

# FEC Imposes New Disclaimer Requirements for Small Digital Ads

December 5, 2022

On Thursday, December 1, 2022, the Federal Election Commission (FEC) adopted new requirements for sponsor disclaimers on digital ads. FEC regulations have generally required full disclaimers (e.g., “Paid for by XYZ PAC and not authorized by any candidate or candidate’s committee, xyzpac.org”) on paid internet and similar digital advertisements where the ad space and functionality could accommodate a full disclaimer. However, the FEC historically relaxed the disclaimer rule with respect to small digital ads, such as the small banner ad on a cell phone screen or a character-limited text message, which could not physically accommodate a full disclaimer. Over time, disagreement evolved among Commissioners over how to distinguish between large versus small digital ads and over precision in the accommodationist rules for small digital ads. In some cases, the FEC adopted workarounds in advisory opinions, such as disclaimers on landing pages after a viewer clicked on the digital ad. In other cases, FEC commissioners split on whether a disclaimer was required at all under the “small items exemption.” The patchwork guidance vexed the Commission and advertisers for over a decade. The new requirements are designed to resolve, once and for all, uniform disclaimer requirements for all digital ads, especially small digital ads.

## **Disclaimer Rules for Large Internet Ads**

Under the new regulation, **large** digital ads must include the full “Paid for by ...” disclaimer according to the following requirements:

1. for internet communications with text or graphic components, including the required written disclaimer, such that the disclaimer can be viewed on the face of the ad without the

## Authors

Lee E. Goodman  
Partner  
202.719.7378  
lgoodman@wiley.law  
Andrew G. Woodson  
Partner  
202.719.4638  
awoodson@wiley.law

## Practice Areas

Election Law & Government Ethics

viewer taking any further action;

2. be of sufficient type size to be clearly readable by the recipient of the communication; and
3. be displayed with a reasonable degree of color contrast between the background and the disclaimer's text.

Suppose the internet ad is a **video** ad. In that case, the disclaimer must be visible for at least 4 seconds and appear in the video without the recipient of the communication taking any action. The disclaimer must be included within the audio component of the communication for an internet ad with an **audio** component and no video, graphic, or text components.

### **Disclaimer Rules for Small Digital Ads**

The greatest change in regulation applies to **small** digital ads. This was the issue that the agency has struggled to resolve for over a decade. To clarify how the disclaimer requirements apply to paid internet ads that are not capable of including a full disclaimer due to character or space constraints intrinsic to the advertising product or medium – i.e., small digital ads – the FEC's new rule permits the ad sponsor to employ an "Adapted Disclaimer." Use of an adapted disclaimer is permissible when the full disclaimer "cannot be provided or would occupy more than **25 percent** of the communication due to character or space constraints intrinsic to the advertising product or medium." The Commission has chosen not to specify how to measure the 25 percentage point (i.e., by pixels, seconds, characters, etc.) so that the rule may remain flexible as new technologies are developed and that speakers may use the most appropriate measurement for their communication.

"Adapted Disclaimers" for small digital ads must comply with the following rules:

1. a **clear statement** that the internet ad is paid for and identify the person(s) who paid for the ad using the sponsor's full name or a commonly understood abbreviation or acronym by which the sponsor is known;
2. a clear and conspicuous, visible or audible, **indicator** (words, image, sound, symbol or icon) to the viewer that s/he may read, observe, or listen to a full disclaimer through a technological mechanism that is one touch away;
3. a **technological mechanism** that enables the person reading, observing, or listening to the ad to read, observe, or listen to a full disclaimer after no more than one action by the viewer, which can be (but is not limited to) a hover-over text, pop-up screens, scrolling text, rotating panels, or hyperlink to a landing page.

### **Other Clarifications**

In adopting these provisions, the FEC expressly is **not** applying the stand-by-your-ad requirements to internet communications because those rules apply solely to television and radio ads.

The new regulation also updates the technologies encompassed in regulated paid advertising. The old regulation covered paid advertisements on third-party “websites,” while the new regulation expands coverage to any third-party “website, digital device, application, or advertising platform.” Because these technologies were assumed to be covered under the existing regulation’s reference to “website,” they are not considered substantive changes in the regulation but rather a clarification.

### **Additional Interpretative Statements by Individual Commissioners**

The vote to adopt the new rules was accompanied by two contemporaneous statements by individual Commissioners. Commissioner Sean Cooksey made clear that the new disclaimer rules do not entirely remove the applicability of the “small items exemptions” (wholly exempting a communication from carrying any disclaimer) for “small-item advertisements and communications for which disclaimers are impracticable, such as with exceptionally short video clips.” That reference appears to apply to brief videos such as 5-second paid video ads. Likewise, Chairman Allen Dickerson and Commissioner Trey Trainor issued a statement underscoring that “the impracticable and small item exemptions serve as backstops within our regulations ... and they apply by extension to all media formats regulated by the Commission, including internet advertisements.” These statements indicate that three commissioners will continue to exempt some very small or very brief digital ads even from the new Adapted Disclaimer rule.