The State Board received six public comments in response to its publication of Proposed Rulemaking I.D. No. SBE-21-18-00047-P amendment of section 6200.10; addition of section 6200.11 to Title 9 NYCRR. The Board received comments from the following entities:

A trade association for newspapers;

A trade association for broadcasters;

A trade association of e-commerce and online companies;

A "privacy coalition" made up of communications, technology, media, and retail companies, and 6 trade associations;

A social network online platform; and

A nonprofit organization that described itself as "dedicated to protecting and strengthening the democratic process across all levels of government."

Summaries of the comments on the proposal and the Department's responses thereto are as follows:

Comment: The newspaper association ("Association") believes that the proposed definition of "online platform" would encompass websites of newspapers, which, according to the Association, is a violation of the First Amendment of the United States Constitution and Election Law § 14-124(1).

Under statute and our proposed regulations, online platforms must collect the registration forms of independent expenditure ("IE") committees upon the purchase of digital advertisements. According to the Association, forcing online platforms to collect registration forms effectively makes the platforms surrogates of the State Board, potentially violating the First Amendment "freedom of press" rights of newspapers. Specifically, the Association states: "(t)he drafters of the First Amendment clearly intended that the press operate unfettered from government control, and the Supreme Court has upheld the freedom of the press to engage in coverage of politics, and to carry paid political content (New York Times v. Sullivan), in a manner that is virtually free of infringement."

Additionally, the Association states that the proposed rule potentially violates Election Law § 14-124(1). Election Law §14-124(1) provides that Article 14 of the Election Law "shall not apply to any person, association or corporation engaged in the publication or distribution of any newspaper or other publication issued at regular intervals in respect to the ordinary conduct of such business." Given this language, the Association argues that the Democracy Protection Act does not apply to newspaper websites and that regulations should reflect this exemption.

Response: Given Election Law § 14-124(1), the State Board agrees that the websites of newspapers should not be considered an online platform; rather they should be treated the same as a printed newspaper. As such, the proposed rules have been amended to exclude websites of newspapers from the definition of "online platform." For purposes of the revised rule, "newspaper" has the same meaning as found in section 60 of the General Construction Law.

Comment: The trade association for broadcasters ("Broadcasters") argue that the threshold of 50 million unique monthly visitors in the United States is too low. The Broadcasters note that "(t)he goal of the legislation is to capture the largest digital platforms that have the potential of transmitting political advertising from an (IE Committee)." The Broadcasters submitted a list of 48 websites that would be

captured under the proposed 50 million unique visitors definition, including websites such as "accuweather.com", "WebMD.com", "Netflix.com", and "Tripadvisor.com". In the alternative, the Broadcasters suggest that a more appropriate threshold would be 130 million unique United States visitors per month.

Conversely, the nonprofit organization dedicated to protecting and strengthening the democratic process ("nonprofit") advocates that the Board lower the threshold. The nonprofit notes that obligations of online platforms (to verify independent expenditure purchases) are modest; as such, increasing the number of platforms subject to the proposed rule would not create an unnecessary burden for either the Board or platforms. The nonprofit also notes that there is a difference between state/local elections and national elections, suggesting that it may be appropriate to have a lower threshold for state/local elections. The nonprofit points to Maryland's statute as an example, where the legislature, in a similar law, set the threshold of an online platform of 100,000 unique monthly U.S. visitors.

Response: The Board finds that the 50 million unique United States visitors per month threshold is too low as it captures many platforms outside the intent of the Act. Upon further review, the Board has determined that 70 million unique United States visitors per month is an appropriate threshold. At 70 million, the regulation would capture 96.02 % US Market Share for social media (see http://gs.statcounter.com/social-media-stats/all/united-states-of-america) and 99.04 % US Market Share for search engines (http://gs.statcounter.com/search-engine-market-share/all/united-states-of-america). No major search engine nor social media platform is captured between the 50 million and 70 million threshold, so the Market Share does not go up significantly by decreasing the threshold to 50 million. However, if the threshold were set at 130 million, as suggested by the Broadcasters, then, according to data submitted by the Broadcasters, the Market Share for social media would diminish to 59.64%. As such, the Board has determined that 70 million unique United States visitors per month is the appropriate threshold.

Comment: The Broadcasters note that it is common for digital companies to own a number of separate digital platforms with variety of different content. The Broadcasters suggest that it would be inaccurate to aggregate "unique visitors" from all on-line digital platforms owned by one company. As such, the Broadcasters suggest language to clarify that the number of unique visitors per month is measured by domain name.

Response: The revised rule adds language that "unique visitors" is measured by domain name as measured by an accredited party.

Comment: The Broadcasters advocate that online platforms owned by broadcast entities should be excluded from the definition of online platforms. According to the broadcasters, advertisements are often sold as a "single package" (e.g. an online component may be "thrown in" with a traditional radio/television ad buy). The Broadcasters suggest that FCC rules would apply and preempt the proposed rules.

Response: As recently noted by David Oxenford in the "Broadcast Law Blog," the "the FCC has tended to stay out of the online political broadcasting world…. (and)… the FCC avoids regulation of ad sales on websites and advertising delivered solely through other digital media platforms." See https://www.broadcastlawblog.com/2018/05/articles/moving-broadcast-political-advertising-rules-to-

the-online-world-ny-state-adopts-a-new-law-while-congress-considers-online-political-advertising-disclosures-and-the-fec-considers-enhanced-o/ (published May 14, 2018). The FCC rules simply do not apply in this instance and would not preempt the Democracy Protection Act.

Comment: The Broadcasters argue that platforms that create original content should be exempt from the definition of online platform. Additionally, the newspaper Association suggests that the proposed rules violate the First Amendment rights of larger media organizations that create original content. The Association urges the State Board to adopt rules that distinguish organizations that "invest in original content" versus "entities which primarily serve as largely neutral conduits for the sharing of information among members who are not paid to produce content or entities whose primary function is to facilitate search functions for information located elsewhere on the internet."

Response: In relation to excluding all websites that create "original content", the State Board finds that this argument is unavailing. Nothing in the statute nor its legislative history suggests that the intent of the statute was to exclude websites that create original content from the requirements of the Act.

Comment: The Broadcasters also advocate an exemption for "Programmatic Advertising." According to the Broadcasters, many digital ads are made through programmatic advertising services. This process involves using computers to purchase and place advertising, where there are no human negotiations or manual insertion of advertisements to an on-line digital platform. Rather, software designed to place posts or on various digital platforms is used. Generally, the programmatic advertising software places the post on a number of different websites and social media platforms that possess the characteristics of the target audience that is selected by an IE committee. According to the Broadcasters, most on-line platforms have contracts with "programmatic advertising" services. Generally, these contracts authorize the programmatic selling service to place posts on the on-line platform's websites or social media platforms. Given this, the Broadcasters argue that such websites have no knowledge about which advertisements are appearing on its platforms. Because there is no direct privity of contract between the IE committee and the digital platform is programmatic sales, the Broadcasters argue that there should be no liability.

Additionally, both the trade association of e-commerce and online companies ("e-commerce") and the privacy coalition note the complexity of programmatic advertising. Both advocate that online platform or ad network that directly interacts with the IE Committee be responsible for verification.

The nonprofit organization commented that purchasing advertisements through ad networks is complicated, noting that "(c)rafting a regulatory definition that distinguishes appropriately between each unit involved in the digital advertising business is difficult due to the diverse and specialized nature of these intermediate entities." The nonprofit suggests that the Board not define "ad networks," as the definition risks becoming obsolete, and instead assess ad networks through an advisory opinion process.

Response: The Board concedes that regulating programmatic advertising and ad networks is complicated; however, not addressing the issue directly risks leaving a large regulatory loophole. While many of these processes may become obsolete in the coming years, the Board is obligated to initially review this regulation within three years, and subsequently review this regulation every five years. This will give the board ample opportunity to modernize this regulation as needed.

The Democracy Protection Act states that: "Online Platform" is "any public-facing website, web application, or digital application, including, but not limited to, a social network, ad network, or search engine, may be designated an "online platform"".

By including "ad network" in the Act, the legislature indicated its intent to regulate third-party advertisement vendors. In some instances, ad networks perform as a third-party advertisement vendor. However, in more recent years, other entities have also acted as third-party vendors. For instance, ad exchanges can act like third-party vendors. As markets have evolved, Demand Side Platforms and Supply Side Platforms have also become third-party vendors.

The revised rules remove the definition of ad network, and now define "third-party advertisement vendor" as outlined above.

As noted by the Broadcasters, many websites sell its ad space through "Programmatic Advertising." In order to adequately capture this market, the regulation needs to adequately capture "third-party vendors." First, the Board finds that "unique monthly United States visitors" is not a meaningful measurement of the size of a "third-party vendor." Purchasers and Sellers of advertisements may visit third-party vendor online platform, but the average US consumer does not.

The Board looked a several ways to measure third-party vendors. One method the Board studied was to look at the different pricing models available and classify the vendors accordingly. The classic pricing model for Internet based advertising is the Cost-Per-Mille (CPM) (cost-per-thousand views or cost-per-impression). See Assaf Y. Prussak, The Income of the Twenty-First Century: Online Advertising As A Case Study for the Implications of Technology for Source-Based Taxation, 16 Tul J Tech & Intell Prop 39, 48–49 [2013]. The other two prevailing pricing models are interactive based. The first, the Cost-Per-Click (CPC) method, the advertisers pays a fee whenever a user clicks on the ad (as opposed to simply viewing it). Under the second, the Cost-Per-Action (CPA) method, neither viewing nor clicking is sufficient. Instead, under the CPA model, the advertiser pays when the user takes an action that benefits the advertising client, such as purchasing a product, registering for a service, filling out a survey, clicking the “like” button on a Facebook page, etc. Id. See also https://socialcompare.com/en/comparison/cpm-cost-per-mille-vs-ppc-pay-per-click-vs-cpa-cost-per-acquisition-advertisements.

Given the above, the regulation can regulate third party vendors using a different methodology than unique monthly visitors. For example, the following metrics could be used: for networks using the "Cost-per-Click" model, any network that sells of procures 30 million impressions/views monthly. For Cost-per-Click or Cost-per-Action, views are not measured. As such, revenue could be used as a measurement (e.g. $50 million in a fiscal year).

However, as a private companies revenue is not subject to public disclosure, it would be difficult to determine which companies would fall under he requirements of this regulation.

As such, the Board opted to use unique monthly visitors, but not to the third party's website; but visitors to the vendor's ad space. At least one company, comscore.com, measures unique monthly visitors of third party vendor ad space. See https://www.comscore.com/Insights/Rankings?keywords=&tag=Rankings&country=US. It should be noted that much of this data is self-reported. See

https://www.mediapost.com/publications/article/222745/whats-in-a-ranking-semantics-apparently.html.

The proposed regulation at 30,000,000 or more unique monthly United States visitors in the aggregate on any advertisement space that it has sold or bought for a majority of months during the preceding 12 months as measured by an independent digital ratings service accredited by the Media Ratings Council.

According to comScore.com's June 2018 Ad Focus Rankings, the 30,000,000 threshold captures approximately 95% of the reported unique visitors of advertisement space. If the same threshold for Online Platforms, 70,000,000, is used, then only 85% of the reported unique visitors of advertisement space is captured. The Board is concerned that using 70,000,000 as a threshold would leave a potential loophole, where Independent Expenditure Committees could engage lesser known Third-Party Vendors to avoid the registration document requirement. As such, the 30,000,000 threshold better captures the intent of the Democracy Protection Act.

The revised proposal also provides that the online platform that directly engages the Independent Expenditure Committee should be responsible for collection of registration documents. This approach enables reliable reporting but avoids the unnecessary complexity and problems of injecting liability on down-stream actors who have no knowledge of the content of the ad nor have a relationship with the Independent Expenditure Committee.

Comment: The nonprofit organization related to strengthening the democratic process suggested several technical amendments related to the definition of "paid internet or digital advertisement." For example, it suggested using terms, such as: "display advertising," "search engine marketing," and "native advertising." Additionally, the nonprofit suggested eliminating superfluous language in section 6200.10(d)(3) of the proposed rule.

Response: The Board made corresponding amendments to the proposed rule.

Comment: The nonprofit suggested adding language related to using an indicator when the “paid internet or digital advertisement” cannot fit a complete attribution statement. Generally, the nonprofit is supportive of using an indicator, but suggests adding language requiring that the indicator navigate recipients to the full statement without having to sift through superfluous and distracting information.

Response: The Board made corresponding amendments to the proposed rule.

Comment: The nonprofit suggests that section 6200.11 is not sufficiently clear and recommends modifications to clarify the reporting obligations of political committees. Specifically, the nonprofit recommends renumbering the specific "political communications" outlined in the proposed rule. Additionally, the nonprofit recommends that section 6200.11 state that the board maintain the internet and digital advertisements for five years. Further, the nonprofit suggests deleting the requirement that the copies of the internet and digital advertisement be submitted in an accessible format. Lastly, the e-commerce trade group suggests that section 6200.11 is not clear as to who must disclose internet and digital advertisements to the State Board.

Response: The proposed rules renumber the specific political communications as recommended. In regard to the five-year maintenance requirement, the Board believes that section 6200.11 is not a proper section to be discussing duties of the Board as the section is designed to give guidance and

direction to political committees. Lastly the Board rejects the recommendation to delete the requirement that copies of internet and digital advertisements be submitted in an accessible format. In order to comply with the ADA, the Board's website must be accessible. In order to ensure that copies of the advertisement are ADA compliant, the Board is requiring that they be submitted in an accessible manner.

Comment: The social media platform is generally supportive of the Act and proposed rule. In regards to online platforms requiring IE committees to file its registration forms with the platform, the social media platform recommends three options:

1) An online platform will have satisfied its obligation if any one of these occurs: (a) it prompts the Independent Expenditure Committee running the communication to provide the online platform with a hyperlink to the registration form filed pursuant to subdivision three of section 14-107, (b) the Independent Expenditure Committee running the communication provides the online platform with a hyperlink to the registration form filed pursuant to subdivision three of section 14-107, or (c) the Independent Expenditure Committee running the communication includes a hyperlink to the registration form filed pursuant to subdivision three of section 14-107 embedded in the independent expenditure when disseminated;

2) An online platform will have satisfied its if it provides notice to the Independent Expenditure Committee running the communication of the platform's obligation under this paragraph and provides a method by which the Independent Expenditure Committee may provide the required copy of the registration form to the platform.

3) An online platform that requires each person or entity running an independent expenditure on its platform to both (a) identify the person or entity running the communication on the face of the communication, and (b) verify its identity before running the communication, is exempt from this provision.

Response: The Act specifically requires that the online platform "shall require that the IE committee (purchasing the advertisement to) file (with the online platform) a copy of the registration form filed by such committee with the state board of elections pursuant to subdivision three of section 14-107 of this article." All of these options absolve the online platform of this duty if it performs certain actions; e.g. informing the IE committee of its duty to file the registration documents and provides a method of submitting the document; the communication itself identifying the entity running the communication; the online platform verifying the identity of the entity, etc. None of these options are authorized by statute. As such, they cannot be used to absolve an online platform from the requirements of the Act.

Comment: The privacy coalition suggested limiting the scope of the definition of "paid internet or digital advertisement" definition in to New York State races or ballot questions.

Response: The Board believes this amendment is unnecessary as Federal Election Commission opinions have made clear that Federal Election Law pre-empts State Election Law; as such, this regulation is not enforceable on federal committees.

Comment: The privacy coalition commented that the regulation should leave room for a nationwide disclosure system that is already in development under the auspices of the Digital Advertising Alliance. This system will require an icon in the advertisement, which will link to a central site so that a state

resident can see all of the required disclosure information for all states. As such, the privacy coalition recommends language that states that any advertisement that displays the icon shall be deemed in compliance.

Response: The amended language is not necessary as the proposed rule already has a provision related to using an indicator to display required attribution information.

Comment: The privacy coalition requested we amend the paragraph (j)(5), which states that “(a)ny online platform that fails to comply with the Requirements of EL 14-107-b shall be subject to a civil penalty of up to one thousand dollars for each violation in a special proceeding…” According to the coalition, It is not clear the provision that this citation refers to, because "14-107-(b) appears to be the definitions section as drafted."

Response: The Board disagrees that paragraph (j)(5) is not sufficiently clear, nor does it read section 14-107-b of the Election Law as dealing solely with "definitions."

Comment: The nonprofit organization dedicated to protecting and strengthening the democratic process suggested we enhance the definition of the foreign entities listed in Section 6200.10(c)(2), such as “foreign national, government, instrumentality or agent,” because the Election Law only defines "foreign national."

Response: The Board made corresponding amendments to the proposed rule.