

Policy Backgrounder: FEC Interpretive Rule on AI in Political Ads

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The rapid growth in the quantity and sophistication of generative-artificial intelligence (AI) is cause for concern as the November elections grow nearer, especially given the absence of federal legislation regulating the use of deepfakes – realistic yet fabricated media – in political ads, an issue CED examined in our Policy Backgrounder [Regulating Political Deepfakes](#).

Last week, the Federal Election Commission (FEC) issued an [Interpretive Rule](#) clarifying that artificial intelligence (AI) falls under existing regulations issued under the Federal Election Campaign Act (FECA) barring fraudulent misrepresentation. The Commission voted 5-1 on the [compromise](#) drafted by Democratic Commissioners Dara Lindenbaum and Shana Broussard and Republican Commissioners Trey Trainor and Allen Dickerson. The move replaces the prospect of new rulemaking following a petition submitted by nonprofit advocacy group Public Citizen in May 2023.

- The FEC's action is similar to that of other agencies. In July, the Federal Communications Commission (FCC) issued a [Notice of Proposed Rulemaking](#) to require on-air and written disclosure of AI-generated content in radio and television political ads. However, the FCC does not have jurisdiction over streaming video or digital platforms, potentially limiting the impact of the proposal. The agency in February issued a [Declarative Ruling](#) classifying AI-generated robocalls under the same standards as the Telephone Consumer Protection Act (TCPA), effectively making them illegal without prior customer consent. FDA has also [approved](#) medical devices using software that employs artificial intelligence/machine learning under its 510(k) premarket clearance authority rather than requiring new medical device approval applications.
- There is a lack of evidence suggesting that the use of generative-AI affects actual electoral outcomes; rather, the major threat regarding deepfakes lies with increasing polarization and [undermining credibility](#) in institutions.
- While the FEC's action applies only to US persons, in this election [Russia](#), [Iran](#), and [China](#) are [using AI tools](#) to further divide Americans ahead of the election. For instance, Microsoft determined that a recent viral video featuring an actress falsely claiming that Vice President Kamala Harris had injured her in a hit-and-run was a product of Russian propaganda.

FEC Foregoes New Rulemaking

The Federal Election Commission (FEC) on September 19 issued an [Interpretive Rule](#) clarifying that artificial intelligence (AI) falls under existing regulations barring fraudulent misrepresentation. The notice from the Commission clarifies that [52 U.S.C. 30124](#), the fraudulent misrepresentation statute and regulation of the Federal Election Campaign Act (FECA), is “technology neutral” and therefore already applies to fraud “accomplished using AI-assisted media.” “The Commission believes that this interpretation of its statute and attendant regulation will clarify the scope of 52 U.S.C. 30124 in connection

with evolving technology, including AI-assisted media and future developments that remain unknown and unpredictable[.]”

In May 2023, Public Citizen submitted a [petition for rulemaking](#) to the FEC to clarify in a new rulemaking that “fraudulent misrepresentation of campaign authority” applies to deliberately deceptive AI campaign ads. In August 2023, the FEC [began its process](#) to potentially regulate AI-generated deepfakes in political ads, voting to advance Public Citizen’s petition. The published Notice of Availability [received over](#) 2,000 comments in response from Members of Congress, political party committees, and groups across the ideological spectrum. However, the FEC is a divided body comprised of six Commissioners, three Republicans and three Democrats, requiring that at least four Commissioners (and therefore at least one from each political party) vote to advance a rulemaking. The divided nature of the FEC has made action difficult in the past, making the task of new rulemaking before the November election highly unlikely.

A Compromise for a Divided Commission

Issuing the Interpretive Rule was an alternative to new rulemaking on AI, with the Commission voting 5-1 to approve a [compromise](#) drafted by Democratic Commissioners Dara Lindenbaum and Shana Broussard and Republican Commissioners Trey Trainor and Allen Dickerson. Commissioner Lindenbaum called the move “one of those instances where the FEC has worked.” FEC Chair Republican Sean Cooksey, who issued the one dissenting vote, had pushed in August for an [initial draft](#) declining new rulemaking that did not include the interpretive rule. That draft noted that “the Commission lacks the statutory authority to promulgate the rule sought by the Petition.” In August, in an [editorial](#) in *The Wall Street Journal*, Cooksey argued that the FEC “[does not] have the experience or expertise to craft effective and appropriately tailored rules” and that “[d]efining the scope of regulatory authority is properly the job of Congress, not unelected bureaucrats.”

Robert Weissman, Co-President of Public Citizen, issued a [statement](#) criticizing the FEC’s decision not to issue a new rulemaking. “[T]he anemic FEC seems to have forgotten its purpose and mission, or perhaps its spine. The FEC’s new proposed ‘interpretative rule’ simply says that fraudulent misrepresentation law applies no matter what technology is used. That’s a resolution of a question that was never in doubt,” said Weissman. However, he added that the compromise proposal “at least leaves the question open” for future action.

A Role for Congress

In a [statement](#), Commissioners Lindenbaum and Broussard express hope that “Congress will move forward on proposed legislation that offers more comprehensive solutions, such as the series of bipartisan bills that were voted out of the Senate Committee on Rules and Administration this summer.” The statement also acknowledged the leading role played by states in the regulation of AI in the election space. As of September 2024, 20 states¹ have passed legislation on the issue, with 18 states [passing](#) bills or amendments this year.

The proposed bipartisan [Protect Elections from Deceptive AI Act](#), approved by the Senate Committee on Rules and Administration, would amend FECA to prohibit the distribution of materially deceptive AI-generated media relating to federal candidates in political ads or certain issue ads to influence a federal election or fundraiser. The bill, introduced by Senators Amy Klobuchar (D-MN), Josh Hawley (R-MO), Chris Coons (D-DE), and Susan Collins (R-ME), allows federal candidates targeted by deceptive AI-generated media to have such content taken down and to seek damages in federal court. Another prominent bipartisan bill on the issue is the proposed [Honest Ads Act](#) introduced by Senators Amy

¹ AL, AZ, CA, CO, FL, HI, ID, IN, MA, MI, MN, MS, NH, NM, NY, OR, TX, UT, WA, WI

Klobuchar (D-MN), Lindsey Graham (R-SC), and Mark Warner (D-VA) would require online political ads to adhere to the same disclaimer requirements as TV, radio, and print ads. Other prominent legislation includes the proposed [REAL Political Advertisements Act](#) which would require disclosures of AI-generated media as well as the [DEEP FAKES Accountability Act](#) which would require watermarked disclosures on this content as well as establish a task force to advance public-private efforts in developing deepfake detection technologies.

On September 17, Representatives Adam Schiff (D-CA), Brian Fitzpatrick (R-PA), Derek Kilmer (D-WA), and Lori Chavez-DeRemer (R-OR) introduced the [AI Ads Act](#). The bipartisan bill would amend FECA to clarify that the prohibition of fraudulent misrepresentation of political candidates or committees includes misrepresentation through the use of AI-generated content. “As AI tools begin to change political advertising in profound ways, our laws must adapt in turn,” said Representative Schiff. Last year, Schiff led a [letter](#) to the FEC in support of their decision to advance Public Citizen’s request for rulemaking.

Conclusion

While there is growing bipartisan interest in Congress on the need for AI guardrails in political ads, federal legislation has not yet advanced to floor action. However, the bipartisan nature of these efforts to establish these guardrails, particularly in the Senate, highlights that concerns over AI-induced disinformation transcends party lines. The FEC’s interpretive rule on the use of AI in campaign ads is part of a wider effort to regulate harmful uses of AI within the limits of their existing authority. Still, the lack of a new rulemaking does not come as a surprise, both because of the divided nature of the FEC and the proximity to the November elections.

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