

May 25, 2018

Mr. Neven F. Stipanovic
Acting Assistant General Counsel
1050 First St. NE
Washington, DC 20463

Dear Acting Assistant General Counsel Stipanovic:

On behalf of Public Knowledge, a public interest advocacy organization dedicated to promoting freedom of expression, an open internet, and access to affordable communications tools and creative works, we submit these comments in response to the Federal Election Commission's Notice of Proposed Rulemaking (NPRM) 2018-06: Internet Communications Disclaimers and Definition of "Public Communication." As an organization that advocates both the freedom of expression and consumer protection, Public Knowledge is well-positioned to opine on the Commission's proposed rule.

Public Knowledge has advocated for robust disclosure requirements as tools to protect consumers in the context of cable pricing,¹ the transition from old copper wire telephone networks to new fiber networks,² and internet platforms' collection and sharing of consumers' personal information,³ among other contexts. But, robust disclaimer requirements are particularly important in the context of election advertising. As the Supreme Court held in *Buckley v. Valeo*,

[D]isclosure [of election spending] provides the electorate with information . . . in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate on the political spectrum more precisely . . . [and] also alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate[s] predictions of future performance in office.⁴

Put simply, disclaimer requirements offer voters useful information to help them understand who is trying to influence them and to better judge the merits of the advertisement in front of them. Disclaimer requirements also aid journalists and watchdog groups that track issues related to fair elections. The Commission recognized the importance of disclosure in its 2002 regulations requiring specific disclaimers for radio, television, and print political ads. It is time for the Commission to update these requirements for the digital age.

¹ John Gasparini, *It's Time to Put a Stop to Cable Billing Practices That Hurt Consumers*, PUBLIC KNOWLEDGE (November 02, 2016), <https://www.publicknowledge.org/news-blog/blogs/its-time-to-put-a-stop-to-cable-billing-practices-that-hurt-consumers>.

² Meredith Whipple, *Tech Transitions: How Will You Know When You're Transitioning?*, PUBLIC KNOWLEDGE (August 28, 2015), <https://www.publicknowledge.org/news-blog/blogs/tech-transitions-how-will-you-know-when-youre-transitioning>.

³ Allie Bohm, *Here's How Congress Should Respond to Facebook/Cambridge Analytica*, PUBLIC KNOWLEDGE (March 23, 2018), <https://www.publicknowledge.org/news-blog/blogs/heres-how-congress-should-respond-to-facebook-cambridge-analytica>.

⁴ *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976).

Voters increasingly get information online. During the 2004 election, only 18 percent of the public cited the internet as a primary news source. By the 2016 election, 65 percent of Americans counted on the internet as a source of news.⁵ Television viewership has also increasingly shifted to the internet. Due to its nationwide scope, Netflix alone has more subscribers in the United States than the six largest traditional cable companies combined.⁶ Perhaps unsurprisingly, advertising dollars are also shifting from the broadcast market to the internet market. Sales of traditional broadcast advertisements have fallen 2.2 percent in the last year, and experts expect that sales will continue to fall by at least 2 percent per year until 2022.⁷ Political advertising has also been following this trend. In 2004, only 1 percent of election advertising dollars were spent online.⁸ In the 2016 election, campaigns spent nearly 50 times more on online advertising than they did in 2004.⁹ Indeed, online advertising may be the great democratizer. Broadcast and print advertisements can be very expensive.¹⁰ By contrast, candidates with limited budgets “can create and purchase sophisticated digital ad campaigns that reach key voters across a variety of platforms and technologies”¹¹ on a shoestring budget.

As political advertising increasingly migrates online, it makes little sense for online advertisements to be subject to lesser disclaimer requirements than broadcast or print advertisements. This is particularly true when the same advertisement can run on television and on the internet or in print and on the internet. As Campaign Solutions wrote in their comments in response to the Commission’s 2017 Advanced Notice of Proposed Rulemaking on this topic, “the lines between television, radio[,] and internet are blurring.”¹²

Still, online advertising presents its own set of unique challenges. For example, most web pages can be viewed not only on a computer, but also on a smartphone, and some websites do not default to a mobile-optimized layout, instead showing a desktop website on a tiny screen.

⁵ BMore Indivisible, Comment Letter on Internet Communication Disclaimers at 1 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358504>. See *The internet and the 2004 election*, PEW RESEARCH CENTER: INTERNET & TECHNOLOGY (Mar. 6, 2005), <http://www.pewinternet.org/2005/03/06/the-internet-and-the-2004-election/>; *The 2016 Presidential Campaign - a News Event That’s Hard to Miss*, PEW RESEARCH CENTER: JOURNALISM & MEDIA (Feb. 4, 2016), <http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss/>.

⁶ Tom Huddleston, Jr., *Netflix Has More U.S. Subscribers Than Cable*, FORTUNE (June 15, 2015), <http://fortune.com/2017/06/15/netflix-more-subscribers-than-cable/>.

⁷ Sapna Maheshwari & John Koblin, *Why Traditional TV Is in Trouble*, N.Y. TIMES (May 13, 2018), <https://mobile.nytimes.com/2018/05/13/business/media/television-advertising.html>.

⁸ Patrick Quinn & Leo Kivijarv, *US Political Media Buying 2004*, 24 INT’L J. ADVERTISING 131, 132, 134 (2005).

⁹ Sean J. Miller, *Digital Ad Spending Tops Estimates*, CAMPAIGNS & ELECTIONS (Jan. 4, 2017), <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates>.

¹⁰ See, e.g., Michal Addady, Donald Trump boasts boosting ad sales for CNN, FORTUNE (Sep. 6, 2015), <http://fortune.com/2015/09/06/trump-cnn-ad/> (“A 30-second ad spot on CNN would cost around \$5,000 under normal circumstances.”); *Super PACs Dominate Airwaves*, WESLEYAN MEDIA PROJECT (Dec. 15, 2015) <http://mediaproject.wesleyan.edu/releases/super-pacs-dominate-airwaves/> (data showing average cost of ad in 2016 GOP primary as around \$1,500).

¹¹ Google, Comment Letter on Internet Communication Disclaimers at 2 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=358482>.

¹² Campaign Solutions, Comment Letter on Internet Communication Disclaimers at 1 (Nov. 9, 2017), <http://sers.fec.gov/fosers/showpdf.htm?docid=365826>.

In addition, advertisements on Facebook, a popular online platform, are designed to blend in seamlessly with unpaid content on the platform; they are often coupled with reactions or comments from a user's friends, just as an unpaid post would be. Ads on platforms like Facebook and Twitter are designed to "go viral," often being shared and distributed organically beyond their original advertising budget.¹³ Compounding the problem, online ad distribution can also be instigated by non-human actors, a scenario that is hard to imagine in the print or broadcast context. For example, during the 2016 presidential debates, researchers found that more than 400,000 online accounts discussing the election were likely bots.¹⁴ Without disclaimers, consumers are unlikely to understand that these sorts of messages are political advertisements. The Federal Trade Commission (FTC) has recognized in the non-political advertising context that advertisements disguised as content can be deceptive, because knowing whether or not "something is an ad will likely affect whether consumers choose to interact with it and the weight or credibility consumers give the information it conveys."¹⁵ This observation is no less true for political ads.

Although the internet does not have the same "resource scarcity problem that exists on the broadcast spectrum (*i.e.* a limited number of available hours of airtime on a limited number of stations),"¹⁶ this factor alone is not dispositive in determining whether or what type of political advertising disclaimers should be required. Indeed, given the possibility of micro-targeting political advertising online, the ability to camouflage advertising as ordinary content, and the curated and self-selecting nature of social networking feeds and online searches – coupled with the salutary effects on democracy of political advertising disclaimers generally¹⁷ – robust, mandatory disclaimers for political advertising online are as important as they are for offline advertising.

Even assuming that required disclosures could chill some speech, the Supreme Court has held time and again that the countervailing benefits to democracy of disclosure are a sufficiently important government interest to justify such regulation.¹⁸ Indeed, Public Knowledge agrees with the *McConnell* Court's denunciation of political advertisers who wanted "to preserve the ability to run . . . advertisements while hiding behind dubious and misleading names . . . [The political advertisers] never satisfactorily answer the question of how 'uninhibited, robust, and wide-open speech can occur when organizations hide themselves from the scrutiny of the voting public.'"¹⁹

¹³ *Leveling the Platform: Real Transparency for Paid Messages on Facebook*, UPTURN at 4 (May 2018), <https://www.teamupturn.org/static/reports/2018/facebook-ads/files/Upturn-Facebook-Ads-2018-05-08.pdf>.

¹⁴ Alessandro Bessi & Emilio Ferrara, *Social bots distort the 2016 U.S. Presidential election online discussion*, FIRST MONDAY (Nov. 2016), <http://firstmonday.org/article/view/7090/5653>.

¹⁵ *Native Advertising: A Guide for Business*, FTC (Dec. 2018) [hereinafter *Native Advertising*], <https://www.ftc.gov/tips-advice/business-center/guidance/native-advertising-guide-businesses>.

¹⁶ Electronic Frontier Foundation, Comment Letter on Internet Communication Disclaimers at 2 (Nov. 9, 2017), https://www.eff.org/files/2017/11/29/comments_of_electronic_frontier_foundation_on_anprm_2011-02_2017-11-09.pdf.

¹⁷ See *Buckley*, 424 U.S. at 66-67.

¹⁸ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-67 (2010); *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 196-97 (2003); *Buckley*, 424 U.S. at 66-67.

¹⁹ *McConnell*, 540 U.S. at 196-97 (quoting *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 237 (D.D.C. 2003)).

In addition, 78 percent of Democrats, 80 percent of Republicans, and 82 percent of Independents support robust disclaimer requirements for political advertisements on social media.²⁰

Fortunately, the Commission is not the first federal agency to consider what online advertising disclaimers should look like. Rather, the FTC,²¹ the Department of Health and Human Services (HHS),²² and the Federal Reserve²³ have all issued guidance pertaining to disclaimers for internet advertising within their respective jurisdictions. Our comments are informed by lessons learned about effective disclosures from these other Agencies.²⁴

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

The Commission asks whether revising the definition of “Public Communication” to include communications placed for a fee on another person’s “internet-enabled device or application,” as well as on another person’s website, is a “clear and technically accurate way to refer to the various media through which paid internet communications can be and will be sent and received.”²⁵ This formulation is too narrow. For example, any user can post content on a platform like Facebook or Twitter for free and then pay for that content to be “promoted” – *i.e.* shown to a broader audience than would see the content absent the payment. These “promoted” posts are a form of advertising, even though the original content was posted free of charge. When these advertisements occur in the election context, they should be subject to the same disclaimer requirements as other political advertisements. For this reason, the Commission should cover communications that have been placed *or promoted* for a fee.

²⁰ *Marist Poll National Nature of the Sample and Tables, October 2017*, MARIST POLL at 15 (Oct. 19, 2017), http://maristpoll.marist.edu/wp-content/misc/usapolls/us171015_HBO/Marist%20Poll%20National%20Nature%20of%20the%20Sample%20and%20Tables_October%202017.pdf#page=3.

²¹ *See .com Disclosures: How to Make Effective Disclosures in Digital Advertising*, FTC at 17-18 (Mar. 2013) [hereinafter FTC, *Disclosures*], <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

²² *See Draft Guidance for Industry: Internet/Social Media Platforms with Character Space Limitations - Presenting Risk and Benefit Information for Prescription Drugs and Medical Devices*, FDA (June 2014) [hereinafter FDA, *Draft Guidance*], <https://www.fda.gov/downloads/drugs/guidancecomplianceregulatoryinformation/guidances/ucm401087.pdf>.

²³ *See* Jeanne M. Hogarth & Ellen A. Merry, *Designing Disclosures to Inform Consumer Financial Decisionmaking: Lessons Learned from Consumer Testing*, FED. RESERVE BULL. (Aug. 2011), <https://www.federalreserve.gov/pubs/bulletin/2011/pdf/designingdisclosures2011.pdf>.

²⁴ However, the Commission should not uncritically adopt all of the best practices endorsed by its sister agencies. For example, the “[Food and Drug Administration] recommends that firms first carefully consider the complexity of the indication and risk profiles [that must be disclosed] for each of their products to determine whether a character-space-limited platform is a viable promotional tool for a particular product.” FDA, *Draft Guidance*, *supra* note 22, at 6, lines 167-69. This approach is inappropriate in the election advertising context, because it is vital that valuable information about candidates for office reach as wide an audience as possible.

²⁵ *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. 12864, 12868 (proposed Mar. 26, 2018) (to be codified at 11 C.F.R. §§ 100.26 & 110.11).

Proposed Revision to the Disclaimer Rules at 11 CFR 110.11

The Commission advances two alternative revisions to the disclaimer rules at 11 CFR 110.11. Public Knowledge generally supports Alternative A. Experience has shown us that attribution is critical in an electoral environment heavily influenced by foreign actors and interest groups. We offer specific feedback on – and recommendations for improving – each of the Commission’s proposed alternatives below.

General Disclaimer Requirements – Alternative A

While Public Knowledge generally prefers Alternative A, there are several ways in which that proposal should be strengthened. Toward this end, we respond to some of the specific questions the Commission poses.

The Commission inquires about how to address advertisements that combine “both text or graphic and video elements”²⁶ or “both audio and graphic elements.”²⁷ In particular, the Commission is interested in whether it is “common for users to view only the printed or video components of an internet advertisement that contains both” and consequently whether “the Commission should adopt rules that require a disclaimer to be included on either the text and graphic portion or the video portion . . . or on both portions.” The Commission asks similar questions about advertisements containing audio and graphic content. The FTC has observed that “consumers don’t read an entire website or online screen,”²⁸ and the Federal Reserve concurs, stating that “consumers will read hard-copy print but scan webpages.”²⁹ There is no guarantee that individuals will view the video or listen to the audio portion of a multimedia advertisement or that individuals who play the video or audio portion will also read the static text or image accompanying it. Because the Commission should assume that only part of the advertisement may be accessed, the Commission should require that multimedia political advertisements adhere to the disclaimer requirements associated with their component parts – that is, the requirements both for video/audio (as appropriate) advertisements and for print advertisements. This approach adheres to the best practices advanced by both the FTC and the Federal Reserve, which counsel advertisers to draw attention to the disclaimer in their advertisement designs.³⁰ It will also make it more likely that disabled voters, who may only be able to access a portion of the multimedia advertisement, will benefit from the disclaimer.

Relatedly, the Commission asks whether it needs to “clarify the term ‘video’ to address whether an advertisement with a GIF³¹ is a communication ‘with a video component’ or one with a ‘graphic’ component.”³² Such a clarification would be useful. GIFs can appear both as moving images and as static images that do not move until clicked on, and some GIFs may not move at

²⁶ *Id.* at 12873.

²⁷ *Id.*

²⁸ FTC, *Disclosures*, *supra* note 21, at 6; *see also Native Advertising*, *supra* note 15.

²⁹ Hogarth, *supra* note 23, at 21.

³⁰ FTC, *Disclosures*, *supra* note 21, at 6. *See Native Advertising*, *supra* note 15 for a description of best practices for drawing attention to required disclaimers online.

³¹ GIF stands for Graphic Interchange Format.

³² *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. at 12871.

all when viewed on certain devices. Given the foregoing, it would be helpful to provide clarity as to which disclaimer requirements advertisers must adhere to when using GIF ads.

The Commission also asks whether a hyperlink in a communication is a reliable way to identify a payor.³³ It is true, as the Commission notes, that a hyperlink can be transient, and the webpage once linked to may cease to be accessible by the time a voter clicks on the link. Another concern is that an ambiguous link, like goo.gl/nRk1H1, the example included in the NPRM, gives the voter no information that might encourage her to click on it. By contrast, HHS, for example, has recommended that the short URLs used explicitly broadcast the information the linked-to page contains.³⁴ The FTC elaborates on this recommendation, explaining that

[a] hyperlink’s label . . . affects whether consumers actually click on it and see and read the disclosure . . . The hyperlink should give consumers a reason to click on it. That is, the label should make clear that the link is related to a particular . . . claim . . . [and] should use clear, understandable text.³⁵

In this case, the short URL should articulate that the website includes information about who paid for the associated political advertisement.

Finally, the Commission inquires about whether it should allow “political committees to identify themselves in adapted disclaimers³⁶ with their FEC Committee ID numbers.”³⁷ Such an approach would undoubtedly hide the ball. The average individual does not know what each political committee’s FEC Committee ID number is. She may not even know that the committees have FEC Committee ID numbers. As described above, “getting consumers to notice and then click on key links can be . . . challenging.”³⁸ Getting voters to observe an FEC Committee ID number in an advertisement, identify it as an FEC Committee ID number, and then go to the Commission’s webpage (or to Google) to determine to whom the FEC Committee ID number pertains may well be insurmountable for all but the most determined voter. If the objective of this rule is to provide valuable information to voters, allowing the use of FEC Committee ID numbers as identifiers undermines that goal.

General Disclaimer Requirements – Alternative B

As described above, Public Knowledge prefers Alternative A’s general disclaimer requirements, which are calculated to provide voters with more, clearer information about the electoral ads they face online. However, we also respond to several of the specific questions proposed by Alternative B.

³³ *Id.* at 12873.

³⁴ See FDA, *Draft Guidance*, *supra* note 22, at 10, lines 345-46 (“[W]hen possible, the Agency recommends that the URL or web address itself denote to the user that the landing page consists of risk information (e.g. www.product.com/risk).”).

³⁵ FTC, *Disclosures*, *supra* note 21, at 11.

³⁶ See pp. 8-13, *infra*, for a more robust discussion of adapted disclaimers generally.

³⁷ *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. at 12873.

³⁸ Hogarth, *supra* note 23, at 21.

As a threshold matter, the Commission possesses the legal authority to extend the Bipartisan Campaign Reform Act’s (BCRA) “stand by your ad” requirements to internet communications. In its 2002 issuance of final rules to implement portions of BCRA’s political disclaimer requirements, the Commission found that, “each form of [communication] specifically listed in the definition of ‘public communication,’ [in 2 U.S.C. 431(22)³⁹] as well as each form of communication listed with reference to a ‘communication’ in 2 U.S.C. 441d(a),⁴⁰ must be a form of ‘general public political advertising.’”⁴¹ Based on this finding, the Commission used its rulemaking authority⁴² to adopt a new section of the Code of Federal Regulations: 11 CFR § 110.11(c)(3).⁴³ This section interpreted “communications” in 2 U.S.C. 441d(d)⁴⁴ – the BCRA’s “stand by your ad” requirements – to include, “transmi[ssions] through radio or television, *or through any broadcast, cable, or satellite transmission*,”⁴⁵ even though the statute explicitly referenced only radio and television.⁴⁶ The court, in *Shays v. Federal Election Commission*, held that Congress intended all other forms of “general public political advertising,” including internet activity, to be covered by the term “public communication” in 52 U.S.C. 30101(22).⁴⁷ The Commission therefore may use its rulemaking authority to reinterpret “communications” in the BCRA’s “stand by your ad” requirements more broadly to include internet transmissions. Indeed, in the recently introduced “Honest Ads Act,” bill sponsors found that the Commission “failed to take action to address online political advertisements,” implying that they believe that the Commission has yet to exercise its existing authority on this issue.⁴⁸

In addition, the Commission asks whether “audio or video internet ads that are very short [should] be required to provide full ‘stand by your ad’ disclaimer information.”⁴⁹ As the Commission observed, it has required such disclaimers in the context of very short, ten to fifteen second television advertisements.⁵⁰ We can think of no compelling reason for the Commission to treat internet advertisements differently. Those viewing political advertisements online have no less of a pressing need for disclaimers than those viewing similar ads on television, and it is no

³⁹ Later transferred to 52 U.S.C. § 30101(22).

⁴⁰ Later transferred to 52 U.S.C. § 30120(a).

⁴¹ *Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds*, 67 Fed. Reg. 76962, 76963 (Dec. 13, 2002).

⁴² The Commission, “shall prescribe rules, regulations, and forms to carry out the provisions of [Title 52, Subtitle III of the U.S. Code].” 52 U.S.C. § 30111(a)(8).

⁴³ *See Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds*, 67 Fed. Reg. at 76966-67, 76976 (Dec. 13, 2002).

⁴⁴ Later transferred to 52 U.S.C. § 30120(d).

⁴⁵ 11 C.F.R. § 110.11(c)(3) (incorporating language from the definition of “public communication” in 52 U.S.C. § 30101(22) and 11 C.F.R. § 100.26) (emphasis added); *see also* 67 Fed. Reg. at 76963 (“It would be unsupportable to require a disclaimer for a television communication that was broadcast, while not requiring a disclaimer for the same communication merely because it was carried on cable or satellite.”).

⁴⁶ *See* 52 U.S.C. § 30120(d).

⁴⁷ *See Shays v. Fed. Election Comm’n*, 337 F. Supp. 2d 28 (D.D.C. 2004), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005) (holding, among other things, that the FEC could not wholly exclude internet activity from the definition of “public communication.”).

⁴⁸ *See* S. 1989, 115th Cong. § 3(11).

⁴⁹ *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. at 12872.

⁵⁰ *See id.* *See also* Fed. Election Comm’n Advisory Opinion 2007-33 (Club for Growth PAC) (requiring full stand-by-your-ad disclaimers in 10- and 15-second television advertisements.).

more burdensome to include such disclaimers on internet video and audio ads than it is to include them in short television ads.

Adapted Disclaimers for Public Communications Distributed Over the Internet

As described previously, disclaimers for political advertisements are of paramount importance, because they enable voters, journalists, and watchdog organizations to better evaluate candidates for office and the interests to which they will likely be beholden in office.⁵¹ At the same time, as repeated in these comments, “getting consumers to notice and then click on key links can be . . . challenging.”⁵² Voters are more likely to observe, absorb, and understand political disclaimers when they appear in the body of the ad⁵³ than when they are abbreviated in the advertisement and the full disclaimer is linked to elsewhere. For this reason, the use of adapted disclaimers should be disfavored. However, the practice should not be prohibited outright, because to prohibit such disclaimers should necessitate prohibiting certain forms of advertising that cannot contain a full disclaimer.⁵⁴ Such a limitation would be inappropriate in the context of political advertisements, because if advertisers are foreclosed from particular platforms, they will likely take their ads elsewhere and deprive the voters who use platforms with character limitations of pertinent information about particular candidates.

Nonetheless, when adapted disclaimers are used, they must adhere to some best practices. This section outlines best practices for adapted disclaimers that are responsive to both Alternative A and Alternative B. The subsequent sections address each Alternative proposal in turn.

First, to maximize adapted disclaimers’ efficacy, the adapted disclaimer must be easy to find. Ideally, it should appear as close as possible to the voter’s focal point when she first encounters the ad.⁵⁵ A voter should not have to scroll or search to find the disclaimer.⁵⁶

Second, the proposed requirement, endorsed by both Alternative A and Alternative B, that advertisers must “provide access to a full disclaimer . . . within one step”⁵⁷ is salutary and should remain in the final rule.⁵⁸ As described earlier, “getting consumers to notice and then

⁵¹ *Buckley*, 424 U.S. at 66-67.

⁵² Hogarth, *supra* note 23, at 21.

⁵³ FTC, *Disclosures*, *supra* note 21, at 6. See *Native Advertising*, *supra* note 15 for a description of best practices for drawing attention to required disclaimers online.

⁵⁴ For example, the Food and Drug Administration counsels against using a character-space-limited platform for products with complex “indication and risk profiles” where a disclaimer might not fit easily in the advertisement. See FDA, *Draft Guidance*, *supra* note 22, at 6.

⁵⁵ See *Native Advertising*, *supra* note 15.

⁵⁶ See FTC, *Disclosures*, *supra* note 21, at 9.

⁵⁷ *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. at 12877.

⁵⁸ Cf. FDA, *Draft Guidance*, *supra* note 22, at 10, lines 322-40 (“FDA recommends that a firm also include . . . a *direct* hyperlink to a destination that is devoted exclusively to [comprehensive disclaimer information].” (emphasis in original)).

click on key links can be . . . challenging.”⁵⁹ The more clicking a voter has to do to encounter the required disclaimer, the less likely she is to actually find and benefit from such disclaimer.

Third, to the extent that the adapted disclaimer includes an image, symbol, or icon as an “indicator,”⁶⁰ that image, symbol, or icon must be a standard indicator set by the Commission itself. The indicator must be “a concise visual statement [that] is immediately recognizable and [that] provides enough information for the casual user to act upon” it.⁶¹ In order to achieve this outcome, the Commission must educate the public about the indicator and its meaning.

The importance of a Commission-selected standard indicator cannot be overstated. Should the Commission permit each advertiser to adopt its own symbol, image, or icon, the Commission runs the risk of galvanizing a “race to the bottom” with advertisers competing to come up with the most obscure icon. For example, in the context of non-political advertising, the Future of Privacy Forum investigated which icon and associated phrase were most likely to convey to consumers that clicking on the icon/phrase would lead to disclosure information and options about behavioral advertising.⁶² The Future of Privacy Forum found that the “asterisk man” icon and the phrases “Why did I get this ad?” and “Interest based ads” performed best. The phrase “Adchoice” performed noticeably less well.⁶³ The ad industry selected, instead of “asterisk man,” a small “forward I” icon and the phrase AdChoices.⁶⁴ This can only be interpreted as a cynical attempt to hide pertinent information from consumers. There is no reason to believe that political advertisers have a greater commitment to authentic transparency than non-political advertisers.

Finally, the use of sound alone as an indicator⁶⁵ is insufficient. An individual with her electronic device on mute would not hear an aural indicator. Moreover, an aural indicator would fail to reach a deaf voter, and, in some circumstances, might violate the Twenty-First Century Communications and Video Accessibility Act of 2010.⁶⁶

Adapted Disclaimers for Public Communications Distributed Over the Internet – Alternative A

The Commission asks whether “it [is] clear what ‘cannot fit’ means in the context of the proposed rules.”⁶⁷ We urge the Commission to explicitly define “cannot fit.” As described above, unfortunately, advertisers have demonstrated an eagerness to avoid meaningful disclosures or

⁵⁹ Hogarth, *supra* note 23, at 21.

⁶⁰ See *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. at 12876.

⁶¹ CMPPLY, Inc., Comment Letter on Internet Communication Disclaimers at 11 (Nov. 9, 2017).

⁶² See FPF Staff, *Online Behavioral Advertising “Icon” Study*, FUTURE OF PRIVACY FORUM (Feb. 15 2010), <https://fpf.org/2010/02/15/online-behavioral-advertising-icon-study/>.

⁶³ See *id.*

⁶⁴ See Jonathan Mayer, *Tracking the Trackers: The AdChoices Icon*, STANFORD LAW SCHOOL: THE CENTER FOR INTERNET & SOCIETY (Aug. 18, 2011), <http://cyberlaw.stanford.edu/blog/2011/08/tracking-trackers-adchoices-icon>.

⁶⁵ See *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. at 12876.

⁶⁶ See Pub. L. No. 111-260 (as codified in 47 U.S.C. § 613(c)(2)(A)); see also 47 C.F.R. § 79.4.

⁶⁷ *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. at 12874.

disclaimers.⁶⁸ Left to their own devices, political advertisers are likely to liberally define “cannot fit” to avoid including a full disclosure as often as possible.

More importantly, the Commission inquires about whether it should “incorporate into the rule a requirement that any technological mechanism used [for adapted disclaimers] must be accessible by all recipients of that communication, including those accessing the communication on mobile devices.”⁶⁹ Such a requirement should be included in the rule. More than one-in-ten American adults access the internet on a smartphone and lack a traditional home broadband internet connection.⁷⁰ The Americans who fall into this category tend to already be at a political disadvantage – they skew younger and lower-income and tend to be non-white.⁷¹ It is imperative that disclaimers be mobile-accessible in order to reach these voters.

While the problem of ensuring that disclaimers are mobile-friendly seems challenging, Google, in its comments in response to the Commission’s Advanced Notice of Proposed Rulemaking, pointed to a technological solution that may work for some platforms and advertisers. It explained:

[S]ome advertisers choose to provide an advertising platform with the various stand-alone components of an ad (such as headlines, images, and logos) and place an order for “smart” ads that are automatically assembled out of the advertiser-provided creative components to fit in different advertising spaces on different apps and websites across the Internet.⁷²

As Google’s comments demonstrate, the technology exists to allow the required disclaimer, if provided as one of the stand-alone ad components, to be incorporated into an ad and optimized for the relevant website, app, or device on which it is most likely to be reviewed.

Similarly, the Commission should disfavor disclaimers that depend on pop-ups, because pop-ups are frequently blocked by popular software, or on Adobe Flash Player, because Flash only works on certain devices and with certain browsers.⁷³

Adapted Disclaimers for Public Communications Distributed Over the Internet – Alternative B

Alternative B diverges from Alternative A in three respects. First, it permits a payor to identify itself using “a clearly recognized identifier such as an abbreviation or acronym.”⁷⁴ Second, it allows for a second tier of adapted disclaimer that requires an advertiser only to include an “indicator” and not the name of the payor on the face of an advertisement.⁷⁵ Third, it

⁶⁸ See discussion of AdChoices, *supra* p. 9.

⁶⁹ *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. at 12878-79.

⁷⁰ *Mobile Fact Sheet*, PEW RESEARCH CENTER (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/mobile/>.

⁷¹ *Id.*

⁷² Google, *supra* note 11, at 4.

⁷³ See FTC, *Disclosures*, *supra* note 21, at 14.

⁷⁴ *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. at 12875.

⁷⁵ See *id.*

proposes to fully exempt some internet advertisements from any disclaimer requirement at all.⁷⁶ This section evaluates these three deviations – and strongly opposes the latter two – and then responds to several of the Commission’s specific questions.

The use of abbreviations or acronyms may be appropriate in certain circumstances.⁷⁷ However, the Commission should define what it means by “clearly recognized” to ensure that only abbreviations and acronyms that have entered the common parlance may be used. In addition, the Commission must be clear that an acronym may not be used where a payor shares it with another entity – for example, the acronym NCLR refers to both the National Council of La Raza⁷⁸ and the National Center for Lesbian Rights.⁷⁹ The use of an acronym in this context is likely to be misleading.

While the proposed use of an acronym or abbreviation in Alternative B is not problematic in all circumstances, the rest of Alternative B’s Adapted Disclaimer requirement evinces a cynical attempt to hide valuable information from voters.

The Commission should eschew Alternative B’s second tier adapted disclaimer. This proposal seems calculated only to ensure that voters do not receive pertinent information about political ads. As described above, consumers are already unlikely to click on links, and the advertising industry has already demonstrated a propensity to select icons and statements that obscure their purpose.⁸⁰ What’s more, the FTC has observed that

[s]ymbols or icons by themselves are not likely to be effective . . . [at] leading to disclosures . . . A symbol or icon might not provide sufficient clues about . . . the nature of the disclosure. It is possible that consumers may view a symbol as just another graphic on the page.⁸¹

The disclaimer explaining who has paid for a political ad is an integral part of the ad, because it permits a voter to understand who is trying to influence her and to better evaluate a candidate for office. As such, at a minimum, the payor’s identity must appear on the face of the ad itself.⁸²

In addition to permitting the use of an “indicator” in the absence of any other useful disclaimer information, the Commission perplexingly proposes to exempt certain internet public communications from the disclaimer requirement all together.⁸³ This appears to be a solution in search of a problem. The Commission concedes that it does not know whether internet

⁷⁶ See *id.* at 12879.

⁷⁷ Cf. FDA, *Draft Guidance*, *supra* note 22, at 14, lines 474-76 (“[C]ommon abbreviations . . . and other symbols may, in many cases, reasonably be used to help address character space constraints.”).

⁷⁸ See Suzanne Gamboa, *National Council of La Raza Changes Name to UnidosUS*, NBC NEWS (Jul. 10, 2017), <https://www.nbcnews.com/news/latino/national-council-la-raza-changes-name-unidosus-n781261>.

⁷⁹ National Center for Lesbian Rights, <http://www.nclrights.org/>.

⁸⁰ See *Adapted Disclaimers for Public Communications Distributed Over the Internet*, *supra*, pp. 8-9.

⁸¹ FTC, *Disclosures*, *supra* note 21, at 12.

⁸² See *id.* at 10 (“Disclosures that are an integral part of a claim or inseparable from it should not be communicated through hyperlink.”).

⁸³ See *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. at 12879.

advertisements that cannot carry an adapted disclaimer or link to a full disclaimer exist.⁸⁴ In fact, character limitations on online platforms are not the same as the physical limitations posed by tangible objects subject to the small items and impracticable exemptions and thus should be treated differently.⁸⁵

Moreover, a full exemption raises the specter of serious harms to democracy. As online political advertising proliferates⁸⁶ and Russian actors increasingly leverage internet advertising to influence U.S. electoral outcomes,⁸⁷ there can be no question that online political advertising disclaimers are necessary to help voters, journalists, and watchdog organizations evaluate who is trying to influence them, the candidates for office themselves, and who those candidates are likely to be beholden to once elected.⁸⁸ Should the Commission allow an exemption, it will simply incentivize the development and use of online political advertising that falls into the exception.⁸⁹ The entities most likely to take advantage of such formats may also be the payors, like Russian agents, about whom disclaimers would be most valuable.

Alternative B's additional proposals and questions also endeavor to hide the ball and make it as difficult as possible for voters to access meaningful online political advertising disclaimers. First, Alternative B suggests that where a full disclaimer would take "ten percent of the time or space in an internet communication," the advertiser can use an adapted disclaimer⁹⁰ and if the adapted disclaimer would take up ten percent of the communication, the advertiser can use the second tier adapted disclaimer.⁹¹ The Commission asks whether ten percent is the appropriate number. As a threshold matter, as described above, the second tier adapted disclaimer should never be permitted. More generally, the ten percent threshold appears arbitrary. In the context of television advertising, the Commission, in Advisory Opinion 2007-33, held that ten- and fifteen-second television ads were subject to the full disclaimer requirements.⁹² In a ten second ad, a four second mandatory disclaimer would occupy nearly half the ad. In a fifteen second ad, it would occupy more than a quarter of the ad. The Commission has articulated no principled reason why online advertisers should be exempted from providing full disclaimers – the most effective way of providing important information to voters – in internet ads when the disclaimers occupy much lower percentage of the ad than they would in a short television ad.

Second, just as Alternative A's adapted disclaimer should be mobile-accessible and technology-neutral, Alternative B's adapted disclaimer must be mobile-accessible and

⁸⁴ See *id.* at 12879 (asking, "Do such ads exist?").

⁸⁵ See Electronic Privacy Information Center, Comment Letter on Internet Communication Disclaimers at 3; FTC, *Disclosures*, *supra* note 21, at 15-16 for explanations of technical solutions and best practices to address character limitations in online advertising.

⁸⁶ See p. 2, *supra*.

⁸⁷ See Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html>.

⁸⁸ See *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976).

⁸⁹ Cf. CPLY Comment Letter at 7 ("[T]he types of advertising that are available . . . are constantly evolving.").

⁹⁰ See *Internet Communication Disclaimers and Definition of "Public Communication"*, 83 Fed. Reg. at 12875.

⁹¹ See *id.* at 12877.

⁹² See Fed. Election Comm'n Advisory Opinion 2007-33 (Club for Growth PAC) (requiring full stand-by-your-ad disclaimers in 10- and 15-second television advertisements.).

technology-neutral. As a result, the Commission’s proposal that a “URL to the payor’s website [could appear] if a reader could move his or her cursor over the words”⁹³ is insufficient. A voter viewing an advertisement on a mobile device has no cursor to move over the words to reveal the URL.

Third, the Commission asks whether it should “allow sponsors of extremely space- or time-limited paid internet advertisements to use platform-provided designations as their indicators.” This approach is inappropriate. As described above, internet ads can spread by both paid and organic distribution. For example, when a user views an ad via paid distribution on Facebook, it is marked as “Sponsored.” If that user shares the ad, Facebook’s “Sponsored” label is not shared.⁹⁴ Because an ad can spread separately from platform-provided disclaimers, such disclaimers are likely to be ineffective and should not be permitted. In addition, there is some evidence that in-ad disclaimers are more likely to attract voters’ attention than those provided by the platform that run adjacent to the ad.⁹⁵

Fourth, the Commission asks, “[i]f a person can access the full disclaimer by clicking anywhere on a communication, should the abbreviated disclaimer even be required on the face of the communication?”⁹⁶ The disclaimer must be required in this context. There is no reason to believe that, absent some indication that a political ad links to a disclaimer, a voter will know that the ad links to such information. In fact, the voter may not even realize that the ad contains a link at all.⁹⁷

Finally, the Commission then queries whether “there are circumstances where an adapted disclaimer would be preferable to a full disclaimer, even if the full disclaimer would take up ten percent or less of the time or space in the internet public communication.”⁹⁸ This proposal flies in the face of existing best practices for drawing attention to disclaimers online.⁹⁹ As repeated ad nauseum, “getting consumers to notice and then click on key links can be . . . challenging.”¹⁰⁰ Voters are more likely to observe and benefit from political disclaimers when they appear in the body of the ad¹⁰¹ than when they are abbreviated in the advertisement and the full disclaimer is linked to elsewhere. We can think of no context in which it is beneficial to voters to hide a political advertiser’s identity.

⁹³ *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. at 12877.

⁹⁴ See UPFRONT, *supra* note 13, at 6.

⁹⁵ Cf. *Native Advertising*, *supra* note 15. (The FTC observes that in the context of video advertising, “consumers might pay little attention to written descriptions and instead look at thumbnail images [when deciding what to watch]. Under those circumstances, a disclosure placed directly on the thumbnail image itself is most likely to be effective.”).

⁹⁶ *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. at 12878.

⁹⁷ Cf. FTC, *Disclosures*, *supra* note 21, at 12 (explaining that consumers are likely to overlook unconventional or obscure links).

⁹⁸ *Internet Communication Disclaimers and Definition of “Public Communication”*, 83 Fed. Reg. at 12878.

⁹⁹ See *Native Advertising*, *supra* note 15 for a description of best practices for drawing attention to required disclaimers online.

¹⁰⁰ Hogarth, *supra* note 23, at 21.

¹⁰¹ See FTC, *Disclosures*, *supra* note 21, at 6. See *Native Advertising*, *supra* note 15 for a description of best practices for drawing attention to required disclaimers online.

The object of the Commission’s rules should be to make political ad disclaimers easy to find and access, not to hide the ball. In this regard, Alternative B falls dramatically short.

Conclusion

Alternative A’s proposed disclaimer requirements accurately recognize that while the internet has changed the medium through which many Americans receive political communications, it has not changed the need for accountability to inform the electorate. The public has both a need and a right to know who is behind a given political ad. The fact that the same ad content is often recycled for different media means that expanding these disclaimer requirements to the internet places only a *de minimis* burden on the advertiser in exchange for a clear and significant public benefit. As the court in *Shays v. Federal Election Commission* recognized, the Federal Election Campaign Act and BCRA were intended to apply broadly.¹⁰² Given the vastly expanded nature of internet advertising today, there is a real danger that adopting Alternative B’s disclaimer requirements would allow the exceptions to the disclaimer requirements to swallow an extremely important rule.

We appreciate the opportunity to comment on the Federal Election Commission’s Notice of Proposed Rulemaking (NPRM) 2018-06: Internet Communications Disclaimers and Definition of “Public Communication” and urge the Commission to adopt Alternative A with our suggested improvements and to amend the definition of “public communication” to cover communications that have been placed *or promoted* for a fee.

Sincerely,



Allison S. Bohm
Policy Counsel
Public Knowledge

¹⁰² See *Shays v. Fed. Election Comm’n*, 337 F. Supp. 2d 28, 70 (D.D.C. 2004), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005) (“To permit an entire class of political communications to be completely unregulated . . . would permit an evasion of campaign finance laws, thus unduly compromising the Act’s purposes.”) (internal quotation marks and citations omitted).