April 15, 2019

Robert M. Knop
Assistant General Counsel
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: REG 2018-05; Notice 2019-04;
Petition for Rulemaking to Amend 11 C.F.R. § 110.11(c)(3)(iii)(A)

Dear Mr. Knop:

The National Association of Broadcasters[1] (NAB) submits these comments in response to the above-captioned Notice of Availability.[2] The Notice seeks comment on a Petition for Rulemaking that asks the Federal Election Commission (FEC) to amend its rules to reduce the required minimum size of textual disclaimers in televised political advertisements from four percent of the vertical picture height to two percent for broadcasts in high definition (HD) resolution.[3] As discussed below, the FEC should dismiss the Petition and decline the requested proceeding because changing the FEC's rule for the size of disclaimers would cause an untenable conflict with parallel rules of the Federal

[1] As a nonprofit trade association that advocates on behalf of local radio television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts, NAB has an interest in the outcome of this proceeding on behalf of its member television stations.
[2] Notice of Availability, *Size of Letters in Disclaimers*, 84 Fed. Reg. 29 (Feb. 12, 2019) (Notice).
[3] 11 C.F.R. § 110.11(c)(3)(iii)(A); Petition for Rulemaking, Extreme Reach (filed Dec. 3, 2018) (Petition). The Petition supports retaining the existing rule for broadcasts in standard definition (SD).

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Communications Commission (FCC), and may result in disclaimers that are unreadable by some television viewers.

I. Changing the FEC Disclaimer Rule Would Force Broadcasters to Choose Between Rejecting FEC-Compliant Political Advertisements or Violating the FCC's Rules

The Bipartisan Campaign Finance Reform Act of 2002 (BCRA) updated and expanded the pre-existing requirements for disclaimers in political communications.[4] The content of disclaimers varies depending on whether the communication is paid for by a candidate or another person; however, all disclaimers must be presented in a clear and conspicuous manner to provide viewers adequate notice of who paid for or authorized the communication.[5] A disclaimer is not considered clear and conspicuous if it is difficult to read or its placement can be easily overlooked.[6]

BCRA added new requirements for disclaimers in radio and television advertisements, including the so-called "stand by your ad" obligation. All such televised ads must contain a "clearly readable printed statement identifying the candidate, and stating that the candidate has approved the broadcast and that the candidate's authorized campaign committee paid for the broadcast."[7] To qualify as "clearly readable" FEC rules require that such written statements must "appear in letters equal to or greater than four (4) percent of the vertical picture height."[8]

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[4] Pub. L. No. 107-155, 166 Stat. 81 (2002); BCRA § 305; 52 U.S.C. § 30120(d).
[5] Notice, Attachment at 2 citing 52 U.S.C. § 30120(c) and (d).
[6] *Explanation and Justification for Final Rules on Disclaimers, Fraudulent Solicitations, Civil Penalties, and Personal Use of Campaign Funds*, 67 FR 76962, 76965 (Dec. 13, 2002) (2002 FEC Disclaimer Order).
[7] 52 U.S.C. § 30120(d)(1)(B)(iii).
[8] 11 C.F.R. § 110.11(c)(3)(iii)(A); 2002 FEC Disclaimer Order, 67 FR at 76967. The FEC's four percent rule existed prior to BCRA, and was retained as one of the criteria for meeting

The Petitioner claims that the four percent rule is outdated because it was adopted before the digital television transition in 2009, and therefore presumably based on SD television aspect ratios and pixel totals.[9] The Petitioner asserts that disclaimers in text that is four percent of the screen height appear too large in programming produced in HD.[10] The Petition states that current industry guidelines for commercial HD programming call for disclaimers that are approximately two percent of the vertical screen height, and asks the FEC to amend its rules to match.[11]

However, the Petition should be rejected because it is flawed in several respects. Most importantly, the request wholly ignores parallel FCC regulations that also mandate that the sponsor of televised political ads must be identified "with letters equal to or greater than four percent of the vertical picture height."[12] The FCC adopted this rule in 1992 to fulfill the sponsor identification requirements in the Communications Act in a manner that provides broadcasters with clear guidelines while ensuring that the sponsor of political advertisements is readily apparent to viewers.[13] While the FEC's requirements are binding on candidates, the FCC's requirements are binding on television stations that broadcast political advertisements.

BCRA's "clearly readable" provision. *Id*. at 76966. The other criteria specify that a disclaimer must appear for at least four seconds against a background having reasonable color contrast.

[9] Petition at 1.

[10] *Id*. at 2.

[11] *Id*.

[12] 47 C.F.R. § 73.1212(a)(2)(ii).

[13] 47 U.S.C. § 317; Memorandum Opinion and Order, *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 1616 (1992).

Thus, granting the Petitioner's request would force television broadcasters into a Hobson's Choice between rejecting a political ad that complies with the amended FEC rule or accepting it in violation of the FCC's rule. For example, if a candidate produces a political ad with a disclaimer in letters that are two percent of the screen height, any station that aired the ad would run afoul of the FCC requirement that the text disclaimer must be at least four percent of the screen height. This would lead to testy exchanges where a station must inform a candidate that it cannot run the ad despite the candidate's insistence that the ad complies with FEC rules. The inevitable conflict and frustration would only increase during the heated last days of a campaign when candidates must make snap decisions about campaign strategy and broadcasters must rapidly manage their advertising inventory for multiple campaigns. Moreover, seeking to reject a candidate's advertisement could have serious consequences for broadcasters because the Communications Act prohibits broadcasters from refusing to air or otherwise censoring advertisements that are paid for or sponsored by legally qualified candidates for public office.[14]

It is baffling why the Petitioner makes no mention of the FCC's parallel four percent rule for disclaimers. Indeed, the only example provided in the Petition to support its request describes a situation where a cable operator rejected a political ad, presumably because the disclaimer text did not meet the four percent threshold in the FCC's rules that binds cable operators as well as broadcasters.[15]

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[14] 47 U.S.C. §§ 312, 315.
[15] Petition at 1.

The Petitioner also reveals an incomplete grasp of the FEC's rules. The request asks the FEC to amend Section 110.11(c)(3)(iii)(A) of its rules, which governs the size of disclaimers in televised ads that are authorized by candidates. However, it ignores an identical provision in the very next subsection of the rules that applies the same four percent requirement on disclaimers in televised ads that are paid for by third parties.[16] Thus, granting the proposal would not only cause a conflict between requirements in the FEC and FCC rules, it would also cause confusion regarding disclaimers in ads authorized by candidates and those sponsored by third parties. Again, the Petition is perplexing because the example it uses to support the request is a cable operator's rejection of a political ad purchased by a third-party group, but fails to take the simple step to request a change to both rules.

II. Halving the Size of Disclaimers in HD-Produced Advertisements May Result in Unreadable Disclaimers for Some Television Viewers

The Petitioner essentially asks the FEC to reduce the size of disclaimers because the current rule requires disclaimers that are "too big" in their view,[17] or the clarity of smaller disclaimers in HD programming would be adequate. However, the "correct" size of disclaimers in political ads is largely a subjective matter that depends 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. The Petitioner has not produced any

[16] 11 C.F.R. § 110.11(c)(4)(iii)(A).
[17] Petition at 2.

evidence that disclaimers that are four percent of the screen height are inherently too large. To some viewers with smaller television sets, four percent may not be large enough.

The entire premise of the request is based on the Petitioner's claim that disclaimers in text that is two percent of the vertical screen height would be consistent with current industry guidelines, yet the Petition does not offer any persuasive evidence in support. The Petition attaches documents from three broadcast networks purporting to demonstrate that two percent is the industry standard for commercial content, however, only one of these documents even mentions the height of horizonal crawls and other superimposed content. While the CBS-related document contains a general recommendation that crawls should be at least 22 video scanlines to be legible (which roughly equates to approximately two percent of the screen height), the documents from ABC and NBC do not specify any particular size for disclaimers. To the contrary, a brief Internet search reveals that the advertising content guidelines for NBC parent Comcast states that the preferred vertical size of visual disclaimers is 54 video scanlines,[18] and that Disney-owned ESPN (and presumably other Disney-owned properties such as ABC) requires that visual disclaimers be displayed in text that is at least five percent of the active picture height,[19] both more than double Petitioner's request. Furthermore, the Petitioner's reference to recommendation from the International Telecommunications Union (ITU) is also inapposite because it makes no mention of the letter size of

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[18] *See* https://www.comcastspotlight.com/sites/default/files/Advertising%20Content%20Restrictions% 20and%20Screening%20Guidelines.pdf.
[19].*See* http://www.espn.com/adspecs/guidelines/en/ESPN_AdStandardsGuidelines.pdf.

disclaimers. The Petitioner's claim that two percent is the industry standard should be viewed with skepticism.

Nor does the Petition offer any proof, such as the results of a focus group or survey, that disclaimers of two percent screen height would be readable, even in HD. The text would still be only half of the current requirement, regardless of the resolution, and therefore more difficult for some viewers to read. Nor does the Petitioner make any effort to prove that a smaller disclaimer would fulfill the FEC's duty to ensure that it is presented in a "clear and conspicuous manner" that provides viewers with adequate notice of who authorized the communication[20] and cannot be easily overlooked.[21] Indeed, the Petitioner never articulates the underlying reason for its request. One is left to speculate that the Petitioner would like the rule changed to leave more screen area for an image of a political candidate or to otherwise draw attention away from the disclaimer. NAB submits that the Petition fails to make a clear claim or adequately support its request.

Finally, the Petition does not account for some of the common ways that viewers receive television service and how some cable operators generate SD programming. For example, not all television stations broadcast all their programming in HD. Some stations multicast several channels and down-convert and reformat HD-produced programming to a lower SD-like resolution for broadcast. NAB understands that disclaimers in such programming may not be considered readable by some viewers. Similarly, many consumers still have older analog sets and watch over-the-air television using a converter

[20] 52 U.S.C. § 30120(c) and (d).
[21] 2002 FEC Disclaimer Order, 67 FR at 76965.

box. Those who use a converter box to watch television on an analog set may not consider a disclaimer that is only two percent of the vertical screen height readable.

Some consumers who subscribe to cable service may face similar problems. For example, although many consumers have HD-capable television sets, many do not subscribe to HD service from their cable company because it is a premium service. If programming is produced in HD with a disclaimer that is two percent of the screen height, but a cable operator down-converts the programming to a lower resolution for these cable subscribers, the resulting disclaimer may not be legible. NAB is not certain exactly how many consumers might encounter problems like these, but we believe they are relatively common, and it is apparent that the Petitioner has not considered these viewer configurations.

III. Conclusion

For the reasons discussed above, NAB respectfully requests that the FEC dismiss the Petition for Rulemaking, and decline to initiate the requested rulemaking proceeding. We appreciate the opportunity to participate in the FEC's consideration of this matter. Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,

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