August 3, 2023

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson LJS by RMK
Acting General Counsel

Neven Stipanovic NES by RMK
Associate General Counsel

Robert Knop RMK
Assistant General Counsel

Jennifer Waldman gw
Attorney

SUBJECT: REG 2023-02 (Artificial Intelligence in Campaign Ads) – Draft Notification of Availability

On July 13, 2023, the Commission received a Petition for Rulemaking (“Petition”) from Public Citizen asking the Commission to amend its regulation on the fraudulent misrepresentation of campaign authority to make it clear that the related statutory prohibition applies to deliberately deceptive Artificial Intelligence campaign advertisements.

The Office of General Counsel has examined the Petition and determined that it meets the requirements of 11 C.F.R. § 200.2(b). Therefore, we have drafted the attached Notification of Availability (“NOA”) seeking comment on whether the Commission should initiate a full rulemaking on the proposal in the Petition. The NOA will be published in the Federal Register pursuant to 11 C.F.R. § 200.3(a)(1).

In keeping with the Commission’s usual procedure, the NOA does not address the merits of the Petition. Instead, it states that consideration of the merits will be deferred until the close of the comment period.

Attachment
FEDERAL ELECTION COMMISSION

11 CFR Part 112

[NOTICE 2023-XX]

Artificial Intelligence in Campaign Ads

AGENCY: Federal Election Commission.

ACTION: Notification of Availability of Petition for Rulemaking

SUMMARY: The Commission announces its receipt of a Petition for Rulemaking filed by Public Citizen. The Petition asks the Commission to amend its regulation on the fraudulent misrepresentation of campaign authority to make clear that the related statutory prohibition applies to deliberately deceptive Artificial Intelligence campaign ads.

DATES: Comments must be submitted on or before [insert date 60 days after publication in the FEDERAL REGISTER].

ADDRESSES: All comments must be in writing. Commenters may submit comments electronically via the Commission’s website at https://sers.fec.gov/fosers/, reference REG 2023-02.

Each commenter must provide, at a minimum, his or her first name, last name, city and state. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the Commission’s website and in the Commission’s Public Records Office.

Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social security number, or driver’s license number, or any
information that is restricted from disclosure, such as trade secrets or commercial or
financial information that is privileged or confidential.

FOR FURTHER
INFORMATION
CONTACT: Robert M. Knop, Assistant General Counsel, or Ms. Jennifer Waldman,
Attorney, 1050 First Street, NE., Washington, D.C. 20463, (202) 694-1650 or (800)
424-9530.

SUPPLEMENTARY
INFORMATION: On July 13, 2023, the Commission received a Petition for
Rulemaking (“Petition”) from Public Citizen, a non-profit advocacy organization. The
Petition asks the Commission to amend its regulation on “fraudulent misrepresentation”
at 11 C.F.R. 110.16 to clarify that “the restrictions and penalties of the law and the Code
of Regulations are applicable” should “candidates or their agents fraudulently
misrepresent other candidates or political parties through deliberately false [Artificial
Intelligence]-generated content in campaign ads or other communications.” Petition at 5.
The Federal Election Campaign Act (the “Act”) provides that a candidate for
federal office, employee, or agent of such a candidate shall not “fraudulently
misrepresent” themselves or any committee or organization under their control “as
speaking or writing or otherwise acting for or on behalf of any other candidate or political
party or employee or agent thereof on a matter which is damaging to such other candidate
or political party or employee or agent thereof.” 52 U.S.C. 30124(a)(1).
The Petition asserts that generative Artificial Intelligence and deepfake
technology, is being “used to create convincing images, audio and video hoaxes.”
Petition at 2. The Petition asserts that while the technology is not so far advanced
currently as for viewers to not be able to identify when it is used disingenuously, if the
use of the “technology continues to improve, it will become increasingly difficult, and
perhaps, nearly impossible for an average person to distinguish deepfake videos and
audio clips from authentic media.” Id.

The Petition notes that the technology will “almost certainly create the
opportunity for political actors to deploy it to deceive voters[, ] in ways that extend well
beyond any First Amendment protections for political expression, opinion or satire.” Id.
According to the Petition, this technology might be used to “create a video that purports
to show an opponent making an offensive statement or accepting a bribe” and, once
disseminated, be used for the purpose of “persuading voters that the opponent said or did
something they did not say or do.” Id. The Petition explains that a deepfake audio clip or
video by a candidate or their agent would violate the fraudulent misrepresentation
provision by “falsely putting words into another candidate’s mouth, or showing the
candidate taking action they did not [take],” thereby “fraudulently speak[ing] or act[ing]
‘for’ that candidate in a way deliberately intended to [harm] him or her.” Id. at 3. The
Petitioner states that because the deepfaker misrepresents themselves as speaking for the
deepfaked candidate, “the deepfake is fraudulent because the deepfaked candidate in fact
did not say or do what is depicted by the deepfake and because the deepfake aims to
deceive the public.” Id. The Petitioner draws a distinction between deepfakes, which it
contends violates the prohibition on fraudulent misrepresentation, and other uses of
Artificial Intelligence in campaign communications, such as in parodies, where the
purpose and effect are not to deceive voters, or as in other communications where “there
is a sufficiently prominent disclosure that the image, audio or video was generated by
[A]rtificial [I]ntelligence and portrays fictitious statements and actions.” Id. at 4.
The Commission seeks comment on the Petition. The public may inspect
the Petition on the Commission’s website at http://www.fec.gov/fosers/.

The Commission will not consider the Petition’s merits until after the comment
period closes. If the Commission decides that the Petition has merit, it may begin a
rulemaking proceeding. The Commission will announce any action that is takes in the
Federal Register.

Dated: ________________

On behalf of the Commission,

Dara Lindenbaum
Chair,
Federal Election Commission.

BILLING CODE: 6715-01-P