

January 9, 2023

Chair Allen Dickerson  
Vice Chair Dara Lindenbaum  
Federal Election Commission  
1050 First Street, NE  
Washington, DC 20463

**Re: REG 2013-01, Technological Modernization**

Dear Chair Dickerson and Vice Chair Lindenbaum:

The Brennan Center for Justice at New York University School of Law<sup>1</sup> respectfully submits this comment in response to the Commission’s Supplemental Notice of Proposed Rulemaking re: Technological Modernization (“SNPRM”), published December 9, 2022 (87 FR 75518), concerning disclaimers on internet communications that are promoted for a fee. We urge the Commission to adopt the rule proposed in the SNPRM.<sup>2</sup>

**Changing Landscape for Political Advertising**

The landscape through which people consume political advertising is continuously changing. As online life has exploded, political advertisers have increasingly moved online as well to disseminate their messages. The 2022 midterms featured around \$2.88 billion in online political spending, up from \$270 million in 2014.<sup>3</sup>

In recent years online advertising itself has expanded from traditional websites to major social media platforms like Facebook and Twitter, media sharing networks like

---

<sup>1</sup> The Brennan Center is a nonpartisan public policy and law institute that focuses on fundamental issues of democracy and justice. The Brennan Center’s Money in Politics project works to reduce the undue influence of money in our democracy. This comment does not purport to convey the position of New York University School of Law, if any.

<sup>2</sup> This comment does not address the other issues raised in the original Notice of Proposed Rulemaking; it only touches on the subject matter of the SNPRM, i.e., whether the Commission should also require disclaimers for public internet communications that are “promoted for a fee.” See Notice of Proposed Rulemaking re: Technological Modernization, published November 2, 2016 (81 FR 76416).

<sup>3</sup> Ed Pilkington, *Unregulated, unrestrained: era of the online political ad comes to midterms*, THE GUARDIAN (Nov. 4, 2022), <https://www.theguardian.com/us-news/2022/nov/04/online-political-ads-us-midterms-2022>; Darren Samuelsohn, *The next big thing in campaigns*, POLITICO (Aug. 26, 2014), <https://www.politico.com/story/2014/08/2014-elections-digital-advertising-110322>.

Instagram and TikTok, and streaming applications like Netflix and Hulu.<sup>4</sup> Streaming alone accounted for around \$1.5 billion in online political ad spending as of 2022 even though connected TVs were not used in a significant way to disseminate political ads until the 2020 election cycle.<sup>5</sup>

Online political advertisers are not only expanding to different types of platforms, but they are also embracing new ways of reaching voters beyond typical web ads. The Commission identified several of these methods in the SNPRM.<sup>6</sup> For example, advertisers have sought to harness the growing reach of social media influencers with large online followings. Commercial advertisers already pay influencers to promote their products and services, sometimes without making clear that the influencer is being paid for their endorsement.<sup>7</sup> Political advertisers have adopted similar tactics. In some cases they have paid influencers to produce supportive content,<sup>8</sup> as when 2020 presidential candidate Michael Bloomberg paid online personalities to generate memes that would promote his candidacy.<sup>9</sup> Advertisers now also have the option of paying influencers to simply share or repost their content, such as through “retweeting” a Twitter post.<sup>10</sup> They can also pay online platforms like Facebook to push their own content higher up in news feeds and search results,<sup>11</sup> a practice that is also well-established in nonpolitical advertising.<sup>12</sup>

---

<sup>4</sup> Notice of Final Rule re: Internet Communication Disclaimers and Definition of “Public Communication” (“Internet Disclaimers Final Rule”), published December 19, 2022 (87 FR 77467) at 77470.

<sup>5</sup> Sara Fischer, *Digital TV ads will flood living rooms during 2022 midterms*, AXIOS (Oct. 12, 2021), <https://www.axios.com/2021/10/12/digital-tv-ads-campaigns-2022-midterms>.

<sup>6</sup> SNPRM at 75519.

<sup>7</sup> Sara Morrison, *TikTok is full of shady secret advertisements*, VOX (July 11, 2022), <https://www.vox.com/recode/23197348/tiktok-ad-sponcon-influencers>.

<sup>8</sup> Stephanie Lai, *Campaigns Pay influencers to Carry Their Messages, Skirting Political Ad Rules*, N.Y. TIMES (Nov. 2, 2022), <https://www.nytimes.com/2022/11/02/us/elections/influencers-political-ads-tiktok-instagram.html>.

<sup>9</sup> Ryan Browne, *Mike Bloomberg is paying online influencers to post memes for his 2020 campaign*, CNBC (Feb. 13, 2020), <https://www.cnn.com/2020/02/13/mike-bloomberg-pays-influencers-to-post-memes-for-2020-campaign.html>.

<sup>10</sup> Elise Dopson, *30+ Influencer Marketing Statistics You Should Know (2023)*, SHOPIFY (Nov. 15, 2022), <https://www.shopify.com/blog/influencer-marketing-statistics>.

<sup>11</sup> *See About Boosted Posts*, META, <https://www.facebook.com/business/help/240208966080581?id=352109282177656> (last visited Jan. 9, 2023).

<sup>12</sup> Kristen McCormick, *Social Media Advertising in 2023: Costs, Types, Tips & Top Channels*, WORDSTREAM (Dec. 3, 2022), <https://www.wordstream.com/blog/ws/2022/07/18/social-media-advertising>.

## Recently Updated Rules for Internet Communication Disclaimers and the Need for Further Changes

Until last month the Commission’s rules governing disclaimers for online ads took no account of the rapid expansion of the Internet in daily life that has taken place over the past decade and a half. As we explained in two previous comments, the lack of effective disclaimer requirements for online ads prevented the electorate from making informed decisions on who to vote for and facilitated foreign interference in our elections.<sup>13</sup>

We applaud you for beginning to rectify this problem through the revisions to 11 C.F.R. 100.26 and 110.11 enacted in the Notice of Final Rule re: Internet Communication Disclaimers and Definition of “Public Communication” (“Internet Disclaimers Final Rule”), published December 19, 2022 (87 FR 77467). These changes revise the definition of “public communication” under the Federal Election Campaign Act (“FECA”)<sup>14</sup> to include communications that are “placed for a fee on another person’s website, digital device, application, or advertising platform” and incorporate that definition into a new category of communications that must carry disclaimers—“Internet public communications.”<sup>15</sup>

These changes are an important step, but until shortly before the Commission adopted the Internet Disclaimers Final Rule, it appeared that the Commission would also include language explicitly requiring disclaimers for communications that were “*promoted* for a fee” on another person’s website, digital device, application, or advertising platform.<sup>16</sup>

We believe it is important to incorporate this paid promotion language into the Commission’s disclaimer rules. The current rules, while a significant improvement, do not provide the regulated community or the wider public with clear guidance as to how the disclaimers will apply to newer methods of online campaign communication, including those in which an advertiser might not literally be paying a fee to place content

---

<sup>13</sup> See Ltr. from Brennan Center re: REG 2011-02, Internet Communication Disclaimers (Nov. 13, 2017) at 2–4, <https://www.brennancenter.org/our-work/research-reports/brennan-center-comment-fec-internet-communication-disclaimers>; Ltr. from Brennan Center re: REG 2011-02, Internet Communication Disclaimers (May 25, 2018) at 2–4, <https://www.brennancenter.org/our-work/research-reports/comment-fec-internet-communications-disclaimers>.

<sup>14</sup> 52 U.S.C. 30101 *et seq.*

<sup>15</sup> Internet Disclaimers Final Rule at 77478–79.

<sup>16</sup> REG 2011-02 (Draft Final Rule and Explanation and Justification for Internet Communication Disclaimers), Draft A (Nov. 10, 2022) at 45–46 (emphasis added).

on a website, digital device, application, or advertising platform.<sup>17</sup> There is no principled distinction between these newer methods of paid communication and typical online ads where the Commission’s disclaimer rules unambiguously apply. In all cases, an advertiser is paying to disseminate a covered political message.<sup>18</sup>

If anything, the need for clear disclaimers is even greater for nontraditional advertising that resembles organic content. Take, for instance, the Cameo video that Nicole Polizzi—better known as “Snooki” from the reality television show *Jersey Shore*—was paid to make on behalf of John Fetterman’s 2022 campaign for the U.S. Senate from Pennsylvania.<sup>19</sup> In the video, Snooki addresses a humorous monologue to Fetterman’s opponent, Dr. Mehmet Oz, emphasizing one of Fetterman’s main campaign themes, namely that Dr. Oz was really from New Jersey, not Pennsylvania.<sup>20</sup> The video, widely lauded for its effectiveness, bears no resemblance to a traditional campaign ad, and could easily have left some viewers with the impression that Snooki was trolling Dr. Oz of her own accord. Other methods, like paying an influencer to share a campaign’s organic content or paying an online platform to boost that content in search results, might also be harder to recognize as paid communications than a typical online ad. Campaigns and other political advertisers have every right to use these methods to reach the public, but as with other types of advertising, voters deserve to know who is seeking to influence them.<sup>21</sup>

As the Commission explained in detail in its explanation and justification to the Internet Disclaimers Final Rule, the revised disclaimer regulations already draw a careful balance between the need for transparency in political communications and the imperative to avoid unnecessary burdens on online speech.<sup>22</sup> Addition of the language proposed in the SNPRM would do nothing to disrupt this balance—it would simply

---

<sup>17</sup> See Ltr. from Campaign Legal Center re: REG 2011-02 (Final Rule and Explanation and Justification for Internet Communication Disclaimers) – Drafts A and B (Nov. 30, 2022) at 2.

<sup>18</sup> The fact that the message may in some cases have been created by a third party (as in the case of influencer generating content) is irrelevant—traditional political ads often are also created by third parties, such as ad agencies, whom the advertiser has hired.

<sup>19</sup> Scottie Andrew, *Snooki got dragged into the Pennsylvania Senate race to troll Dr. Oz*, CNN (July 15, 2022), <https://www.cnn.com/2022/07/15/entertainment/snooki-cameo-dr-oz-john-fetterman-ccc/index.html>.

<sup>20</sup> *Id.*

<sup>21</sup> As the Federal Trade Commission notes in its guidance requiring online influencers to disclose their financial relationships with product or service providers they endorse, disclosure “is important because it helps keep your recommendations honest and truthful, and it allows people to weigh the value of your endorsements.” *Disclosures 101 for Social Media Influencers*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers> (last visited Jan. 9, 2023). The same logic applies here, given the analogous relationship of political advertisers to product or service providers.

<sup>22</sup> See generally Internet Disclaimers Final Rule at 77474–75.

ensure that the Commission’s rules better reflect the political advertising landscape of 2023. Doing so would be fully consistent with the FECA’s broad disclaimer requirements for public campaign communications as repeatedly upheld by the Supreme Court.<sup>23</sup> We urge you to take this important step.<sup>24</sup>

Respectfully submitted,

/s/

---

Daniel I. Weiner  
Harry Isaiah Black

---

<sup>23</sup> See 52 U.S.C. § 30120(a); *Citizens United v. Federal Election Commission*, 558 U.S. 310, 366 (2010) (Disclaimer and disclosure requirements “do not prevent anyone from speaking” and “help citizens ‘make informed choices in the political marketplace’”) (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 197, 201 (2003) (other quotations omitted)).

<sup>24</sup> Two issues that the Commission left open are whether it should also require disclaimers for public internet communications placed or promoted for a fee on a “service” and whether there are any such communications that are too small or impracticable to require disclaimers. These issues might need to be addressed in a subsequent rulemaking as the online advertising landscape continues to develop.