This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

FEDERAL ELECTION COMMISSION

11 CFR Parts 100 and 110

[Notice 2018–06]

Internet Communication Disclaimers and Definition of “Public Communication”

AGENCY: Federal Election Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Election Commission requests comment on two alternative proposals to amend its regulations concerning disclaimers on public communications on the internet that contain express advocacy, solicit contributions, or are made by political committees. The Commission is undertaking this rulemaking in light of technological advances since the last revised its rules governing internet disclaimers in 2006, and questions from the public about the application of those rules to internet communications. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DATES: Comments must be received on or before May 25, 2018. The Commission will hold a public hearing on this notice on June 27, 2018. Anyone wishing to testify at such a hearing must file timely written comments and must include in the written comments a request to testify.

ADDRESSES: All comments must be in writing. Commenters are encouraged to submit comments electronically via the Commission’s website at http://sers.fec.gov/fosers/rulemaking.htm?pid=74739. Alternatively, commenters may submit comments in paper form, addressed to the Federal Election Commission, Attn.: Neven F. Stipanovic, Acting Assistant General Counsel, 1050 First St. NE, Washington, DC 20463. Each commenter must provide, at a minimum, his or her first name, last name, city, and state; comments without this information will not be accepted. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the Commission’s website and in the Commission’s Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social security number, or driver’s license number, or any information that is restricted from disclosure, such as trade secrets or commercial or financial information that is privileged or confidential.

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

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

A. Rulemaking History

1. Definition of “Public Communication”

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

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

The Commission proposed to update the definition by adding communications placed for a fee on another person’s “internet-enabled device or application.” The purpose of the proposed change was to reflect post-2006 changes in internet technology3—

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

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

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

The Commission received only one comment in response to this aspect of the Technology NPRM.4 The comment generally supported the proposed revision to the definition of “public communication” in section 100.26.5 The Commission has decided to reintroduce the proposed change to the definition of “public communication” in this rulemaking for the limited purpose of determining whether the term “internet-enabled device or application” is a sufficiently clear and technically accurate way to refer to the various media through which paid internet communications can be sent and received. The term is closely tied to the internet communication disclaimer requirements.6

2. Internet Communication Disclaimers

On October 13, 2011, the Commission published in the Federal Register an Advance Notice of Proposed Rulemaking (“ANPRM”) soliciting comment on whether to modify disclaimer requirements at 11 CFR 110.11 for certain internet communications, or to provide

next year—much as they’ll be bombarded with ads on television,” including ads using geolocation to target “potential voters who may have downloaded the candidate’s app”). Indeed, a recent study has shown that 19% of Americans access the internet exclusively or primarily through their smartphones as opposed to desktop or laptop computers. See Pew Research Ctr., U.S. Smartphone Use in 2015, at 3 (2015), www.pewinternet.org/files/2015/03/PI_Smartphones_040115.pdf.


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

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

exceptions thereto, consistent with the Act.7 The Commission received eight comments in response. Six of the commenters agreed that the Commission should update the disclaimer rules through a rulemaking, though commenters differed on how the Commission should do so.

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

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

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

B. Current Statutory and Regulatory Framework Concerning Disclaimers

A “disclaimer” is a statement that must appear on certain communications to identify who paid for it and, where applicable, whether the communication was authorized by a candidate. 52 U.S.C. 30120(a); 11 CFR 110.11; see also Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds, 67 FR 76962, 76962 (Dec. 13, 2002) (“2002 Disclaimer E&J”). The Supreme Court has recognized that disclaimer requirements may burden political speech, and thus must bear a substantial relation to a sufficiently important governmental interest. See Citizens United v. FEC, 558 U.S. 310, 366–67 (2010) (“Citizens United”) (citing Buckley v. Valeo, 424 U.S. 1, 64, 66 (1976) (“Buckley”)).

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

recommending modified disclaimers in some, but not all, circumstances; appearing to make contradictory statements in support or opposition; presenting unclear statements of preferred action, or 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.

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

8 See internet Communication Disclaimers; Reopening of Comment Period and Notice of Hearing, 81 FR 71647 (Oct. 18, 2016). The Commission postponed the hearing announced in that notice because few commenters expressed interest in participating. As noted above, the Commission will hold a hearing on the proposals in this notice on June 7, 2018.

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

10 Commission staff read and categorized each comment in one of three broad categories: Support, oppose, or neutral. “Support” included comments supporting more stringent disclaimer rules; favoring “transparency”; criticizing the shortcomings 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, “infringing constitutional rights or ‘censorship’; or reminding the Commission to read the Constitution. “Neutral” included comments recognizing the value of disclaimers, but noting the difficulty of providing disclaimers online;
With some exceptions, the Act and Commission regulations require disclaimers for public communications:

- Made by a political committee;
- expressly advocate the election or defeat of a clearly identified federal candidate; or
- seek a contribution.

The regulations do not include internet communications other than “communications placed for a fee on another person’s website.” 11 CFR 100.26. In addition to these internet public communications, “electronic mail of more than 500 substantially similar communications when sent by a political committee . . . and all internet websites of political committees available to the general public” also must have disclaimers. 11 CFR 110.11(a).

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

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

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

C. Application of the Disclaimer Requirements to Internet Communications

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

The Commission first addressed disclaimers on internet communications in two 1995 advisory opinions regarding the application of the Act to internet solicitations of campaign contributions. See Advisory Opinion 1995–35 (Alexander for President); Advisory Opinion 1995–90 (NewtWatch PAC). The Commission determined that internet solicitations are “general public political advertising” and, as such, they “are permissible under the [Act] provided that certain requirements, including the operation of appropriate disclaimers, are met.” Advisory Opinion 1995–35 (Alexander for President) at 2 (characterizing conclusion in Advisory Opinion 1995–90 (NewtWatch PAC)). Later that year, the Commission stated in a rulemaking that “internet communications and solicitations that constitute general public political advertising require disclaimers,” adding that “[t]hese communications and others that are indistinguishable in all material aspects from those addressed in [Advisory Opinion 1995–90 (NewtWatch PAC)] will now be subject to” the disclaimer requirement. See

The current rule uses the term “public communication” as defined at 11 CFR 100.26, which includes “general public political advertising.”
placement of advertising on another person’s website for a fee includes all potential forms of advertising, such as banner advertisements, streaming video, popup advertisements, and directed search results.” 13 Id.; see also id. at 18608 n.52 (noting that, as used in a different context, “terms ‘website’ and ‘any internet or electronic publication’ are meant to encompass a wide range of existing and developing technology” including “social networking software”). Thus, since 2006, Commission regulations have required disclaimer information to be included in certain paid internet advertisements.

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

The Commission has been asked on a number of occasions about the application of the disclaimer requirement to internet communications, including small, character- or space-limited internet communications such as banner advertisements; social media text, video, or image advertisements; and directed search results. The queries center on whether the communications are exempt from the disclaimer requirements under the impracticable or small items exception to the general disclaimer requirement to internet communications; including “social networking software”). Thus, since 2006, Commission regulations have required disclaimer information to be included in certain paid internet advertisements.

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

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

The Commission has not exempted any disclaimers under the small items exception in 10- and 15-second television advertisements, the Commission was first asked to apply the small items exception or mobile units could read stand by your ad language, rather than candidate who was not physically present).

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

In response to two subsequent advisory opinion requests concerning the possible application of the small items exception or impracticable exception to small internet advertisements, the Commission was unable to issue advisory opinions by the required four affirmative votes. See Advisory Opinion Request, Advisory Opinion 2011–09 (Facebook) (Apr. 26,

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

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

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

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

Accordingly, the Commission is reopening the definition of “public communication” in 11 CFR 100.26 for the limited purpose of determining whether revising the definition to include communications placed for a fee on another person’s “internet-enabled device or application,” in addition to communications placed for a fee on another person’s website, would be a clear and technically accurate way to refer to the various media through which paid internet communications can be and will be sent and received. The Commission invites comment on this proposal. Is it clear from the proposed language that both the placement-for-a-fee requirement and the third-party requirement would apply to websites, internet-enabled devices, and applications? In this rulemaking, the Commission is not considering any change to the definition of “public communication” other than the terminology that should replace “website” as used in the definition.

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

Technological developments over the past 15 years have rendered much current advertising distinguishable from the non-internet-based SMS advertisements to which the Commission applied the small items exception in Advisory Opinion 2002–09 (Target Wireless) and from the internet advertisements the Commission considered in promulgating the disclaimer regulations in 2002. As Facebook explained in a comment on this rulemaking, “[w]hen Facebook submitted its request for an advisory opinion in 2011, ads on Facebook were small and had limited space for text. Ad formats available on Facebook have expanded dramatically since that time.”

Indeed, many internet advertisements today include video, audio, and graphic components in addition to the text components considered in the Target Wireless advisory opinion. See, e.g., Advisory Opinion Request, Advisory Opinion 2017–12 (Take Back Action Fund) (Oct. 31, 2017). Moreover, today, commercial internet advertisements are subject to other federal regulatory disclosure regimes. Are the different degrees of First Amendment protection afforded political speech as opposed to commercial speech relevant to any consideration of other agencies’ disclosure regimes?

As noted above, the Commission’s regulations have required disclaimer information to be included in certain paid internet advertisements since 2006. Spending on digital political advertising grew almost eightfold just between 2012 and 2016, from $159 million to $1.4 million.

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

21 See Buckley, 424 U.S. at 14 (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order ‘to assure (the) unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”) (citation omitted); Sorrell v. IMS Health Inc., 564 U.S. 552, 579 (2011) (“[G]overnment’s legitimate interest in protecting consumers from ‘commercial harms’ explains why commercial speech can be subject to governmental regulation than noncommercial speech.”) (citation omitted); Citizens United, 558 U.S. at 329 (“[P]olitical speech . . . is central to the meaning and purpose of the First Amendment.”).
proposes to apply the type of disclaimer requirements that now apply to printed public communications to text and graphic public communications distributed over the internet. Finally, Alternative A would allow certain small text or graphic public communications distributed over the internet to satisfy the disclaimer requirements through an “adapted disclaimer.” Alternative B proposes to treat internet communications differently from communications in traditional media, Alternative B would require disclaimers on internet communications to be clear and conspicuous and to meet the same general content requirement as other disclaimers, without imposing the additional disclaimer requirements that apply to print, radio, and television communications. Alternative B also proposes to allow certain paid internet advertisements to satisfy the disclaimer requirements through an adapted disclaimer, depending on the amount of space or time necessary for a clear and conspicuous disclaimer as a percentage of the overall advertisement. In the event that an advertisement could not provide a disclaimer even through a technological mechanism, Alternative B proposes to create an exception to the disclaimer requirement specifically for paid internet advertisements.

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

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

Both Alternative A and Alternative B propose to add new paragraph (c)(5) to 11 CFR 110.11. New paragraph (c)(5) in each proposal would provide specific disclaimer requirements for internet communications. This approach would be consistent with the current structure of the disclaimer rule at 11 CFR 110.11, which categorizes disclaimer requirements by the form of communication on which they appear. In the first paragraph of Alternative B’s proposed section (c)(5), Alternative B proposes to define the term “internet communications.” Alternative A does not propose to introduce or define this term. Alternative B’s proposed paragraph (c)(5)(i)(A) defines “internet communications” as email of more than 500 substantially similar communications sent by a political committee; internet websites of political committees available to the general public; and “internet public communications” as defined in paragraph (c)(5)(i)(B). Alternative B’s proposed paragraph (c)(5)(i)(B) defines “internet public communication,” in turn, as any communication placed for a fee on another person’s website or internet-enabled device or application. Alternative B’s proposed definition of “internet communication” is intended to capture all online “public communications,” as defined in 11 CFR 100.26. Are the proposed definitions sufficiently broad to encompass new technologies? Are they platform-neutral? Should the definition of “internet public communication” include a reference to virtual reality, social networking, or internet platforms?

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

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

As described below, Alternative A proposes to extend the specific requirements for disclaimers on radio and television communications to public communications distributed over the internet. Alternative B likewise proposes to require that radio and television communications distributed over the internet must satisfy the general requirements that apply to all public communications requiring disclaimers. Alternative B would not extend any additional disclaimer requirements to such communications.

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

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


24 See, e.g., Sunlight Foundation, Comment at 1 (Nov. 13, 2017), http://sees.fec.gov/fosers/ showpdf.htm?docid=368054 (“The FEC and Congress should act to ensure disclosures and disclaimers are neither discretionary nor uneven . . . . Disclaimers and disclosures don’t mean renounce chilling of free speech, any more than has been the case for TV or radio stations.”).


27 See, e.g., Borrell-2016-political-advertising-analysis-exec sum-jan-2017-detail (subscription required).


29 See, e.g., Borrell-2016-political-advertising-analysis-exec sum-jan-2017-detail (subscription required).
an audio statement spoken by the candidate, identifying the candidate and stating that the candidate has approved the communication. 11 CFR 110.11(c)(3)(i). Radio communications that are not paid for or authorized by a candidate must include an audio statement identifying the person paying for the communication and that person is "responsible for the content of this advertising." 11 CFR 110.11(c)(4)(i). Television, broadcast, cable, or satellite communications paid for or authorized by a candidate must include a statement by the candidate, identifying the candidate and stating that the candidate has approved the communication, either through a full-screen view of the candidate making the statement or by a voice-over accompanied by a "clearly identifiable photographic or similar image" of the candidate; these communications must also include a similar statement "in clearly readable writing" at the end of the communication. 11 CFR 110.11(c)(3)(ii)–(iii). Television, broadcast, cable, or satellite communications that are not paid for or authorized by a candidate must include the audio statement required by 11 CFR 110.11(c)(4)(i) and conveyed by a "full-screen view of a representative" of the person making the statement or in a voice-over by such person; these communications must also include a similar statement "in clearly readable writing" at the end of the communication. 11 CFR 110.11(c)(4)(ii)–(iii).

As noted above, internet advertisements may be in the form of audio or video communications, or may incorporate audio or video elements. Alternative A is based on the premise that these advertisements are indistinguishable from offline communications that may be distributed on radio or television, broadcast, cable, or satellite in all respects other than the medium of distribution. Moreover, because the audio and video components of internet communications with these elements do not contain "character" restrictions, Alternative A proposes to apply parameters to such communications akin to the parameters in which disclaimers must appear on radio and television advertisements rather than the conditions that may constrain "printed" materials on which a disclaimer must appear.

Accordingly, in Alternative A, the Commission proposes to provide that public communications distributed over the internet with audio or video components are treated, for purposes of the disclaimer rules, the same as "radio" or "television" communications. The Commission, in Alternative A, proposes to do so in proposed paragraph (c)(5)(ii), which would incorporate the existing requirements at 11 CFR 110.11(c)(3) and (4) that apply to radio, television, broadcast, cable, and satellite communications, because those provisions have been in operation for 15 years and are, therefore, familiar to persons paying for, authorizing, and distributing communications. Moreover, by applying the specifications for radio and television communications to audio and video communications distributed over the internet, the proposed regulations would ensure that internet audio ads could air on radio and internet video could air on television without having to satisfy different disclaimer requirements.

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

Alternative A’s proposals concerning audio communications (like Alternative A’s proposals for video, text, and graphic internet communications discussed below) incorporate the term "public communication," as it exists or may be amended, to make clear that these provisions neither expand nor contract the scope of the disclaimer rules set forth at 11 CFR 110.11(a). The proposed reference to "a public communication distributed over the internet with an audio component but without video, graphic, or text components" (like the reference to the "internet" in Alternative A’s proposals for video, text, and graphic internet communications discussed below) is intended to encompass advertisements on websites as well as those distributed on other internet-enabled or digital devices or applications; for audio internet advertisements, these would include communications on podcasts, internet radio stations, or app channels. The proposed reference to a "public communication distributed over the internet" is not intended to alter the definition of "public communication," as defined in 11 CFR 100.26. Is this clear, or should the Commission include a cross-reference in the regulatory text? Moreover, so as to how closely to the "radio" provisions that Alternative A incorporates, the proposed amendments regarding "audio" internet communications are intended to apply to those communications with only an audio component. The Commission proposes to address communications with any "video, graphic, or text components" separately, as explained below.

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

Because this proposal is intended to encompass video purview communications on websites, apps, and streaming video services, Alternative A’s proposed new paragraph (c)(5)(ii)

29 The Commission previously extended the "stand by your ad" requirements to communications transmitted through broadcast, cable, or satellite transmission. See 2002 Disclaimer Ej, 67 FR at 76963 (referencing article "Book of Broadcast Disclaimers," February 2002). The Commission has further explained that disclaimers are also required on radio or television, broadcast, cable, or satellite in all respects other than the medium of distribution. See, e.g., Electronic Privacy Information Center, Comment at 3 (Nov. 3, 2017), http://seres.fec.gov/fosers/showpdf.htm?docid=358477 [requesting extension of broadcast communication disclaimer requirements to "analogous" communication online]; Rep. John Sarbanes et al., Comment at 2 (Nov. 9, 2017), http://seres.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 Ej, 71 FR at 18600 ("The Commission has consistently viewed online, internet-based dissemination of news stories, commentaries, and editorials to be indistinguishable from offline television and radio stations, newspapers, magazines, and periodical publications for the purposes of applying the media exemption under the Act"); but see Software and Information Industry Association, Comment at 3 (Nov. 13, 2017), http://seres.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."]

30 See, e.g., 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 ("[o]ur research suggests that 18 million listeners per month are tuning into internet radio stations, or app channels.").
would apply to a video that a political committee pays to run as a “pre-roll” video on the YouTube app or appear in a promoted YouTube.com search result, but would not apply to the same video posted for free on YouTube.com (since a communication not placed for a fee would not be a “public communication”). Unlike traditional television, broadcast, cable, or satellite ads, however, video advertisements placed online may include non-video components such as separate text, or graphic fields. The proposed rule regarding internet video ads thus would differ from the existing television, broadcast, cable, and satellite provisions in that the proposed rule would apply even if the communication also included non-video components.

This aspect of Alternative A would not explicitly address small audio or video internet ads. The Commission proposes to take this approach to how Alternative A’s proposed rules on audio and video ads as closely as possible to the existing disclaimer provisions for advertising is inherently more diverse and television.44 Thus, Alternative B’s proposed paragraph (c)(5)(ii) would require disclaimers on internet communications to meet the general content requirements in 11 CFR 110.11(b) and the general “clear and conspicuous” requirement of 11 CFR 110.11(c)(1), but not the additional “stand by your ad” requirements for radio and television communications.45

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

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

The proposals in Alternative B are premised on the internet as a “unique medium of . . . communication[]”37 that poses “unique challenges with respect to advertising disclosures.”36 Although advertisements on the internet may often look or sound like television or radio advertisements, several commenters focused on the differences between internet advertising and advertising online.44 The Commission anticipates that, as with current TV and radio ads, such circumstances could be addressed in an advisory opinion seeking to exempt such a communication from the disclaimer requirements.33

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

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

The Commission also welcomes comment on any aspect of these proposals, including the approach towards the exceptions and, more generally, the advisability of treating audio and video internet communications in the manner that radio, television, broadcast, cable, and satellite communications are treated.43

Given the rapid pace of technological change and an inability to forecast the future, the revisions to the disclaimer rules proposed in Alternative B are intended to recognize the differences between the internet and traditional forms of media like newspapers, radio, and television.44 Thus, Alternative B’s proposed paragraph (c)(5)(ii) would require disclaimers on internet communications to meet the general content requirements in 11 CFR 110.11(b) and the general “clear and conspicuous” requirement of 11 CFR 110.11(c)(1), but not the additional “stand by your ad” requirements for radio and television communications.45


—Public Citizen and Free Speech for People, Comment at 3 (Nov. 1, 2017), http://sers.fec.gov/fosers/showpdf.htm?docid=354344; see also Campaign Solutions, Comment at 1 (Nov. 9, 2017), http://sers.fec.gov/fosers/showpdf.htm?docid=365826 (“As new and disruptive technologies change the way we interact with technology and consume media, we are sometimes unable to anticipate the format of political advertising.”)

—See Electronic Frontier Foundation, Comment at 2 (Nov. 9, 2017), http://sers.fec.gov/fosers/showpdf.htm?docid=358498; see also Google, Comment at 4 (“[i]nclude broadcast advertising, which involves an advertiser providing a static advertisement to the broadcaster that is the same ad every time it airs, digital ads can be dynamic.”); Coolidge-Reagan Foundation, Comment at 4 (“Any internet-related regulations should afford speakers

Continued
The Act requires all disclaimers to provide payment and authorization information, regardless of the form that the communication may take, but imposes additional “stand by your ad” requirements only on television and radio communications. Does the Commission have the legal authority to extend those requirements to internet communications? If so, should the Commission exercise that authority? Or, as a practical matter, do the differences between internet advertising and radio and television advertising make the “stand by your ad” requirements a poor fit for audio and video public communications on the internet? Some commentators in this rulemaking indicated that the internet is a continuously evolving advertising medium with a wide range of platforms, formats, displays, duration, and interactivity. Are the “stand by your ad” requirements for television and radio communications overly inflexible by comparison? For example, television advertisements must have both spoken and written disclaimers. One commentator estimated that the spoken disclaimer can take five or more seconds to deliver, and the Act requires the written disclaimer to appear “in a clearly readable manner . . . for a period of at least 4 seconds.” Is it reasonable to impose these requirements on paid internet advertisements? Should audio or video internet ads that are very short be required to provide full “stand by your ad” disclaimer information, as the Commission has decided in the television advertising context? Does requiring a candidate or other individual representing the payor to claim responsibility for a communication by image or voice-over (as is currently required for radio and television communications) impose an additional burden on the person making the communication? Is this the type of obligation that courts have approved in television and radio advertising? What additional information, if any, does this requirement convey to a reader, viewer, or listener about the source of the communication?

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

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

a. Alternative A

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

Internet advertisements may be in the form of text, image, and other graphic elements with audio but without video components; such advertisements come “in all shapes and sizes.” Alternative A proposes to adapt the existing requirements at 11 CFR 110.11(c)(2) that apply to printed communications because they have been in operation for 15 years and are, therefore, familiar to persons paying for, authorizing, and distributing communications.

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

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

The proposal in Alternative A regarding a public communication distributed over the internet “with text or graphic components but without any video component” is intended to work in conjunction with Alternative A’s video proposal discussed above; under the operation of both of these parts of Alternative A, an internet communication that contains both text or graphic elements and a video component would be subject only to the specific disclaimer rules applicable to television, broadcast, cable, and satellite communications that are incorporated into Alternative A’s proposed paragraph (c)(5)(ii). The Commission seeks...
comment on this proposal. In particular, the Commission seeks comment regarding how users interact with internet advertisements that contain both text or graphic and video elements. Is it common for users to view only the printed or video components of an internet advertisement that contains both? Should the Commission require that such communications include at least an adapted disclaimer, see below, on the face of the text or graphic element? Do such adapted disclaimers provide adequate transparency? How important is it for adapted disclaimers to provide information sufficient to identify the communication’s payor on the communication’s face? Would a hyperlink in a communication be a reliable way to identify the payor or could hyperlinks prove to be transient? Could an indicator be used to defeat disclosure by linking to, for example, goo.gl/nRk1H1 at publication and then, once a complaint is filed with the Commission, to an actual political committee’s website? Should the Commission consider other approaches, such as allowing political committees to identify themselves in adapted disclaimers of political committees to connect to the committees’ fec.gov pages? Should the Commission adopt rules that require a disclaimer to be included on either the text and graphic portion or the video portion of an internet advertisement, or on both portions, depending on the proportion of the advertisement that contains each type of content? Alternatively, should the rules allow an advertiser the choice between the “radio” or “text or graphic” communication disclaimer rules for an internet communication that contains both audio and text or graphic components?

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

iii. Text and Graphic Internet Communication Disclaimer Text Size Safe Harbor

Alternative A proposes to establish a “safe harbor” provision identifying disclaimer text size—“letters at least as large as the majority of the other text in the communication”—that clearly satisfies the rule. This would track the current approach for “printed” materials. See 2002 Disclaimer E&J, 67 FR 76965 (describing current 12-point type safe harbor for printed communication disclaimers); cf. Advisory Opinion 1995–09 (NewtWatch PAC) at 2 (approving disclaimer on political committee’s website that was “printed in the same size type as much of the body of the communication”). The Commission recognizes that some text or graphic internet communications may not have a “majority” text size. The possible diversity of text sizes in internet text and graphic communications is, in this respect, similar to text size diversity in printed communications currently addressed in 11 CFR 110.11(c)(2)(i). As the Commission explained when adopting the current safe harbor in lieu of a strict size requirement, “the vast differences in the potential size and manner of display of larger printed communications would render fixed type-size examples ineffective and inappropriate.” 2002 Disclaimer E&J, 67 FR 76965. Thus, for internet communications with text or graphic components that are not included in the proposed text-size safe harbor, the intent behind Alternative A is that questions of whether a disclaimer is of sufficient type size to be clearly readable would be “determined on a case-by-case basis, taking into account the vantage point from which the communication is intended to be seen or read as well as the actual size of the disclaimer text,” as they are under the current rule for printed materials. Id. Would the use of metrics minimize the need for case-by-case determinations?

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

Alternative B proposes to treat graphic, text, audio, and video communications on the internet equally for disclaimer purposes. Under proposed paragraph (c)(5)(ii) in Alternative B, disclaimers for all such communications would have to meet the general content requirement of 11 CFR 110.11(b) and be “clear and conspicuous” under 11 CFR 110.11(c)(1), including disclaimers for graphic and text communications on the internet. Thus, the disclaimers would have to be “presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and, where required, that authorized the communication,” 11 CFR 110.11(c)(1). Under Alternative B, disclaimers could not be difficult to read or hear, and their placement would not be easily overlooked. Id. Is Alternative B’s proposal to treat internet communications differently from print, radio, and TV communications for disclaimer purposes a reasonable approach to address current internet advertisements and future developments in internet communications?

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

4. Adapted Disclaimers for Public Communications Distributed Over the Internet

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

The discussion in this section explains the Commission’s alternative proposals for when a public communication distributed over the internet may utilize an adapted disclaimer. Alternative A allows the use of an adapted disclaimer when a full disclaimer cannot fit on the face of a text or graphic internet communication due to technological constraints. Alternative B allows the use of an adapted disclaimer when a full disclaimer would occupy more than a certain percentage of any internet public communication’s available time or space. Under Alternative B, the first tier of an adapted disclaimer would require the identification of the payor plus an indicator on the face of the communication. Alternative B’s second tier adapted disclaimer would require only an indicator on the face of the communication.


While current text and graphic internet advertisements are akin in many respects to analog printed advertisements, material differences between them remain. Most significant among these differences are the availability of “micro” sized text and graphic internet advertisements and the interactive capabilities of advertisements over the internet. To ensure the disclaimer rules remain applicable to new forms of internet advertising that may arise, while also reducing the need for serial revisions to Commission regulations in light of such developments, Alternative A proposes adopting a provision specifically addressing those text and graphic internet advertisements that cannot, due to external character or space constraints, practically include a full disclaimer on the face of the communication. See Advisory Opinion 2004–10 (Metro Networks) at 3 (concluding that modifications or adaptations to disclaimers may be permissible in light of technologically or physically limited aspects of a communication). Accordingly, under Alternative A’s proposed paragraph (c)(5)(ii)(A), a “public communication distributed over the internet with text or graphic components but without any video component” that, “due to external character or space constraints,” cannot fit a required disclaimer must include an “adapted disclaimer.” This provision would explain the circumstances under which a communication may use technological adaptations, describe how the adaptations must be presented, and provide examples of the adaptations. Under Alternative A, the determination of whether a public communication distributed over the internet with text or graphic components but without any video component cannot fit a full disclaimer is intended to be an objective one. That is, the character or space constraints intrinsic to the technological medium are intended to be the relevant consideration, not the communication sponsor’s subjective assessment of the “difficulty” or “burden” of including a full disclaimer. As the Supreme Court has held in the context of broadcast advertisements, the government’s informational interest is sufficient to justify disclaimer requirements even when a speaker claims that the inclusion of a disclaimer “decreases both the quantity and effectiveness of the group’s speech.” Citizens United, 558 U.S. at 368. Alternative A is built upon the proposition that the informational interest relied upon by the Supreme Court with respect to broadcast communications is equally implicated in the context of text and graphic public communications distributed over the internet.

Alternative A’s reference to “external character or space constraints” is intended to codify the approach to those terms as the Commission has discussed them in the context of the small items and impracticable exceptions discussed above. See, e.g., Advisory Opinion 2007–33 (Club for Growth PAC) at 3 (contrasting lack of “physical or technological limitations” constraining 10- and 15-second television advertisements with “overall limit” and “internal limit” on size or length of SMS ads), Advisory Opinion 2004–10 (Metro Networks) at 3 (discussing “physical and technological limitations” of ad road live from helicopter). This approach to determining when a communication cannot fit a required disclaimer—rather than by the particular size of the communication as measured by pixels, number of characters, or other measurement—is intended to minimize the need for serial revisions to Commission regulations as internet technology may evolve. Should existing or newly developed internet advertising opportunities raise questions as to whether a particular communication may fit a disclaimer, the intent behind Alternative A is that such questions may be addressed in an advisory opinion context. Would this approach provide sufficient clarity about the application of the disclaimer requirement, and the disclaimer exceptions, to particular communications? Should Alternative A, if adopted, preclude the use of the small items and impracticable exceptions for internet public communications?

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

55 See Public Citizen and Free Speech for People, Comment at 3 (noting that paid online communications by “bots” “can be very short and seamlessly integrated into social conversations. Absent disclaimers, such messages are not likely to be perceived as paid messages”); see also Spot-0n, 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”).

56 See 11 CFR 112.1.
b. Alternative B—Proposed 11 CFR 110.11(c)(5)(ii)-(iv): When a Communication May Use Technological Adaptations

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

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

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

\(^{59}\) Commission regulations also apply a time-space approach to attributing regulatory action that does not allow for broadcast communications to more than one candidate. See 11 CFR 106.1(a).

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

\(^{61}\) See Advisory Opinion 2012–18 (Revolution Messaging), Advisory Opinion Request 2011-09 (Facebook); Advisory Opinion 2010–19 (Google).
110.11(c)(5)(i). The proposal would further clarify that the adapted disclaimer “must indicate the person or persons who paid for the communication in letters of sufficient size to be clearly readable by a recipient of the communication.”

Alternative A is proposing that adapted disclaimers include a payer’s name on the face of the communication for several reasons. First, the inclusion of such information would signal to a recipient that the communication is, indeed, a paid advertisement. This is especially important on the internet where paid content can be targeted to a particular user and appear indistinguishable from the unpaid content that user views, unlike traditional media like radio or television, where paid content is transmitted to all users in the same manner and is usually offset in some way from editorial content. Second, the inclusion of the payer’s name would allow persons viewing the communication on any device, even if the recipient does not view the full disclaimer, to know “the person or group who is speaking” and could, therefore, assist voters in identifying the source of advertising so they are better “able to evaluate the arguments to which they are being subjected.”

Citizens United, 558 U.S. at 368 (internal quotations and alterations removed). Alternative A is based on the premise that a technological mechanism to reach a full disclaimer provided by shortened URL and without the payer’s name would not provide, on the face of the communication, the same informational value. Third, some commenters suggested that the Commission and the public not rely on social media platforms’ voluntary efforts to identify paid communications (such as by a tag that a communication is “paid,” “sponsored,” or “promoted”). As a preliminary matter, the Commission lacks any enforcement mechanism to ensure compliance with such voluntary efforts, which, by definition, may be modified or abandoned at any time. In addition, tags that identify whether an advertisement is “paid,” “sponsored,” or “promoted,” do not necessarily identify who paid, sponsored, or promoted the advertisement, and even that limited information may disappear when a paid communication is shared with other social media users.

To further help voters evaluate the message, Alternative A proposes to require that information about the payer be of a size to “be clearly readable.” As with the size requirements for text and graphic internet communications described above, Alternative A intends that questions of whether a disclaimer is of sufficient type size to be clearly readable would be “determined on a case-by-case basis, taking into account the context and the type of the communication being intended to be seen or read as well as the actual size of the disclaimer text.”

Commission’s designing and promulgating a single indicator to be used across all media and platforms?

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

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

Under the first tier, described in proposed paragraph (c)(5)(iii), an advertisement could identify the payor by the payor’s full name or by a clearly available by a technological mechanism.
recognized abbreviation, acronym, or other unique identifier by which the payor is commonly known. Thus, for example, if the Democratic Senatorial Campaign Committee were to pay for a Facebook advertisement, the advertisement could state that it was paid for by the DSCC, @DSCC, or DSCC.org, while providing the committee’s full name in a disclaimer through a technological mechanism, as described below. This flexibility is intended to address internet public communications that might not otherwise conveniently or practicably accommodate the payor’s name, such as character-limited ads, or where the payor’s name is unusually lengthy, or where the payor wishes to use the ad to promote its social media brand.68

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

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

Alternative B’s proposed paragraph (c)(5)(ii)(B) clarifies the “abbreviated disclaimer” information aspect of the “abbreviated disclaimer” definition in proposed paragraph (c)(5)(i). It would require the abbreviated disclaimer on the face of a communication to be presented in a clear and conspicuous manner. An abbreviated disclaimer would not be clear and conspicuous if it is difficult to see, read, or hear, or if the placement is easily overlooked. Proposed paragraph (c)(5)(ii)(D) provides that an “indicator” is any visible or audible element of an internet public communication that gives notice to persons reading, observing, or listening to the communication that they may read, observe, or listen to a disclaimer satisfying the general requirements of 11 CFR 110.11(b) and (c)(1) through a technological mechanism.69 Under Alternative B, an indicator may take any form, including words (such as “paid for by” or “sponsored by”), a website URL, or an image, sound, symbol, or icon. For example, under Alternative B a severely character-limited public internet communication could include an indicator stating “Paid for by,” “Paid by,” “Sponsored by,” “Ad by,” or providing the URL to the payor’s website, if a reader could move his or her cursor over the words or link to a landing page and see the full disclaimer.70 Would this proposal promote disclosure and transparency by addressing extremely space- or time-constrained paid internet ads? Does an indicator alone provide sufficient guidance that the full disclaimer is available through a technological mechanism? Would this proposal help to ensure that voters have easy access to the full statutorily prescribed disclaimer for more online communications, while providing greater flexibility to political advertisers on the internet? Or would an indicator that takes the form of a hyperlink, for example, be prone to manipulation? Should the Commission require an indicator to take a specific form or to include specific language?

In their comments on the ANPRM, Google and Twitter said that they intend to require each political advertisement on their platforms to bear a special designation that will allow viewers to obtain additional information about the sponsor of the ad.71 Should the Commission allow sponsors of extremely space- or time-limited paid internet advertisements to use platform-provided designations as their indicators, if such disclaimers meet all of the requirements for providing a disclaimer through a technological mechanism? Or do the limitations inherent in platform-provided designations, discussed above, argue against doing so? In any event, under Alternative B, the responsibility for ensuring that the disclaimer provided through a technological mechanism complies with the disclaimer requirement would remain with the person paying for the communication, and would not fall on the internet platform hosting it.

6. Adaptations Utilizing One-Step Technological Mechanism

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

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68 See, e.g., Advisory Opinion Request, Advisory Opinion 2010–19 (Google) [Aug. 3, 2010] (asking to include URL to payor’s website in lieu of disclaimer in severely character-limited internet ads, with disclaimer on landing page); Advisory Opinion Request, Advisory Opinion 2013–13 (Freshman Hold’Em [JFC et al.]) [Aug. 21, 2013] (asking to use shortened form of name and URL in disclaimer, where joint fundraising committee-payor’s name included among 8 participating committees); Advisory Opinion Request, Advisory Opinion 2017–05 (Great America PAC, et al.) [June 2, 2017] (asking to use payor’s Twitter handle in disclaimers).

69 The proposed reference to the person “observing” an internet communication derives from the existing requirement that “[a] disclaimer... must be presented in a clear and conspicuous manner, to give the reader, observer, or listener adequate notice of the identity of the person or political committee that paid for and authorized the communication.” 11 CFR 110.11(c)(1) (emphasis added). As used in Alternative B, it is intended to be synonymous with “viewer.”

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

Because the provision of an ad payor’s name is necessary but not always sufficient to meet the Act’s disclaimer requirement, Alternative A requires a mechanism to provide the additional required information. Alternative A’s proposed paragraph (c)(5)(i)(A) would specify that the technological mechanism used to provide the full disclaimer must be “associated with” the indicator and allow a recipient of the communication to locate the full disclaimer “by navigating no more than one step away from the adapted disclaimer.” This means that the additional technological step should be apparent in the context of the communication and to which the disclaimer, once reached, should be “clear and conspicuous” and otherwise satisfy the full requirements of 11 CFR 110.11(c). Moreover, this proposed requirement is intended to notify a recipient of the communication that further information about or from the payor is available and that the recipient may find that information with minimal investment of additional effort. Thus, for example, a hyperlink underlying the “paid for” language would be “associated with” the full disclaimer at the landing page located one step away from the communication and to which the link leads. One commenter suggested that “the Commission should allow people and entities subject to disclaimer requirements to satisfy them through any reasonable technological means”, rather than through a particular technology. Should the Commission explicitly include a requirement that a technological mechanism be “reasonable” or can the reasonableness requirement for such mechanisms be assumed?

b. Alternative B—Associated With Adapted Disclaimer

Alternative B’s proposed paragraph (c)(5)(i)(C) defines the term “technological mechanism” as any use of technology that enables the person reading, observing, or listening to an internet public communication to read, observe, or listen to a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) without navigating more than one step away from the internet public communication, and is associated with an adapted disclaimer as provided in proposed 11 CFR 110.11(c)(5)(ii). Thus, by definition, the technological mechanism must be “associated with” the abbreviated disclaimer on the face of the internet communication itself, and must not require the person reading, observing, or listening to an internet public communication to navigate more than one step away to read, observe, or listen to the disclaimer. The additional technological step under Alternative B should be apparent in the context of the communication, and the disclaimer provided through alternative technical means must be “clear and conspicuous” under 11 CFR 110.11(c)(1). Should a technological mechanism be deemed to be “associated with” the abbreviated disclaimer on the face of an internet public communication if the person reading, observing, or listening to the communication can read, observe, or listen to a disclaimer by clicking anywhere on the communication? If a person can access the full disclaimer by clicking anywhere on a communication, should the abbreviated disclaimer even be required on the face of the communication? Are there circumstances where an adapted disclaimer would be preferable to a full disclaimer, even if the full disclaimer would take up ten percent or less of the time or space in the internet public communication?

7. Examples of Technological Mechanisms in Adapted Disclaimers

Alternatives A and B provide similar lists of possible technological mechanisms. a. Alternative A—Illustrative List of Mechanisms

Alternative A provides a list of examples of “technological mechanisms for the provision of the full disclaimer” including, but not limited to, “hover-over mechanisms, pop-up screens, scrolling text, rotating panels 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 web page with disclosure information’); id. at (b)(3)(G)(1) providing ‘disclaimer via roll-down display’; Md. Code. Regs. 33.13.07(D)(2)(i)(I) (permitting ‘viewer to click’ and be ‘taken to a landing or home page’ with disclaimer).” An extended list incorporates examples of one-step technological mechanisms the Commission has seen utilized by advisory opinion requestors and other federal and state agency disclosure regulations. The list is intended to provide guidance while retaining flexibility for advertisers to utilize other existing technological mechanisms or new mechanisms that may arise in the future.

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

75 See, e.g., Advisory Opinion 2010–19 (Google) (addressing proposal to provide disclaimer by hyperlink to landing page listing full disclaimer); Fed. Trade Comm’n., Internet Advertisements: How to Make Effective Disclosures in Digital Advertising 10 (2013), https://www.ftc.gov/system/files/documents/plain-language/ftc-brief-on-disclosures-information-about-online-advertising.pdf (permitting disclosure to “be provided by using a hyperlink”); id. at 12 (allowing “mouse-over” display if effective on mobile devices); id. at 13–14 (allowing disclosures by pop ups and interstitial pages); id. at 16 (allowing scrolling text or rotating panels in space-constrained banner ad to present required disclosures); Cal. Code Regs. tit. 2, sec. 18450.4(b)(3)(G)(1) (permitting “link to a web page with disclosure information”); id. at (b)(3)(G)(1) “providing disclaimer via roll-down display”; Md. Code. Regs. 33.13.07(D)(2)(i)(I) (permitting “viewer to click” and be “taken to a landing or home page” with disclaimer). See also First Gen. Counsel’s Report at 5 n.19, MUR 6911 (Frankel) (noting respondent committee’s claim that “its Twitter profile contains a link to the campaign’s website that contains a disclaimer”); Interactive Advertising Bureau, Comment at 3 (Nov. 10, 2017), http://sers.fec.gov/fosers/showpdf.htm?docid=358484 (advocating a rule allowing for flexibility in disclaimer provision, such as by click through links); CMPPLY, Comment at 2–3 and 9–11 (describing several “short-form” disclosure solutions within character-limited social media platforms).

76 See, e.g., Asian Americans Advancing Justice, et al., Comment at 9–11 (presenting statistics showing that persons of color are more likely to consume information on internet than television and are more likely to do so on mobile devices than display (desktop) platforms); CMPPLY, 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”).
accessing the communication on mobile devices?

b. Alternative B—Illustrative List of Mechanisms

Alternative B’s proposed paragraph (c)(5)(i)(C) provides the same examples of technological mechanisms as Alternative A, with two exceptions. First, because Alternative B does not limit the use of technological mechanisms to internet communications with text or graphic components and anticipates that technology will develop to enable speakers to provide future disclaimers in ways that might not be available today, it includes “voice-over” as an example. Second, Alternative B proposes to refer to “mouse-over” and “roll-over” as examples, in addition to “hover-over.” Are these additional references useful, or are they already subsumed under “hover-over”? Should the list of examples be further expanded or refined?

8. Proposed Exceptions to Disclaimer Rules for Internet Public Communications

a. Alternative A

No Proposal.

b. Alternative B

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

The proposed exception in Alternative B is intended to replace the small items and impracticable exceptions for internet public communication, so that the small items and impracticable exceptions would no longer apply to such communications. The small items and impracticable exceptions both predate the digital age, and the Commission has faced challenges in applying them to internet communications. Despite several requests, the Commission has issued only one advisory opinion in which a majority of Commissioners agreed that a disclaimer exception applied to digital communications. See Advisory Opinion 2002–09 (Target Wireless). Statements by individual Commissioners indicate a difference of opinion regarding the application of the exceptions to internet communications.77

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

If the Commission adopts either the single-tier adapted disclaimer approach of Alternative A or the two-tier approach of Alternative B, would there be a need to exempt any internet public communications from the disclaimer requirement? Or would the adaptations adequately address any technological limitations? Would adopting any new exception to the disclaimer requirement for internet public communications lead to manipulation and abuse of the exception? If so, what can the Commission do to minimize the risk of manipulation and abuse, and enhance disclosure? Conversely, if the Commission decides not to adopt a new exception for internet public communications, what effect would that decision have on political discourse on the internet? Could such a decision, coupled with uncertainty over the application of the existing exceptions to internet public communications, potentially chill political speech on the internet?

F. Conclusion

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

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

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

List of Subjects
11 CFR Part 100
Elections.

11 CFR Part 110
Campaign funds, Political committees and parties.

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

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

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

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

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

PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

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


Alternative A

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

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

(c) * * *

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

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

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

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

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

* * * * *

Alternative B

5. Amend § 110.11 as follows:

a. Add paragraph (c)(5).

b. Add paragraph (f)(1)(iv).

The additions read as follows:

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

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

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

(A) The internet public communication must provide a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section through a technological mechanism as described in paragraph (c)(5)(i)(C) of this section.

(B) The internet public communication must present the abbreviated disclaimer on the face of the communication in a clear and conspicuous manner. An abbreviated disclaimer is not clear and conspicuous if it is difficult to read, hear, or observe, or if the placement is easily overlooked.

(C) For an internet public communication consisting of text, graphics, or images, time or space must be measured in [characters or pixels].

(D) For an internet public communication consisting of audio or video, time or space must be measured in [seconds].

(iii) If the time or space required for a disclaimer satisfying the general requirements of paragraphs (b) and (c)(1) of this section would exceed [ten] percent of the time or space in an internet public communication, then the abbreviated disclaimer on the face of the communication must include an indicator.

(f) Exceptions.

(1) * * *

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

* * * * *

On behalf of the Commission,

Dated: March 20, 2018.

Caroline C. Hunter,
Chair, Federal Election Commission.

[FR Doc. 2018–06010 Filed 3–23–18; 8:45 am]

BILLING CODE 6715–01–P

BUREAU OF CONSUMER FINANCIAL PROTECTION
12 CFR Chapter X
[Docket No. CFPB–2018–0012]

Request for Information Regarding the Bureau’s Inherited Regulations and Inherited Rulemaking Authorities

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Request for information.

SUMMARY: The Bureau of Consumer Financial Protection (Bureau) is seeking comments and information from interested parties to assist the Bureau in considering whether, consistent with its statutory authority to prescribe rules pursuant to the Federal consumer financial laws, the Bureau should amend the regulations or exercise the rulemaking authorities that it inherited from certain other Federal agencies.

DATES: Comments must be received by June 25, 2018.

ADDRESSES: You may submit responsive information and other comments, identified by Docket No. CFPB–2018–0012, by any of the following methods:

• Electronic: Go to http://www.regulations.gov. Follow the instructions for submitting comments.

• Email: FederalRegisterComments@cfpb.gov. Include Docket No. CFPB–2018–0012 in the subject line of the message.

• Mail: Comment Intake, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

• Hand Delivery/Courier: Comment Intake, Consumer Financial Protection Bureau, 1700 G Street NW, Washington, DC 20552.

Instructions: The Bureau encourages the early submission of comments. All submissions must include the document title and docket number. Please note the number of the topic on which you are commenting at the top of each response (you do not need to address all topics). Because paper mail in the Washington, DC area and at the Bureau is subject to delay, commenters are encouraged to submit comments electronically. In general, all comments received will be posted without change to http://www.regulations.gov. In addition, comments will be available for public inspection and copying at 1700 G Street NW, Washington, DC 20552, on official business days between the hours of 10 a.m. and 5 p.m. eastern time. You can make an appointment to inspect the documents by telephoning 202–435–7275.

All submissions in response to this request for information, including attachments and other supporting materials, will become part of the public record and subject to public disclosure. Proprietary information or sensitive personal information, such as account numbers or Social Security numbers, or names of other individuals, should not be included. Submissions will not be edited to remove any identifying or contact information.

FOR FURTHER INFORMATION CONTACT: Thomas L. Devlin and Kristin McPartland, Senior Counsels, Office of Regulations, at 202–435–7700. If you require this document in an alternative electronic format, please contact CFPB_Accessibility@cfpb.gov.

SUPPLEMENTARY INFORMATION: Congress established the Bureau in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) and therein set forth the Bureau’s purpose, objectives, and functions.1 Pursuant to that Act, on July 21, 2011, the “consumer financial protection functions” previously vested in certain other Federal agencies transferred to the

1 Public Law 111–203, 124 Stat. 2081 (2010) (codified at 15 U.S.C. 1603a et seq.). Section 1021 of the Dodd-Frank Act states that the Bureau shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive. Section 1021 also authorized the Bureau to exercise its authorities under Federal consumer financial law for the purposes of ensuring that, with respect to consumer financial products and services, live specific objectives are met.