INSTITUTE FOR
FREE SPEECH

May 25, 2018

VIA ELECTRONIC SUBMISSION SYSTEM

Federal Election Commission
Attn: Neven F. Stipanovic
Acting Assistant General Counsel
1050 First Street N.E.
Washington, D.C. 20463

RE: Notice of Proposed Rulemaking on Internet Communication Disclaimers and the Definition of "Public Communication" (Notice 2018-06)

Dear Chair Hunter, Vice Chair Weintraub, and members of the Federal Election Commission:

On behalf of the Institute for Free Speech ("the Institute"),[1] we respectfully submit the following comments in response to the Notice of Proposed Rulemaking on Internet Communication Disclaimers and the Definition of "Public Communication" in the regulations of the Federal Election Commission ("FEC" or "Commission").[2] The Institute, formerly known as the Center for Competitive Politics, has closely followed this proposed rulemaking for years,[3] and the Commission has cited the Institute's comments[4] in wrestling with these difficult issues.[5] In addition to these written comments, we respectfully request that a representative of the Institute be permitted to testify at the June 27, 2018 hearing noticed in the NPRM.

[1] The Institute is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, press, assembly, and petition. Originally known as the Center for Competitive Politics, it was founded in 2005 by Bradley A. Smith, a former chairman of the Commission. In addition to scholarly and educational work, the Institute is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels.

[2] Fed. Election Comm'n, Internet Communication Disclaimers and Definition of "Public Communication," Notice 2018-06, 83 Fed. Reg. 12864 (Mar. 26, 2018) ("NPRM").

[3] *See*, *e.g.*, Stephen M. Hoersting and Allen Dickerson, Center for Competitive Politics, Comments on Notice 2011-14 (Nov. 14, 2011) http://sers.fec.gov/fosers/showpdf.htm?docid=98752 ("IFS Comment I"); Allen Dickerson and Zac Morgan, Center for Competitive Politics, Comments on Notice 2016-13 (Dec. 19, 2016) http://sers.fec.gov/fosers/showpdf.htm?docid=354344 ("IFS Comment II"); Allen Dickerson and Zac Morgan, Institute for Free Speech, Comments on Notice 2017-12 (Nov. 9, 2017) http://sers.fec.gov/fosers/showpdf.htm?docid=358495 ("IFS Comment III"). These comments are incorporated herein by reference.

[4] *See*, *e.g.*, NPRM, 83 Fed. Reg. at12871 n.44; *id.* at 12875 n.60.

[5] The other relevant substantive notices on this subject are the following: Fed. Election Comm'n, Internet Communication Disclaimers; Reopening of Comment Period and Notice of Hearing, Notice 2016-13, 81 Fed. Reg. 71647 (Oct. 18, 2016); Fed. Election Comm'n, Internet Communication Disclaimers Advance Notice of Proposed Rulemaking, Notice 2011-14, 76 Fed. Reg. 63567 (Oct. 13, 2011).

Congress has required disclaimers on a wide variety of core political speech, compelling would-be speakers to truncate their own message in order to convey the government's preferred information. While there is little reason to believe these disclaimers add much to the national conversation, especially where they require poorly-written scripts that go far beyond identifying the speaker's identity,[6] these burdens have generally been considered manageable when applied to the paradigmatic big-budget broadcast advertisements Congress clearly envisioned and which the Commission habitually regulates.[7]

But in other cases, Congress has provided—and the Commission has traditionally exercised—discretion to excuse these disclaimers where they overly-burden the speaker's message while providing little value to the listener. Even in cases where a disclaimer can technically be included (there is no bar to printing disclaimers on a t-shirt or bumper sticker), the Commission has exercised common sense and permitted speakers to proceed without including a disclaimer.

The Internet has upended that consensus. Time and again, the Commission has been unable to agree that online speakers may be excused from including or modifying disclaimers where they are clearly impractical.[8] This state of affairs was troubling enough when such small or brief advertisements were comparatively rare. But online advertisements now constitute a significant share of Americans' paid political speech.[9] Requiring disclaimers that will, in many cases, consume a substantial portion of a particular advertisement will impose significant burdens on these speakers. This is especially true for poorly-resourced individuals and groups relying on small or brief online advertisements precisely because they are cost effective.[10]

These burdens are not hypothetical. Advertisements are getting shorter, but the disclaimer requirements stay the same. Fifteen-second advertisements are an industry standard, and *six-second* advertisements loom on the horizon.[11] The short run-times forces the speaker to spend more time disclaiming and less time getting their message out. One congressional candidate's fifteen-second advertisement was cut in half by the required disclaimers.[12] Even those who have more experience running political communications cannot get the disclaimers down to a manageable level. AFT Solidarity produced a fifteen-second video advertisement, where the spoken and visual

---

[6] *See* 52 U.S.C. § 30120(d)(2) (requiring independent speakers to use the unwieldy phrase "is responsible for the content of this advertising").

[7] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 368 (2010).

[8] *See, infra*, at 16-17.

[9] Rani Molla, *Advertisers will spend $40 billion more on internet ads than on TV ads this year*, Recode (Mar. 26, 2018) https://www recode net/2018/3/26/17163852/online-internet-advertisers-outspend-tv-ads-advertisers-social-video-mobile-40-billion-2018.

[10] As Vice-Chair Weintraub has recognized, extended disclaimers add "additional language," and "every additional word" the speaker is compelled to say means that he or she "ha[s] to pay more." Fed. Election Comm'n, Open Meeting, 6:07 (July 28, 2008) *available at* https://www.fec.gov/resources/audio/2008/20080728_02 mp3 (discussing Draft Advisory Opinion 2007-33, Agenda Docs. No. 08-12 and 08-12-A).

[11] Sapna Maheshwari, *Six-Second Commercials Are Coming to N.F.L. Games on Fox*, The New York Times, (Aug. 30, 2017) https://www nytimes.com/2017/08/30/business/media/nfl-six-second-commercials.html; Adweek, *Why Brands and Agencies Are Preparing for the Era of 6-Second Ads* (Aug. 10, 2017) https://www.adweek.com/digital/why-brands-and-agencies-are-preparing-for-the-era-of-6-second-ads/.

[12] Pat Davis, "[Expletive] the NRA," YouTube, https://youtu.be/nu_7m--Ozrs.

disclaimers required a *third* of the advertisement's run time.[13] Political speakers are already using new platforms, such as Snapchat,[14] that carry strict limitations. For example, New Day for America ran an advertisement on Snapchat featuring Governor John Kasich,[15] and another Snapchat advertisement supported Senator Rand Paul's view on tax cuts.[16] These are but the start of the new trend in shorter advertisement times on new platforms.

In this context, the full disclaimers mandated by 52 U.S.C. § 30120 will clearly swallow much of an advertisement's substantive message and, in practice, ban political speakers from using these short and economical advertising products.[17] This NPRM allows the Commission an opportunity to avoid the constitutional difficulties that result will pose.

The NPRM posits two potential approaches while specifically inviting commenters to "extract the best elements of each, or suggest improvements or alternatives."[18] In that vein, the Institute recommends the following.

(1) The Commission should decline to import the additional disclaimer requirements found at 52 U.S.C. § 30120(c) and (d) in favor of the general disclaimers found at 52 U.S.C. § 30120(a).

(2) The existing small item and impracticality exemptions should be explicitly extended to online and mobile advertisements.

(3) Political advertisers should be excused from including disclaimers on the face of their communications where the relevant advertising platform will include identifying information about the speaker, as a matter of course, within one-click of the advertisement.

(4) In all cases, the full 52 U.S.C. § 30120(a) disclaimer should be excused in favor of the bare name of the sponsoring organization where the disclaimer would comprise more than 4% of the relevant advertisement, and even this limited disclaimer should be excused where the organization's name would also exceed that threshold.

(5) In such cases, the Commission should require a copy of the excused ad to be included as an addendum to the relevant PAC or Independent Expenditure report covering that expenditure.

---

[13] AFT Solidarity, Hillary Clinton "Standout" 15 Seconds, YouTube, https://youtu.be/uba4cbW7Vkk.

[14] Shane Goldmacher, *Snapchat makes play for political ad revenue*, Politico (Nov. 19, 2015) https://www.politico.com/story/2015/11/snapchat-makes-play-for-political-ad-revenue-216036.

[15] New Day for America, "Snapchat Ad," YouTube, https://youtu.be/Mr3Qip2sbtU.

[16] America's Liberty PAC, "How Rand Rolls (10-second Snapchat ad)" YouTube, https://youtu.be/m31DGiZQUdU.

[17] For example, while hover-over text might expand the space available for a disclaimer in some contexts, an SMS message cannot take advantage of that option.

[18] NPRM, 83 Fed. Reg. at 17869.

I. The NPRM's two proposed Alternatives differ in approach and regulatory burden.

The NPRM proposes two Alternatives—labeled A and B—reflecting different premises. The two Alternatives differ significantly in their regulation of Internet communication disclaimers and their treatment of exemptions for small or brief online advertisements. The use of "adapted disclaimers" also differ between the proposals.

a. Alternative A forces Internet disclaimers to follow rules designed for traditional media.

Alternative A is premised on the idea that Internet advertising is "indistinguishable from offline advertis[ing]."[19] The draft rule therefore "proposes to apply the full disclaimer requirements" of "radio and television communications" to Internet advertisements "with audio or video components."[20] Among other requirements, Alternative A would require Internet audio and video communications to include the "stand by your ad" scripts for broadcast advertisements.[21]

For other Internet communications that have "text and graphic" components only, Alternative A would apply the print disclaimer requirements,[22] requiring the disclaimer text to be "of sufficient type size to be clearly readable by the recipient of the communication."[23] If the disclaimer uses "letters at least as large as the majority of the other text in the communication," Alternative A would presume the text size "satisfies the size requirement."[24]

The proposed rule text in Alternative A provides for a narrow exemption from this disclaimer requirement. Alternative A would allow for an adapted disclaimer when "external character or space constraints" limit the use of the scripted, broadcast-style disclaimers.[25] Such external character or space constraints must be "intrinsic to the technological medium."[26] Alternative A would not consider the burdens disclaimers place upon particular forms of communication, or the technological difficulties involved, so long as any technological issues can be overcome with the investment of sufficient time and money.[27] Alternative A's application of the broadcast rules to audio and video Internet communications would "not explicitly address small

---

[19] NPRM, 83 Fed. Reg. at 12870.

[20] *Id*. at 12869.

[21] *Id*. at 12870; *cf.* 11 C.F.R. § 110.11(c)(3)(iv)(A) ("I am [insert name of candidate], a candidate for [insert Federal office sought], and I approved this advertisement.") (brackets in original); 11 C.F.R. § 110.11(c)(3)(iv)(B) ("My name is [insert name of candidate]. I am running for [insert Federal office sought], and I approved this message.") (brackets in original); 11 C.F.R. § 110.11(c)(4)(i) ("XXX is responsible for the content of this advertising.") ("XXX" in original).

[22] NPRM, 83 Fed. Reg. at 12869.

[23] *Id*. at 12872 (adapting language from 11 C.F.R. § 110.11(c)(2)(i) on disclaimer legibility for printed communications).

[24] *Id*.

[25] *Id*. at 12874.

[26] *Id*.

[27] *Id*.

audio or video [I]nternet ads."[28] There is also no proposal under Alternative A for any categorical exceptions to the disclaimer rules for Internet communications.[29]

Alternative A's "adapted disclaimer" would apply only to text or graphic communications and "require, on the face of the advertisement, the payor's name plus an 'indicator' that would give notice that further information is available."[30] The adapted disclaimer must still be "in letters of sufficient size to be clearly readable by a recipient of the communication."[31] Neither tags such as "paid," "sponsored," or "promoted," nor shortened hyperlinks will satisfy Alternative A's adapted disclaimer.[32]

b. Alternative B treats disclaimers on the Internet differently from those applicable to traditional media.

Alternative B is premised on a view that the Internet is "a unique medium of communication" with "unique challenges with respect to advertising" disclaimers.[33] The draft rule therefore "proposes to treat [I]nternet communications differently from communications in traditional media." [34] The goal of Alternative B is "to establish objective criteria that would cover all situations and minimize the need for case-by-case determinations."[35]

Under Alternative B, Internet "graphic, text, audio, and video communications" would be treated "equally for disclaimer purposes."[36] Alternative B therefore would require Internet communications to carry disclaimers that "meet the general content requirements" that already exist.[37] All Internet disclaimers would need "to be ''presented in a clear and conspicuous manner" and "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."[38]

Alternative B provides for "adapted disclaimers." It would create a bright line test: if the disclaimer takes up "ten percent of the time or space in an internet communication," then an

[28] *Id*. at 12871.

[29] *Id*. at 12879.

[30] *Id*. at 12875.

[31] *Id*. at 12876.

[32] *Id*.

[33] *Id*. at 12871 (internal footnotes omitted, punctuation edited for clarity).

[34] *Id*. at 12869 ("Alternative B would require disclaimers on [I]nternet 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*.") (emphasis added).

[35] *Id*. at 12873.

[36] *Id*.

[37] *Id*. at 12871; *cf*. 11 C.F.R. § 110.11(b) (general disclaimer content requirements).

[38] NPRM, 83 Fed. Reg. at 12873 (quoting 11 C.F.R. § 110.11(c)(1)).

adapted disclaimer may be used.[39] For text, graphics, or images, the "space" is defined by characters or pixels.[40] For audio and video, the proposed rule uses seconds.[41]

Alternative B proposes two tiers of "adapted disclaimers," which are "abbreviated disclaimer[s] 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 existing law.[42] The first tier would be substantively similar to Alternative A's adapted disclaimer, except that "in lieu of a payor's full name," a group may be "identified by a clearly recognized identifier such as an abbreviation or acronym."[43] The second tier would only "require, on the face of the advertisement . . .an 'indicator,'" but neither a name nor other identifier would be required.[44] Alternative B defines "indicator" to be "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."[45] Under *both* tiers, the advertisement "would have to provide a full disclaimer through a technological mechanism."[46] This technological mechanism must make the full disclaimer available "within one step."[47]

While Alternative A proposes no rule governing exceptions for disclaimers on Internet communications, Alternative B would create an "exception" that "is intended to replace the small item and impracticable" exemptions[48] that have long existed in the Commission's regulations.[49] The small item and impracticable rules would no longer apply to Internet communications. Instead, such Internet concerns would be governed by Alternative B's proposed § 110.11(f)(1)(iv), which would "exempt[] from the disclaimer requirement any paid internet advertisement that cannot provide a disclaimer in the communication itself nor an adapted disclaimer under" either of Alternative B's two tiers.[50]

Comparing the two proposed rules, Alternative A seeks to force disclaimer rules designed for traditional broadcast media into the online space. Alternative A therefore provides little to no flexibility in adapting disclaimers to new technology. By contrast, Alternative B starts from the premise that the Internet presents new considerations relevant to disclaimer requirements. Alternative B is therefore more flexible than Alternative A, providing for multiple tiers of "adapted

---

[39] *Id*. at 12875.

[40] *Id*.

[41] *Id*.

[42] *Id*. at 12876.

[43] *Id*. at 12875.

[44] *Id*. at 12876.

[45] *Id*. at 12877. Such 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." *Id*.

[46] *Id*. at 12876.

[47] *Id*. at 12877. This "one step" must be "apparent in the context of the communication, and the disclaimer provided through alternative technical means must be 'clear and conspicuous.'" *Id*. at 12878.

[48] *Id*. at 12879.

[49] *See* Section III(b), *infra*.

[50] NPRM, 83 Fed. Reg. at 12879.

disclaimers," and including an updated version of the "small item" exemption specifically for Internet ads.

II. The Commission's rulemaking authority is limited by the statute it enforces.

At the outset, certain aspects of the proposed rules, and especially the approach taken by Alternative A, appear to lie outside the Commission's statutory authority.

Fundamentally, campaign advertising disclaimers are justified only insofar as they inform the listener or viewer concerning who paid for an advertisement. By providing "[i]dentification of the source of advertising," the federal disclaimer laws are intended to allow the electorate to "be able to evaluate the arguments to which they are being subjected."[51] For example, the Supreme Court has noted that "disclaimers avoid confusion by making clear [when] ads are not funded by a candidate or political party."[52]

The history of disclaimers reflects this limited purpose. They were originally intended as a means of informing voters where to find *disclosure* reports.[53] In response to the landmark *Buckley v. Valeo*[54] decision, Congress created new disclaimer requirements in the 1976 amendments to the federal law,[55] requiring more identification concerning who ran an advertisement and whether they were connected to a candidate or political party.

The 1976 statute mandated that "[w]henever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate" through "any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, or any other type of general political advertising" there should be one of two disclaimers.[56] "[I]f authorized by a candidate," then the ad "[s]hall clearly and conspicuously . . . state that the communication has been authorized."[57] But if the ad is not authorized by the candidate, then it "shall . . . state that the communication is not authorized by any candidate and state the name of the person who made or financed the expenditure for the communication."[58] So the law stood for many years: disclaimers were short and simply identified who was responsible for the advertising, and, for non-candidates, contained an affirmation that no candidate authorized the ad.

Starting in 1976, the FEC wrote rules that largely tracked these limited statutory disclaimer provisions.[59] In 1995, the Commission engaged in a rulemaking that mentioned new forms of

---

[51] *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978).

[52] *Citizens United*, 558 U.S. at 368.

[53] Federal Election Campaign Act of 1974, Pub. L. 93-443 § 205, 88 Stat. 1263, 1278 (Oct. 15, 1974) (""A copy of our report is filed with the Federal Election Commission and is available for purchase from the Federal Election Commission, Washington, D.C."").

[54] 424 U.S. 1 (1976) (per curiam).

[55] Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283 § 112, 90 Stat. 475, 493 (May 11, 1976).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] Fed. Election Comm'n, Establishment of Chapter, Notice 1976-38, 41 Fed. Reg. 35932, 35952 (Aug. 25, 1976). The very next year, the Commission noted in its report to Congress that the disclaimer rules under then-11 C.F.R.

communication, including Internet communications.[60] In that rulemaking, the FEC established that Internet communications, to the extent they qualified as "general public political advertising," required disclaimers mirroring the statute's general two-tiered system.[61] The 1995 rulemaking only mentioned the Internet and applicability of the *general* rules—it did not create an Internet-specific rule, and it did not reference the Internet as a type of broadcast media.

a. A disclaimer's content depends on the medium used.

The general information Congress requires in a disclaimer is laid out in 52 U.S.C. § 30120(a). Ads "paid for and authorized by a candidate, an authorized political committee of a candidate, or its agents, shall clearly state that the communication has been paid for by such authorized political committee."[62] If a candidate authorizes an ad paid for by someone else, then the ad must "clearly state that the communication is paid for by such other persons and authorized by such authorized political committee."[63] But the disclaimers are lengthier for those not under the control or authorization of a candidate. Non-candidate persons who run unauthorized ads "shall clearly state the name and permanent street address, telephone number, or World Wide Web address of the person who paid for the communication and state that the communication is not authorized by any candidate or candidate's committee."[64]

When printed, the disclaimer must "be of sufficient type size to be clearly readable by the recipient of the communication" and "be printed with a reasonable degree of color contrast between the background and the printed statement."[65] There must be "a printed box" around the disclaimer, and the disclaimer must be "set apart from the other contents of the communication."[66]

On radio, the standard disclaimers of subsection (a) must also have "an audio statement by the candidate that identifies the candidate and states that the candidate has approved the communication."[67] Television advertisements require "an unobscured, full-screen view of the candidate making the statement" (or a clear "photographic or similar image of the candidate") *and* a written disclaimer "at the end of the communication in a clearly readable manner with a reasonable degree of color contrast between the background and the printed statement, for a period

§ 109.4, "follow[ed] 2 U.S.C. § 441d." HOUSE DOC. No. 95-44, Fed. Election Comm'n, Explanation and Justification for 1977 Amendments to Federal Election Campaign Act of 1971 at 55 (.pdf page 17) (Jan. 12, 1977) *available at* https://transition.fec.gov/law/cfr/ej_compilation/1977/95-44.pdf. The disclaimer rules were originally at 11 C.F.R. § 109.4, but are now found at 11 C.F.R. § 110.11. Similarly, the statutory codification was updated. The disclaimer statute was at 2 U.S.C. § 441d, but now is found at 52 U.S.C. § 30120.

[60] Fed. Election Comm'n, Communications Disclaimer Requirements, 60 Fed. Reg. 52069, 52071 (Oct. 5, 1995).

[61] *Id*.; *see id*. at 52072 (laying out then-11 C.F.R. § 110.11(a)(1), which tracked the statutory language in effect at the time).

[62] 52 U.S.C. § 30120(a)(1).

[63] 52 U.S.C. § 30120(a)(2).

[64] 52 U.S.C. § 30120(a)(3).

[65] 52 U.S.C. §§ 30120(c)(1) and (c)(3).

[66] 52 U.S.C. § 30120(c)(2).

[67] 52 U.S.C. § 30120(d)(1)(A).

of at least 4 seconds."[68] All of these requirements apply to both candidate committees and non-candidates alike.

But non-candidates, whether natural persons or artificial ones, running broadcast ads have the extra duty of disclosing specifically that they "[are] responsible for the content of this advertising."[69] This extra script is attached to both the audio and visual disclaimers and must be made by "a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over."[70]

Like any statute, 53 U.S.C. § 30120 must be read in its entirety. Subsection (a) lists the types of communications that must carry disclaimers, and gives general principles on what the disclaimers must contain (subsections (a)(1) though (a)(3)). Subsection (c) gives specific rules on clarity of typeface for print media, but not specific scripts. Subsection (d) gives specific scripts for broadcast media—television and radio advertisements run on broadcast stations.

Understanding this framework, the Commission must consider which provision, if any, covers Internet advertisements. Alternative A's focus on importing the television and radio scripted disclaimers to the Internet is not in harmony with the underlying statute. Alternative B, by contrast, recognizes that there are general guidelines from Congress on what a disclaimer must contain, and that the Commission has authority to act reasonably in enforcing those broad guidelines. But no matter the approach adopted, the Commission must be wary of writing a rule that effectively silences speakers in the name of applying rigid disclaimer requirements. [71]

b. The Internet is not broadcast media within the meaning of the statute.

In the Bipartisan Campaign Reform Act of 2002 ("BCRA") § 311, Congress mandated new, lengthier "stand by your ad" disclaimers for broadcast media.[72] The disclaimer statute delineated between "broadcasting station[s]," various print media, and "any other type of general public political advertising."[73] In so doing, Congress did not abrogate the 1970s disclaimer rules, but instead added specific scripts for disclaimers "transmitted" on television or radio by "broadcast

[68] 52 U.S.C. § 30120(d)(1)(B). The written component of the televised disclaimer must be "in letters equal to or greater than four (4) percent of the vertical picture height" and be on-screen for four seconds. 11 C.F.R. §§ 110.11(c)(4)(iii)(A) and (B). Of course, the text must be legible with proper contrast. 11 C.F.R. § 110.11(c)(4)(iii)(C).

[69] 52 U.S.C. § 30120(d)(2). The Commission clarified that it must be "spoken clearly" with a "an unobscured full-screen view of a representative of the political committee or other person making the statement, or by a representative of such political committee or other person in voice-over." 11 C.F.R. §§ 110.11(c)(4)(i) and (ii).

[70] 52 U.S.C.§ 30120(d)(2); 11 C.F.R. § 110.11(c)(4).

[71] Where the choice is between silence and anonymity, the latter should prevail. The Electronic Frontier Foundation, in its comments on this NPRM, has explained that anonymous speech is a central, First-Amendment protected liberty entitled to the Commission's protection. Elec. Front. Found'n, Comments to Federal Election Commission Re: ANPRM 2011–02: Internet Communication Disclaimers (Nov. 9, 2017) https://www.eff.org/document/eff-comments-federal-election-commission-re-anprm-2011-02-internet-communication. The Institute agrees with that analysis.

[72] Pub. L. 107-155, 116 Stat. 87, 105 (Mar. 27, 2002) *codified at* 52 U.S.C. § 30120.

[73] 52 U.S.C. § 30120(a).

stations."[74] A careful reading of the statutory text reveals that these new scripts do not apply to the Internet.

The very structure of § 30120 precludes application of the broadcast scripts to Internet communications. In 52 U.S.C. § 30120(a), Congress listed required disclaimers when:

> a political committee makes a disbursement for the purpose of financing any communication *through any broadcasting station*, newspaper, magazine, outdoor advertising facility, mailing, *or any other type of general public political advertising.*[75]

Congress uses this same list when requiring disclaimers for "disbursement[s] for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate."[76] In each case, Congress uses the term "broadcasting station" as distinct from other forms of communication—and the Internet is not enumerated.

Turning to the specific requirements for broadcast media in 52 U.S.C. § 30120(d)(1), Congress specifies that the additional scripts apply to *radio* and *television*. The specific scripts apply when "[a]ny communication described in . . .subsection (a) [] is *transmitted* through radio." Such advertisements must include "an audio statement by the candidate that identifies the candidate and states that the candidate has approved the communication."[77] The statute uses substantively similar language for television: "[a]ny communication described in . . .subsection (a) which is *transmitted* through television" must carry certain visual and audio disclaimers.[78] Both subsections use the term "transmitted," and in both cases "broadcast stations" are the entities transmitting the relevant radio and television communications.[79] Consequently, Internet communications must fall under the "other type" of public communications mentioned in subsection (a). In fact, even on its own general information webpages, the Commission has recognized that the scripts are part of the "[s]pecial rules for television and radio ads."[80]

Of course, the disclaimer statute covers "electioneering communications" as well, with specific reference to that signature term-of-art.[81] Looking to BCRA § 201(f)(3), electioneering communications are, by definition, limited to "broadcast, cable, or satellite communication[s]"[82] and do not cover the Internet. The Supreme Court upheld the "electioneering communications"

---

[74] 52 U.S.C. § 30120(d).

[75] 52 U.S.C. § 30120(a) (emphasis added).

[76] *Id*. Electioneering communications—which are, by definition, limited to "broadcast, cable, or satellite communication[s]"—also must carry a disclaimer.

[77] 52 U.S.C. § 30120(d)(1)(A) (emphasis added).

[78] 52 U.S.C. § 30120(d)(1)(B) (emphasis added). Television, as a visual and auditory medium, triggers both on-screen and voicer over disclaimers. 52 U.S.C. §§ 30120(d)(1)(B)(i)(I) and (II).

[79] *See* 52 U.S.C. § 30120(a).

[80] Fed. Election Comm'n, Advertising https://www fec.gov/help-candidates-and-committees/making-disbursements/advertising/.

[81] 52 U.S.C. § 30120(a) (incorporating, by reference, the definition of electioneering communication in 52 U.S.C. § 30104(f)(3)(A)(i)).

[82] BCRA §201, 116 Stat. at 89, *codified at* 52 U.S.C. § 30104(f)(3)(A)(i).

definition only while noting that it "*applies only* (1) to a *broadcast* (2) clearly identifying a candidate for federal office, (3) *aired* within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners."[83] Advertisements that fall within this "narrowly defined"[84] provision must carry additional disclaimers under 52 U.S.C. § 30120(d)(2).

Thus, under the express terms of 52 U.S.C. § 30120(d), the scripted disclaimers apply only to advertisements "transmitted" by "broadcasting stations" over radio and television. Disclaimers for electioneering communications are, by definition, similarly limited to broadcast media. Subsection (c) lists a few requirements for "printed" media[85]—but each requirement is on visibility of the disclaimer, not a specific script and Internet postings are not, by definition, "printed."[86] This leaves the Internet to the general disclaimer principles found in 52 U.S.C.§§ 30120(a)(1) through (3).[87]

Similarly, where Congress defined what counts as a regulable "public communication" in the federal campaign finance laws, it differentiated between broadcast communications, newspaper advertisements, and mass mailings—but never mentioned the Internet:

> The term "public communication" means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.[88]

Therefore, under 52 U.S.C. § 30101(22), the Internet, according to Congress, is a "form of *general public political advertising*" that is distinct from "broadcast, cable, or satellite communication[s]."

Accordingly, under both §30120(a) and § 30101(22) the Internet is an "other" communication and is therefore subject to the general principles of the disclaimer law, not the specific requirements applicable only to broadcast media. This plain reading of the statute is bolstered by both the legislative history of BCRA and Supreme Court guidance, discussed below.

---

[83] *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 194 (2003) (emphasis added).

[84] *Fed. Election Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 519 (2007) (Souter, J. dissenting) ("The new phrase 'electioneering communication' was narrowly defined in BCRA's § 201 as 'any broadcast, cable, or satellite communication . . . .'").

[85] 52 U.S.C. § 30120(c), requiring disclaimers on printed communications "be of sufficient type size to be clearly readable" and be in "a printed box set apart from the other contents" and have "a reasonable degree of color contrast between the background and the printed statement").

[86] *See, e.g.*, Paul Suggett, *The Different Types of Advertising Methods Available to You*, The Balance (May 3, 2018) https://www.thebalancesmb.com/different-types-of-advertising-methods-38548 (differentiating between electronic advertising and other forms of advertising); *Types of Media*, SparkNotes, http://www.sparknotes.com/us-government-and-politics/american-government/the-media/section1/ ("There are three main types of news media: print media, broadcast media, and the Internet.").

[87] Subsection (b) in not applicable for the purposes of this rulemaking because it mandates parity for advertising rates in newspapers and magazines. 52 U.S.C. § 30120(b). As such, it has nothing to do with specific disclaimer rules for the Internet.

[88] 52 U.S.C. § 30101(22).

c. Both legislative history and Supreme Court guidance support the view that 52 U.S.C. § 30120(d) is applicable only to broadcast media.

Congress was aware of the existence of the Internet when it drafted the disclaimer scripts for broadcast media in 2002—it required this Commission to put campaign disclosure records on the Web.[89] And yet, *contra* Alternative A, Congress mandated specific scripts *only* for television and radio in 52 U.S.C.§ 30120(d). It did not do so either for print media in subsection (c) or for other "general public political advertising" under subsection (a).

BCRA's legislative history supports the view that the Internet is distinct from broadcast media. BCRA was targeting "negative ads by outside interest groups" that were "continu[ing] to permeate the *airwaves*."[90] Senator Jeffords noted that he was proud that BCRA "reform[ed] the law concerning *broadcast advertisements*."[91] Congress was focused on the passivity and lack of background information available to viewers of television ads[92]—a problem that does not exist for Internet-connected devices that can also access the FEC database, conduct web searches, and electronically visit Wikipedia, OpenSecrets, and a variety of other clearinghouses for information.

Similarly, the Supreme Court recognizes that statutory references to "broadcast" media may not apply to other types of speech. In *Southeastern Promotions, Ltd. v. Conrad*, the Supreme Court held that "each medium of expression . . . may present its own problems."[93] Therefore, some justifications for regulation of "broadcast media" may not apply "to other speakers."[94] That is because TV and radio have a long "history of extensive government regulation" based on "the scarcity of available frequencies."[95] And the "distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium."[96]

Additionally, because radios and televisions *receive* communications, ads are comparatively "invasive" and the government may therefore have greater interest in regulating broadcast media.[97] Even *cable* television enjoys less government regulation than broadcast radio and television ads because the scarcity and passivity of reception factors are not present.[98] It is the physical spectrum limitations, not economic markets, that allow for such close regulation of

---

[89] *See* BCRA § 502, 116 Stat. at 115 *codified at* 52 U.S.C. § 30112.

[90] 148 CONG. REC. S2096, S2117 (March 20, 2002) (statement of Sen. Cantwell) (emphasis added).

[91] *Id*. (discussing the creation of "electioneering communications" regulation) (emphasis added).

[92] *Id*. ("[T]oday a campaign is waged on television and radio, many times by people and groups who the voters do not know.")

[93] 420 U.S. 546, 557 (1975).

[94] *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997).

[95] *Id*. (citing *Red Lion Broadcasting Co. v. Fed. Communications Comm'n,* 395 U.S. 367, 399-400 (1969) and *Turner Broadcasting System, Inc. v. Fed. Communications Comm'n,* 512 U.S. 622, 637-638 (1994)).

[96] *Turner Broadcasting System*, 512 U.S. at 637 (collecting cases); *id*. ("there are more would-be broadcasters than frequencies available in the electromagnetic spectrum").

[97] *Reno*, 521 U.S. at 868 (citing *Sable Communications of Cal., Inc. v. Fed. Communications Comm'n*, 492 U.S. 115, 128 (1989)).

[98] *See, e.g.*, *Turner Broadcasting*, 512 U.S. at 638-639.

broadcast media compared to other media.[99] And "the mere assertion of dysfunction or failure in a speech market, without more, is not sufficient to shield a speech regulation from the First Amendment standards applicable to *nonbroadcast* media."[100]

But spectrum limitations or a history of close regulation are "factors . . . not present in cyberspace."[101] The Internet is a *two-way* communications medium, and so it is not "invasive."[102] The Supreme Court has upheld the Federal Communications Commission's ("FCC") ruling that Internet providers are not delivering "telecommunications" but are instead "information-service providers."[103] The Court deferred to the FCC's interpretation that the Internet was a different form of communications service.[104]

Because the Internet is not a passive experience, it is different from traditional print, radio, and television. When the Senate passed BCRA, Senator Levin noted that "[w]hen one watches a TV ad, they do not know who bought it," and so the broadcast disclaimers help alleviate the problem of identifying relevant information about "the Good Government Committee."[105] But now such information is a web search away—in fact, on a smartphone, sometimes the keyboard application *itself* will do the context searching.[106]

Now viewers no longer need to remember to look up "the Good Government Committee" later in the phone book or call the FEC for records. Instead

> [r]eports and databases are available on the FEC's Web site almost immediately after they are filed, supplemented by private entities such as OpenSecrets.org and FollowTheMoney.org. Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided.[107]

Thus, "[w]ith modern technology, disclosure now offers a particularly effective means of arming the voting public with information,"[108]—far more and better information than is contained within the scripts mandated in BCRA. All that really matters is that there be a good hyperlink to that information, or some similarly easy way to access it.

---

[99] *Turner Broadcasting*, 512 U.S. at 640 (citing *Fed. Communications Comm'n v. League of Women Voters*, 468 U.S. 364, 377 (1984)).

[100] *Id*. (citing, *inter alia*, *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657-658, (1990) and *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256-259 (1986)) (emphasis added).

[101] *Reno*, 521 U.S. at 868

[102] *Id*. (quotation marks omitted).

[103] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005).

[104] *Id*. at 986.

[105] 148 CONG. REC. at S2116.

[106] *See, e.g.*, Google, "Search Google & send results from your keyboard" https://support.google.com/websearch/answer/6380730?co=GENIE.Platform%3DAndroid&hl=en ("With Gboard you can: Search and send anything from Google, like nearby restaurants, videos, and weather forecasts . . .").

[107] *McCutcheon v. Fed. Election Comm'n*, 572 U.S. ___, ___, 134 S. Ct. 1434, 1460 (2014) (Roberts, C.J., controlling opinion).

[108] *Id*.

In recent opinions, the Supreme Court has reaffirmed its view that the Internet is not the same as broadcast media. In *Packingham v. North Carolina*,[109] the Court held that the Internet is the very epitome of a forum for the "exchange of views" because it is a "'vast democratic forum[]' . . . social media in particular."[110] Social media, like the rest of the Internet, "offers 'relatively unlimited, low-cost capacity for communication of all kinds.'"[111] In short, the Internet is more like a street or park and less like a broadcast facility with one-way communication.[112] The Internet is a forum for expressive conduct, done interactively, and thus lengthy disclaimers add little because a listener can seamlessly conduct a web search for information on the speaker.

Thus, to the extent Alternative A suggests the Internet can be put into the same box as radio and television,[113] it is mistaken. At the same time, Alternative B recognizes the Internet's interactivity[114] and the Commission's historical willingness to adapt the basic disclaimer information found at 52 U.S.C. § 30120(a), at least where it can be included without undue burden on the communication's content. Alternative B therefore would allow a minimal "adapted disclaimer" that is only an "indicator" that more information may be available.[115]

d. Political speakers must be allowed to use any commercially-available medium.

Speakers should be able to use any commercially-available tool to engage the electorate. The FEC has the opportunity to *encourage* electronic communications rather than stifle them with disclaimer burdens designed for other media. If the rules are drafted so as to calcify existing technological practices, then they are too burdensome. Caution is particularly warranted because "[u]nique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity."[116] For these reasons, the Institute has previously cautioned the Commission against adopting a new and unnecessarily burdensome regulatory framework for Internet disclaimers.[117]

Under the First Amendment, neither demanding particular technologies nor requiring shortened messages to fit a disclaimer are viable substitutes for a speaker's preferred means of communicating. The "response that a speaker should just take out a newspaper ad" or use other

---

[109] 582 U.S. ___, 137 S. Ct. 1730 (2017).

[110] *Id*. at 1735 (quoting *Reno*, 521 U.S. at 868).

[111] *Id*. (quoting *Reno*, 521 U.S. at 870).

[112] *Id*.; *see also id*. at 1738 (Alito, J., concurring) (criticizing the majority opinion for "equat[ing] the entirety of the [I]nternet with public streets and parks.").

[113] NPRM, 83 Fed. Reg. at 12869 ("Alternative A proposes to apply the full disclaimer requirements that now apply to radio and television communications to public communications distributed over the [I]nternet with audio or video components."); *id*. at 12870 ("[I]n Alternative A, the Commission proposes to provide that public communications distributed over the [I]nternet with audio or video components are treated, for purposes of the disclaimer rules, the same as 'radio' or 'television' communications").

[114] *Id*. at 12871 ("The proposals in Alternative B are premised on the [I]nternet as a unique medium of communication.") (internal citation omitted, punctuation modified for clarity).

[115] *Id*. at 12875 ("Under its second tier, Alternative B would require, on the face of the advertisement, only an 'indicator'; neither the payor's name nor an identifier would be required under tier two of Alternative B.").

[116] *AFL-CIO v. Fed. Election Comm'n*, 333 F.3d 168, 170 (D.C. Cir. 2003).

[117] *See, e.g.*, IFS Comment II, *supra* n.3, at 2.

traditional media "is too glib."[118] The mere possibility of an alternative medium is simply irrelevant. Speakers choose their platforms, not the Commission.

And a speaker should not have to shorten her message—effectively a chilling of speech—for the sake of fitting a long disclaimer designed for other types of media onto an Internet advertisement. That

> is akin to telling Cohen that he cannot wear his jacket because he is free to wear one that says "I disagree with the draft," . . . or telling 44 Liquormart that it can advertise so long as it avoids mentioning prices.[119]

Because "*all* speech inherently involves choices of what to say and what to leave unsaid,"[120] speech is only free when the one who chooses to speak decides what is said or not said.[121] Of course, campaign finance disclaimers of purely factual information have been generally upheld,[122] but the Courts have not yet considered the FEC's NPRM's Alternative A that would import disclaimers designed for broadcast media onto the Internet.

Alternative A, while providing for "adaptive disclaimers," unnecessarily restricts use of the adapted rules to cases where an ad, "cannot, due to external character or space constraints, practically include a full disclaimer on the face of the communication."[123] The test is based on "pixels, number of characters, or other measurement[s]."[124] While perhaps meant to be objective, this test does not provide a threshold for when a disclaimer subsumes the underlying communication. Indeed, the NPRM specifically precludes any consideration of "burden" or "difficulty" under Alternative A.[125] There is no proportionality or ratio test—objective standards the Commission already uses for determining when disclaimers are the proper size on other media.[126] Alternative A is therefore too restrictive, for in practice it creates a rule that commercially-available communications formats are unavailable to political speakers unless they

---

[118] *Wis. Right to Life, Inc*., 551 U.S. at 477 n.9 (2007) (Roberts, C.J., concurring opinion).

[119] *Id*. (citing *Cohen v. Calif.*, 403 U.S. 15 (1971) and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)).

[120] *Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Calif.*, 475 U.S. 1, 11 (1986)) (emphasis in *Pacific Gas*).

[121] *Id*.

[122] *Citizens United*, 558 U.S. at 368. The organization challenged the electioneering communications disclosure (BCRA § 201) and disclaimer (BCRA § 311) provisions *together*. *See, e.g.*, Merits Br. of Appellant Citizens United at 42, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (No. 08-205) ("The district court upheld the application of BCRA's disclaimer, disclosure, and reporting requirements . . . This was error.""). Nonetheless, *Citizens United* started out, in part, as a challenge to whether Video On Demand and supporting television advertisements were constitutionally permitted to be regulated as "electioneering communications." *See, e.g. Citizens United v. Fed. Election Comm'n*, 530 F. Supp. 2d 274, 275 (D.D.C. 2008) (three-judge court) (describing distribution method of the film); *id*. at 276 (describing the ads as "three television advertisements"). Of course, electioneering communications are properly treated differently than Internet advertisements. 52 U.S.C. § 30104(f)(3)(A)(i) ("[t]he term 'electioneering communication' means any broadcast, cable, or satellite communication . . .").

[123] NPRM, 83 Fed. Reg. at 12874.

[124] *Id*.

[125] *Id*.

[126] *See, e.g.*, 11 C.F.R. § 110.11(c)(3)(iii)(A) (mandating on-screen disclaimers must be "in letters equal to or greater than four (4) percent of the vertical picture height").

can include BCRA's lengthy broadcast ad disclaimers. That cannot be the rule under a First Amendment that encourages speakers to use all manner of platforms and methods to speak on "the most salient political issues of our day."[127]

III. Adequate disclaimers are already required where they can be practicably included, and the existing common-sense exceptions where they are overly burdensome should be explicitly extended to online communications.

a. Adequate disclaimers are already required where they can be conveniently included.

Public communications are already required to include disclaimers. A "public communication" is "any other form of general public political advertising"[128] where a "communication[is] placed for a fee on another person's Web site."[129] Email blasts from political committees that reach 500 or more recipients also qualify as "public communications" that require disclaimers.[130] Combined, these requirements reach the vast majority of ways the regulated community places advertisements via the Internet.[131] Political committees' own websites must have disclaimers. Their mass marketing emails must have disclaimers. Standard internet advertisements bearing express advocacy must have disclaimers. For all but the pithiest ads, the existing rules mandate disclaimers.

What is at stake in this rulemaking, then, is the viability of small (or brief) ads delivered using new technology. Various political speakers have requested advisory opinions from the Commission on this topic, and the Commission has struggled to apply existing rules (and their exemptions) to Internet ads.[132] Target Wireless, for instance, asked about disclaimers for SMS, also known as text-messaging, which uses short bursts of cellular data to transmit messages to mobile phones.[133] In 2010, Google sought guidance concerning disclaimers on its "AdWords" small ads program.[134] This was followed the next year by Facebook asking a similar question for

---

[127] *Citizens United*, 558 U.S. at 324.

[128] 52 U.S.C. § 30101(22).

[129] 11 C.F.R. § 100.26.

[130] 11 C.F.R. § 110.11(a)(1) (regulating "electronic mail of more than 500 substantially similar communications"). This email rule is analogous to the statute's regulation of "mass mailing[s]" and "telephone bank[s]" as public communications. 52 U.S.C. § 30101(22).

[131] This rulemaking will not resolve every issue raised by the Commission's regulation of Internet-based political speech. The NPRM is focused on only the definition of "public communication" and "paid internet communications," not material shared for no cost—for example, non-sponsored Tweets on Twitter. *See, e.g.*, NPRM, 83 Fed. Reg. at 12865; 52 U.S.C. § 30101(22) (defining public communication as a list of specific media and "general public political *advertising*"). Addressing these issues would require a separate rulemaking with proper notice-and-comment procedures. 5 U.S.C. § 553(b) (mandating a "notice of proposed rule making shall be published in the Federal Register"); 5 U.S.C. § 553(c) (requiring sufficient notice to allow "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" for the "consideration" of the agency).

[132] 52 U.S.C. § 30108 (establishing process for and legal protections of Commission advisory opinions).

[133] AO 2002-09 (Target Wireless); *see also* Per Larsen, *Text Message Price Gouging: A Perfect Storm of Tacit Collusion*, 8 J. on Telcomm'ns & High Tech. L. 217, 221 (2010) ("[A] standard SMS message is limited to 140 bytes (160 7-bit characters). Thus, to transmit a single text message a cellular phone must send slightly more than one quarter of the amount of data contained in the average second of voice transmission.").

[134] AO 2010-19 (Google).

its small ads and promoted items in the social network's feed.[135] Revolution Messaging's advisory opinion request centered on smartphone ads.[136] This history is familiar, as is the Commission's difficulty addressing those comparatively narrow issues.

By contrast, in AO 2013-13 (Freshman Hold'em), the Commission had no problem issuing an advisory opinion—unanimously—stating the unremarkable: that a political committee's emails, webpages, and printed materials (none of which were small or space limited) are *not* exempt from the standard disclaimer requirements of 52 U.S.C. § 30120.[137] The FEC can and has issued advisory opinions mandating disclaimers on social media,[138] even when the individual commissioners could not agree on the rationale for why the disclaimer provision applied.[139]

While Google and Facebook are the current major players online, they do not control all speech on the Internet, which is vast and diverse—and subject to standard disclaimer rules under 52 U.S.C. § 30120(a). In other words, there is little reason to doubt that a large portion of Internet advertisements can easily convey the required, standard disclaimers.

What is left are the subset of Internet ads that would cease to be practically available if they were forced to bear disclaimers—particularly if they must contain the much lengthier BCRA disclaimers discussed in Section II, *supra*.

b. The FEC's existing small item and impracticality exemptions are a common-sense approach to disclaimers that should be applied online.

The Commission's difficulty excusing unwieldy disclaimers is a recent development. In addition to limiting Internet disclaimers to properly-defined "public communications,"[140] the FEC has long recognized that, while disclaimers may be technically possible in many cases, they will swallow the underlying message or otherwise prove impractical.

Indeed, the "small item" exemption dates back to the very genesis of the FEC's campaign finance rules[141] and covers "[b]umper stickers, pins, buttons, pens, and similar small items upon

---

[135] AO 2011-09 (Facebook).

[136] AO 2013-18 (Revolution Messaging).

[137] AO 2013-13 (Freshman Hold'em) at 2.

[138] *See, e.g.*, AO 2017-12 (Take Back Action Fund) at 1 ("The Commission concludes that, under the circumstances described in the request, TBAF must include all of the disclaimer information specified by 52 U.S.C. § 30120(a) on its proposed paid Facebook Image and Video advertising.").

[139] *See, e.g., id.* at 1 n.1; AO 2010-19 (Google) at 2 ("The Commission concludes that, under the circumstances described in [Google's] request, the conduct is not in violation of the Act or Commission regulations. Further explanation is provided in the Commissioners' concurring opinions."). Certainly, uniformity and consistency from the Commission's rationales in advisory opinions would be helpful to the regulated community, but nonetheless, on close questions, the Commission is able to still give an answer to the requestors.

[140] 11 C.F.R. § 100.26; 11 C.F.R. § 110.11(a)(1).

[141] The "small item" exemption was promulgated in 1976 as part of the founding regulations from the Commission. *See* Establishment of Chapter, 41 Fed. Reg. at 35947 (exempting "bumper strip, a pin, button, pen, and similar small items upon which the disclaimer cannot be conveniently printed"). Originally found at 11 C.F.R. § 109.4(a)(1), the exemption for "small items upon which the disclaimer cannot be conveniently printed" was transferred to its current location in § 110.11 in 1980. Fed. Election Comm'n, Amendments to Fed. Election Campaign Act of 1971; Regulations Transmitted to Congress, Notice 1980-8, 45 Fed. Reg. 15080, 15088 (Mar. 7, 1980).

which the disclaimer cannot be *conveniently* printed."[142] Likewise, the Commission created an "impracticable" exemption in 1983,[143] applicable where "displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable."[144] The Commission also created an "administrative documents" exemption in 1995.[145]

There is no reason, other than Commission intransigence, why these exemptions cannot be applied online. By their very nature, they are *de minimis* exceptions that reflect the reality of political speech in a dynamic campaign context. It is not that a disclaimer *cannot* be placed on a pen or a water tower;[146] it is technically possible to do so. But insisting upon disclaimers in those contexts would be, frankly, silly. Recognizing this, the Commission, having "implied *de minimis* authority to create even certain categorical exceptions to a statute when the burdens of regulation yield a gain of trivial or no value,"[147] excuses the otherwise-required disclaimers.

Such an approach is both wise and well within the Commission's authority. Agencies have "inherent power to overlook trifling matters"[148] like the application of disclaimers to small online ads.[149] It is only when Congress has been "'extraordinarily rigid' in drafting the statute"[150] that an administrative agency does not have the deference to write such a rule. Here, the relevant exemptions have been in place for decades. And while Congress was "rigid" in describing the

---

[142] 11 C.F.R. § 110.11(f)(1)(i) (emphasis supplied).

[143] Fed. Election Comm'n, Disclaimer Notices, Notice 1983-5, 48 Fed. Reg. 8809 (Mar. 2, 1983) (adopting impracticable exemption).

[144] 11 C.F.R. § 110.11(f)(1)(ii). Lamentably, the impracticability exemption, while sound policy, has languished outside the specific examples—"skywriting, water towers, [and] wearing apparel"—listed in the regulation.

[145] Communications Disclaimer Requirements, 60 Fed. Reg. at 52071 ("Consistent with the Notice, new paragraph (a)(6)(iii) clarifies that checks, receipts and similar items of minimal value that do not contain a political message and that are used for purely administrative purposes do not require a disclaimer."); 11 C.F.R. § 110.11(f)(1)(iii) (exempting from the disclaimer requirement "[c]hecks receipts, and similar items of minimal value that are used for purely administrative purposes and do not contain a political message"). The administrative documents exemption is not applicable to this particular rulemaking.

[146] *See* Allen Dickerson, Center for Competitive Politics Comments on AO 2013-18 (Revolution Messaging, LLC) at 2-3 (Jan. 15, 2014) http://ifs.org/wp-content/uploads/2014/01/CCP-Comments-on-AO-2013-18-Revolution-Messaging-LLC.pdf (noting that while pens "that contain a pull-out, printed inset" are available, "no one suggests that the 'small item' exemption cannot apply to ordinary pens").

[147] *Waterkeeper All. v. Envtl. Prot. Agency*, 853 F.3d 527, 530 (D.C. Cir. 2017) (quoting *Public Citizen v. Fed. Trade Comm'n*, 869 F.2d 1541, 1556 (D.C. Cir. 1989) (internal quotation marks removed)).

[148] *New York v. Envtl. Prot. Agency*, 443 F.3d 880, 888 (D.C. Cir. 2006) (internal quotation marks and citation omitted).

[149] Of course, as with any regulation, the Commission must "articulate[] identifiable standards for exercising that authority." *Nat'l Ass'n of Broads. v. Fed. Commc'ns Comm'n*, 569 F.3d 416, 426 (D.C. Cir. 2009) (collecting cases). And it should identify "practical problems" and other "feasibility" issues supporting its position. *Public Citizen*, 869 F.2d at 1556 (emphasis removed). But the longstanding availability of categorical exemptions for particular types of non-electronic communications where disclaimers' burdens are significant and their advantages trivial—as opposed to the more "invasive" broadcast ads described in Section II, *supra*—supports such an approach. There has been no outcry for bumper sticker or skywriting disclaimers because common sense tells us they would provide little of value. Only a particularly wooden regulator would fail to see this reasoning's clear applicability to analogous electronic communications.

[150] *EDF, Inc. v. Evntl. Prot. Agency*, 82 F.3d 451, 466 (D.C. Cir. 1996); *see also Shays v. Fed. Election Comm'n*, 414 F.3d 76, 113-14 (D.C. Cir. 2005) (recognizing *de minimis* exceptions rule, but noting that the statute's character controls—the stricter the statute, the lower the ability for the agency to create an exemption).

specific disclaimers required for transmissions over radio and television by broadcast stations, and could have similarly addressed the Internet, it did not do so. Instead, it relied upon the general guidelines of 52 U.S.C. § 30120(a), leaving the Commission with discretion to excuse disclaimers where they would simply be too burdensome.

Alternative A would ignore both this history and common sense. It fails to provide reasonable exemptions for any significant category of "public communications."[151] Instead, Alternative A implicitly removes existing protections based upon the "particular size of the communication as measured by pixels, number of characters, or other measurement."[152] In this way, it creates a double standard where only non-Internet media may take advantage of the small item and impracticability exemptions. By contrast, Alternative B would create an Internet-specific rule for small advertisements independent of the existing small item and impracticable exemptions.[153]

Alternative B is the better approach. One can reasonably ask whether disclaimers, and in particular lengthy disclaimers going beyond the identity of the speaker, provide ordinary voters—as opposed to the tiny subset of individuals with a particular interest in campaign finance regulation—with anything of value. The same question exists online. In such circumstances, it is folly to extend the disclaimer burdens of broadcast advertisements—an expensive medium available only to the most sophisticated and well-resources actors—to Internet advertisements, a uniquely cost-effective and democratic speech medium.

Similarly, the small item and impracticality exemptions should be explicitly extended to the Internet. Small items can be physical or digital. Disclaimers can be impracticable for both bumper stickers and banner ads. The Commission should apply the same exemption in both cases.

The alternative, where a disclaimer is simply too burdensome, or an alternative commercial product more expensive, is that the speech will not occur.[154] An unnecessarily rigid rule may silence speakers from using popular platforms. The electorate will receive fewer messages and fewer speakers will be able to add their voices to the conversation.[155] There is no basis for imposing

---

[151] NPRM. 83 Fed. Reg. at 12879 ("[n]o proposal" for exceptions for Internet disclaimer rules under Alternative A).

[152] *Id*. at 12874. The NPRM askes, "Should Alternative A, if adopted, preclude the use of the small items and impracticable exceptions for internet public communications?" *Id*. For the reasons discussed here, the Institute answers unequivocally "no."

[153] *Id*. ("The proposed exception in Alternative B is intended to replace the small items and impracticable exceptions for internet public communication . . . .").

[154]Alternative A appears to countenance this outcome, as the NPRM explicitly states that it is intended to state that "business decision to sell small ads" where it is technologically possible to sell a different product "do not justify use of" even a modified disclaimer. *Id*. at 12874.

[155] More speech is a worthy goal unto itself. *See, e.g., Wis. Right to Life, Inc.*, 551 U.S. at 474 (Roberts, C.J., concurring opinion) ("'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'") (quoting *Thornhill v. Ala.*, 310 U.S. 88, 102 (1940)); *Whitney v. Calif.*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (noting that our Constitutional framework is dependent on the idea that "the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market").

these Constitutional harms where a long-tested and wholly practical alternative exists in simply excusing disclaimers in contexts where they make no sense.

IV. Alternative B provides the regulated community with better guidance than existing Commission practice or Alternative A.

a. The Commission should adopt a bright line test.

When disclaimers, a form of compelled speech, are mandated, clarity is paramount. Speakers need to know, *a priori*, whether particular activity triggers disclaimer requirements and relevant exemptions. This precision is best provided by a general regulation. As former Commissioner Cynthia Bauerly noted, "a rulemaking would be a far more productive and inclusive approach . . . [r]ather than the case-by-case approach"[156] of the advisory opinion process.[157] The alternative leaves speakers "wholly at the mercy of the varied understanding of his hearers"[158]—whether they be the Commissioners or otherwise. In that spirit, the Institute supports, and has supported, this rulemaking.[159]

After all, a clear regulatory approach is Constitutionally mandated. The *Buckley* Court observed that laws regulating speech inevitably discourage speakers from speaking plainly, and that the First Amendment does not allow speakers to be forced to "hedge and trim" their preferred message.[160] Likewise, when a rule is "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application"[161] it can run afoul of the First Amendment.[162] The problem is not just that a vague rule may be applied inconsistently or arbitrarily, but that such a rule might also "operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone."[163] The First Amendment needs "'breathing space to survive, [and so] government may regulate in the area only with narrow specificity.'"[164]

One cure for vagueness is to create clear rules where the regulated community knows for sure whether its activity is regulated. The Commission has made good use of such bright line tests in the past. For example, under the FEC regulations governing independent expenditures, a communication is "coordinated" when it is "paid for, in whole or in part, by a person other than" the candidate or political party *and* the communication satisfies one of several enumerated content standards *and* meets one of several conduct standards.[165] Similarly, in *Citizens United*, the

---

[156] Cynthia Bauerly, "The Revolution Will Be Tweeted and Tmbl'd and Txtd: New Technology and the Challenge for Campaign-Finance Regulation," 44 U. Tol. L. Rev. 525, 534 (2013).

[157] *See* NPRM, 83 Fed. Reg. at 12866-68 (discussing history of attempted rulemaking and advisory opinion guidance).

[158] *Wis. Right to Life, Inc.*, 551 U.S. at 469 (Roberts, C.J. concurring opinion) (quoting *Buckley*, 424 U.S. at 43).

[159] NPRM, 83 Fed. Reg. at 12868.

[160] 424 U.S. at 43 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)).

[161] *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

[162] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010) (applying *Connally*); *cf. Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("Vague laws may trap the innocent by not providing fair warning.").

[163] *Buckley*. 424 U.S. at 41 n.48 (quoting *Grayned*, 408 U.S. at 108-109 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958))) (internal quotation marks in *Buckley* omitted).

[164] *Id*. (quoting *NAACP v. Button*, 371 U.S. at 433).

[165] 11 C.F.R. § 109.21(a).

Supreme Court upheld the disclosure contained within a federal electioneering communication report, which discloses the entity making the expenditure and the purpose of the expenditure.[166] Such a report only discloses contributors giving over $1,000 *for the purpose of furthering* the electioneering communication.[167] The disclosure required by Congress has been interpreted by the Commission to mean contributions *earmarked* for these expenditures, an interpretation upheld by the United States Court of Appeals for the District of Columbia Circuit.[168]

Bright line tests also help the Commission. Clear rules remove much of the impetus for advisory opinion requests, and thus free the Commission to focus on other work. Such requests are inefficient because they reach only particular circumstances[169] and may be relied upon only where a "specific transaction or activity . . . is indistinguishable in all its material aspects from the transaction or activity with respect to which [the] advisory opinion is rendered."[170] Moreover, requiring potential speakers to spend the time and resources to seek an advisory opinion also imposes burdens of a constitutional magnitude, especially in a medium conducive to speakers with limited resources.

Alternative B creates a bright line test. In relevant part, the proposed rule provides that if "ten percent of the time or space in an internet communication" is used by the relevant disclaimer, then an adapted disclaimer may be used.[171] For text, graphics, or images, the "space" is defined by characters or pixels.[172] Likewise, for audio and video, the rule uses seconds.[173] If the adapted disclaimer is triggered, Alternative B would allow, "in lieu of a payor's full name . . . a clearly recognized identifier such as an abbreviation or acronym."[174]

Alternative A, by contrast, is unworkable. It eschews the use of existing exceptions or adaptations, and forces the broadcast advertisement rules onto the Internet. Alternative A would allow for an adapted disclaimer—but only when "external character or space constraints" limit the use of the scripted disclaimers.[175] That is, the limit must be "intrinsic to the technological medium"—and not whether the speaker considers the disclaimer burdensome or difficult to

---

[166] 52 U.S.C. § 30104(f)(2) (federal electioneering communications disclosure statute); *cf. Citizens United.*, 558 U.S. 369-70.

[167] 11 C.F.R. § 104.20(c)(9); *cf.* 52 U.S.C. §§ 30104(f)(2)(E) and (F); *Citizens United*, 558 U.S. at 369.

[168] *Van Hollen v. Fed. Election Comm'n*, 811 F.3d 486, 501 (D.C. Cir. 2016) (upholding 11 C.F.R. § 104.20(c)(9)). Similarly, Colorado's electioneering communications provision was upheld precisely because it was similarly limited to the federal standard—including only reporting earmarked contributions. *Independence Inst. v. Williams*, 812 F.3d 787, 797 (10th Cir. 2016) ("[I]t is important to remember that the Institute need only disclose those donors who have specifically earmarked their contributions for electioneering purposes.").

[169] 52 U.S.C. § 30108(c)(1)(A); *cf.* 11 C.F.R. § 112.5(a)(1).

[170] 52 U.S.C. § 30108(c)(1)(B); *cf.* 11 C.F.R. § 112.5(a)(2).

[171] NPRM, 83 Fed. Reg. at 12875.

[172] *Id*.

[173] *Id*.

[174] *Id*. This acronym provision is probably fine for known, big-time players in the political world. It is not hard to reason what "RGA" or "DSCC" stand for, particularly by sophisticated citizens, the regulated community, and the Commission. The FEC, however, should be wary of letting the exception envelop the rule to the point that unclear acronyms take the place of the actual names in the disclaimer. *See, e.g.*, 52 U.S.C. § 30120(a)(3) (requiring the person running an ad "clearly state the name" of the sponsoring organization).

[175] *Id*. at 12874.

incorporate, or even whether a "business decision" to offer a small ad would render that advertising format unworkable.[176]

In the past, the Institute has suggested a four percent rule for when a disclaimer may qualify as a "small item."[177] The Institute's suggestion was based on the Commission's existing rule that the font for disclaimers should be at least four percent of the vertical height of the screen.[178] While Alternative B suggests ten percent, the Commission should look to existing rules. Consequently, the Institute continues to believe that four percent is a reasonable standard. A standard disclaimer should not take more than one line, especially as the longer BCRA-inspired scripts should not be imported to the Internet for the reasons already given. If that is true for written disclaimers in a video context, no reason has been given as to why it is insufficient in the other text-based situations that will arise for online public communications.

b. Technology moves faster than the regulatory state.

The pace of technological advancement is blinding, at least to the eyes of a federal regulator. For big advertising companies like Google and Facebook, letting users know who is behind an ad is already a keen interest.[179] Even without close regulatory guidance from the FEC, the Internet advertising industry has already provided for practical disclaimers for ads on various platforms.

In Google's Advisory Opinion Request from 2010, for example, the company suggested that including the relevant Uniform Resource Locator ("URL") for the political entity, and having the relevant disclaimer on the landing page, might be enough to satisfy the disclaimer requirement.[180] And in the past, the FEC has been willing to embrace such ingenuity. In AO 2004-10 (Metro Networks), for example, the Commission allowed the requestor to use an alternative, briefer script that fit the nature of live broadcast advertising during traffic reports.[181]

The NPRM attempts to be media-neutral by establishing an all-embracing term of art: "internet-enabled device or application."[182] This stems from the Commission's recognition that technological applications are flourishing. The NPRM even names some:

---

[176] *Id*.

[177] IFS Comment II, *supra* n.3, at 4.

[178] IFS Comment I, *supra* n.3, at 5 ("This four percent figure is taken, by analogy, from the requirements for television advertising."); *cf.* 11 CFR § 110.11(c)(3)(iii)(A).

[179] *See, e.g.*, BBC News, *Google changes rules for buying election adverts*, (May 7, 2018) http://www.bbc.com/news/technology-44030119; Sarah Perez, *Facebook's new authorization process for political ads goes live in the US*, TechCrunch (Apr. 23, 2018) https://techcrunch.com/2018/04/23/facebooks-new-authorization-process-for-political-ads-goes-live-in-the-u-s/.

[180] Google Advisory Opinion Request, AOR 2010-19, at 7 (Aug. 5, 2010) https://www.fec.gov/files/legal/aos/2010-19/1147698.pdf.

[181] AO 2004-10 (Metro Networks) at 1-2 (describing the requestor's background and proposed scripts); *id*. at 4 (Commission approving a modified disclaimer script to simply say "Paid for by the committee to re-elect candidate ABC. ABC approved this message.").

[182] *Id*. at 12864.

> [I]nternet 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.[183]

But that list, which seems to be on the bleeding edge now, will likely seem quaint in just a few years.

For example, Vine, a short-form video hosting service, launched on January 24, 2013,[184] and was immediately successful, having up to 200 million active users.[185] But by October 27, 2016—less than five years later—the website was shuttered to new submissions.[186] In contrast to the short life of Vine, this proposed rulemaking has been in consideration since 2011.[187] Thus, the short video hosting service has come and gone while the Commission considered how to apply to disclaimers to services like Vine. Even upgrading and applying new technology internally is difficult for the government. The FEC itself is just now putting in place a new website, after years of suffering from an out-of-date format.[188]

D.C. moves slower than Silicon Valley, and Alternative B recognizes this reality,[189] focusing on general principles that can be adapted to new technology.[190] 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

---

[183] *Id*. at 12868 (internal footnotes omitted).

[184] Jordan Crook, *Twitter's 6-Second Video Sharing App, Vine, Goes Live In The App Store*, TechCrunch (Jan. 24, 2013) https://techcrunch.com/2013/01/24/twitters-video-sharing-app-vine-goes-live-in-the-app-store/.

[185] Adam Levy, *What Can Vine Be for Twitter Inc? Vine isn't a social network; it's an entertainment platform*, The Motley Fool (Nov. 8, 2015) https://www fool.com/investing/general/2015/11/08/what-can-vine-be-for-twitter-inc.aspx.

[186] Chris Foxx, *Twitter axes Vine video service*, BBC (Oct. 27, 2016) http://www.bbc.com/news/technology-37788052.

[187] *See* Advance Notice of Proposed Rulemaking, 76 Fed. Reg. at 63567 (published Oct. 13, 2011). The courts also struggle to move adequately fast for election cycles. *See, e.g.*, *Wis. Right to Life, Inc.*, 551 U.S. at 462 (holding challenges to campaign finance laws, specifically the electioneering communications provisions, fit the "established exception to mootness for disputes capable of repetition, yet evading review"); *Bellotti*, 435 U.S. at 774 (noting that "18 months . . . proved too short a period of time for appellants to obtain complete judicial review" of campaign finance laws).

[188] Fed. Election Comm'n, Press Release: FEC introduces retooled, streamlined, user-centered website, (May 30, 2017) https://www fec.gov/updates/fec-introduces-retooled-streamlined-user-centered-website/; *see also* Noah Manger and Jennifer Thibault, "The New FEC.gov" Gov't Services Admin. Blog: 18F (May 30, 2017) https://18f.gsa.gov/2017/05/30/the-new-fec/ (discussing highlights of the new website design process).

[189] NPRM, 83 Fed. Reg. at 12871 (noting "the rapid pace of technological change").

[190] *Id*.

imposing the additional disclaimer requirements that apply to print, radio, and television communications.[191]

In short, Alternative B would correctly "require disclaimers on internet communications to meet the *general* content requirements" of existing law.[192]

In short, this guidance is sufficient. Private industry, the nonprofit sector, and business associations are already hard at work providing information—in many cases, far more information than is provided by BCRA's disclaimers—to consumers. Permitting innovation in the delivery of the basic information required by 52 U.S.C. § 30120(a) will accomplish the aims of Congress and allow political speakers, and especially those without significant resources or technical expertise, to rely upon policies developed by the platforms they are most likely to use.

In fact, there is no reason why speakers should be required to furnish additional disclaimers where a particular platform or forum has already provided the relevant information, either on the face of the ad format or through standardized links to other webpages or similar online content. Major advertising platforms have already taken steps to provide the statutorily-required information within "one-click" of an advertisement. Choosing to use such a product should explicitly immunize advertisers from Commission scrutiny.

c. Where existing practice and industry standards fail to address the problem, the Institute proposes an alternative.

Alternative B is attractive precisely because it recognizes the general statutory principles involved, and provides a bright line test for when a standard disclaimer is too burdensome to be required. For those Internet ads that can neither have a full disclaimer nor an "adapted disclaimer" with the organization's name under Alternative B's first-tier,[193] the Institute suggests an alternative method for disclosing an advertisement's sponsor.

The Institute suggests that the FEC exercise its authority in creating *disclosure* forms[194] to assure the public knows who is behind an Internet advertisement. Namely, if an advertisement cannot carry the disclaimer in either its full form or Alternative B's first tier "adapted disclaimer," then the person running the ad should be excused under the small item or impracticality exemptions, and instead include a copy of the communication in its regular FEC filing for the relevant period.[195] The Commission could then flag that addendum on the disclosure portal website and provide an index for "ads that do not carry a full disclaimer" under one of the specified exemptions. This would make it trivial for citizens to look up such ads and obtain the full disclaimer (together with all other relevant data).

---

[191] *Id*. at 12869.

[192] *Id*. at 12871 (emphasis added).

[193] *Id*. at 12875 ("Under its first tier, Alternative B would require, on the face of the advertisement, identification of the payor plus an 'indicator.'").

[194] 52 U.S.C. § 30107(a)(8) ("The Commission has the power . . . to develop such prescribed forms . . . as are necessary to carry out the provisions of [the Federal Election Campaign] Act").

[195] In such cases, filers should be permitted to file a single example of substantially-similar ads where colors or images may differ but the relevant text is substantially the same.

As a matter of course, the regulated community must itemize information about expenditures in the disclosure forms the FEC collects.[196] Already the Commission has and publishes all sorts of information regarding expenditures for the public to examine. Thus, the marginal burden on the regulated community would be small, and would occur outside the compelled-speech context. And because the FEC itself is already configured to quickly publish that information on the Web, the marginal cost to the Commission would also be low.[197]

d. The examples of how Alternative A will operate provide more confusion than clarity.

With approximately two weeks left in the comment period,[198] the Commission published a document purporting to give examples of how Alternatives A and B would operate in the real world. The Sample Internet Ads[199] are eighteen variations on the same design: a graphical advertisement with text and sometimes photographs. None of the examples address other types of Internet-based technology, such as short video clips, Graphics Interchange Format (.gif) files, or the like. The Sample Internet Ads, then, only cover a small slice of the possible technologies that may be used to run political ads—now or in the near future.

The examples start out with an easy case: a standard disclaimer on a large advertisement for John Doe, paid for by the (fictitious) Federal Election[200] Committee PAC. According to the accompanying commentary, such an ad would not need to invoke any special Internet disclaimer rule under either Alternative A or B.[201]

But the very next item, Example 2, creates confusion. Alternative A, by its express terms, would permit an adaptive disclaimer only when an advertisement "cannot, due to external character or space constraints, practically include a full disclaimer on the face of the communication."[202] Furthermore, Alternative A will not consider the ''difficulty'' or ''burden''

---

[196] *See, e.g.*, 11 C.F.R.§ 104.4 (regulations on independent expenditure reporting); Schedule E of FEC Form 3X, https://www.fec.gov/documents/143/fecfrm3x.pdf (itemized independent expenditures for political committees); Schedule 5-E of FEC Form 5, https://www.fec.gov/documents/147/fecfrm5.pdf (independent expenditure disclosure).

[197] Indeed, the FEC is finalizing the organization of its new website already, and so adding a page for the publication of the addenda to existing FEC disclosure forms would be minimally burdensome.

[198] The FEC did not decide to publish the Sample Internet Ads until May 10, 2018. *See* Fed. Election Comm'n, Open Meeting Agenda at 2 (May 10, 2018), http://sers.fec.gov/fosers/showpdf.htm?docid=375778. The Commission's staff published the document the same day. The substantial delay in publishing the Sample Internet Ads creates irregularities for the rulemaking's Administrative Procedure Act "notice and comment" requirements. 5 U.S.C. § 553(b) (generally requiring material to be published in the Federal Register along with the Notice of Proposed Rulemaking, not merely on the agency's website, and such notice to be timely).

[199] Fed. Election Comm'n, Disclaimer Proposals Applied to Sample Internet Ads for REG 2011-02 Internet Communications Disclaimers and Definition of "Public Communication" (May 10, 2018) ("Sample Internet Ads"), http://sers.fec.gov/fosers/showpdf.htm?docid=377434.

[200] Under the Hatch Act and its amendments, Federal Election Commission employees are not allowed to engage in partisan political activity, 5 U.S.C. § 7323(b), and yet FEC rules mandate that the name of PACs follow certain conventions, such as "[t]he name of a separate segregated fund . . . shall include the full name of its connected organization." 11 C.F.R. § 102.14(c). While no harm is inferred in the examples, such considerations should be pondered before publishing example advertisements.

[201] Sample Internet Ads at 1-2.

[202] NPRM, 83 Fed. Reg. at 12874.

of including a full disclaimer and gives no clear threshold of when a full disclaimer takes up too much of an advertisement.[203] Comparing Examples 2 and 6—which are roughly the same except that Example 2 uses the full disclaimer and Example 6 uses an adapted disclaimer, albeit an incomplete one under Alternative A—shows that Alternative A uses some form of burden analysis, although one left completely unspecified.[204]

In Example 2, the full disclaimer text takes up 34% of the advertisement's surface[205]—indeed, *most* of the candidate's face is still recognizable. The Institute does not disagree that the full disclaimer is too long—but the Institute is confused as to why Alternative A would not mandate a full disclaimer on Example 2 where it is technically feasible to do so—as shown in the example itself. If the Institute cannot predict, from the text of the NPRM, that Alternative A would excuse a full disclaimer in Example 2, how is the regulated community to know how Alternative A will be applied in the future? These same questions apply to Examples 4, 5, and 7.[206]

Examples 3, 8, 9, and 11 are all noted as having declaimers that are not "clearly readable."[207] But this begs the question, for the advertisements are not appearing in their native environments—smartphone apps or wearable devices, for example—but rather in Portable Document Format (.pdf) that can appear on any number, types, and sizes of screens with or without magnification. In the case of the Institute's review, the Sample Internet Ads were printed in color onto 8.5x11" (letter-size) paper. But whether the small writing is legible depends on the quality of the printer. That is, the determination of whether the disclaimer is readable is divorced from the electronic devices that would carry the advertisement *and* is dependent on the quality of office equipment used by the Commission (and by extension, the regulated community). More importantly, there is no discussion of any webpage link with the full disclaimer, which is allowed under Alternative B and would be somewhat akin to current industry practice for other advertisements. This rulemaking is about *Internet* advertisements, and the Internet, by definition, is the networking of computer systems.[208]

Comparing Examples 12 with Example 4 further confuses the application of Alternative A. Example 10 is 250 pixels, square.[209] Example 10 is listed as requiring a full disclaimer under Alternative A, despite the disclaimer taking up 25% of the advertisement's face.[210] But Example 4, with a 25% ratio, is exempt from running a full disclaimer under Alternative A, and permitted to use an adapted disclaimer.[211] Is 25% the unspoken threshold under Alternative A? It is unclear why the outcome is different in each example.[212] The examples are not giving the regulatory

---

[203] *Id*.

[204] *Compare* Sample Internet Ads at 2 (Example 2 "Ad size: 120 x 240 px"), *with id*. at 7 (Example 6 "Ad size: 120 x 240 px").

[205] Sample Internet Ads at 2.

[206] *Id*. at 4-6 and 8-9.

[207] *Id.* at 3-4, 9, 10, and 12.

[208] *See, e.g.*, *Internet*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/Internet.

[209] Sample Internet Ads at 11, 13.

[210] *Id*. at 11.

[211] *Id*. at 5.

[212] To be sure, Example 4 features a smaller advertisement, but there is no commentary on why 25% is too much for a vertical advertisement bar but not too much for a square-shaped advertisement.

community clarity; they are confounding the regulated community's ability to determine what *objective* standards will be applied by the Commission under Alternative A. Comparing Examples 10, 12, and 4 rules out simply looking at the ratio of disclaimer to the size of the advertisement.

The Facebook illustrations (Examples 13-14)[213] will very soon be out of date, as the Sample Internet Ads document concedes.[214] But taking them as guidance for now, the examples create more questions than they answer. Much of the disclaimer information appears, not on the face of the advertisement (i.e. the picture itself), but in frames surrounding the image—frames provided by the platform, not the advertiser. Presumably, such frames are created and maintained by Facebook's programmers. What happens if and when the social media site changes how it presents information, such as choosing to hide the URL for the link for the advertisement, for example? Will Alternative A allow for this new scenario that is entirely out of the hands of the example PAC?

Example 15 is based on Facebook's picture-based platform, Instagram.[215] Disclaimers are lengthy, and already Instagram shortens what first appears in the picture's description when presented in a "feed" (tapping on the description will reveal the rest of the communication).[216] If Instagram programmers shorten the point at which a photo's description is truncated, do such ads now run afoul of the "on the face" requirement of Alternative A? It would seem that such a situation would require either a new rulemaking, or extensive advisory opinion requests.

The remaining example advertisements are classic candidates for a "small item" exemption. Examples 16 through 18 are each described as a "micro bar" that is only "88 X 31 px."[217] All but Example 16 would supposedly have a "[f]ull disclaimer available through technological mechanism[s]."[218] Again, giving examples on letter-sized paper is unhelpful for seeing how such a "micro bar" advertisement may be shown, so the examples shed little light on the relevant considerations. What is apparent is that Alternative B's second-tier indicator at least signals that there is more information available. It would appear that, again, such ads' interactivity via Internet links would help—at least under Alternative B. Alternative A would ban such advertisements, for want of real estate on a small advertisement.[219] Thus, Examples 16-18 highlight how Alternative A will silence speech in favor of disclaimers.

Ultimately, none of the Examples are fully enlightening, because each appear in a .pdf file that was either viewed on a variety of monitors or printed on paper—none of which may be how

---

[213] Sample Internet Ads at 15-16.

[214] *Id*. at 15 n.7 (citing a blog post from Facebook founder and current Chief Executive Officer Mark Zuckerberg).

[215] *Id*. at 17. Instagram is owned by Facebook. Evelyn M. Rusli, *Facebook Buys Instagram for $1 Billion*, The New York Times (Apr. 9, 2012) https://dealbook nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/.

[216] *See, e.g.*, Veep (@veephbo), Instagram (Sep. 28, 2017), https://www.instagram.com/p/BYREIOZFLvW/ (when viewed in the native Instagram app). A plot line on the television show Veep will feature a fictional character named Jonah Ryan running for President and the production studio created a satirical campaign website. *See* Steve Greene, *'Veep': God Help Us All, Here's Jonah Ryan's Presidential Campaign Website*, IndieWire (June 26, 2017) http://www.indiewire.com/2017/06/veep-jonah-ryan-president-campaign-website-timothy-simons-hbo-1201847223/.

[217] Sample Internet Ads at 18-20.

[218] *Id*.

[219] *See, e.g., id*. at 18-19 ("Does the disclaimer satisfy the requirements under Alternative A? No.").

actual voters would see the advertisements. Adding the Sample Internet Ads was, therefore, unhelpful in addition to being untimely, at least in describing Alternative A. Since Alternative B has a percentage threshold and allows for more flexibility in producing the disclaimers, the examples only reinforce why Alternative B is a better approach.

V. In the pursuit of mandating disclaimers in new technology, the FEC risks overreaching its expertise.

The FEC expertise is limited to overseeing political actors as they engage in political campaigns. Looking to statutory grants of power, Congress charged the FEC with "administer[ing], seek[ing] to obtain compliance with, and formulat[ing] policy with respect to [the Federal Election Campaign] Act."[220] Indeed, the FEC has "exclusive jurisdiction with respect to the civil enforcement of such provisions."[221] In carrying out its mission, the Commission is to "avail itself of the assistance . . . of other agencies and departments of the United States"[222] where its expertise ends. That is because the FEC's expertise is the civil regulation of campaign finance, not the regulation of communications platforms, tax law,[223] or criminal prosecutions.[224]

The FEC is not the regulatory agency with expertise concerning the subtle differences between various communications platforms, especially at the speed of modern technological advancement. Indeed, the Commission recently noted that many of its reporting regulations are using outdated technology, like "microfilm" and "facsimile cop[ies]" on file.[225] The regulation of platforms is better left to other agencies expert in that area.

By contrast, Congress created the Federal Communications Commission ("FCC") to execute the policy mandates of the Communications Act of 1934, which covered "wire and radio communication service."[226] Thus, while the Federal *Election* Commission makes sure that political actors have the proper disclaimers on their advertising,[227] it is the Federal *Communications* Commission that oversees the implementation of the "lowest unit charge" for candidates under the communications laws,[228] for example.

---

[220] 52 U.S.C. § 30106(b)(1). The Commission also has oversight of the Presidential Election Campaign Fund Act and the Presidential Primary Matching Payment Account Act—that is, the public financing of presidential campaigns. *Id*.; *cf*. 26 U.S.C. § 9001 *et seq*. and 26 U.S.C. § 9031 *et seq*.

[221] 52 U.S.C. § 30106(b)(1).

[222] 52 U.S.C. § 30106(f)(3).

[223] *See, e.g.*, 52 U.S.C. § 30111(f) ("In prescribing such rules, regulations, and forms under this section, the Commission and the Internal Revenue Service shall consult and work together to promulgate rules, regulations, and forms which are mutually consistent.").

[224] 52 U.S.C. § 30109(c) (mandating criminal violations be referred to the United States Attorney General).

[225] *See* Fed. Election Comm'n, Notice of Proposed Rulemaking on Technological Modernization, Notice 2016-12, 81 Fed. Reg. 76416, 76432 (Nov. 2, 2016).

[226] 47 U.S.C. § 151 (establishment of FCC).

[227] BCRA § 311, 116 Stat. at 105, *codified at* 52 U.S.C. § 30120.

[228] BCRA § 305, 116 Stat. at 100-102, *codified at* 47 U.S.C. § 315.

It is the *Communications* Act, not the campaign finance code, that regulates the platforms and availability of broadcast facilities for candidates for public office.[229] Indeed, FCC has the expertise to enforce the rule requiring for-profit broadcast companies to give "reasonable access" and "reasonable amounts of [advertising] time" to federal candidates,[230] not the FEC. And it is the FCC's Media Bureau that maintains the Electioneering Communications Database that determines if an advertisement run on a specific broadcast station will qualify as "targeted to the relevant electorate."[231] Even when amending election law generally, Congress designed BCRA specifically to place the regulation of the broadcast station recordkeeping under the Communications Act. Platform regulation is thus better understood as under the purview of the Federal Communications Commission, not the FEC.[232]

The FEC should remember its limited statutory authority and expertise. It would be wise to eschew attempting to regulate platforms—which may have wider-reaching effects the Commissioners cannot yet see. Congress created other agencies to regulate media platforms, and the FEC has been instructed to generally make use of their help and expertise rather than creating potential regulatory conflicts.

VI. Request To Testify

The Institute for Free Speech requests the opportunity to send a representative to testify at the public hearing for this proposed rulemaking.[233] The NPRM raises important issues arising under campaign finance law, administrative law principles, and the First Amendment. The importance of the issues and complexity of the pertinent law suggest that oral testimony will be helpful to the Commission.

* * *

The process for writing a rule for Internet disclaimers has been lengthy, but fruitful. In Alternative B, the Commission is moving toward a rule recognizing that the nature of the Internet is distinct from other media, especially broadcast media. Accordingly, the Institute recommends that (1) the Commission require only the general disclaimers found at 52 U.S.C. § 30120(a); (2) explicitly apply the small item and impracticality exemptions to online advertisements; (3) excuse political advertisers from including disclaimers on the face of their communications where the relevant advertising platform will include identifying information, as a matter of course, within one-click of the advertisement; (4) in all cases, excuse full disclaimers in favor of the bare name

---

[229] 47 U.S.C. § 315. The FCC oversees, *inter alia*, broadcast "advertisements" which include "any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended . . . (3) to support or oppose any candidate for political office." 47 U.S.C. § 399b(a)(3); *see also* 47 U.S.C. § 399 (prohibiting "noncommercial educational broadcasting station[s]" from supporting or opposing "any candidate for public office," a provision the FCC enforces).

[230] 47 U.S.C. § 312(a)(7) (providing that the Federal Communications "Commission may revoke any station license or construction permit-- . . . for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station . . . by a legally qualified candidate for Federal elective office on behalf of his candidacy").

[231] *See* FCC Media Bureau, The Electioneering Communication Database, http://apps fcc.gov/ecd/.

[232] BCRA § 504, 116 Stat. at 115 (amending the Communications Act of 1934).

[233] NPRM, 83 Fed. Reg. at 12864 (requiring such a request be made in writing in conjunction with these comments).

of the sponsoring organization where the disclaimer would comprise more than 4% of the relevant advertisement, and fully excuse disclaimers where the organization's name would also exceed that threshold; and (5) in such cases, require a copy of the excused ad to be included as an addendum to the relevant PAC or Independent Expenditure report covering that expenditure.

Thank you for considering these comments. Should you have any further questions regarding this or related proposals, please contact the Institute at (703) 894-6800 or by email at adickerson@ifs.org.

Respectfully submitted,

Allen Dickerson
Tyler Martinez
INSTITUTE FOR FREE SPEECH
124 S. West Street, Suite 201
Alexandria, Virginia, 22314