Proposed Rules

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

FEDERAL ELECTION COMMISSION

11 CFR Part 110

[NOTICE 2023–17]

Size of Letters in Disclaimers

AGENCY: Federal Election Commission.

ACTION: Notification of disposition of Petition for Rulemaking.

SUMMARY: The Commission announces its disposition of a Petition for Rulemaking filed on December 4, 2018, by Extreme Reach. The Petition asks the Commission to amend its regulation on the size of letters in disclaimers in certain television advertisements such that the required letter size for advertisements broadcast in high definition would be reduced. Because changing the Commission's regulations as requested in the Petition would create a direct conflict with regulations of the Federal Communications Commission, the Commission is not initiating a rulemaking at this time.

DATES: October 20, 2023.

FOR FURTHER INFORMATION CONTACT: Ms. Amy L. Rothstein, Assistant General Counsel, or Mr. Anthony T. Buckley, Attorney, 1050 First Street NE, Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Federal Election Campaign Act, 52 U.S.C. 30101–45 (the ''Act''), and Commission regulations generally require public communications to feature disclaimers if they are made by a political committee, expressly advocate the election or defeat of a clearly identified Federal candidate, or solicit contributions.[1] The information these disclaimers must contain depends on whether the public communications were authorized or funded by a Federal candidate, an authorized committee of a Federal candidate, or an agent of either.[2] Every disclaimer must appear in a clear and conspicuous manner to provide the reader, observer, or listener adequate notice of who paid for or authorized the communication.[3] A disclaimer is not clear and conspicuous if it is difficult to read or hear or if its placement is easily overlooked.[4]

Disclaimers on public communications transmitted through television or any broadcast, cable, or satellite transmission must meet certain additional requirements. Notably, the disclaimer must appear in letters equal to or greater than four percent of the communication's vertical picture height.[5]

On December 4, 2018, the Commission received a Petition for Rulemaking from Extreme Reach (the ''Petition''). The Petition asks the Commission to amend 11 CFR 110.11(c)(3)(iii)(A) in two respects: (1) to specify that the four percent vertical picture height requirement applies only to the standard definition format; and (2) to add a separate requirement for the high-definition format where letters must be equal to or greater than two percent of the vertical picture height.

The Petition argues that the Commission's current four-percent minimum standard for disclaimers on high-definition-resolution television advertisements is outdated. The Petition asserts that the four-percent standard reflects a period when television was broadcast only in standard definition; that most television advertising currently is in high-definition resolution; and that the current industry standard size of a normal disclaimer is 22 pixels, or only about two percent of the vertical picture height, using high-definition resolution.[6] The Petition includes a copy of a publication of the International Telecommunication Union and the disclaimer portions of advertising guidelines from the ABC, CBS, and NBC television networks to support its claims.[7]

The Commission published a Notification of Availability on February 12, 2019, asking for public comment on the Petition.[8] The Commission received 27 comments from 26 commenters in response: One comment supported the Petition; the remaining comments opposed the Petition.[9]

The comments opposing the Petition asserted several reasons for doing so. One such comment, submitted by a nonprofit trade association whose members include television stations and broadcast networks, asserted that modifying the regulation would force broadcasters to reject FEC-compliant political advertising to avoid violating Federal Communications Commission (''FCC'') rules.[10] The comment stated that FCC regulations require the sponsor of televised political ads to be identified ''with letters equal to or greater than four percent of the vertical picture height,'' leading to an ''untenable conflict'' if the FEC revised its regulation.[11] The comment also contended that reducing the size of the letters might result in unreadable disclaimers for some viewers because whether a viewer can read a disclaimer will depend on ''the mechanism for receiving the broadcast signal (*e.g.,* over the air, through a cable system), the device used for displaying the ad (*e.g.,* an older analog television receiver, a 65-inch HD television) and the visual acuity of the viewer.'' [12] Further, the comment disputed the Petition's claim that a two-percent standard would be consistent with current industry guidelines. The comment noted that only one of the three network guidelines submitted with the Petition specifies 22 scanlines as a minimum height to assure legibility.[13]

The remaining comments opposing the Petition were filed by individuals. Of these, two stated that the proposed standard contradicts the purpose of the disclaimer requirement in the Act, which they described as ''provid[ing] transparency'' and ''ensur[ing] voters are well-informed.'' [14] The remaining comments were primarily concerned that the two-percent standard would make disclaimers harder to read.

A comment filed by a nonpartisan, nonprofit organization supported the Petition. The comment asserted that

[1] *See* 52 U.S.C. 30120(a); 11 CFR 110.11(a).

[2] *See* 52 U.S.C. 30120(d); 11 CFR 110.11(b), (c).

[3] 52 U.S.C. 30120(c), (d); 11 CFR 110.11(c).

[4] 11 CFR 110.11(c).

[5] *See* 11 CFR 110.11(c)(3)(iii)(A), (c)(4)(iii)(A).

[6] Petition at 1.

[7] *Id.* at 9–12, 13–31.

[8] Rulemaking Petition; Size of Letters in Disclaimers, 84 FR 3344 (Feb. 12, 2019).

[9] Of the comments opposing the petition, one was submitted by an organization, and the remaining 25 were submitted by individuals (one of whom submitted two comments).

[10] National Association of Broadcasters, Comment.

[11] *Id.* at 1–2.

[12] *Id.* at 5.

[13] *Id.* at 6.

[14] A. Spencer, Comment; S. Tinsley, Comment.

most televisions in use today ''are significantly larger than those of the 1970's when [the Act] was enacted, and even than the televisions of the early 2000's when [the Bipartisan Campaign Reform Act] was enacted.'' [15] Consequently, the comment stated, ''[w]hile still proportionally 4% of the screen, the disclaimer itself has significantly increased in size, and will continue to increase as screen size grows.'' [16] The comment further asserted that ''the disclaimer visibility proposed in the Petition can easily be seen and read by the human eye.'' [17]

After considering the comments received, the Commission has decided not to initiate a rulemaking at this time. The Petition's proposal that the Commission reduce the minimum permissible size of disclaimers on political advertisements appearing in high-definition format to just two percent of the vertical picture height would create a conflict between the Commission's regulations and the FCC's regulation requiring broadcasters under the FCC's jurisdiction to carry disclaimers on televised political advertisements ''with letters equal to or greater than four percent of the vertical picture height.'' [18] Indeed, the Commission adopted the minimum four-percent disclaimer standard in 1995 precisely to be consistent with the FCC's four-percent standard.[19] As the Commission recognized in that rulemaking, ''the FCC and not the FEC has authority over these technical requirements'' for broadcasters.[20] Further, neither the Petition nor the public comments provided a compelling reason for the Commission to depart from its current minimum four-percent standard.[21]

For the above reasons, the Commission therefore declines to commence a rulemaking to revise its regulation on the size of letters in disclaimers on television ads at 11 CFR 110.11(c)(3)(iii)(A).

Copies of the comments and the Petition for Rulemaking are available on the Commission's website, *http://www.fec.gov/fosers/* (REG 2018–05 Size of Letters in Disclaimers (2018)), and at the Commission's Public Records Office, 1050 First Street NE, Washington, DC 20002, Monday through Friday between the hours of 9 a.m. and 5 p.m.

Dated: October 16, 2023.

On behalf of the Commission.

Dara Lindenbaum,

Chair, Federal Election Commission.

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[15] Institute for Free Speech, Comment at 2.

[16] *Id.*

[17] *Id.* at 3.

[18] 47 CFR 73.1212(a)(2)(ii).

[19] *See* Communications Disclaimer Requirements, 60 FR 52069, 52071 (Oct. 5, 1995) (noting that ''the FCC conducted a lengthy rulemaking, in which the FEC participated, before deciding that the current standards were appropriate'').

[20] *Id.* Thus, even if this Commission were to revise its standard, disclaimers on advertisements falling within the FCC's jurisdiction would still be subject to the FCC's minimum four-percent size requirement.

[21] The Petition does not provide information supporting its contention that there is an industry standard for the size of letters in disclaimers, or that the standard is or should be two percent of the vertical picture height. Only one of the three network advertising guidelines submitted with the Petition has established 22 pixels as a minimum size for disclaimers. Petition at 3–6. Moreover, as this is a minimum standard, a disclaimer appearing at greater than 22 pixels would be consistent with that guideline.

FEDERAL ELECTION COMMISSION

11 CFR Part 112

[NOTICE 2023–16]

Advisory Opinion Comment Procedures

AGENCY: Federal Election Commission.

ACTION: Notification of disposition of Petition for Rulemaking.

SUMMARY: The Commission announces its disposition of a Petition for Rulemaking. The Petition asked the Commission to modify its regulation on written comments on advisory opinion requests to provide time for the public to comment on drafts of advisory opinions before the Commission votes on the drafts. For the reasons described in detail below, the Commission is not initiating a rulemaking at this time.

DATES: October 20, 2023.

FOR FURTHER INFORMATION CONTACT: Robert M. Knop, Assistant General Counsel, or Mr. Evan R. Christopher, Attorney, 1050 First Street NE, Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Federal Election Campaign Act (the ''Act''), 52 U.S.C. 30101–45, authorizes the Commission to issue advisory opinions on written questions about the applicability of the Act or Commission regulations to a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future.[1] The persons involved in the specific activity described in the request, as well as any person involved in an activity ''which is indistinguishable in all its material aspects'' from the specific activity described in the request, may rely on the advisory opinion to avoid sanction by the Commission for engaging in that activity.[2]

The Act and Commission regulations require the Commission to respond to all requests for advisory opinions.[3] The Commission must respond to any advisory opinion request (''AOR'') that is complete and qualified under 11 CFR 112.1(b) [4] with either a formal advisory opinion (''AO'') or notice that the Commission was unable to issue an AO with the required minimum of four affirmative votes.[5] The Commission must publicize receipt of a complete and qualified AOR and formally respond within 20 or 60 days of receiving a complete AOR.[6]

Requestors and interested persons are provided several opportunities to participate in the Commission's AOR process. First, the Act requires that the Commission provide a 10-day window for public comment on complete, qualified, AORs before the Commission issues a formal response.[7] Second, beginning provisionally in 1993 and adopted formally in 2009, it is the Commission's policy to seek comments on drafts of advisory opinions, which it endeavors to release at least one week before the meeting at which it will consider the AOR and any draft AOs.[8] Third, the Commission allows an AOR requestor to ask to appear before the Commission to answer questions about the AOR at the open meeting at which the Commission considers the AOR and

[1] *See* 52 U.S.C. 30108(a); *see also* 11 CFR part 112.

[2] 11 CFR 112.5.

[3] *See* 52 U.S.C. 30108(a); 11 CFR 112.4(a) and (b).

[4] The Commission must respond to a person who submits an incomplete AOR or one that does not qualify under 11 CFR 112.1(b) within 10 days to ''specify the deficiencies in the request.'' 11 CFR 112.1(d).

[5] *See* 52 U.S.C. 30108(a); 11 CFR 112.4(a) and (b).

[6] *Id.* Candidates are entitled to receive a response to a AOR within 20 days if the request is made within 60 days of an election in which the candidate is participating and it presents a specific transaction or activity related to the election that may invoke the 20 day period if the connection is explained in the request. *See* 52 U.S.C. 30108(a)(2); 11 CFR 112.4(b). Further, the Commission has an informal process under which it may, upon request, issue an opinion within 30 days under certain circumstances. *See* Notice of New Advisory Opinion Procedures and Explanation of Existing Procedures, 74 FR 32160 (July 7, 2009).

[7] *See* 52 U.S.C. 30108(d); *see also*11 CFR 112.3.

[8] *See* Revision to Advisory Opinion Comment Procedure, 58 FR 62259 (Nov. 26, 1993); Notice of Advisory Opinion Procedure, 74 FR 32160 (July 7, 2009). The Commission endeavors to release at least one draft AO at least one week in advance. Drafts that are not available by the one-week deadline are required to be identified as ''late submitt[ed]'' and subject to additional procedural requirements before the Commission may consider them. *See* Comm'n Dir. No. 17 (effective date May 6, 2021), available at *https://www.fec.gov/resources/cms-content/documents/directive_17.pdf.*