2. The Commission concluded, in light of such
19 technological constraints, that the small items exception applied to paid SMS messages,
20 emphasizing “that the SMS technology places similar limits on the length of a political

⁹ See Advisory Opinion 2017-12 (Take Back Action Fund); Advisory Opinion 2010-19 (Google); see also Advisory Opinion Request 2013-18 (Revolution Messaging); Advisory Opinion Request 2011-09 (Facebook). In addition to the advisory opinion requests concerning small 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.

1 advertisement as those that exist with bumper stickers.” Id. at 4.

2 The Commission has not exempted any disclaimers under the small items exception in
3 the 15 years since it issued the Target Wireless Advisory Opinion. The Commission’s most
4 robust discussion of the small items exception was in Advisory Opinion 2007-33 (Club for
5 Growth PAC), which concerned whether an advertiser could “dispense with” or “truncate” the
6 required disclaimers in 10- and 15-second television advertisements. The Commission
7 concluded that because the short length of the proposed ads was not driven by any physical or
8 technological limitations intrinsic to television advertising, the advertisements did not qualify for
9 the small items exception.

10 The related impracticable exception at 11 CFR 110.11(f)(1)(ii) exempts from the
11 disclaimer requirement advertisements displayed via skywriting, water towers, and wearing
12 apparel, as well as “other means of displaying an advertisement of such a nature that the
13 inclusion of a disclaimer would be impracticable.” The list of communications in the rule is not
14 exhaustive; the relevant question is whether the very nature of an advertising medium renders a
15 disclaimer impracticable. The Commission has not, however, applied the impracticable
16 exception to a situation beyond those listed in section 110.11(f)(1)(ii). See Advisory Opinion
17 2007-33 (Club for Growth PAC) (determining that 10- and 15-second television advertisements
18 do not qualify for impracticable exception); Advisory Opinion 2004-10 (Metro Networks)
19 (determining that a “live read” traffic report sponsorship message, by reporters from mobile units
20 and aircraft, did not qualify for impracticable exception); see also Advisory Opinion 2013-13
21 (Freshman Hold’em JFC et al.) at n.4 (concluding that “emails and webpages ... are not
22 electronic communications in which the inclusion of disclaimers may be inherently
23 impracticable.”).

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

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

18 In response to two subsequent advisory opinion requests concerning the possible
19 application of the small items exception or impracticable exception to small internet
20 advertisements, the Commission was unable to issue advisory opinions by the required four
21 affirmative votes. See Advisory Opinion Request 2011-09 (Facebook) (concerning application
22 of exceptions to zero-to-160 text character ads with thumbnail size images); Advisory Opinion
23 Request 2013-18 (Revolution Messaging) (concerning application of exceptions to mobile

1 banner ads).

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

10 D. Proposed Revisions to the Disclaimer Rules at 11 CFR 110.11

11 Technological developments over the past 15 years have rendered much current internet
12 advertising distinguishable from the SMS advertisements to which the Commission applied the
13 small items exception in Advisory Opinion 2002-09 (Target Wireless) and from the internet
14 advertisements the Commission considered in promulgating the disclaimer regulations in 2002.
15 As Facebook explained in a comment on this rulemaking, “[w]hen Facebook submitted its
16 request for an advisory opinion in 2011, ads on Facebook were small and had limited space for
17 text. Ad formats available on Facebook have expanded dramatically since that time.”¹⁰ Indeed,
18 many “smaller” internet advertisements today include video, audio, and graphic components in
19 addition to the text components considered in the Target Wireless Advisory Opinion. See, e.g.,
20 Advisory Opinion 2017-12 (Take Back Action Fund). Moreover, today, social media and other

¹⁰ Facebook, Comment at 3 (Nov. 13, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358468> (citing Facebook, Facebook Ads Guide, <https://www.facebook.com/business/ads-guide>); see also Fidji Simo, An Update on Facebook Ads, Facebook Newsroom (June 6, 2013), <https://newsroom.fb.com/news/2013/06/an-update-on-facebook-ads/> (announcing reconfiguration of ad products); Google, Comment at 3 (Nov. 8, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358482> (noting that the “types and varieties of digital advertisements that political advertisers create and place throughout the web has grown exponentially since 2011.”).

1 small internet advertisements already capably comply with other federal regulatory regimes
2 requiring disclaimers.¹¹

3 As noted above, the Commission has required disclaimer information to be included in
4 paid internet advertisements since 2006. Nonetheless, there appears to be much public confusion
5 about how this requirement applies to different types of internet communications.¹² Thus, the
6 Commission is proposing to add regulatory provisions clarifying, for different types of paid
7 internet public communications, the disclaimers required and, in some circumstances, when a
8 paid internet communication may employ a modified approach to the disclaimer requirements.

9 1. Specific Disclaimer Requirements for Video and Audio Communications

10 Distributed over the Internet — Proposed 11 CFR 110.11(c)(3)(v) and (c)(4)(iv)

11 As noted above, the Act and Commission regulations impose specific requirements for
12 disclaimers on radio and television communications. See 52 U.S.C. 30120(d); 11 CFR
13 110.11(c)(3)-(4). These requirements vary, depending on whether a candidate or another person
14 pays for or authorizes the communication.

15 Radio communications paid for or authorized by a candidate must include an audio
16 statement spoken by the candidate, identifying the candidate and stating that the candidate has
17 approved the communication. 11 CFR 110.11(c)(3)(i). Radio communications that are not paid

¹¹ See CMPLY, Comment at 2 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358493> (noting that regulatory disclaimer and disclosure requirements “have been addressed in similar contexts for marketing, financial and pharmaceutical, without those regulators exempting disclosures in social media channels”).

¹² See, e.g., Service Employees International Union *et al.*, Comment at 1 (Dec. 19, 2016), <http://sers.fec.gov/fosers/showpdf.htm?docid=354341> (noting that five labor organizations “have found it persistently challenging both to understand and to comply with the disclaimer requirements . . . particularly because advisory opinions and enforcement matters often produce inconclusive results that either reveal a lack of consensus among the Commissioners about these matters or rely upon technological facts that later prove to be ephemeral.”); Center for Competitive Politics, Comment at 3 (Dec. 19, 2016), <http://sers.fec.gov/fosers/showpdf.htm?docid=354344> (noting “unpredictability” under current disclaimer rules); and see Statement of Reasons of Chairman Michael E. Toner, Vice Chairman Robert D. Lenhard, and Commissioners David M. Mason, Hans A. von Spakovsky, Steven T. Walther, and Ellen L. Weintraub, MUR 5526 (Graf for Congress) (Nov. 27, 2006) at 2, <https://www.fec.gov/files/legal/murs/current/56473.pdf>.

1 for or authorized by a candidate must include an audio statement identifying the person paying
2 for the communication and that that person “is responsible for the content of this advertising.”
3 11 CFR 110.11(c)(4)(i).

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

10 Television, broadcast, cable, or satellite communications that are not paid for or authorized by a
11 candidate must include the audio statement required by 11 CFR 110.11(c)(4)(i) and conveyed by
12 a “full-screen view of a representative” of the person making the statement or in a voice-over by
13 such person; these communications must also include a similar statement “in clearly readable
14 writing” at the end of the communication. 11 CFR 110.11(c)(4)(ii)-(iii).

15 Internet advertisements may be in the form of audio or video communications, or may
16 incorporate audio or video elements.¹³ These advertisements are indistinguishable from offline
17 advertisements that may be distributed on radio or television, broadcast, cable, or satellite in all
18 respects other than the medium of distribution.¹⁴ Moreover, because the audio and video

¹³ See, e.g., 5 Advertising Trends from the 2016 Presidential Election, Pandora for Brands (Dec. 8, 2016), <http://pandoraforbrands.com/insight/5-advertising-trends-from-the-2016-presidential-election> (urging readers “[t]o learn how Pandora can help amplify your next political campaign”); Amy Schatz, In Hot Pursuit of the Digital Voter, Wall St. J., Mar. 23, 2012, www.wsj.com/articles/SB10001424052702303812904577299820064048072 (showing screenshots of 2012 presidential committee advertisements on Hulu and noting another campaign’s purchase of advertisements on Pandora internet radio); see also Advisory Opinion Request 2017-12 (Take Back Action Fund).

¹⁴ See, e.g., Electronic Privacy Information Center, Comment at 3 (Nov. 3, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358477> (urging extension of broadcast communication disclaimer requirements to “analogous” communication online); Rep. John Sarbanes et al., Comment at 2 (Nov. 9, 2017),

1 components of internet communications with these elements do not contain “character”
2 restrictions, they are more akin to the parameters in which disclaimers must appear on radio and
3 television advertisements than the conditions that may constrain “printed” materials on which a
4 disclaimer must appear.

5 Accordingly, the Commission proposes to make explicit in its regulations that public
6 communications distributed over the internet with audio or video components are treated, for
7 purposes of the disclaimer rules, the same as “radio” or “television” communications. The
8 Commission proposes to do so via the existing requirements at 11 CFR 110.11(c)(3) and (4) that
9 apply to radio, television, broadcast, cable, and satellite communications, because those
10 provisions have been in operation for 15 years and are, therefore, familiar to persons paying for,
11 authorizing, and distributing communications. Moreover, by applying the specifications for
12 radio and television communications to audio and video communications distributed over the
13 internet, the proposed regulations would ensure that audio and video ads could air on radio,
14 television, and the internet without having to satisfy different disclaimer requirements.

15 Proposed new paragraph (c)(3)(v) would provide that, for purposes of the disclaimer
16 rules applicable to radio and television advertisements paid for and authorized by candidates, a
17 “communication transmitted through radio” includes a “public communication distributed over
18 the internet with audio but without video, graphic, or text components.” Similarly, proposed new
19 paragraph (c)(4)(iv) would provide that, for purposes of the disclaimer rules applicable to radio

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

1 and television advertisements not paid for or authorized by candidates, a “communication
2 transmitted through radio” includes a “public communication distributed over the internet with
3 audio but without video, graphic, or text components.”

4 The proposals concerning audio communications (like the proposals for video, text, and
5 graphic internet communications discussed below) incorporate the term “public communication”
6 to make clear that these provisions neither expand nor contract the scope of the disclaimer rules
7 set forth at 11 CFR 110.11(a). The proposed reference to an audio public communication
8 distributed “over the internet” (like the reference to the “internet” in the proposals for video, text,
9 and graphic internet communications discussed below) is intended to encompass advertisements
10 on websites as well as those distributed on other internet-enabled or digital devices or
11 applications; for audio internet advertisements, these would include communications on
12 podcasts, internet radio stations, or app channels.¹⁵ The proposed reference to a “public
13 communication distributed over the internet” is not intended to alter the definition of “public
14 communication,” as defined in 11 CFR 110.26. Is this clear, or should the Commission include a
15 cross-reference in the regulatory text? Moreover, so as to hew most closely to the “radio”
16 provisions that the Commission proposes to amend, the proposed amendments regarding “audio”
17 internet communications are intended to apply to those communications with only an audio
18 component. The Commission proposes to address communications with any “video, graphic, or
19 text components” separately, as explained below.

20 Proposed new paragraph (c)(3)(v) would also provide that, for purposes of the disclaimer
21 rules applicable to radio and television advertisements paid for and authorized by candidates, a
22 “communication transmitted through television or through any broadcast, cable, or satellite

¹⁵ See Software and Information Industry Association, Comment at 3 (“in-app advertising has become one of the fastest-growing mobile ad mediums”).

1 transmission” includes a “public communication distributed over the internet with a video
2 component.” Similarly, proposed new paragraph (c)(4)(iv) would provide that, for purposes of
3 the disclaimer rules applicable to radio and television advertisements not paid for or authorized
4 by candidates, a “communication transmitted through television or through any broadcast, cable,
5 or satellite transmission” includes a “public communication distributed over the internet with a
6 video component.”

7 Because this proposal is intended to encompass video public communications on
8 websites, apps, and streaming video services, it would apply to a video advocating the election of
9 a candidate that a political committee pays to run as a “pre-roll” video on the YouTube app or
10 appear in a YouTube.com search result, but would not apply to the same video posted for free on
11 YouTube.com (since a communication not placed for a fee would not be a “public
12 communication”).¹⁶ Does this distinction make sense? Should disclaimers be required on videos
13 posted for free on YouTube.com or analogous platforms? Unlike traditional television,
14 broadcast, cable, or satellite ads, however, video advertisements placed online may include non-
15 video components such as separate text, or graphic fields. The proposed rule regarding internet
16 video ads thus would differ from the existing television, broadcast, cable, and satellite provisions
17 in that the proposed rule would apply even if the communication also included non-video
18 components.

19 The proposed rule would not explicitly address small audio or video internet ads. The
20 Commission proposes to take this approach to hew the proposed rules on audio and video ads as
21 closely as possible to the existing disclaimer provisions for advertisements transmitted by radio,
22 television, broadcast, cable, and satellite, which do not, in paragraphs (c)(3) or (4), account for

¹⁶ See Google, Comment at 3 (describing Google ad products on YouTube).

1 “small” advertisements. Should new technology develop that would render the provision of a
2 disclaimer on a particular type of audio or video internet communication impracticable, the
3 Commission anticipates that, as with current TV and radio ads, such circumstances could be
4 addressed in an advisory opinion seeking to exempt such a communication from the disclaimer
5 requirements.¹⁷

6 The Commission seeks comment as to whether these proposals accurately describe audio
7 and video communications over the internet, regardless of the electronic or digital platforms on
8 which they may be distributed. For example, does the Commission need to clarify the term
9 “internet”? Similarly, does the Commission need to clarify the term “video” to address whether
10 an advertisement with a GIF is a communication “with a video component” or one with a
11 “graphic” component? Similarly, should the Commission expressly include or exclude from the
12 term “video” static (*i.e.*, non-moving) paid digital advertisements in dynamic (*i.e.*, moving)
13 environments such as “billboard” ads inside interactive gaming systems, or virtual-reality and
14 augmented-reality platforms?¹⁸

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

19 2. Specific Disclaimer Requirements for Text and Graphic Communications

20 Distributed over the Internet — Proposed 11 CFR 110.11(c)(2)(vi)

¹⁷ See 11 CFR 112.1 (describing advisory opinion requests); *see also* Advisory Opinion 2007-33 (Club for Growth PAC) (considering and rejecting request to apply small items exception to disclaimers in 10- and 15-second television advertisements).

¹⁸ *See, e.g.*, Steve Gorman, *Obama Buys First Video Game Campaign Ads*, Reuters, Oct. 17, 2008, <https://www.reuters.com/article/us-usa-politics-videogames/obama-buys-first-video-game-campaign-ads-idUSTRE49EAGL20081017> (showing example of static court-side ad in dynamic basketball gaming environment).

1 Internet advertisements may be in the form of text, image, and other graphic elements
2 with audio but without video components; such advertisements come “in all shapes and sizes.”¹⁹
3 As noted above, the Act and Commission regulations impose specific requirements for
4 communications that are “printed.” See 52 U.S.C. 30120(c); 11 CFR 110.11(c)(2). First, a
5 disclaimer appearing on any “printed public communication” must be of “sufficient type size to
6 be clearly readable by the recipient of the communication.” 11 CFR 110.11(c)(2)(i).
7 Commission regulations clarify that a disclaimer “in twelve (12)-point type size” satisfies the
8 size requirement when “used for signs, posters, flyers, newspapers, magazines, or other printed
9 material that measures no more than twenty-four (24) inches by thirty-six (36) inches.” Id.
10 Second, such a disclaimer must “be contained in a printed box set apart from the other contents
11 of the communication.” 11 CFR 110.11(c)(2)(ii). Third, the text of such a disclaimer must be
12 “printed with a reasonable degree of color contrast between the background and the printed
13 statement.” 11 CFR 110.11(c)(2)(iii). Finally, Commission regulations for disclaimers on
14 printed communications also contain two provisions addressing multi-page communications and
15 separable communications (such as those included in a package of materials). See 11 CFR
16 110.11(c)(2)(iv)-(v).

17 Neither the Act nor Commission regulations define the term “printed communication,”
18 nor has the Commission ever explained in a rule or advisory opinion whether internet
19 communications are “printed” for purposes of the disclaimer rule.²⁰ Nonetheless, in a 2006
20 enforcement matter considering whether a political committee’s website was subject to the

¹⁹ Google, Comment at 5 (describing ad products on the Google Display Network); see also Advisory Opinion Request 2017-12 (Take Back Action Fund).

²⁰ The Commission did note, in a separate rulemaking, that the “printed” aspect of the disclaimer rules may be addressed in this rulemaking. See Technological Modernization, 81 FR at 76421 n.40.

1 “printed” communication disclaimer requirements, six Commissioners unanimously agreed that
2 “the term ‘printed communication’ in [52 U.S.C. 30120(c)] does not include communication on
3 Internet pages. Hence, the additional disclaimer requirements of [52 U.S.C. 30120(c)] do not
4 apply to Internet pages.”²¹ The Commissioners specifically noted that “printed boxes around
5 particular text on the Internet would not work particularly well” given that “Internet pages can
6 appear and print differently on different computers and printers.”²²

7 That decade-old conclusion regarding the meaning of “printed” as applied to a
8 committee’s own website does not fit well in the current context of communications that are
9 placed for a fee on another person’s website. As a preliminary matter, disclaimers on paid
10 internet ads are different than disclaimers on political committee websites; unlike a dynamic
11 website that may be comprised of multiple, constantly changing webpages that may appear
12 differently to users accessing it through different browsers or devices, an internet advertisement
13 is purchased in a set size.²³ Furthermore, the Commission recognizes that there have been
14 extraordinary developments in technology in the last decade, including the now easy ability to
15 overlay images with text in multiple font sizes and colors or graphic shapes like boxes for
16 immediate upload to the internet using only applications built in to one’s mobile device.²⁴ The
17 Commission therefore concludes that, in conjunction with the opportunity for modified

²¹ Statement of Reasons of Chairman Michael E. Toner, Vice Chairman Robert D. Lenhard, and Commissioners David M. Mason, Hans A. von Spakovsky, Steven T. Walther, and Ellen L. Weintraub, MUR 5526 (Graf for Congress) at 4.

²² Id. at 3 n.9.

²³ See, e.g., Internet Advertising Bureau, IAB New Standard Ad Unit Portfolio (July, 2017), https://www.iab.com/wp-content/uploads/2017/08/IABNewAdPortfolio_FINAL_2017.pdf (describing dozens of ad size specifications across a variety of digital platforms).

²⁴ See, e.g., Emily Price, How to Get the Most Out of iOS 11’s New Screenshot Editor, Liferhacker, Sept. 23, 2017, <https://liferhacker.com/how-to-get-the-most-out-of-ios-11s-new-screenshot-edito-1818696949>.

1 disclaimers described below, treating text and graphic paid advertisements distributed over the
2 internet as “printed” communications for purposes of the disclaimer requirements may be
3 appropriate.

4 The Commission proposes to utilize the existing requirements at 11 CFR 110.11(c)(2)
5 that apply to printed communications because they have been in operation for 15 years and are,
6 therefore, familiar to persons paying for, authorizing, and distributing communications.
7 Moreover, by applying the specifications for “printed” public communications to text and
8 graphic communications distributed over the internet, the proposed regulation would ensure that
9 ads could be disseminated both in traditional print media and over the internet without being
10 subject to different disclaimer requirements.

11 Proposed new paragraph (c)(2)(vi) would provide that, for purposes of the disclaimer
12 rules applicable to printed communications, a “printed public communication” includes a “public
13 communication distributed over the internet with text or graphic components but without any
14 video component.” Proposed new paragraph (c)(2)(vi) would also clarify the “text size”
15 requirement for printed communication disclaimers in the context of internet communications by
16 providing that a “disclaimer on a printed public communication distributed over the internet that
17 appears in letters at least as large as the majority of the other text in the communication satisfies
18 the size requirement of paragraph (c)(2)(i).”

19 a. Printed Internet Communications with Video or Audio Components

20 The proposal regarding a public communication distributed over the internet “with text or
21 graphic components but without any video component” is intended to work in conjunction with
22 the video proposal discussed above; under the operation of both proposals in this notice, an
23 internet communication that contains both printed elements (such as text or graphic fields) and a

DRAFT

1 video component would be subject only to the more specific disclaimer rules applicable to
2 television, broadcast, cable, and satellite communications. The Commission seeks comment on
3 this proposal. In particular, the Commission seeks comment regarding how users interact with
4 internet advertisements that contain both text or graphic and video elements. Is it common for
5 users to view only the printed or video components of an internet advertisement that contains
6 both? Should the Commission require that such communications include at least a truncated or
7 adapted disclaimer, see below, on the face of the text or graphic element? Do such adapted
8 disclaimers provide adequate transparency? Must even an adapted disclaimer provide
9 information sufficient to identify the communication’s payor on the communication’s face, to
10 avoid complications with hyperlinks that may prove to be transient? Should the Commission
11 adopt rules that require a disclaimer to be included on either the printed or video portion of an
12 internet advertisement, or on both portions, depending on the proportion of the advertisement
13 that contains each type of content? Alternatively, should the rules allow an advertiser the choice
14 between the “television” or “printed” communication disclaimer rules for an internet
15 communication that contains both video and printed (i.e., text or graphic) components?

16 Similarly, under the operation of the printed and audio proposals in this notice, an
17 internet communication that contains both printed elements (such as text or graphic fields) and
18 an audio, but not a video, component, would be subject to the more specific disclaimer rules
19 applicable only to “printed” communications. The Commission did not include such
20 communications in the proposed “audio” rules because such advertisements appear more like
21 “printed” communications than “radio” ones. The Commission seeks comment on this proposal.
22 In particular, and as with the proposal above, the Commission seeks comment regarding how
23 users interact with internet advertisements that contain both text or graphic and audio elements.

1 Is it common for users only to view the printed components or listen to the audio components of
2 an internet advertisement that contains both? Should the Commission instead consider such
3 advertisements under the “audio” proposals discussed above? Should the Commission require
4 that such communications include both “radio” and “printed” disclaimers? Should the
5 Commission adopt rules that require disclaimer to be included in either the printed or audio
6 portion of an internet advertisement, or on both portions, depending on the proportion of the
7 advertisement that contains each type of content? Alternatively, should the rules allow an
8 advertiser the choice between the “radio” or “printed” communication disclaimer rules for an
9 internet communication that contains both audio and printed (i.e., text or graphic) components?

10 b. Printed Internet Communication Disclaimer Text Size Safe Harbor

11 The proposed rule would establish a “safe harbor” provision identifying disclaimer text
12 size — “letters at least as large as the majority of the other text in the communication” — that
13 clearly satisfies the rule. This would track the current approach for “printed” materials. See
14 2002 Disclaimer E&J, 67 FR 76965 (describing current 12-point type safe harbor for printed
15 communication disclaimers); cf. Advisory Opinion 1995-09 (NewtWatch PAC) at 2 (approving
16 disclaimer on political committee’s website that was “printed in the same size type as much of
17 the body of the communication”). The Commission recognizes that some text or graphic internet
18 communications may not have a “majority” text size. The possible diversity of text sizes in
19 internet text and graphic communications is, in this respect, similar to text size diversity in
20 printed communications currently addressed in 11 CFR 110.11(c)(2)(i). As the Commission
21 explained when adopting the current safe harbor in lieu of a strict size requirement, “the vast
22 differences in the potential size and manner of display of larger printed communications would
23 render fixed type-size examples ineffective and inappropriate.” 2002 Disclaimer E&J, 67 FR

1 76965. Thus, for internet communications with text or graphic components that are not included
2 in the proposed text-size safe harbor, the Commission intends that questions of whether a
3 disclaimer is of sufficient type size to be clearly readable are “to be determined on a case-by-case
4 basis, taking into account the vantage point from which the communication is intended to be seen
5 or read as well as the actual size of the disclaimer text,” as they are under the current rule. Id.

6 3. Adapted Disclaimers for Text and Graphic Communications Distributed over the
7 Internet — Proposed 11 CFR 110.11(c)(5)

8 While current text and graphic internet advertisements are akin in many respects to
9 analog printed advertisements, material differences between them remain. Most significant
10 among these differences are the availability of “micro” sized text and graphic internet
11 advertisements and the interactive capabilities of advertisements over the internet.²⁵ To ensure
12 the disclaimer rules remain applicable to new forms of internet advertising that may arise, while
13 also reducing the need for serial revisions to Commission regulations in light of such
14 developments, the Commission favors adopting a provision specifically addressing those internet
15 advertisements that cannot, due to external character or space constraints, practically include a
16 full disclaimer. See Advisory Opinion 2004-10 (Metro Networks) at 3 (concluding that
17 modifications or adaptations to disclaimers may be permissible in light of technologically or
18 physically limited aspects of a communication).

19 Accordingly, under proposed paragraph (c)(5), a “printed public communication
20 distributed over the internet” that, “due to external character or space constraints,” cannot fit a

²⁵ See Public Citizen and Free Speech for People, Comment at 3 (Nov. 1, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358485> (noting that paid online communications by “bots” “can be very short and seamlessly integrated into social conversations. Absent disclaimers, such messages are not likely to be perceived as paid messages”); see also Spot-On, Comment at 8 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358480> (noting that “all [online] ads link to some sort of web page or presence”).

1 required disclaimer must include an “adapted disclaimer.” This provision would explain when a
2 communication could use technological adaptations, describe how the adaptations must be
3 presented, provide examples of the adaptations, and clarify that neither the small items nor
4 impracticable exception would apply to any internet text or graphic communication that can use
5 an adapted disclaimer.

6 a. When a Communication May Use Technological Adaptions — External
7 Character and Space Constraints

8 The Commission intends the determination of whether a printed public communication
9 distributed over the internet “cannot fit” a disclaimer to be an objective one. That is, the
10 character or space constraints intrinsic to the technological medium are intended to be the
11 relevant consideration, not the communication sponsor’s subjective assessment of the
12 “difficulty” or “burden” of including a full disclaimer. As the Supreme Court has held in the
13 context of broadcast advertisements, the government’s informational interest is sufficient to
14 justify disclaimer requirements even when a speaker claims that the inclusion of a disclaimer
15 “decreases both the quantity and effectiveness of the group’s speech.” Citizens United, 558 U.S.
16 at 368. The Commission concludes that the informational interest relied upon by the Supreme
17 Court with respect to broadcast communications is equally implicated in the context of text and
18 graphic public communications over the internet.

19 The reference to “external character or space constraints” is intended to codify the
20 approach to those terms as the Commission has discussed them in the context of the small items
21 and impracticable exceptions discussed above. See, e.g., Advisory Opinion 2007-33 (Club for
22 Growth PAC) at 3 (contrasting lack of “physical or technological limitations” constraining 10-
23 and 15-second television advertisements with “overall limit” and “internal limit” on size or

1 length of SMS ads); Advisory Opinion 2004-10 (Metro Networks) at 3 (discussing “physical and
2 technological limitations” of ad read live from helicopter). This approach to determining when a
3 communication cannot fit a required disclaimer — rather than by the particular size of the
4 communication as measured by pixels, number of characters, or other measurement — is
5 intended to minimize the need for serial revisions to Commission regulations as internet
6 technology may evolve. Should newly developed internet advertising opportunities raise
7 questions as to whether a particular communication may fit a disclaimer, the Commission
8 expects that such questions may be addressed in an advisory opinion context.²⁶

9 Does the “external character or space constraints” approach provide sufficiently clear
10 guidance in light of technological developments that may occur? If not, would a bright-line rule
11 referencing pixel size, character number, or other technological characteristic that might define a
12 “small” internet advertisement provide better guidance? Alternatively, should the Commission
13 adopt a safe harbor indicating that ads under particular pixel size, character limit, or other
14 technological characteristic may use adapted disclaimers? If the Commission were to adopt
15 either a bright-line rule or a safe harbor based on pixel size, character limit, or other
16 technological characteristic, what should those technological limits be? Does the “external
17 character or space constraints” wording make clear that business decisions to sell small ads that
18 are not constrained by actual technological limitations do not justify use of an adapted
19 disclaimer?

20 b. How Adaptions Must be Presented — Truncated Disclaimers

21 The proposed rule would explain that an “adapted disclaimer” means “a truncated
22 disclaimer on the face of a communication in conjunction with an indicator through which a

²⁶ See 11 CFR 112.1.

1 reader can locate the full disclaimer required” under 11 CFR 110.11(c)(2). The proposal would
2 further clarify that the truncated portion of an adapted disclaimer “must indicate the person or
3 persons who paid for the communication in letters of sufficient size to be clearly readable by a
4 recipient of the communication.”

5 The Commission is proposing that adapted disclaimers include a payor’s name on the
6 face of the communication for several reasons. First, the Commission notes that the inclusion of
7 such information would signal to a recipient that the communication is, indeed, a paid
8 advertisement. This is especially important on the internet where paid content can be targeted to
9 a particular user and appear indistinguishable from the unpaid content that user views, unlike
10 traditional media like radio or television, where paid content is transmitted to all users in the
11 same manner and is usually offset in some way from editorial content.²⁷ Second, the inclusion of
12 the payor’s name would allow persons viewing the communication on any device, even if the
13 recipient does not view the full disclaimer, to know “the person or group who is speaking” and,
14 therefore, assist voters in identifying the source of advertising so they are better “able to evaluate
15 the arguments to which they are being subjected.” Citizens United, 558 U.S. at 368 (internal
16 quotations and alterations removed). For example, a joint comment from three organizations
17 argued that, “[a]s frequent targets of voter suppression tactics, communities of color need to
18 know the identity of the entity paying for and authorizing internet communications” because
19 “[w]ithout disclosure requirements that bring transparency to online political communications,

²⁷ See, e.g., Center for Digital Democracy, Comment at 2 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358502> (noting that “native advertising” online “purposefully blurs the distinctions between editorial content and advertising”); Twitter, Comment at 2 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358496> (noting that, absent paid “Promoted” tag, Promoted Tweets “look and act just like regular Tweets”); Electronic Privacy Information Center, Comment at 4 (“Online platforms use algorithms to target ads with a level of granularity that has not been possible before”).

1 campaigns will continue to exploit communities of color through voter suppression tactics.”²⁸ A
2 technological mechanism to reach a full disclaimer provided by shortened URL and without the
3 payor’s name would not provide, on the face of the communication, the same informational
4 value.²⁹ Third, the Commission and the public cannot rely on social media platforms’ voluntary
5 efforts to identify paid communications (such as by a tag that a communication is “paid,”
6 “sponsored,” or “promoted”).³⁰ As a preliminary matter, the Commission lacks any enforcement
7 mechanism to ensure compliance with such voluntary efforts, which, by definition, may be
8 modified or abandoned at any time. In addition, tags that identify whether an advertisement is
9 “paid,” “sponsored,” or “promoted,” do not necessarily identify who paid, sponsored, or
10 promoted the advertisement,³¹ and even that limited information may disappear when a paid
11 communication is shared with other social media users.

²⁸ Asian Americans Advancing Justice, et al., Comment at 11-12, <http://sers.fec.gov/fosers/showpdf.htm?docid=358472> (discussing examples of voter suppression ads on Facebook and Twitter in 2016); see also Campaign Legal Center, Comment at 5 (Nov. 8, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=359381> (explaining that “voters would assess a political ad differently if they knew that Russia was behind it. And if disclaimers had been required for online political ads, journalists, watchdog groups, and law enforcement might have been able to uncover the Russian influence effort sooner”); Sen. Mark Warner, et al., Comment at 3 (Nov. 13, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=359176> (noting belief of 15 Senators that lack of disclaimers on “direct, ephemeral advertisements” online “has incentivized the use of contradictory, materially false, and racially inflammatory ads” and “provided an enticing set of tools for foreign interests intent on sowing disinformation, discord, and division among the electorate”); Prof. Abby Wood, Comment at 2 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358509> (describing multiple studies concluding that disclaimers affect recipients’ perception of messages received from political advertisements).

²⁹ See Electronic Privacy Information Center, Comment at 3 (explaining that “URL shortening tools such as goo.gl and bit.ly can take lengthy hyperlinks and reduce them to just a few characters. This would allow an ad with character limitations to provide a URL that linked to a full disclaimer.”).

³⁰ See, e.g., Twitter, Comment at 2 (describing “promoted” tweet label); Rob Goldman, Update on Our Advertising Transparency and Authenticity Efforts, Facebook Newsroom (Oct. 27, 2017), <https://newsroom.fb.com/news/2017/10/update-on-our-advertising-transparency-andauthenticity-efforts/> (indicating that, starting in summer 2018, Facebook “advertisers will have to include a disclosure in their election-related ads, which reads: ‘Paid for by.’”).

³¹ See Electronic Frontier Foundation, Comment at 4 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358498> (noting current ability to “publish anonymous election related advertisements on Facebook via an advertising account linked to a pseudonymous Facebook page”).

1 To further help voters evaluate the message, the Commission proposes to require that
2 information about the payor be of a size to “be clearly readable.” As with the size requirements
3 for text and graphic internet communications described above, the Commission intends that
4 questions of whether a disclaimer is of sufficient type size to be clearly readable are “to be
5 determined on a case-by-case basis, taking into account the vantage point from which the
6 communication is intended to be seen or read as well as the actual size of the disclaimer text,” as
7 they are under the current rule. 2002 Disclaimer E&J, 67 FR 76965.

8 As a component of adapted disclaimers, the Commission proposes to require the use of
9 an “indicator,” which it defines in proposed paragraph (6) as “any visible or audible element of
10 an internet communication that is presented in a clear and conspicuous manner, to give the
11 reader, observer, or listener adequate notice that the information required by paragraph (5) is
12 available. An indicator is not clear and conspicuous if it is difficult to see, read, or hear, or if the
13 placement is easily overlooked” and adds in proposed paragraph (7): “An indicator may take any
14 form including, but not limited to, words, images, sounds, symbols, and icons.” What are the
15 advantages and disadvantages of this approach? What would be the advantages and
16 disadvantages of the Commission’s designing and promulgating a single indicator to be used
17 across all media and platforms?

18 c. How Adaptations Must be Presented — One-Step Technological
19 Mechanism

20 Because Congress has determined that provision of an ad payor’s name is necessary but
21 not sufficient to constitute a useful disclaimer,³² the proposal requires a mechanism to provide

³² See, e.g., 52 U.S.C. 30120(a) (requiring authorization statements and, if not authorized by a candidate, a payor’s street address, telephone number, or “World Wide Web” address); Hearing before the Subcomm. on Privileges and Elections of the S. Comm. on Rules and Admin., 94th 19 20 Cong. 141 (Feb. 18, 1976) (testimony of Antonin Scalia, Asst. Att’y Gen’l) (testifying, in response to question about proposal to amend Act to require payor

1 the additional required information. Proposed paragraph (c)(5) would specify that the
2 technological mechanism used to provide the full disclaimer must be “associated with” the paid
3 for information and allow a recipient of the communication to locate the full disclaimer “by
4 navigating no more than one step away from the adapted disclaimer.” This means that the
5 additional technological step should be apparent in the context of the communication and the
6 disclaimer, once reached, should be “clear and conspicuous” and otherwise satisfy the full
7 requirements of 11 CFR 110.11(c). Moreover, this proposed requirement is intended to notify a
8 recipient of the communication that further information about or from the payor is available and
9 that the recipient may find that information with minimal investment of additional effort.³³ Thus,
10 for example, a hyperlink underlying the “paid for” language would be “associated with” the full
11 disclaimer at the landing page located one step away from the communication and to which the
12 link leads. One commenter suggested that “the Commission should allow people and entities
13 subject to disclaimer requirements to satisfy them through any reasonable technological means”
14 rather than through a particular technology.³⁴ Should the Commission explicitly include a
15 requirement that a technological mechanism be “reasonable” or can the reasonableness
16 requirement for such mechanisms be assumed?

17 d. Examples of Technological Mechanisms in Adapted Disclaimers

name and authorization statement, that “[t]he principle seems to me a good one” that “seems to me like a sensible provision” to minimize risk that “candidate’s campaign can be run by somebody other than the candidate”).

³³ See, e.g., Terrill Moore, MCCI, Comment at 2 (Nov. 12, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=360063> (asking, rhetorically, “Who doesn’t know how to click a link in an ad?” in arguing for short word like “ad” or “paid” with hyperlink by which readers “will ultimately be able to track material back to its source”).

³⁴ Coolidge-Reagan Foundation, Comment at 4 (Nov. 8, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358499>.

1 The proposal would provide a list of examples of “technological mechanisms for the
2 provision of the full disclaimer” including, but not limited to, “hover-over mechanisms, pop-up
3 screens, scrolling text, rotating panels, or hyperlinks to a landing page with the full disclaimer.”
4 This illustrative list incorporates examples of one-step technological mechanisms the
5 Commission has seen utilized by advisory opinion requestors and other federal and state agency
6 disclosure regulations.³⁵ The list is intended to provide guidance while retaining flexibility for
7 advertisers to utilize other existing technological mechanisms or new mechanisms that may arise
8 in the future.

9 Should the Commission allow advertisers to include different parts of a full disclaimer in
10 different frames or components of text or graphic internet advertisements (such as a disclaimer
11 split between two character-limited text fields, one above an image and one below)? Several
12 commenters noted the importance of ensuring that disclaimers are visible across devices or
13 platforms and expressed concern that some technological mechanisms may not be functional
14 across all devices or platforms.³⁶ Should the Commission incorporate into the rule a requirement

³⁵ See, e.g., Advisory Opinion 2010-19 (Google) (addressing proposal to provide disclaimer by hyperlink to landing page containing full disclaimer); FTC Disclosures at 10 (permitting disclosure to “be provided by using a hyperlink”); *id.* at 12 (allowing “mouse-over” display if effective on mobile devices); *id.* at 13-14 (allowing disclosures by pop ups and interstitial pages); *id.* at 16 (allowing scrolling text or rotating panels in space-constrained banner ad to present required disclosures); Cal. Code Regs. tit. 2, sec. 18450.4(b)(3)(G)(1) (permitting “link to a webpage with disclosure information”); *id.* at (b)(3)(G)(1) (allowing disclaimer “displayed via rollover display”); Md. Code. Regs. 33.13.07(D)(2)(b)(i) (permitting “viewer to click” and be “taken to a landing or home page” with disclaimer); see also First General Counsel’s Report, MUR 6911 (Frankel) at 5 n.19 (noting respondent committee’s claim that “its Twitter profile contains a link to the campaign’s website that contains a disclaimer”); and see Interactive Advertising Bureau, Comment at 3 (Nov. 10, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358484> (advocating a rule allowing for flexibility in disclaimer provision, such as by click through links); CPLY, Comment at 2-3 and 9-11 (describing several “short-form” disclosure solutions within character-limited social media platforms).

³⁶ See, e.g., Asian Americans Advancing Justice, *et al.*, Comment at 9-11 (presenting statistics showing that persons of color are more likely to consume information on internet than television and are more likely to do so via mobile devices than display (desktop) platforms); CPLY, Comment at 2 (noting that “‘roll over’ or ‘hover’ disclosures . . . have significant limitations in social media platforms and . . . do not function within the user interfaces of mobile devices, where the majority of social media engagement takes place and where we have seen the largest increases in Internet and broadband usage”).

1 that any technological mechanism used must be accessible by all recipients of that
2 communication, including on mobile devices?

3 e. Non-applicability of Small Items and Impracticable Exceptions with
4 Adapted Disclaimers

5 Finally, proposed paragraph (c)(5) would clarify that a “printed public communication
6 distributed over the internet that can accommodate an adapted disclaimer cannot be exempt from
7 the disclaimer requirements under paragraph (f)(1).” Some commenters urged the Commission
8 to prohibit the use of the small items exception or impracticable exception for internet
9 advertisements while other commenters urged the Commission to apply either the small items
10 exception or impracticable exception to all internet advertisements.³⁷ The Commission agrees
11 with those commenters who believe that most internet advertisements should contain disclaimers
12 but, given the uncertainty of internet technology that might develop and the constraints that those
13 developments might place on the provision of disclaimers, prefers to codify a preference for
14 adapted disclaimers, when necessary, while leaving open the possibility of the application of the
15 existing exceptions. Thus, this final aspect of proposed paragraph (c)(5) would require that a
16 space-constrained internet communication that can, nonetheless, incorporate existing technology
17 to provide, within one step, a full disclaimer, must provide such a disclaimer.

18 The Commission welcomes comment on any aspect of the adapted disclaimer proposal.
19 Additionally, the Commission seeks comment addressing how differences between online
20 platforms, providers, and presentations may affect the application of any of the proposed

³⁷ Compare, e.g., Democracy 21, Comment at 5 (Nov. 2, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358478> (advocating against an “across the board” application of exceptions to internet communications as inconsistent with recognized governmental interest in requiring disclaimers), with Coolidge-Reagan Foundation, Comment at 6 (urging application of exception to social media and other internet advertisements); Revolution Messaging, Comment at 2-3 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358467> (urging application of exceptions to all communications appearing on mobile devices and rejection of the need for technological adaptations as too costly).

1 disclaimer rules for text, graphic, video, and audio internet advertisements. The Commission is
2 particularly interested in comment detailing the challenges and opportunities persons have
3 experienced in complying with (and receiving disclosure from) similar state and federal
4 disclaimer or disclosure regimes. Given the development and proliferation of the internet as a
5 mode of political communication (digital political advertising grew almost eightfold between
6 2012 and 2016, from \$159 million to \$1.4 billion), and the expectation that continued
7 technological advances will further enhance the quantity of information available to voters
8 online, the Commission welcomes comment on whether the proposed rules allow for flexibility
9 to address future technological developments while honoring the important function of providing
10 disclaimers to voters.

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

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

20 **List of Subjects**

21 11 CFR Part 110

22 Campaign funds, Political committees and parties.

1 For the reasons set out in the preamble, the Federal Election Commission proposes to
2 amend 11 CFR Part 110, as follows:

3 **Part 110 – Contribution and expenditure limitations and prohibitions**

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

5 Authority: 52 U.S.C. 30101(8), 30101(9), 30102(c)(2), 30104(i)(3), 30111(a)(8), 30116, 30118,
6 30120, 30121, 30122, 30123, 30124, and 36 U.S.C. 510.

7 2. Amend § 110.11 as follows:

8 a. Add paragraph (c)(2)(vi);

9 b. Add paragraph (c)(3)(v);

10 c. Add paragraph (c)(4)(iv); and

11 d. Add paragraph (c)(5).

12 The additions read as follows:

13 **§ 100.11 Communications; advertising; disclaimers (52 U.S.C. 30120).**

14 * * * * *

15 (c) * * *

16 (2) * * *

17 (vi) For purposes of this section, a printed public communication includes a public
18 communication distributed over the internet with text or graphic components but without any
19 video component. A disclaimer on a printed public communication distributed over the internet
20 that appears in letters at least as large as the majority of the other text in the communication
21 satisfies the size requirement of paragraph (c)(2)(i).

22 (3) * * *

1 (v) For purposes of this section, a communication transmitted through radio includes a public
2 communication distributed over the internet with audio but without video, graphic, or text
3 components. For purposes of this section, a communication transmitted through television or
4 through any broadcast, cable, or satellite transmission includes a public communication
5 distributed over the internet with a video component.

6 (4) * * *

7 (iv) For purposes of this section, a communication transmitted through radio includes a public
8 communication distributed over the internet with audio but without video, graphic, or text
9 components. For purposes of this section, a communication transmitted through television or
10 through any broadcast, cable, or satellite transmission includes a public communication
11 distributed over the internet with a video component.

12 (5) Technologically adapted disclaimers for printed public communications over the internet.

13 A printed public communication distributed over the internet that, due to external character or
14 space constraints, cannot fit a required disclaimer must include an adapted disclaimer. For
15 purposes of this paragraph, an adapted disclaimer means a truncated disclaimer on the face of a
16 communication in conjunction with an indicator through which a reader can locate the full
17 disclaimer required by paragraph (c)(2). The truncated portion of an adapted disclaimer must
18 indicate the person or persons who paid for the communication in letters of sufficient size to be
19 clearly readable by a recipient of the communication. The technological mechanism in an
20 adapted disclaimer must be associated with the “paid for” information and must allow a recipient
21 of the communication to locate the full disclaimer by navigating no more than one step away
22 from the adapted disclaimer. Technological mechanisms for the provision of the full disclaimer
23 include, but are not limited to, hover-over mechanisms, pop-up screens, scrolling text, rotating

DRAFT

1 panels, or hyperlinks to a landing page with the full disclaimer. A printed public communication
2 distributed over the internet that can accommodate an adapted disclaimer cannot be exempt from
3 the disclaimer requirements under paragraph (f)(1).

4 (6) As used in this paragraph (5), an “indicator” is any visible or audible element of an internet
5 communication that is presented in a clear and conspicuous manner, to give the reader, observer, or
6 listener adequate notice that the information required by paragraph (5) is available. An indicator is
7 not clear and conspicuous if it is difficult to see, read, or hear, or if the placement is easily
8 overlooked.

9 (7) An indicator may take any form including, but not limited to, words, images, sounds, symbols,
10 and icons.

11

12 * * * * *

13

14

15

On behalf of the Commission,

16

17

Caroline C. Hunter,
Chair,
Federal Election Commission.

18

19

20

21 DATED: _____

22 BILLING CODE: 6715-01-P

23