FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

MEMORANDUM

TO: The Commission

FROM: Chairman Sean J. Cooksey

                    Commissioner Allen J. Dickerson

                    Commissioner James E. "Trey" Trainor, III

DATE: August 8, 2024

RE: REG 2023-02 (Artificial Intelligence in Campaign Ads) – Draft NOD

Attached is a draft Notification of Disposition ("NOD") for REG 2023-02 (Artificial Intelligence in Campaign Ads). We request that the draft NOD be placed on the agenda for the August 15th, 2024, open meeting.

Further, we recommend that the Commission: (1) approve the attached draft NOD, and (2) authorize the Office of the General Counsel to make any necessary technical and conforming edits prior to publication in the Federal Register.

Attachment

1 BILLING CODE: 6715-01-P

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3 **FEDERAL ELECTION COMMISSION**

4 **11 CFR Part 112**

5 **[NOTICE 2024-XX]**

6 **Artificial Intelligence in Campaign Ads**

7 **AGENCY:** Federal Election Commission.

8 **ACTION:** Notification of Disposition of petition for rulemaking.

9 **SUMMARY:** The Commission announces its disposition of a Petition for Rulemaking

10 filed on July 13, 2023. The Petition asked the Commission to revise existing rules on the

11 fraudulent misrepresentation of campaign authority to make clear that the related

12 statutory prohibition applies to deliberately deceptive campaign ads using artificial

13 intelligence. For the reasons described below, the Commission is not initiating a

14 rulemaking at this time.

15 **DATES:** [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

16 **FOR FURTHER INFORMATION CONTACT:** Mr. Robert M. Knop, Assistant

17 General Counsel, or Ms. Jennifer Waldman, Attorney, 1050 First Street, NE.,

18 Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

19 **SUPPLEMENTARY INFORMATION:** The Federal Election Campaign Act of 1971,

20 as amended (the "Act"), contains two narrow prohibitions against fraudulent

21 misrepresentations in connection with federal campaigns.[1] First, the Act prohibits a

22 candidate, his or her employee or agent, or an organization under the candidate's control,

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[1]   52 U.S.C. 30124.

1   from purporting to speak, write, or act for another candidate or political party on a matter

2   that is damaging to the other candidate or party.[2] Second, the Act prohibits any person

3   from falsely representing that they are speaking, writing, or acting on behalf of a federal

4   candidate or a political party for the purpose of soliciting contributions.[3] The

5   Commission's regulation implementing 52 U.S.C. 30124 essentially mirrors the statutory

6   text.[4]

7   On July 13, 2023, Public Citizen submitted a Petition for Rulemaking ("Petition")

8   to the Commission, asking it to undertake a rulemaking "to clarify that the law against

9   'fraudulent misrepresentation' (52 U.S.C. § 30124) applies to deliberately deceptive AI-

10   produced content in campaign communications."[5] The Petition described how recent

11   advances in artificial intelligence ("AI"), in particular the development of "deepfake

12   technology," have "create[d] the opportunity for political actors to deploy [AI] to deceive

13   voters in ways that extend well beyond any First Amendment protections for political

14   expression, opinion, or satire."[6] The Petition requested that the Commission initiate a

15   rulemaking for the purpose of amending 11 CFR 110.16(a), in order to make clear that "if

16   candidates or their agents fraudulently misrepresent other candidates or political parties

17   through deliberately false AI-generated content in campaign ads or other communications

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[2]   52 U.S.C. 30124(a). *See also* Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 FR 76962, 76968 (Dec. 13, 2002). The Commission has explained that "on a matter that is damaging" means "actions or spoken or written communications that are intended to suppress votes for the candidate or party who has been fraudulently misrepresented." *Id.* at 76968–69.

[3]   52 U.S.C. 30124(b).

[4]   *See* 11 CFR 110.16.

[5]   Petition at 1.

[6]   Petition at 2. Public Citizen expressed special concern that a "blockbuster deepfake video" depicting a federal candidate could "go viral" shortly before Election Day, and voters would have "no ability . . . to determine that its claims are fraudulent." *Id.*

1   – absent clear and conspicuous disclosure in the communication itself that the content is

2   generated by artificial intelligence and does not represent real events – then the restrictions

3   and penalties of the law and the Code of Regulations are applicable."[7]

4   On August 16, 2023, the Commission published a Notice of Availability seeking

5   public comment on the Petition.[8] It received more than 2,000 comments in response,

6   including from Members of Congress, political party committees, advocacy groups across

7   the ideological spectrum, and individual citizens. Commenters held a range of views about

8   the potential uses and effects of AI in elections.

9   Many commenters supported the Petition and urged the Commission to formulate

10   regulations for AI in campaign advertising, citing the potential misuse of deepfakes and

11   other AI-generated content to sow confusion in U.S. elections absent Commission

12   action.[9] Other commenters questioned whether the agency has the underlying legal

13   authority to promulgate regulations specifically for AI-generated ads. Among other

14   concerns, these commenters highlighted the limited reach of 52 U.S.C. 30124 and

15   emphasized that it does not operate as a ban on false representations in campaign

16   communications "writ large."[10] Commenters also noted the serious First Amendment

17   issues that would arise from any attempt by the Commission to restrict the use of AI in

18   campaign advertising.[11]

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[7]   Petition at 5.

[8]   *See* Notice of Availability, 88 FR 55606 (Aug. 16, 2023).

[9]   *See, e.g.,* Brennan Center for Justice, Comment; Campaign Legal Center, Comment.

[10]   Republican National Committee, Comment at 2; *see also* Holtzman Vogel Baran Torchinsky & Josefiak, PLLC, Comment; Institute for Free Speech, Comment.

[11]   *See, e.g.,* George Mason University, Comment; Republican National Committee, Comment.

1   In deciding whether to initiate a rulemaking in response to a petition, the

2   Commission generally considers five factors: (1) the Commission's statutory authority;

3   (2) policy considerations; (3) the desirability of proceeding on a case-by-case basis; (4)

4   the necessity or desirability of statutory revision; and (5) available agency resources.[12]

5   After considering these factors and reviewing the comments received on the petition, the

6   Commission has decided not to initiate a rulemaking at this time.

7   First, and most significantly, the Commission lacks the statutory authority to

8   promulgate the rule sought by the Petition. The Act empowers the Commission to

9   "make, amend, or repeal such rules . . . as are necessary to carry out the provisions of

10   [the] Act."[13] In rulemakings and enforcement matters, the Commission has concluded

11   that actionable violations of 52 U.S.C. 30124(a) must involve the misrepresentation of

12   campaign authority by a candidate or a candidate's agents on behalf of another candidate

13   or a political party in a damaging manner; other campaign communications that distort or

14   even fabricate statements or actions of another candidate generally do not violate the law,

15   so long as they include a proper disclaimer identifying the communication's true source.

16   By contrast, the kinds of AI communications that the Petition asks the Commission to

17   regulate—such as "[a] deepfake audio clip or video by a candidate or their agent that

18   purports to show an opponent saying or doing something they did not do"[14]—go well

19   beyond the statute.

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[12]   11 CFR 200.5.

[13]   52 U.S.C. 30107(a)(8).

[14]   Petition at 3.

1   Second, policy considerations and the desirability of case-by-case consideration

2   counsel against a rulemaking. The Commission is ill-positioned to take on the issue of AI

3   regulation and does not have the technical expertise required to design appropriately

4   tailored rules for AI-generated advertising, which makes a rulemaking at this stage a poor

5   use of agency resources. The relatively limited use of AI-generated content in federal

6   campaigns to date means there is little evidence of significant harms that would benefit

7   from regulation.

8   Lastly, the "necessity or desirability of statutory revision" weighs against

9   pursuing the proposed rulemaking, because the changes sought by the Petition would

10   require a statutory revision given that the Commission currently lacks authority under the

11   Act to promulgate the rules proposed.[15] Accordingly, after considering the comments

12   received regarding the Petition and in consideration of each of the factors discussed, the

13   Commission declines to initiate a rulemaking in response to the Petition.

14   Copies of the comments and the Petition for Rulemaking are available on the

15   Commission's website, http://www.fec.gov/fosers/ (REG 2023-02 Artificial Intelligence

16   in Campaign Ads (2023)) and at the Commission's Public Records Office, 1050 First

17   Street NE., Washington, D.C. 20463, Monday through Friday between the hours of 9

18   a.m. and 5 p.m.

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[15]   11 CFR 200.5.

1   DATED: _____

2   On behalf of the Commission,
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6   **Sean J. Cooksey,**

7   *Chairman,*

8   *Federal Election Commission.*