



January 9, 2023

Federal Election Commission
1050 First St. NE
Washington, DC 20463

Re: REG 2013-01 (Technological Modernization)

Dear Commissioners:

Campaign Legal Center (“CLC”) respectfully submits this comment on the Federal Election Commission’s (the “FEC” or “Commission”) recent update to REG 2013-01 (Technological Modernization). We fully support the Commission’s effort to modernize its regulations in ways that clarify political committees’ regulatory obligations when using new and emerging technologies and advertising tactics to reach voters. In that vein, as we previously emphasized in our recent comments on the Internet Disclaimer rulemaking,¹ it is important that the Commission ensure internet communications “promoted for a fee” include disclaimers that provide voters with statutorily required sponsorship information.

Political Committees and “Promoted” Content

In recent election cycles, candidates and committees have increasingly sought to reach voters through promoted content. For instance, Senate candidate John Fetterman’s “Snooki ad” — a Cameo video² featuring Nicole Polizzi a/k/a “Snooki,” the well-known reality television star of “Jersey Shore” — was one of the most talked-about communications of the 2022 election cycle, demonstrating just how effective it can be to work with influencers.³ Future candidates will surely take note. Though the Fetterman campaign paid for Snooki’s Cameo video, the video appeared to be Snooki simply recording herself needling Fetterman’s general election

¹ CLC Comment, REG 2011-02 (Final Rule and Explanation and Justification for Internet Communication Disclaimers) – Drafts A and B (Nov. 30, 2023).

² See *Cameo Is Where You Can Connect with Your Favorite Stars*, CAMEO, <https://www.cameo.com/about> (last visited Jan. 6, 2023) (explaining that the Cameo website allows users to purchase personalized video messages from a variety of celebrities).

³ Chris Cioffi, *To Cameo or Not to Cameo? That’s the Question for Political Campaigns*, ROLL CALL (Aug. 3, 2022), <https://rollcall.com/2022/08/03/to-cameo-or-not-question-for-political-campaigns/>.

opponent, Dr. Mehmet Oz, for the entertainment of her millions of followers on various social media platforms. Absent a disclaimer statement, viewers of the “Snooki ad” may have had no idea it was paid political advertising.

Promoted political content can take several forms. One popular option is to pay “influencers” — individuals that have amassed a sizable following on social media that advertisers will pay the influencer to reach — to convey a message in their own voice to their followers on social media platforms, like Instagram, Twitter, and Tik Tok. In the leadup to the 2022 midterm elections, the *New York Times* reported on the prevalence of this tactic, noting that is often unclear from committees’ disclosure reports that the committees are paying influencers “because PACs and campaigns typically pay firms that then contract to work with influencers.”⁴ When committees work with influencers, the financial transaction between the two parties may be nearly invisible — and in some cases, that financial connection may be deliberately concealed.

Beyond using influencers to create content, political committees can leverage influencers’ ability to reach a wider audience by paying them to republish committee-produced content. For example, an influencer might retweet a political committee’s tweet, thereby not only conveying the influencer’s overt approval of the message but reaching a wider and more diverse audience that might not otherwise receive the committee’s communications. Yet without a disclaimer that the influencer is being paid to promote this content, viewers might reasonably be left with the misleading and false impression that the influencer is organically supporting the committee’s message, instead of being hired to advertise on the committee’s behalf.

Political committees also frequently pay media platforms (e.g., Meta/Facebook) directly to promote content. If a political campaign sees an article or op-ed that comments positively on its candidate, it can pay social media platforms to push the article to users’ news feeds, increasing its visibility. Similarly, a committee can “boost” posts on its own page so that they reach a wider audience than the committee’s existing followers.⁵ As with influencer communications, absent disclaimers, viewers might reasonably conclude that this boosted or promoted content is organic, when in reality it is targeted to them as part of a financial transaction, like any other kind of political advertising.

The common thread with these different types of “promoted” political content is that without a disclaimer on the communication, a viewer is unaware that they are seeing paid political advertising. Even for someone who delves into FEC disclosure reports, it is unlikely that a committee’s disclosures would reveal any meaningful information about these particular communications (because, as noted above, the

⁴ 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/influence-rs-political-ads-tiktok-instagram.html>.

⁵ See *About Boosted Posts*, META, <https://www.facebook.com/business/help/240208966080581?id=352109282177656> (last visited Jan. 5, 2023).

committee's payments might well be to a media consultant working with multiple promoters or promotion agencies).

Requiring disclaimers on promoted content is the simplest and least burdensome way to protect voters, ensuring they are clearly informed when they are viewing paid political advertising through promoted content — information that is vital in assessing the credibility of that advertising.

Internet Communications in the Age of Influencers

When the FEC updated its rules for internet communication disclaimers at the end of 2022, the final rule unwisely excised the specific “promoted” language in the rule, but the more general language of the new rule seems to apply to promoted content, and mandatory disclaimers for such content are alluded to in the Explanation and Justification.⁶ As such, while the existing rule appears to cover promoted content, explanatory material in the Explanation and Justification is easily overlooked, so the Commission should clarify the requirement by adding an explicit reference to paid promoted content. This would both clarify the rule for the regulated community and better protect voters' informational rights. There should be no ambiguity about whether these kinds of communications require disclaimers and can be treated as coordinated communications, and the Commission's current proposal would achieve that goal.

To not specifically mention communications “promoted for a fee” in the FEC's regulations would represent a clear disconnect from the reality of advertising practices in the 2024 election cycle and for the foreseeable future. Political advertisers can ill afford to ignore the market power of influencers and the paid promotion of content. As observers have widely recognized, the influencer industry is a multibillion-dollar business. At the beginning of 2022, *Forbes* estimated that advertisers would spend \$15 billion on influencer marketing over the course of the upcoming year.⁷

On the other end of the transaction, many influencers are professionals who make a lucrative full-time living through their social media activities; this is, for many, a career, not a weekend hobby. It is not unusual for influencers with smaller numbers of followers to earn six-figure yearly salaries.⁸ Some even have contracts through media agencies to facilitate relationships with advertising customers.⁹ Other regulators have responded to this burgeoning industry with rules and guidance that

⁶ Internet Communication Disclaimers and Definition of “Public Communication,” 87 Fed. Reg. 77467, 77471 (Dec. 19, 2022).

⁷ Ismael El Qudsi, *The State of Influencer Marketing: Top Insights for 2022*, FORBES (Jan. 14, 2022), <https://www.forbes.com/sites/forbesagencycouncil/2022/01/14/the-state-of-influencer-marketing-top-insights-for-2022/?sh=649eb1595c78>.

⁸ Sydney Bradley, *How Much Money Instagram Influencers Make*, BUSINESS INSIDER (Dec. 23, 2022), <https://www.businessinsider.com/how-much-money-instagram-influencers-earn-examples-2021-6>.

⁹ Lai, *supra* note 4.

reflect its growing market power, and the public disclosure obligations that should accompany that power.¹⁰

It would be a mistake for the Commission to conflate professional influencers that are paid to promote content with casual bloggers organically expressing their personal views on political issues and candidates in their spare time. Influencers are the central element of a novel, highly structured, lucrative advertising market that operates much like the traditional advertising business. Failing to treat the influencer industry accordingly would mean condemning the Commission's new disclaimer rule to being antiquated at its inception.

Conclusion

After more than a decade of effort, the Commission made meaningful improvements to its regulations at the end of 2022 by expanding the definition of “public communication” and the disclaimer requirements for such communications, finally recognizing the many new forms of online technology that have become commonplace tools for political advertisers. The Commission now has a chance to complete its modernization efforts by explicitly including communications “promoted for a fee” in those regulations.

As demonstrated herein, paid promotions generally, and the influencer industry in particular, are well-established institutions that already play a huge part in the online advertising market — earning billions of dollars along the way. Political committees turn to various types of promotions to communicate their messages to larger audiences and their concurrent disclosure obligations when doing so should be made crystal clear.

To protect the public from confusion about who is paying not only to produce, but to promote, these communications, and to ensure the FEC is remaining current in its application of statutory requirements to modern technology and political practices, it must add the proposed “promoted for a fee” language into its technological modernization package.

¹⁰ The Federal Trade Commission (“FTC”) acted years ago to develop a robust set of guidelines for people who promote commercial products on social media. The FTC instructs influencers to prominently disclose their relationship to a brand in any message endorsing the brand. See *Disclosure 101 for Social Media Influencers*, FTC, <https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers> (last updated Nov. 2019).

Respectfully submitted,

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