



Lisa J. Stevenson
Acting General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Submitted Electronically

RE: Comment on REG 2013-01: “Technological Modernization”

Dear Ms. Stevenson,

Campaign Legal Center (“CLC”) respectfully submits this comment in response to the Commission’s recent request for additional comments regarding the Notice of Proposed Rulemaking on “Technological Modernization,” 87 Fed. Reg. 54,915 (Sept. 8, 2022).

The Commission initiated this rulemaking in 2013, nearly ten years ago, to “update its regulations to reflect *recent* technological advances.”¹ It goes without saying that the need for such updates has only grown exponentially over the past decade. Because technology marches on, even as the Commission has remained idle, Commission regulations are now even further outdated. They not only refer to technologies long out of everyday use, like telegrams, typewriters, and fax machines. More problematically, the regulations fail to address some of the most common technologies that are in use, every election, by campaigns and PACs to raise and spend money and influence voters, such as streaming media channels and internet-powered apps and social media. The FEC’s failure to adequately address the money being spent through these new technological media inflicts real harm on the public each election cycle.

How the Commission defines a “public communication” is a particularly important issue, where the Commission must amend its regulations to keep pace with the modern world. A growing share of the American electorate does not consume information or entertainment via “broadcast, cable, or satellite”

¹ See “Technological Modernization,” 85 Fed. Reg. 25,365 (May 2, 2013) (emphasis added).

television,² let alone newspapers or magazines, but through streaming platforms — *i.e.*, “over-the-top” or “OTT” media, which bypasses networks and cable providers and is offered directly to consumers.³ Indeed, a recent report indicated that in 2021, for the first time, “the number of Americans streaming TV content (83%) actually surpassed those watching live TV (81%).”⁴ CLC provided this report to the Commission in a separate comment regarding a different (though certainly related) FEC rulemaking, “REG 2011-02 – Internet Communication Disclaimers,” where we also noted that the Commission’s regulations have not kept pace or offered “even the most basic guidance” on whether these new technologies are covered by the Federal Election Campaign Act or existing FEC regulations.⁵

Likewise, in this rulemaking, CLC previously filed a comment in 2016 that emphasized the need to update the definition of a “public communication”⁶ to encompass “not only communications placed for a fee on another person’s ‘Web site,’ but also paid communications on an ‘internet-enabled device of application.’”⁷ As the Commission has not taken any of the actions we urged six years ago, its regulations still sorely need amending to close loopholes, including, *e.g.*, the archaic “internet exemption,”⁸ which is increasingly abused by super PACs and candidates to openly coordinate the super PACs’ electoral spending on the candidates’ behalf.⁹

We therefore continue to urge the Commission to amend the definition of “public communication” to make clear that expenditures beyond a de minimis amount for Internet-based communications are not exempt simply because the final product is published on the Internet (including through both web pages and internet-powered streaming media, applications and social media).

The outmoded definition of “public communication” also unlawfully undermines the Commission’s disclaimer requirements. As Americans

² 11 C.F.R. § 100.26.

³ See Streaming TV and the Political Market: Navigating CTV Advertising in the 2022 Campaign Cycle, Campaigns & Elections (May 2022), <https://campaignsandelections.com/navigating-ctv-advertising-in-the-22-campaign-cycle/>.

⁴ *Id.* at 2.

⁵ CLC Comment re: REG 2011-02 – Internet Communication Disclaimers (May 17, 2022), <https://sers.fec.gov/fosers/showpdf.htm?docid=417853>.

⁶ See 11 C.F.R. § 100.26.

⁷ CLC Comment re: REG 2013-01 – Technological Modernization (Dec. 2, 2016) at 1, <https://sers.fec.gov/fosers/showpdf.htm?docid=354002>.

⁸ Commission regulations currently exempt from the definition of “public communications” any “communications over the Internet, except for communications placed for a fee on another person’s Web site.” 11 C.F.R. § 100.26.

⁹ See, *e.g.*, Saurav Ghosh, Voters Need to Know What “Redboxing” Is and How It Undermines Democracy (May 13, 2022), <https://campaignlegal.org/update/voters-need-know-what-redboxing-and-how-it-undermines-democracy>.

increasingly consume information and entertainment over streaming platforms and internet-powered applications (instead of websites or web pages), campaigns and PACs have swiftly adapted to those changing preferences by shifting their voter outreach and influence efforts to these new technologies. Meanwhile, the Commission's disclaimer regulations have not evolved, leaving a major regulatory gap through which ads placed on streamers and apps may not disclose who is paying for them or who is responsible for their content. Again, this regulatory failure to keep pace with technology is harming voters, who will be left in the dark about who is paying for, and responsible for the content of, the political ads they see while streaming shows and browsing apps.

In sum, the concerns we raised in 2016 have only grown more urgent over the past six years, and the need for Commission action is even more pressing. By definition, updating regulations to account for recent technological developments simply cannot take years, let alone nearly a decade. If the Commission is to fulfill its statutory mandate to protect voters by meaningfully regulating the torrents of money being spent to influence elections, it must address the novel channels through which that money is flowing.

CLC respectfully urges the Commission to act now, and thank the Commission for the opportunity to submit this comment.

Sincerely,

/s/ Saurav Ghosh

Saurav Ghosh

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