FEDERAL ELECTION COMMISSION
Washington, DC

INTERPRETIVE STATEMENT OF CHAIRMAN ALLEN J. DICKERSON AND COMMISSIONER JAMES E. "TREY" TRAINOR, III REGARDING REG 2011-02 (INTERNET COMMUNICATION DISCLAIMERS AND DEFINITION OF "PUBLIC COMMUNICATION")

The internet has provided Americans with an unprecedented forum for political expression. Today, anyone with an internet connection and a desire to participate in public debate can instantly share their speech with a global audience. In a manner unimaginable to prior generations, the internet empowers ordinary citizens to participate in public life without incurring prohibitive costs or facing confusing shibboleths.

"Unique among federal administrative agencies, the Federal Election Commission has as its sole purpose the regulation of core constitutionally protected activity": that is, political speech.[1] Given the inherent tension between our governing statute and the Constitution, we are compelled to provide clear regulatory guidance. There is broad agreement that the disclaimer requirements in the Federal Election Campaign Act (the "Act")—which were born in an era dominated by broadcast and print media—are unnecessarily burdensome in the context of short and inexpensive internet ads. Nevertheless, the Commission has been unable, for more than a decade, to reach agreement on a path forward. The resulting ambiguity has served no one, least of all ordinary Americans seeking to exercise their constitutional rights without access to sophisticated campaign counsel.

Courts have long recognized the need to protect and nurture democratic media for expression and shield them from crushing regulation. In *Buckley v. Valeo*, the Supreme Court observed that laws regulating speech can serve to discourage Americans from speaking plainly, and that the First Amendment does not allow the government to force speakers to "hedge and trim" their preferred message.[2] Because "all speech inherently involves choices of what to say and what to leave unsaid," speech is only free when the one who speaks decides his or her own message.[3] It follows that when disclaimers—a form of compelled speech—are mandated, clarity is paramount.

Accordingly, this regulation clarifies the term "public communication" as it applies to general public political advertising on the internet and provides a bright-line test for when a standard disclaimer is too burdensome to be required. It also provides a pragmatic

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

[2] 424 U.S. 1, 43 (1976) (internal citations omitted).

[3] *Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557, 573 (1995) (quoting *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.,* 475 U.S. 1, 11 (1986)).

alternative, in the form of an "adapted disclaimer," to the Commission's "full" disclaimer requirements at 11 C.F.R. §110.11(b)–(c). The adapted disclaimer represents a safe harbor for paid advertisements that might not be large or long enough for a full disclaimer, or where the disclaimer runs the risk of subsuming the advertisement itself. This alternative allows speakers to engage in more of their *own* speech and less verbiage compelled by the government. And in cases where even the adapted disclaimer provided by this regulation is too burdensome for a given advertising format, our existing regulatory exemptions for small items and impractical disclaimers[4] will continue to apply.

Ultimately, the flexibility provided by this revised regulation helps alleviate ambiguity about internet disclaimer requirements in a broad spectrum of situations, present and future, and accordingly shields a wide swath of online speech from the threat of costly and onerous enforcement action.

I. THE ACT'S DISCLAIMER REQUIREMENT

Congress has long required that political actors include disclaimers in certain types of speech. The longest and most detailed disclaimers—and hence, the heaviest burden on the speaker—apply to broadcast and print advertisements and other printed materials, which Congress bore in mind when passing and amending the Act in the 1970s.[5]

After Congress amended the Act in 1976, the law 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" the communication must contain one of two disclaimers.[6] "[I]f authorized by a candidate," then the ad "[s]hall clearly and conspicuously ... state that the communication has been authorized."[7] But if the ad is not authorized by a 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."[8]

Thus, disclaimers were intended to be short and identify only who was responsible for the advertising, and, for non-candidates, to include an affirmation that no candidate authorized the ad. Beginning in 1976, the Commission promulgated regulations that tracked these limited statutory provisions.[9]

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[4] 11 C.F.R. § 110.11(f)(1)(i)–(ii).

[5] 52 U.S.C. § 30120.

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

[7] *Id.*

[8] *Id.*

[9] Establishment of Chapter, 41 Fed. Reg. 35,932, 35,952 (Aug. 25, 1976). In 1977, the Commission informed Congress that its disclaimer rules "follow[ed] 2 U.S.C. § 441d." House Doc. No. 95-44, Fed. Election Comm'n, Explanation and Justification, 1977 Amendments to Federal Election Campaign Act of 1971 at 55 (Jan. 12, 1977). The disclaimer statute was originally codified at 2 U.S.C. § 441d, but was renumbered 52 U.S.C. § 30120; the disclaimer regulations were originally at 11 C.F.R. § 109.4, but are now found at 11 C.F.R. § 110.11.

In certain instances, however, Congress allowed room for the Commission to exercise its discretion to exempt select forms of advertising from disclaimer requirements where the disclaimer would overwhelm or subsume the message. The Commission thus promulgated a regulatory exemption for small items, including "[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed,"[10] in 1976; and an exemption for scenarios where "displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable" in 1983.[11]

In the years that followed, the Commission was generally able to reach agreement on the applicability of the impracticable and small item exceptions,[12] but the rise of the internet upset the apple cart.

II. A BRIEF HISTORY OF INTERNET REGULATION AT THE COMMISSION

For nearly three decades, the Commission has struggled in its attempts to regulate political speech on the internet and to balance vital constitutional rights with the disclaimer mandates passed by Congress. A review of this history is in order.

Fundamentally, political advertising disclaimers are compelled speech that are only justified insofar as they inform the listener or viewer about the identity of an ad's sponsor. The 1976 amendments to the Act, which Congress passed in response to Supreme Court's decision in *Buckley v. Valeo*,[13] reflect this limited purpose—and under the statutory language of the Act, the only internet communications that require a disclaimer are "general public political advertis[ements]."[14]

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[10] Establishment of Chapter, 41 Fed. Reg. 35,932, 35,947 (Aug. 25, 1976).

[11] Disclaimer Notices, 48 Fed. Reg. 8,809 (Mar. 2, 1983).

[12] *See, e.g.*, Advisory Op. 1978-33 (Allen) (rejecting application of small item exception to newspaper advertisements); Advisory Op. 1980-42 (Hart) (applying small item exception to concert tickets); Gen. Counsel's Rpt. at 4–5, MUR 960 (Life Amendment PAC) (rejecting application of small item exception to handbills); First Gen. Counsel's Rpt. at 6, MUR 1474 (Ad Hoc Committee Against Nazism & Anti-Semitism) (applying small item exception to stickers); Gen. Counsel's Rpt. at 2, MUR 2261 (Norris for Congress Committee) (applying small item exception to wooden nickels disseminated by a candidate's campaign at a county fair); Gen. Counsel's Rpt. at 5, MUR 3086 (Willamette Citizen) (rejecting application of impracticable or small item exceptions to newspaper advertisements); First Gen. Counsel's Rpt. at 2, MUR 3092 (Kasten for Senate Committee) (applying small item exception to 3½-inch by 2-inch magnet); Factual & Legal Analysis at 3, MUR 4416 (Hamilton for Congress) (rejecting application of impracticable or small item exceptions to fliers and printed shopping bags); Statement of Reasons of Vice Chairman Darryl R. Wold and Comm'rs Lee Ann Elliott, Danny McDonald, David M. Mason, and Karl J. Sandstrom, MUR 4791 (Ryan for Congress) (rejecting application of impracticable or small item exceptions to football schedules); First Gen. Counsel's Rpt. at 6, MUR 5583 (Christian Interactive Network) (applying small item exception to stickers); Factual & Legal Analysis at 4, MUR 7471 (Mary Bono for Congress) (rejecting application of small item exception to doorhangers).

[13] 424 U.S. 1 (1976) (per curiam).

[14] 52 U.S.C. § 30120(a).

The Commission first specifically attempted to regulate political speech on the internet in 1995, when it was a relatively new medium. In that rulemaking, we stated that internet communications only required disclaimers to the extent they qualified as "general public political advertising."[15] We did not, however, create an internet-specific rule, or distinguish between paid and unpaid internet activities. What followed was a series of ill-fated, often unconstitutional attempts by the Commission to shoehorn its disclaimer regulations into internet political speech on a case-by-case basis.[16] These efforts were (predictably) doomed, as they relied on law that was later held unconstitutional by the Supreme Court[17] or attempted to assign monetary worth to websites and emails, which by their nature are not easily valued.[18]

In 2002, the Commission promulgated rules to implement the Bipartisan Campaign Reform Act of 2002 ("BCRA")'s changes to the disclaimer provisions of the Act and the definition of "public communication" by applying the disclaimer rules to political committees' websites and the distribution of more than 500 substantially similar unsolicited emails.[19] In 2006, following litigation that successfully challenged the regulatory definition of "public communication,"[20] the Commission revised its rules to include internet communications "placed for a fee on another person's Web site" in the definition of "public communication" and, therefore, within the scope of the disclaimer rule, thus distinguishing between paid and unpaid internet communications and exempting the latter from disclaimer requirements.[21] We also explained that "the placement of advertising on another person's website for a fee includes all potential forms of advertising, such as banner advertisements, streaming video, popup advertisements, and directed search results."[22]

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[15] At the time, 11 C.F.R. § 110.11 explicitly applied to "general public political advertising." The current rule uses the term "public communication" as defined at 11 C.F.R. § 100.26, which in turn refers to "general public political advertising."

[16] *See, e.g.*, Factual & Legal Analysis at 5–6, MUR 5281 (American Muslim Council, *et al.*) (finding reason to believe respondent corporation's website containing express advocacy failed to include a proper disclaimer, but ultimately taking no further action and admonishing respondent) (superseded by *Citizens United v. FEC, 558 U.S. 310 (2010)*); Factual & Legal Analysis at 5–6, MUR 4340 (Tweezerman Corporation) (finding reason to believe respondent corporation's website containing a link to a candidate's website failed to include a proper disclaimer, and characterizing a hyperlink as a "thing of value") (superseded by *Citizens United v. FEC*); First Gen. Counsel's Rpt. at 17–19, MUR 4607 (National Council of Senior Citizens) (finding reason to believe respondent 501(c)(4)'s website containing a federal candidate endorsement failed to include a proper disclaimer, but ultimately taking no further action) (superseded by *Citizens United v. FEC*).

[17] *See generally Citizens United v. FEC*, 558 U.S. 310 (2010).

[18] *See, e.g.*, Statement of Reasons of Vice Chairman Allen J. Dickerson and Comm'rs James E. "Trey" Trainor and Sean J. Cooksey at 10–11, MUR 7271 (DNC, *et al.*).

[19] Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,962 (Dec. 13, 2002); Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,111 (July 29, 2002).

[20] *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) (holding, *inter alia*, that the Commission could not completely exclude internet activity from the definition of "public communication").

[21] Internet Communications, 71 Fed. Reg. 18,589, 18,593–94 (Apr. 12, 2006).

[22] *Id.* at 18,593–94.

Both before and after the adoption of these regulations in 2006, the Commission considered several advisory opinion requests concerning the application of disclaimers to various types of internet communications and other novel forms of communication. In 2002, we were asked whether political committees could send text messages containing 160 characters or fewer to supporters without including a disclaimer, and concluded in a 4–1 bipartisan vote that the "small item" exception applied.[23] In 2010, we concluded that political committees that purchased Google search ads would not violate the Act if they failed to include a disclaimer on those ads, but we were unable to reach an agreement by the required four affirmative votes that the "small item" exception applied.[24] And in 2022, we determined that "short code" text messages do not constitute a form of general public political advertising and, therefore, are not public communications that would require a disclaimer.[25] However, in many other instances involving the application of disclaimers to internet speech, we were unable to issue an advisory opinion by the required four votes[26] or to provide a legal rationale for the requirement that a disclaimer appear on an advertisement.[27]

III. THE IMPRACTICABLE AND SMALL ITEM EXEMPTIONS APPLY TO INTERNET POLITICAL SPEECH

Internet advertising technology has advanced at a rapid and escalating pace since the mid-2000s, when ads primarily took the form of website pop-ups and banners. At that time, streaming video applications like YouTube (founded in 2006) were nascent, due in part to the fact that most Americans still accessed the internet on a personal computer, via a dial-up connection.[28] Now, more than 83% of Americans access the internet via a smartphone, tablet, or mobile device utilizing 4G or 5G technology.[29] Smaller screens for viewing ads, and increasingly brief advertisements, may lead to situations where the broadcast and print

[23] Advisory Op. 2002-09 (Target Wireless).

[24] Advisory Op. 2010-19 (Google).

[25] Advisory Op. 2022-19 (Maggie for NH). Although this request specifically concerned whether a "split-it" fundraising page transmitted via a short code text message was subject to the joint fundraising rules, the Commission's rationale for allowing the conduct in question turned on our conclusion—by a 4 – 1 bipartisan vote—that short code text messages are not public communications, which in turn are subject to disclaimer requirements.

[26] *See* Advisory Op. 2011-09 (Facebook) (concerning application of exceptions to 160-character ads with thumbnail images); Advisory Op. 2013-18 (Revolution Messaging) (concerning application of exceptions to mobile banner ads).

[27] Advisory Op. 2017-12 (Take Back Action Fund) at 1. Because the Commission could not agree on the underlying rationale for the decision, the advisory opinion itself merely concluded that disclaimers would be required on Facebook Image and Video ads in cases where the specific circumstances were substantially similar to those laid out in the request, but did not discuss the reasoning behind that conclusion.

[28] In 2006, a Pew Research survey found that 42% of Americans had broadband access at home. John B. Horrigan, *Broadband Adoption in the United States*, PEW RESEARCH CTR. (May 28, 2006), *available at* https://www.pewresearch.org/internet/2006/05/28/part-1-broadband-adoption-in-the-united-states/.

[29] *How Do Americans Connect to the Internet?*, PEW RESEARCH CTR. (July 7, 2022), *available at* https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2022/07/how-do-americans-connect-to-the-internet.

disclaimers that Congress contemplated decades ago impose insurmountable burdens on speakers because they are not technically feasible on certain internet platforms, or because the disclaimer language would subsume the ad. This is especially true for political speakers with financial or resource constraints, who often rely on smaller, shorter, or more cost-effective formats to advertise most efficiently.

There is no reason why the impracticable or small item exemptions cannot be applied to internet political speech. By their nature, they are *de minimis* exceptions that reflect the reality of political speech in a dynamic environment, where we know from experience that favored advertising platforms change from cycle to cycle. Generally, the Commission has implied authority to create categorical exceptions to a statute when the burdens of regulation yield a gain of trivial or no value.[30] If, however, Congress was "'extraordinarily rigid' in drafting the statute" we lack discretion to provide for such exceptions.[31] Here, Congress was "rigid" in detailing the specific disclaimers required for broadcast communications. But it did not do the same for internet communications. Instead, it relied upon the general guidelines of 52 U.S.C. § 30120(a), leaving the Commission with discretion to exempt speakers from disclaimer requirements where the burden to the speaker would outweigh the utility to the public.

The rationale for the impracticable and small item exceptions is constitutionally compelled: if there is a means of communication that exists in the commercial marketplace, political advertisers must be able to use it. A fundamental principle of advertising is that it is only effective if you meet your audience where they are—and political advertisers' audience is increasingly found on the internet. It follows that the Commission should encourage innovation in political advertising, rather than stifling it with disclaimer requirements geared at the more inflexible formats of the mid-to-late twentieth century. We are also constitutionally prohibited from imposing disclaimer requirements that would preclude a political speaker from using a particular advertising medium that is otherwise available to the public.[32]

As such, the impracticable and small item exemptions serve as backstops within our regulations and as necessary tools of constitutional avoidance, and they apply by extension to all media formats regulated by the Commission, including internet advertisements.

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[30] *See, e.g.*, *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 1,541, 1,556 (D.C. Cir. 1989)).

[31] *See, e.g.*, *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 113–14 (D.C. Cir. 2005) (recognizing the *de minimis* rule but noting that the statute's character controls—the stricter the statute, the lesser the agency's ability to create an exemption).

[32] *See, e.g.*, *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015) (holding that town's law prohibiting and restricting the display of unpermitted outdoor signs by political advertisers, among others, did not survive strict scrutiny, and thus violated free speech guarantees); *see also Yes on Prop B v. City & Cnty. of San Francisco*, 440 F. Supp. 3d 1049 (N.D. Cal.), appeal dismissed, 826 F. App'x 648 (9th Cir. 2020) (holding that state law violated First Amendment where, as practical matter, it foreclosed certain formats for political advertising).

IV. THE REVISED INTERNET COMMUNICATIONS REGULATION IMPROVES CLARITY AND REDUCES AMBIGUITY IN A RAPIDLY CHANGING LANDSCAPE

Although the Commission has clearly distinguished between paid and unpaid internet communications since 2006,[33] regulatory ambiguities abound for those who seek to engage in political advertising on the internet. The sheer variety of internet advertising formats that are available, as well as the widespread use of mobile devices, has led to an acceleration in both enforcement activity and advisory opinion requests relating to disclaimer requirements for internet speech. And time and again, the Commission has been unable to agree that online speakers may be exempted from a disclaimer requirement or may truncate a disclaimer where a full disclaimer is clearly impracticable or impossible.[34]

For more than a decade, this has been the status quo, and it is both unfair and constitutionally suspect. Because disclaimers are a form of compelled speech mandated by law, the Commission needs to clarify when and where they must appear, and what they must contain, to the maximum extent possible. Vague or unclear rules lead to inconsistent and arbitrary enforcement.[35] They also "operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone,"[36] resulting in a chilling effect for more risk-averse would-be speakers.

Speakers have been subject to a sword of Damocles in the enforcement context: because the Commission's regulations were unclear, innovative advertisers were frequently subject to complaints from both political opponents and entities that seek to police and restrict core political speech. The result was that more risk-adverse speakers self-censored for fear of running afoul of the Commission, while other speakers were hauled before the Commission to defend their actions, and in many cases, forced to outlay campaign contributions for legal expenses rather than in support of their political mission.

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[33] *See supra* n.21 and accompanying text.

[34] *See, e.g.*, MUR 6729 (Checks and Balances) (Commission split 3–3 on recommendation to find no RTB with respect to alleged disclaimer violation for internet-only advertisements); Advisory Op. 2017-05 (Commission was unable to provide a response concerning whether political committee could use Twitter without including disclaimer on profile page, or if a link to disclaimer would suffice; or whether political committee could satisfy disclaimer requirement by including graphic bearing disclaimer on profile page); Advisory Op. 2010-19 (Google) (Commission was unable to provide a response concerning whether "text ads" generated by Google's AdWords program are exempt from disclaimer requirements under "small item" exception, or whether hyperlink to full disclaimer would satisfy requirement); Advisory Op. 2011-09 (Facebook) (Commission was unable to provide a response concerning application of disclaimer exceptions to 160-character ads with thumbnail images); Advisory Op. 2013-18 (Revolution Messaging) (Commission was unable to provide a response concerning application of disclaimer exceptions to mobile banner ads).

[35] *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (holding that if a regulation is "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," that regulation violates due process); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010) (applying *Connally*).

[36] *Buckley v. Valeo*, 414 U.S. 1, 41 n.48 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 ("Vague laws may trap the innocent by not providing fair warning.") (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)))) (internal quotation marks omitted).

Political speakers need to know—at the outset—when and how their speech is regulated, and the best way to accomplish this is via clear regulatory guidance from the Commission. The instant regulation is the Commission's best effort to improve what has, until now, been a patchwork approach to the internet. It is not a panacea—we can look around the next corner or down the road, but not over the horizon—but it does provide clearer guidance, and it lessens the threat of harassing complaints for those who seek to engage in innovative and novel forms of advertising on the internet.

V. CONCLUSION

During the twelve-year period this rulemaking has been pending, the internet has changed dramatically. Some internet sites and applications that were popular in 2010 no longer exist, while others that are popular now did not exist then. Technology is fleeting and ephemeral, it moves faster than the regulatory state, and neither the Commission nor the federal government at large can accurately and consistently predict how people might choose to engage in political speech in 2030, or 2050, or 2100. Therefore, the technological characteristics of a particular website, internet ad, or online platform should not be the primary basis for regulating core political speech—and demanding that an advertiser refrain from using a particular advertising format or requiring that they truncate their message to accommodate a disclaimer is not a viable solution under our Constitution.

Instead, the Commission should ground its regulations in essential First Amendment principles and draw upon technological minutia only as necessary.[37] Accordingly, this regulation is intended to address advertising formats that exist now, formats that are in development, and formats that have not yet been invented or even conceived. After all, the medium through which a political speaker chooses to communicate can hold just as much value as the message itself,[38] and political speakers have the right to meet their audience where that audience is, using the medium of their choosing.

December 1, 2022
Date

Allen J. Dickerson
Chairman

December 1, 2022
Date

James E. "Trey" Trainor, III
Commissioner

[37] *See The Message in the Medium: The First Amendment on the Information Superhighway*, 107 HARV. L. REV. 1062, 1063 (1994).

[38] *See generally* Marshall McLuhan, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN (1st ed. 1964).