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Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: FEC Comments on the Use of GenAI in Campaigns

Dear Federal Election Commission:

ArentFox Schiff is pleased to submit the following comments to the Federal Election Commission's Notice of Availability concerning the potential for Generative Artificial Intelligence (GenAI) technology to create deceptive campaign advertisements. Our firm has been at the forefront of law, technology, and politics for many years, and agree the Commission should address this subject simply, and as quickly as possible, in the form of a rulemaking.

As the Commission knows, the Federal Election Campaign Act of 1971 (FECA) prohibits "persons" and committees from impersonating other "persons" or committees when making contributions, soliciting campaign contributions, filing campaign reports, or engaging in regulated campaign communications.   Although the misrepresentation statute covers the acts of "persons" it should not be read to exclude any particular method a person employs to disseminate misrepresentative speech. "The computer did it" should never be a defense.

Accordingly, we believe the Federal Election Commission should amend its regulation on fraudulent misrepresentation at 11 CFR 110.16 to make it clear that the section's prohibition applies not just to any person, but to any artificially-generated advertisement or solicitation created, used, or disseminated by that person.

That said, the challenges posed by AI technology cannot be solved by the Commission, alone. Congress could also act to protect voters from deceptive AI-generated content. For example, a bill introduced by Senators Klobuchar, Hawley, Coons and Collins would allow federal candidates who are the subject of deceptive GenAI content to have the content removed and to seek damages in federal court. The bill covers "individuals, political committees, or other entities that distribute materially deceptive content intended to influence an election or raise money fraudulently."[1] By prohibiting the distribution of materially deceptive content, rather than only

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[1] *Klobuchar, Hawley, Coons, Collins Introduce Bipartisan Legislation to Ban the Use of Materially Deceptive AI-Generated Content in Elections*, UNITED STATES SENATOR AMY KLOBUCHAR WORKING FOR THE PEOPLE OF MINNESOTA (September 12, 2023), https://www.klobuchar.senate.gov/public/index.cfm/2023/9/klobuchar-hawley-

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by "imposters," this legislative effort could give voters more confidence in the messages they are receiving.[2]

The FEC should examine how other federal agencies are addressing the challenges of artificial intelligence. For example, the Commission should participate in any coordinated federal effort requiring content produced by GenAI to include an indelible tag or digital ID that identifies the content as having been created by GenAI. This is in-line with the comments of an industry leader who has called for the regulation of GenAI to mitigate its misuse. In a recent Senate Judiciary subcommittee hearing, Sam Altman the CEO of OpenAI said the potential for AI-propagated disinformation and manipulation is a "significant area of concern" and urged a coordinated federal response.[3]

Amending the Commission's regulation could also empower social media platforms - who may have the ability to automatically detect if election-related content was created by GenAI - to require the labelling of that content as created by GenAI which could increase transparency and reduce the risk of viral misrepresentation. In fact, some social media platforms have already taken steps to prevent the proliferation of deepfakes and other misleading GenAI content. TikTok, for example, currently requires creators to specially label content that was produced by GenAI and is testing features to automatically apply an "AI-generated" tag to advertisements the platform detects that were created by GenAI.[4] Meta and X have policies that require the removal of content that has been manipulated to mislead the average person. Meta's policy explicitly covers content that was created by AI, specifically using deepfakes as an example of manipulated media.[5]

As this country approaches another presidential election, the FEC can play a simple, but critical role in protecting the general public from the dangers of misrepresentative GenAI content. The

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coons-collins-introduce-bipartisan-legislation-to-ban-the-use-of-materially-deceptive-ai-generated-content-in-elections.

[2] Speech that is misleading is much broader than speech that misrepresents someone's identity or authority – and the terms are not interchangeable. Misleading is defined by Merriam-Webster as possessing the capacity or tendency to create a mistaken understanding or impression. Misrepresenting, on the other hand, is part of the common law definition of fraud and is defined as making a false or misleading statement or a material omission which renders other statements misleading, with the intent to deceive. *Legal Information Institute*, CORNELL L. SCH., https://www.law.cornell.edu/wex/misrepresentation. An advertisement can be held to be misrepresentative even if the underling content is true.

[3] Diane Bartz, Zeba Siddiqui, and Jeffrey Dastin, *OpenAI Chief Concerned About AI Being Used to Compromise Elections*, TIME (May 16, 2023), https://www.reuters.com/technology/openai-chief-goes-before-us-congress-propose-licenses-building-ai-2023-05-16/.

[4] *New Labels for Disclosing AI-generated Content* (September 19, 2023), https://newsroom.tiktok.com/en-us/new-labels-for-disclosing-ai-generated-content.

[5] *Misinformation*, META TRANSPARENCY CENTER (September 28, 2023), https://transparency.fb.com/policies/community-standards/misinformation/.

Commission should make it clear that a "person" will always be held responsible for ads or solicitations that violate the existing prohibition against fraudulent misrepresentation.

Sincerely,

Dan Jasnow
Partner

Craig Engle
Partner