

# THE MISSING STRUCTURAL DEBATE: REFORMING DISCLOSURE OF ONLINE POLITICAL COMMUNICATIONS

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*The Federal Election Commission (FEC), the nation’s campaign finance regulator, is charged with administering one of America’s fundamental anti-corruption measures: disclosure and disclaimer requirements for political communications. The FEC has come under attack for failing to enforce its disclosure laws against the Internet Research Agency, the Russian-based organization recently indicted for meddling in American elections through use of online political propaganda. Had the FEC properly enforced the disclosure laws, it could have armed the millions of Americans who viewed Internet Research Agency advertisements with critical information to take to the polls. Efforts to address this campaign finance failure have coalesced around the Honest Ads Act, a bill that proposes substantive changes to the campaign finance disclosure rules. This Note argues that the Honest Ads Act mischaracterizes the problem that led to the FEC’s regulatory failure, and offers another explanation: the structural problems that have led to agency inaction and capture. This Note explores FEC inaction and capture and begins to develop a legislative alternative to the Honest Ads Act.*

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## INTRODUCTION

The Federal Election Commission (FEC), one of three agencies with the jurisdiction to pursue enforcement actions against foreign nationals meddling in American elections,<sup>1</sup> has recently come under scrutiny for failing to require disclosure of online political advertisements generated by the Russia-based Internet Research Agency.<sup>2</sup> Facebook estimates that during the 2016 election cycle, approximately 126 million people viewed politically-related content that the Internet Research Agency either generated or bought.<sup>3</sup> Twitter found 36,746 automated accounts with links to the Russian organization. Those accounts produced 1.4 million tweets about the 2016 elections and were viewed 288 million times.<sup>4</sup> Google also found two Internet Research Agency accounts that bought online advertisements with political content, in addition to eighteen election-related YouTube channels, which can be traced to the same organization.<sup>5</sup> During the 2016 election, the FEC did not bring any enforcement actions against the Internet Research Agency. In fact, they did not even detect

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<sup>1</sup> The other two agencies are the Department of Justice and the Department of State. See *Indictment at 11–12, United States v. Internet Research Agency, LLC*, No. 1:18-cr-00032-DLF (D.D.C. Feb. 16, 2018).

<sup>2</sup> See Simon Shuster, *Robert Mueller's Indictment Could Be a Win for Russia's Trolls*, TIME (Feb. 21, 2018), <http://time.com/5168104/mueller-indictment-russia-troll-factory-help/> (describing how the Russia-based Internet Research Agency used fake social media accounts to interfere in American elections).

<sup>3</sup> *Hearing Before the H. Permanent Select Comm. on Intelligence*, 114th Cong. 4–5 (2017) (statement of Colin Stretch, General Counsel, Facebook).

<sup>4</sup> *Hearing Before S. Select Comm. on Intelligence*, 114th Cong. 9–10 (2017) (statement of Sean J. Edgett, Acting General Counsel, Twitter, Inc.).

<sup>5</sup> *Id.* at 3 (statement of Kent Walker, Senior Vice President and General Counsel, Google).

Russian infiltration of American elections through online communications.<sup>6</sup>

Criticism of the FEC's inaction has so far focused on the FEC's online disclosure rule, which requires disclaimers on ads and regular reports to the FEC for content produced or posted online for a fee.<sup>7</sup> Senators Amy Klobuchar and Mark Warner, for example, proposed the Honest Ads Act, the leading solution on this issue.<sup>8</sup> The Honest Ads Act would bring the online communications disclosure rule in line with the FEC's more expansive regulations governing radio, television, and print advertisements.<sup>9</sup> But the focus on substantive changes overlooks that the Commission still failed to regulate the Internet Research Agency's activities using other provisions prohibiting election activities by foreign nationals, and did not even investigate more than 3000 paid Facebook and Google political advertisements, viewed by over 11 million people.<sup>10</sup> The problem underlying the FEC's regulatory failure is larger than its leading critics describe.

This Note argues that the FEC's failure to detect and enforce against Russian political online communications is due to inaction and capture, two issues that stem from structural, not substantive, issues at the FEC. Part I of the Note provides background on the FEC, campaign finance disclosure laws, and the Honest Ads Act. I conclude that the substantive insufficiency of disclosure rules does not adequately describe what caused the FEC's failure to regulate foreign

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<sup>6</sup> The FEC only publishes materials of closed cases. See *Enforcing Federal Campaign Finance Law*, FED. ELECTION COMM'N, <https://www.fec.gov/legal-resources/enforcement/> (last visited Feb. 12, 2018) [hereinafter *Enforcing Federal Campaign Finance Law*] (“[A]ll enforcement cases must remain confidential until they're closed.”). A simple search for matters opened during the 2016 election cycle with “Internet Research Agency” as respondents yielded no results. See *Matters Under Review*, FED. ELECTION COMM'N, <https://www.fec.gov/data/legal/search/enforcement/> (last visited Feb. 12, 2018) (To replicate the search, go to the link and type in “Internet Research Agency” in the “MUR Respondents” box).

<sup>7</sup> See *infra* Section I.B (discussing the rules governing disclosure of online political communications).

<sup>8</sup> See Honest Ads Act, S. 1989, 115th Cong. (2017).

<sup>9</sup> See *id.* at 8–16.

<sup>10</sup> Nancy Scola & Ashley Gold, *Facebook: Up to 126 Million People Saw Russian-Planted Posts*, POLITICO (Oct. 30, 2017, 6:12 PM), <https://www.politico.com/story/2017/10/30/facebook-russian-planted-posts-244340>. Had the FEC detected this infiltration, it could have, for instance, brought an enforcement action against the Internet Research Agency. See 52 U.S.C. § 30121(a) (2015) (prohibiting foreign nationals from using funds for electioneering communications or expenditures). If an investigation had illuminated the requisite evidence, the FEC could have also prosecuted the Internet Research Agency for failing to register and report to the Commission as a political committee. See 52 U.S.C. § 30101(4) (2015) (defining “political committee” as any group that receives contributions or makes expenditures in excess of \$1000 during a calendar year).

meddling. The Honest Ads Act's substantive solutions therefore inadequately address the problem. As an alternative explanation for the FEC's failure, Part II identifies two problems related to agency structure, inaction, and capture. The argument in Part II proceeds in two sections. The first section develops the concept of FEC inaction through an examination of recent FEC Internet communications rulemaking efforts, and the FEC's structure and procedures. I show that FEC inaction, the result of older design features intended to insulate the Commission from partisan influences, contributed to the FEC's failure to regulate the Internet Research Agency. The second section discusses a new phenomenon that stems from agency inaction: capture by new political actors such as 501(c)(4) organizations and online platforms. I argue that the mechanisms that insulate the FEC from partisan influence, which led to FEC inaction, have also left the FEC vulnerable to capture by groups that the FEC's designers could not have anticipated.

Although the majority of this Note is dedicated to uncovering the true causes of the FEC's regulatory failure, Part III offers an alternative legislative solution to the Honest Ads Act. In particular, I propose that Congress pass a bill that addresses both inaction and capture. However, congressional action is not a silver bullet. This Part also acknowledges the shortcomings of a congressional solution and offers other possibilities. In putting several options on the table, Part III urges reformers to think about the whole system of campaign finance administration, especially structural issues at the FEC, in fashioning a solution to digital foreign interference in American elections.

At the outset, I note that the discussion below is limited to the Internet Research Agency and election meddling from a campaign finance perspective. I do not take on the full panoply of issues related to Russian interference in American democracy, nor do I argue that effective disclosure would have eliminated foreign interference in the 2016 elections. But the FEC's regulatory failure did contribute to a democratic crisis. Had the FEC properly enforced its rules, it could have reported the Russian interference to the Department of Justice for criminal proceedings earlier in the election cycle and provided critical information to voters, watchdog organizations, and investigative journalists.

Disclosure is also fundamental to our democracy in other ways. Because of drastic changes in the law,<sup>11</sup> disclosure remains one of the

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<sup>11</sup> Courts have struck down several campaign finance laws over the past twenty years, with some of the most drastic legal changes occurring in the last ten years. In the now infamous *Citizens United v. FEC*, the Supreme Court struck down independent expenditure restrictions for corporations and unions. See *Citizens United v. Fed. Election*

only remaining anti-corruption measures in money and politics.<sup>12</sup> Disclosure has therefore become an increasingly important tool for the FEC, campaign finance reformers, and good government groups in particular. It will be even more critical as online platforms become home to a larger share of political advertisements. Most importantly, disclosure forms a fundamental basis for free and fair elections. Disclosure provides valuable information to voters making decisions about the ballot.<sup>13</sup> At the individual level, disclosures and disclaimers provide an average citizen with the tools to assess a political advertisement or communication. Collectively, information about political spending also improves the quality of civic participation.<sup>14</sup> Through the data that the FEC collects, we have more insight about who is involved in campaign funding and electoral advocacy, and we can use that information to engage in more informed debates about the features and future of our democracy.<sup>15</sup> Finally, disclosure plays a symbolic role. It sends the deep, resounding message that foreign or corrupt influences cannot hide from voters in plain sight.

## I

### THE SUBSTANTIVE PROBLEM IS A MISCONCEPTION

The leading campaign finance proposal addressing online foreign meddling in U.S. elections involves substantively amending the digital communications disclosure rule, but that will not be enough. This Part demonstrates why rule reform will not assist the FEC in preventing,

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Comm'n, 558 U.S. 310, 365–66 (2010) (striking down Bipartisan Campaign Reform Act § 203 which prohibited corporate and labor union disbursements for electioneering communications as well as the Federal Election Campaign Act's general restrictions on corporate independent expenditures). Courts have eliminated some contribution-related provisions as well. For instance in 2014, the Supreme Court ruled in *McCutcheon v. FEC* that the Bipartisan Campaign Reform Act limits on an individual's aggregate contributions to federal candidates in a single election year were unconstitutional. *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1442 (2014).

<sup>12</sup> Changes to campaign finance law, as a result of litigation, have elevated the role of disclosure laws, one of the remaining anti-corruption measures in campaign finance. See *infra* note 30 (discussing the Supreme Court's repeated upholding of disclosure laws, despite finding other campaign finance laws unconstitutional).

<sup>13</sup> See Jennifer A. Heerwig & Katherine Shaw, *Through a Glass, Darkly: The Rhetoric and Reality of Campaign Finance Disclosure*, 102 GEO. L.J. 1443, 1465 (2014) (noting that "disclosure may aid the electorate by informing an analysis of candidate positions").

<sup>14</sup> Greater campaign finance transparency also increases legislator responsiveness to their constituents. See Abby K. Wood & Christian R. Grose, *Campaign Finance Transparency Affects Legislator's Election Outcomes and Behavior* 4 (USC Gould Sch. of Law Ctr. of Law and Soc. Sci., Legal Studies Research Paper Series No. 18–24, 2018) (finding incumbents seeking reelection whose audits revealed violations took more trips home to their districts).

<sup>15</sup> See *id.* (noting a general public interest in disclosure that would inform the public about the way our political system works).

detecting, or sanctioning future foreign involvement in American elections. Through a brief discussion of the FEC's powers, procedures, and disclosure rules, I show that, contrary to popular reform proposals like the Honest Ads Act, a substantive explanation for and solution to the FEC's regulatory failure is inadequate.<sup>16</sup>

### A. *The FEC: Powers and Procedures*

In order to understand how substantive changes to disclosure rules would not fully address the FEC's failure to enforce its regulations, it is important to understand the FEC and its enforcement powers. In reaction to the Watergate scandal, Congress passed the 1974 amendments to the Federal Election Campaign Act (FECA), which established the Federal Election Commission, an independent agency tasked with enforcing Federal Election Campaign Act.<sup>17</sup> The FEC is a unique agency headed by six Commissioners, each of whom must be appointed by the President and confirmed by the Senate.<sup>18</sup> No more than three Commissioners can be members of the same political party, but "at least four votes are required for any official Commission action."<sup>19</sup> Commissioners are appointed for staggered six-year terms.<sup>20</sup>

The Commission is required to meet at least once a month.<sup>21</sup> In meetings closed to the public, the FEC discusses enforcement actions.<sup>22</sup> Third parties generally initiate these actions through a formal complaint, although the FEC may also pursue matters on its own.<sup>23</sup> If the FEC finds a respondent in violation of its rules, it may issue a civil penalty.<sup>24</sup> In certain circumstances, the FEC may also refer the violation to the Department of Justice, which may initiate a

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<sup>16</sup> See *infra* Section I.C (discussing the components of the Honest Ads Act, the leading reform proposal on the issue).

<sup>17</sup> See 52 U.S.C. §§ 30106–30107 (2015) (describing the powers of the FEC).

<sup>18</sup> *Leadership and Structure*, FED. ELECTION COMM'N, <https://www.fec.gov/about/leadership-and-structure/> (last visited Dec. 11, 2017).

<sup>19</sup> *Id.*

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

<sup>21</sup> FED. ELECTION COMM'N, COMM'N DIRECTIVE NO. 10, 1 (2007).

<sup>22</sup> See *Enforcing Federal Campaign Finance Law*, *supra* note 6.

<sup>23</sup> See R. SAM GARRETT, CONG. RESEARCH SERV., THE FEDERAL ELECTION COMMISSION: ENFORCEMENT PROCESS AND SELECTED ISSUES FOR CONGRESS 4 (2015), <https://www.fas.org/sgp/crs/misc/R44319.pdf> (explaining that enforcement actions begin when one of four external entities files a complaint or the internal audit or reports analysis division makes an internal referral); OFFICE OF COMMISSIONER ANN M. RAVEL, FED. ELECTION COMM'N, DYSFUNCTION AND DEADLOCK 6–7 (2017) [hereinafter RAVEL REPORT].

<sup>24</sup> See GARRETT, *supra* note 23, at 5–6, 11–12.

criminal proceeding at its discretion.<sup>25</sup> In “open meetings,” Commissioners review Advisory Opinion Requests, which are compliance questions individuals or entities looking to engage in particular political activities certify to the Commission.<sup>26</sup> Commissioners also discuss rulemaking or administrative matters unrelated to ongoing enforcement actions during open meetings.<sup>27</sup>

### B. *How Campaign Finance Disclosure Works*

Campaign finance law requires certain individuals and entities engaging in political activities to provide disclosures to the FEC and to place disclaimers on advertisements.<sup>28</sup> Disclosures to the FEC typically require information about the individual or organization engaging in the activity, funds spent on political communications, and sources of funding.<sup>29</sup> Though the Supreme Court has refused to provide a blanket exemption for disclosure laws from First Amendment scrutiny, it has repeatedly upheld the constitutionality of disclosure and acknowledged that “disclosure requirements, as a general matter, directly serve substantial governmental interests.”<sup>30</sup>

Political communications, similar to those made by the Internet Research Agency, are generally subject to four campaign finance rules. First, the FEC requires a “political committee,” a group that

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<sup>25</sup> See *id.* at 8 (noting that although the FEC may refer violations to the Department of Justice, it is rare that the FEC actually does so).

<sup>26</sup> See *Advisory Opinions*, FED. ELECTION COMM’N, <https://www.fec.gov/data/legal/advisory-opinions/> (last visited Mar. 5, 2018).

<sup>27</sup> See *Commission Meetings*, FED. ELECTION COMM’N, <https://www.fec.gov/meetings/?tab=open-meetings> (last visited Sept. 1, 2018).

<sup>28</sup> See, e.g., 52 U.S.C. § 30104(b) (2015) (noting specific reporting requirements for political committees); § 30104(f) (noting reporting requirements for electioneering communications). This discussion of the disclosure and disclaimer rules is limited to those that apply to non-party committees and individuals, since they are most relevant to this Note.

<sup>29</sup> See, e.g., § 30104(b) (noting specific reporting requirements for political committees).

<sup>30</sup> *Buckley v. Valeo*, 424 U.S. 1, 66–68 (1976) (upholding the 1974 Federal Election Campaign Act amendment disclosure requirements under a governmental interest to provide the electorate with information about candidates and campaign funds, to deter corruption and avoiding the appearance of corruption, and to keep gathering data necessary to detect campaign finance violations). The Court affirmed its decision to uphold campaign finance disclosure provisions on an as-applied basis in *Citizens United v. FEC*, noting that “[d]isclaimer and disclosure requirements may burden the ability to speak, but they ‘impose no ceiling on campaign-related activities.’” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 366 (2010) (quoting *Buckley*, 424 U.S. at 64 (1976)). The Court again upheld disclosure provisions recently in *McCutcheon v. FEC*, a case challenging the cap to how much individuals can contribute to multiple federal candidates in an election cycle, finding that even though “[d]isclosure requirements burden speech,” they “often represent[ ] a less restrictive alternative to flat bans on certain types or quantities of speech.” *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1459–60 (2014).



raises at least \$1000 in political contributions or spends \$1000 on political activities, to register and regularly report their contribution and expenditure information.<sup>31</sup> Second, non-political committees, such as individuals engaging in electoral activity, must also report to the FEC if they spend more than \$250 on political activities within the calendar year.<sup>32</sup> Third, the FEC mandates disclosure of political activity through electioneering communications rules. “Electioneering communications” are certain political communications, such as radio advertisements, made within a period of time close to a primary or general election that also reach a threshold number of people.<sup>33</sup> Fourth, the FEC requires electoral advertisements to carry disclaimers that provide information to voters about the source making the communication.<sup>34</sup>

But the FEC has exceptions for political communications made online. Many groups using digital advertisements escape reporting as political committees because the FEC has adopted a narrow interpretation of “political committee.”<sup>35</sup> The Commission’s rules regulate only paid online communications,<sup>36</sup> so unpaid digital communications by outside groups also escape reporting.<sup>37</sup> Additionally, the definition of electioneering communications specifically exempts “communications over the Internet” from ordinary disclosure rules.<sup>38</sup> Finally, the FEC requires only those digital advertisements produced or placed online for a fee to include a disclaimer. The disclaimer rules apply to “general public political advertising,” which, according to FEC rules,

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<sup>31</sup> 52 U.S.C. § 30101(4) (defining a “political committee”); § 30103 (requiring political committees to register with the FEC). *See also* 52 U.S.C. § 30104(b) (noting specific reporting requirements for political committees).

<sup>32</sup> § 30104(c).

<sup>33</sup> *See* § 30104(f) (noting reporting requirements for electioneering communications).

<sup>34</sup> *See* § 30120.

<sup>35</sup> *See infra* note 109 and accompanying text (describing the FEC’s indecision in determining whether these nonprofit groups must register and report regularly as political committees).

<sup>36</sup> Coordinated communications are considered in-kind contributions to a candidate that must be reported as a contribution and an expenditure. *See* 11 C.F.R. § 109.20. But to be considered “coordinated,” a communication must satisfy one of the FEC’s content standards, all of which define a communication as a “public communication.” *See* § 109.21. Under the FEC’s current rules, “[p]ublic communication . . . shall not include communications [made] over the Internet, except for communications placed for a fee on another person’s Web site.” § 100.26.

<sup>37</sup> *See, e.g.,* Lachlan Markay & Andrew Desiderio, *How Gridlock, Social Media Giants, and the Clintons Made the Internet Ripe for Russian Meddling*, DAILY BEAST (Oct. 19, 2017, 10:59 AM), <https://www.thedailybeast.com/how-gridlock-social-media-titans-and-the-clintons-turned-the-internet-into-the-wild-west-of-american-politics> (describing the Hillary for America campaign’s coordination with pro-Hillary Super PAC Correct the Record through activity online).

<sup>38</sup> 11 C.F.R. § 100.29(c)(1).



“shall not include communications over the Internet, except communications placed for a fee on another person’s Web site.”<sup>39</sup>

### C. *The Honest Ads Act’s Substantive Solutions Are Insufficient*

Some FEC critics are rightfully concerned that these exceptions allowed the Russian-based Internet Research Agency to infiltrate American elections in the most recent election cycle by making their political communications online. These reformers have therefore advocated for expanding the disclosure rules to more broadly define the types of online political activity subject to disclosure.<sup>40</sup> Senators Amy Klobuchar and Mark Warner put forth the leading congressional proposal on the issue, the Honest Ads Act, which would align the online communications rule with the FEC’s more expansive regulations governing radio, television, and print advertisements. The Act would expand two definitions of critical terms used throughout the regulatory framework to describe activities that groups must disclose.<sup>41</sup> For instance, the term “electioneering communications,” which triggers disclosure, currently exempts all Internet communications.<sup>42</sup> Section 6 of the Act would add paid Internet content into the definition of “electioneering communications.”<sup>43</sup> The Act would also extend some disclaimer requirements to all political communications made online, paid or not.<sup>44</sup> Finally, the Honest Ads Act would require digital platforms to make reasonable efforts to ensure that foreign nationals are not attempting to influence elections through the use of their platform, and that digital platforms with 50,000,000 or more unique monthly visitors keep records of political advertisements dis-

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<sup>39</sup> § 100.26.

<sup>40</sup> See, e.g., Jen Herrick, *Letter: Groups Support Legislation to Expose Foreign Influence in U.S. Elections*, PEOPLE FOR THE AMERICAN WAY (Oct. 20, 2017), <http://www.pfaw.org/blog-posts/letter-groups-support-legislation-to-expose-foreign-influence-in-u-s-elections/> (showing twenty-seven reform groups and individuals who signed on to support the Honest Ads Act); Lawrence Norden & Ian Vandewalker, *This Bill Would Help Stop Russia from Buying Online Election Ads*, SLATE (Oct. 19, 2017, 1:45 PM), [http://www.slate.com/articles/technology/future\\_tense/2017/10/the\\_honest\\_ads\\_act\\_would\\_help\\_stop\\_online\\_election\\_meddling\\_from\\_foreign.html](http://www.slate.com/articles/technology/future_tense/2017/10/the_honest_ads_act_would_help_stop_online_election_meddling_from_foreign.html) (writing as staffers of the Brennan Center for Justice in support of the Honest Ads Act).

<sup>41</sup> Section 6 amends the definition of “electioneering communication.” See Honest Ads Act, S. 1989, 115th Cong. § 6 (2017). Section 5 amends the definition of “public communications” to explicitly include “paid Internet, or paid digital communications.” See *id.* § 7. However, part of the definition already includes paid digital advertisements, so it is unclear how this language would change the effect of the application of “public communications.” See 11 C.F.R. § 100.26 (defining “public communication” to include “communications placed for a fee on another person’s website”).

<sup>42</sup> See *id.*

<sup>43</sup> See *id.*

<sup>44</sup> See Honest Ads Act, S. 1989, 115th Cong. § 7 (2017).

seminated through their platform.<sup>45</sup> The Act would instruct the FEC to complete a rulemaking on such recordkeeping and would also require the FEC to provide a compliance report to Congress every two years.<sup>46</sup>

This legislation, however, does not respond to the FEC's failure to initiate an enforcement action against the Internet Research Agency for not disclosing \$100,000 spent on digital advertisements<sup>47</sup> that did not carry a disclaimer, activities that existing FEC rules currently reach.<sup>48</sup> Nor does the Act address the FEC's nonenforcement of a provision well within the FEC's powers that prohibits the involvement of non-U.S. citizens in electoral activities. In other words, it is already within the FEC's power to require the Internet Research Agency to disclose information about its funding sources and to punish the Internet Research Agency for failing to disclose. Although the Honest Ads Act provides a substantive explanation and solution to the FEC's failure to detect foreign meddling and enforce campaign finance laws, this Note shows that this characterization of the problem, and thus the solution, is insufficient.

## II

### STRUCTURAL PROBLEMS CAUSED FEC REGULATORY FAILURE

This Part offers an alternative diagnosis of the problem that led to the FEC's regulatory failure. A closer look at recent rulemaking, FEC enforcement, and advisory opinion decisions illuminates structural problems that led to agency inaction and capture. This Part proceeds in two sections. The first discusses contemporary Internet communication rulemaking history to highlight agency inaction. In exploring the agency structure and procedures that produced inaction, I find that the original agency design—intended to insulate the FEC from undue partisan influence—instead inhibited the Commission's ability to update its Internet rules and enforce campaign finance disclosure laws, such as those regulating the Internet Research Agency.

In the second section, I show that agency inaction, the product of antiquated agency structure, also led to capture by new players in

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<sup>45</sup> See *id.* § 8(a).

<sup>46</sup> See *id.* § 8(b).

<sup>47</sup> See 52 U.S.C. § 30121(a) (2015) (prohibiting foreign nationals from using funds for electioneering communications or expenditures). The FEC could also have prosecuted the Internet Research Agency for failing to register and report to the Commission as a political committee. See 52 U.S.C. § 30101(4) (a “political committee” is any group that receives contributions or makes expenditures in excess of \$1000 during a calendar year).

<sup>48</sup> See Scott Shane & Vindu Goel, *Fake Russian Facebook Accounts Bought \$100,000 in Political Ads*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/technology/facebook-russian-political-ads.html>.

politics, such as 501(c)(4) organizations and online platforms. I describe these new groups and their increasingly prominent role in American politics. I then introduce two forms of capture, passive and active, both of which involve regulated entities taking advantage of the FEC's inaction. I argue that both passive and active weakening of FEC regulations ultimately opened the doors for the Internet Research Agency to meddle in American elections undetected.

### A. *Insulating Structures and Procedures Produced FEC Inaction*

A brief examination of the FEC's rulemaking history highlights a structural problem: agency inaction. In 2006, the FEC promulgated its most recent rule, which sets up the framework for most of the Internet communication regulations today.<sup>49</sup> At the time, liberal and conservative interest groups seemed satisfied with the FEC's final rule.<sup>50</sup> As further confirmation of a job well done, Congress dropped legislation it had been considering that would have superseded the FEC's rule and limited the Commission's ability to regulate political activity online.<sup>51</sup> Since then, the FEC has barely acted.

#### 1. *Contemporary History Indicates an Inaction Problem*

There has been little rulemaking activity regarding Internet communications since 2006. In 2011, the FEC issued a narrow Advanced Notice of Proposed Rulemaking (ANPRM) requesting comments on whether it should issue a Notice of Proposed Rulemaking (NPRM) to revise its Internet disclaimer rules.<sup>52</sup> The FEC received only seven

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<sup>49</sup> See Internet Communications, 71 Fed. Reg. 18,589, 18,591–93 (Apr. 12, 2006) (to be codified at 11 C.F.R. pts. 100, 110, 114).

<sup>50</sup> See Letter from Members of the House Judiciary Comm. to the Fed. Election Comm'n 1–2 (Mar. 21, 2005) (expressing the concerns of a bipartisan group of Representatives including Maxine Waters and Ron Paul, expressing concern about news bloggers, and urging the FEC to extend the press exemption to political content reported online).

<sup>51</sup> See L. PAIGE WHITAKER & R. SAM GARRETT, CONG. RESEARCH SERV., CAMPAIGN FINANCE REFORM: REGULATING POLITICAL COMMUNICATIONS ON THE INTERNET 6 (2005) (noting H.R. 1605 and H.R. 1606, and S. 678, the corresponding legislation in the Senate sponsored by Senator Reid, that sought to exempt Internet communications from “public communication[s]”). See also Senator Harry Reid, *Ex Parte* Communication Regarding Proposed Rule on Internet Communications (Mar. 17, 2005) (urging the FEC to exempt all Internet communications). Congress considered some of the bills but halted legislation after the FEC issued its regulations. L. PAIGE WHITAKER & JOSEPH E. CANTOR, CONG. RESEARCH SERV., CAMPAIGN FINANCE REFORM: REGULATING POLITICAL COMMUNICATIONS ON THE INTERNET 4–5 (2008) (“In the wake of the new FEC regulations approved on March 27, 2006, however, House floor action was postponed indefinitely.”).

<sup>52</sup> See Internet Communication Disclaimers, 76 Fed. Reg. 63,567 (proposed Oct. 13, 2011) (to be codified at 11 C.F.R. pt. 110).

comments.<sup>53</sup> The FEC did not attempt to extend its comment period or host a public hearing to gather more input. Instead, the FEC waited until October 2016 to reopen the same ANPRM to generate additional comments.<sup>54</sup> The 2016 ANPRM also announced a public hearing would take place in February 2017. This time the Commission received even fewer comments—only six,<sup>55</sup> and the hearing never happened.<sup>56</sup>

The FEC has also barely acted in the enforcement context. In 2014, the FEC voted on a highly contentious matter involving a tax-exempt organization, Checks and Balances for Economic Growth, which did not “report[ ] its costs associated with . . . two videos it produced and posted for free on the Internet site YouTube.”<sup>57</sup> Three Commissioners found reason to believe the group violated reporting and disclaimer laws and three Commissioners voted to dismiss the case.<sup>58</sup> Absent a four-Commissioner majority required to initiate an investigation, the organization could continue to produce expensive political video ads and post them online without disclosing ad produc-

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<sup>53</sup> See Internet Communications, 71 Fed. Reg. 18,589, 18,591–93 (Apr. 12, 2006) (to be codified at 11 C.F.R. pts. 100, 110, 114).

<sup>54</sup> See Internet Communication Disclaimers; Reopening of Comment Period and Notice of Hearing, 81 Fed. Reg. 71,647 (proposed Oct. 18, 2016) (to be codified at 11 C.F.R. pt. 110) (reopening the 2011 ANPRM).

<sup>55</sup> See Internet Communications, 71 Fed. Reg. 18,589, 18,591–93 (Apr. 12, 2006) (to be codified at 11 C.F.R. pts. 100, 110, 114).

<sup>56</sup> In November 2017, after the reports of Russian meddling in the 2016 elections, the Commission made a third attempt to reopen the same ANPRM. *Id.* After receiving nearly 150,000 comments, the FEC issued an NPRM on March 14, 2018. See Fed. Election Comm’n, Minutes of an Open Meeting of the Federal Election Commission 3, 10 (Mar. 14, 2018), [https://www.fec.gov/resources/cms-content/documents/March\\_142c\\_2018\\_Open\\_Meeting.pdf](https://www.fec.gov/resources/cms-content/documents/March_142c_2018_Open_Meeting.pdf). See also Internet Communication Disclaimers and Definition of “Public Communication,” 83 Fed. Reg. 12,864 (proposed Mar. 26, 2018) (to be codified at 11 C.F.R. pts. 100, 110) (referring to an upcoming meeting that was subsequently never held). The FEC has not promulgated a rule pursuant to this NPRM as of the publishing of this Note. Meanwhile, proposals to initiate new rulemakings to address foreign influence on U.S. elections failed for the third time since reports of Russian meddling in American elections surfaced in 2016. See Jordan Muller, *FEC Rejects Proposal to Consider New Rules on Foreign Spending in U.S. Elections*, OPENSECRETS (May 25, 2018), <https://www.opensecrets.org/news/2018/05/fec-rejects-proposal-to-consider-new-rules-on-foreign-spending-in-us-elections/>. The four current Commissioners deadlocked on these proposals on a vote of 2-2. Peter Overby, *Federal Election Commission Can’t Decide if Russian Interference Violated Law*, NPR (May 25, 2018, 5:01 AM), <https://www.npr.org/2018/05/25/613748826/federal-election-commission-cant-decide-if-russian-interference-violated-law>.

<sup>57</sup> Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen, Checks & Balances for Econ. Growth, MUR 6729 (FEC 2014), <https://www.fec.gov/files/legal/murs/current/104790.pdf>.

<sup>58</sup> See Certification of the Recirculation of First General Counsel’s Report, Checks & Balances for Econ. Growth, MUR 6729 (FEC 2014) (certifying the Commissioners’ 3-3 vote on the Advisory Opinion).

tion costs or disclaiming the organization behind the publication of the ad.

Some of these events demonstrate telltale signs of agency inaction. The rulemaking attempts in 2011 and 2016 exemplify “rule ossification”: the phenomenon by which rulemakings are stunted and slowed to a halt by bureaucratic procedure.<sup>59</sup> The FEC’s patterns of nonenforcement and the Commissioners’ refusal to enforce agency regulations are also common characteristics of agency inaction.<sup>60</sup> Inaction could explain why the FEC failed to pursue enforcement actions against the Internet Research Agency.<sup>61</sup> The problem of inaction and its ties to the FEC’s structure becomes more clear by exploring the Commission’s internal mechanisms more generally.

## 2. *Independence Caused Inaction*

The Commission’s inaction, generally, is well publicized, and FEC critics often attribute these issues to political gridlock.<sup>62</sup> With six Commissioners but no more than three allowed from one political party, it is logical to assume deadlock and dysfunction. However, these critics too easily dismiss the problem as being bad politics. It is not true that the FEC was always gridlocked along political lines. For instance, their criticism does not explain how the Commission was

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<sup>59</sup> See Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 17 ROGER WILLIAMS U. L. REV. 221, 232 (2012) (describing “rule[ ] ossification” as the process by which rulemaking is slowed due to “procedural hurdles” and “small staffs and less money”).

<sup>60</sup> See, e.g., Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 678–80 (1985).

<sup>61</sup> A perceptive reader might question why inaction is appearing now, when the FEC was acting regularly on Internet communications issues prior to 2006. One reason for increased inaction is greater political gridlock in the FEC, a symptom of our polarized politics today generally. I address this explanation in the following section, Section II.A.ii. I also develop another explanation in Section II.B.iii. Technological advancements and the courts have fundamentally altered the campaign finance framework in recent years. The FEC is now dealing with highly complicated questions of how to apply regulations to new political entities such as 501(c)(4) organizations and online platforms like Facebook. These novel questions, which get at fundamental theoretical disagreements about the FEC’s role, purpose, and direction, have invited even greater disagreement amongst Commissioners.

<sup>62</sup> See, e.g., Nicholas Confessore, *Election Panel Enacts Policies by Not Acting*, N.Y. TIMES (Aug. 25, 2014), <https://www.nytimes.com/2014/08/26/us/politics/election-panel-enacts-policies-by-not-acting.html> (noting that the FEC’s gridlock mirrors that of Congress and it has prevented the Commission from acting); Dave Levinthal, *How Gridlock Is Hurting Campaign Finance Oversight*, TIME (June 30, 2015), <http://time.com/3941263/campaign-finance-fed-gridlock/> (describing how gridlock has prevented the Commission from making any progress to enforce the rules or develop new ones); Eric Lichtblau, *Democratic Member to Quit Election Commission, Setting up Political Fight*, N.Y. TIMES (Feb. 19, 2017), <https://www.nytimes.com/2017/02/19/us/politics/fec-elections-ann-ravel-campaign-finance.html> (reporting that Democratic Commissioner Ann M. Ravel would leave her term early because of gridlock at the FEC).

able to overcome partisanship and come to a final rule on the disclosure of online communications in the past.<sup>63</sup> Nor does it account for wide acceptance from citizens and interest groups across the ideological spectrum on some previous rules.<sup>64</sup> Even Commissioner Ellen Weintraub, the FEC's longest-serving Commissioner, acknowledged that there used to be days when the Commissioners would work together to move the Commission forward.<sup>65</sup> The FEC's decisions are not always political knee-jerk reactions. Second, even when the FEC overcame partisanship,<sup>66</sup> inaction persisted.<sup>67</sup> The inquiry must not end with blaming Commissioner-level partisanship.

I argue that the FEC inaction that contributed to the FEC's failure to regulate the Internet Research Agency runs deeper. It lies in an agency design that produces independence and insulation from party influence. The restriction that no more than three Commissioners may be from one political party plays a part in FEC inertia, but this structural constraint also contributes to a lack of leadership. In order to avoid political advantages that tip the scales of power towards one political party, the FEC has created procedures where each Commissioner has nearly the same amount of control over

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<sup>63</sup> The Commission finalized a rule regarding political communications made online in 2003 and again in 2006. Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 430 (Jan. 3, 2003) (to be codified at 11 C.F.R. pts. 100, 102, 109, 110, 114); Internet Communications, 71 Fed. Reg. 18,589, 18,591–93 (Apr. 12, 2006) (to be codified at 11 C.F.R. pts. 100, 110, 114). *See also* RAVEL REPORT, *supra* note 23, at 6 (noting that the FEC worked to enforce the law in a bipartisan manner for many years).

<sup>64</sup> The 2005 rulemaking that produced the 2006 final rule brought together groups from across the ideological spectrum. For instance, many commenters noted their preference to fully, or at least mostly, exempt Internet communications. These individuals and groups included left-leaning Alliance for Justice and Jim Bopp who wrote for the James Madison Center for Free Speech, a group with libertarian views. *See* Alliance for Justice, Comment Letter on Proposed Rule on Internet Communications 1–2, 11 (June 3, 2005) (recognizing the *Shays* court ordered the FEC to revise its rules, but recommending the FEC leave the Internet largely unregulated); James Madison Center for Free Speech, Comment Letter on Proposed Rule on Internet Communications 2 (June 3, 2005) (noting a preference for no regulation of Internet communications, but acknowledging that may not be possible in light of the *Shays* court decision). *See also* Letter from Members of the House Judiciary Comm. to the Fed. Election Comm'n, *supra* note 50.

<sup>65</sup> *See* Lichtblau, *supra* note 62 (describing a conversation with Commissioner Weintraub, the FEC's longest-serving Commissioner, who stated that there were times when Commissioners worked together in the past despite ideological differences). *See also* Ann M. Ravel, Opinion, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017), <https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html> (disagreeing that Congress designed the FEC to deadlock).

<sup>66</sup> *See supra* note 64 and accompanying text (describing the FEC's bipartisan process in passing disclosure rules for online communications in 2003 and again in 2006).

<sup>67</sup> *See supra* Section II.A.1 (detailing how the FEC has failed to enforce its Internet disclosure rules).

the FEC decisions.<sup>68</sup> For instance, one of the six Commissioners serves as the Chair of the Commission and another serves as the Vice Chair.<sup>69</sup> The position of Chair is not based on merit, external or individual decisionmaking, or seniority.<sup>70</sup> Instead, the position rotates.<sup>71</sup> The Federal Election Campaign Act also states that a Commissioner may not serve as Chair or Vice Chair more than once per six-year term.<sup>72</sup> What's more, the Chair and Vice Chair may not be members of the same political party.<sup>73</sup> Because of these constraints, the Chair rotates annually not only from person-to-person but also from party-to-party.<sup>74</sup> With only a year before a new Chair of a different political party takes over, it is very difficult for any Commissioner to prescribe and carry out a vision for the Commission. The watchful instinct to treat Commissioners equally in order to insulate Commission decisionmaking from the influence of one or the other political party has instead drained the FEC's leadership positions of real merit and leadership content, leaving the Commission without clear guidance or direction.

In addition to its problematic leadership structure, the FEC ensures even distribution of power amongst Commissioners through voting procedures. The Federal Election Campaign Act requires four votes for any official action by the Commission.<sup>75</sup> The FEC also relies heavily on Commissioner votes for even the most minor actions, so that each Commissioner has ample opportunity to weigh in. For

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<sup>68</sup> See, e.g., *supra* notes 67–74 and accompanying text.

<sup>69</sup> *Leadership and Structure*, FED. ELECTION COMM'N, *supra* note 18 (showing one Chair and one Vice Chair).

<sup>70</sup> Andy Kroll, *The Chairwoman Who's at War with Her Own Agency*, ATLANTIC (Oct. 13, 2015), <https://www.theatlantic.com/politics/archive/2015/10/the-chairwoman-whos-at-war-with-her-own-agency/440031/> (noting “[t]he chair position is a symbolic, largely powerless rotating title at the FEC”).

<sup>71</sup> *Id.*

<sup>72</sup> 52 U.S.C. § 30106(a)(2)(D)(5) (2015).

<sup>73</sup> *Id.*

<sup>74</sup> For example, the current Chair is Caroline C. Hunter, a Republican, and the current Vice Chair is Ellen L. Weintraub, a Democrat. See *Leadership and Structure*, FED. ELECTION COMM'N, *supra* note 18. Caroline Hunter served as Vice Chair the previous year. See *Caroline C. Hunter*, FED. ELECTION COMM'N, <https://www.fec.gov/about/leadership-and-structure/caroline-c-hunter/> (last visited Sept. 1, 2018) (confirming Caroline Hunter as the current Chair). Steven Walther, an Independent who votes with Democratic Commissioners, was the previous Chair. See *Steven T. Walther*, FED. ELECTION COMM'N, <https://www.fec.gov/about/leadership-and-structure/steven-t-walther/> (last visited Aug. 20, 2018) (confirming that Steve Walther was the Chair in 2017); Michelle Ye Hee Lee, *FEC Commissioner's Departure Leaves Panel with Bare-Minimum Quorum*, WASH. POST (Feb. 7, 2018), [https://www.washingtonpost.com/politics/fec-commissioners-departure-leaves-panel-with-bare-minimum-quorum/2018/02/07/03fb24a0-0c28-11e8-8890-372e2047c935\\_story.html](https://www.washingtonpost.com/politics/fec-commissioners-departure-leaves-panel-with-bare-minimum-quorum/2018/02/07/03fb24a0-0c28-11e8-8890-372e2047c935_story.html) (noting that Walther often sides with the Democrats on the Commission).

<sup>75</sup> See RAVEL REPORT, *supra* note 23, at 6–7.



instance, Commissioners submit votes on enforcement actions and policy matters.<sup>76</sup> If a Commissioner objects to any draft opinion produced by the Office of the General Counsel, their objection automatically places the matter on the agenda for discussion at the next meeting, where the Commissioners yet again take a vote.<sup>77</sup> Commissioners may also request revisions or alternative drafts from the Office of the General Counsel.<sup>78</sup> When an alternative draft is produced, Commissioners must follow the same procedures as a vote on any initial draft, which means that an objection from any Commissioner would place the draft on the agenda for discussion and the Commissioners would vote on the draft again at the meeting.<sup>79</sup>

Procedures for enforcement matters are particularly cumbersome and dependent on full Commission votes at several different junctures.<sup>80</sup> For the Commission to even open an investigation, it must find “reason to believe that a person has committed, or is about to commit, a violation” of the Federal Election Campaign Act.<sup>81</sup> But Commissioners may also vote to dismiss the complaint or find no reason to believe there was a violation.<sup>82</sup> Because there are three potential actions, each complaint could generate three votes on each of these three options, even at the outset of an enforcement matter. These multiple and duplicative voting procedures allow Commissioners to counteract or delay action.<sup>83</sup>

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The FEC’s inability to move forward with any new rulemakings related to the disclosure of online political communications indicates an inaction problem resulting from structural issues, not substantive

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<sup>76</sup> See FED. ELECTION COMM’N, COMM’N DIRECTIVE NO. 52, CIRCULATION VOTE PROCEDURE 1 (2016) (“For any circulated manner that is discussed at a Commission meeting, any Commissioner may cast or change his or her vote at the meeting.”).

<sup>77</sup> See *id.* at 1–3.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.* at 2–5 (noting only that any draft opinion circulated follows the same procedure without any special procedure for subsequent or conflicting drafts).

<sup>80</sup> Commissioners have the opportunity to vote to move forward with an enforcement action (or block action) at a minimum of four different points. At each point, Commissioners are also given multiple options for how to proceed. For a detailed explanation of enforcement procedures, see FED. ELECTION COMM’N, ENFORCEMENT MANUAL (1998) and FED. ELECTION COMM’N, ADDITIONAL ENFORCEMENT MATERIALS (2011). See also RAVEL REPORT, *supra* note 23, at 6–7 (discussing enforcement procedures).

<sup>81</sup> See 52 U.S.C. § 30109(a)(2) (2015).

<sup>82</sup> See Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12,545, 12,545 (Mar. 16, 2007) (to be codified at 11 C.F.R. pt. 111). See also RAVEL REPORT, *supra* note 23, at 6–7.

<sup>83</sup> See RAVEL REPORT, *supra* note 23, at 6–7 (noting the multiple stages of voting “provides ample opportunity for Commissioners to block action by splitting 3-to-3”).

ones. An analysis of the Commission's design features that were intended to insulate the agency from partisan influences further confirms this conclusion. With a statutory requirement of four votes to proceed at any stage of an enforcement action,<sup>84</sup> Commissioners must form coalitions in order to act. But the political party restrictions make it difficult for Commissioners to build coalitions. Any campaign finance solution for detecting and deterring foreign meddling in U.S. elections must take into consideration the design mechanisms intended to insulate the Commission from political influence that contributed to FEC inaction.

### B. *Inaction Led to FEC Capture*

Although FEC inaction contributed to the FEC's failure to enforce its disclosure rules against the Internet Research Agency, it also led to a related problem—FEC capture. In this section, I describe the rise of new groups in politics, such as 501(c)(4) organizations and online platforms. I then introduce two forms of capture: passive and active. I argue that the antiquated agency structure and its resulting inaction left the FEC vulnerable to capture by these new actors in politics, which ultimately opened the doors to online foreign meddling in American elections.

#### 1. *The Rise of New Political Actors*

Congress created the FEC at a time when parties clearly dominated the political scene.<sup>85</sup> Since then, technological changes and a wave of litigation over the past twenty years have fundamentally changed campaign finance<sup>86</sup> and contributed to the decline of political parties and the rise of new political actors.<sup>87</sup> For instance, in the now infamous *Citizens United v. FEC*, the Supreme Court struck down Federal Election Campaign Act and Bipartisan Campaign Reform Act independent expenditure restrictions for corporations and

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<sup>84</sup> See *Leadership and Structure*, FED. ELECTION COMM'N, *supra* note 18.

<sup>85</sup> See *supra* note 17 and accompanying text.

<sup>86</sup> See, e.g., *supra* note 12 and accompanying text (noting recent changes to campaign finance law that have shifted the flow of political funding).

<sup>87</sup> See *Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm. (Colorado Republican II)*, 533 U.S. 431 (2001) (upholding coordinated expenditure limits for political parties). Cf. Richard Pildes, *How to Fix Our Polarized Politics? Strengthen Political Parties*, WASH. POST (Feb. 6, 2014), <https://www.washingtonpost.com/news/monkey-cage/wp/2014/02/06/how-to-fix-our-polarized-politics-strengthen-political-parties/> (noting intra-party fragmentation that has weakened party leadership is part of a larger breakdown of traditional institutional powers).

unions.<sup>88</sup> The D.C. Circuit followed with an opinion a few months later that struck down contribution limits to independent expenditure-only organizations.<sup>89</sup> This permitted a free flow of funds to organizations that could also, as of *Citizens United*, make unlimited independent expenditures on communications and activities for or against a candidate.

Many argue that the ability to raise and spend unlimited funds has led to the prevalence of Super PACs, which are independent expenditure-only committees, and 501(c)(4) and other tax-exempt corporations in politics.<sup>90</sup> In 2016, Super PAC spending accounted for \$1 billion of the \$1.7 billion of independent expenditures in the 2016 election cycle.<sup>91</sup> Tax-exempt organizations like 501(c)(4) corporations spent an estimated \$175 million in the 2016 election cycle.<sup>92</sup>

Online platforms, like Facebook, Twitter, and Google, have also become more prominent players in politics because technological

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<sup>88</sup> See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365–66 (2010) (striking Bipartisan Campaign Reform Act § 203 which prohibited corporate and labor union disbursements for electioneering communications as well as Federal Election Campaign Act's general restrictions on corporate independent expenditures).

<sup>89</sup> See *SpeechNow.org v. Fed. Election Comm'n*, 599 F.3d 686, 693–96 (D.C. Cir. 2010) (holding that a provision limiting contributions by individuals to political committees that made only independent expenditures violated the First Amendment).

<sup>90</sup> See, e.g., IAN VANDEWALKER, BRENNAN CTR. FOR JUSTICE, *ELECTION SPENDING 2014: OUTSIDE SPENDING IN SENATE RACES SINCE CITIZENS UNITED 1*, 5–7 (2015), <https://www.brennancenter.org/sites/default/files/publications/Outside%20Spending%20Since%20Citizens%20United.pdf> (noting the rise in outside spending since *Citizens United* and that nonparty groups outspent candidates and political parties in several of the most competitive 2014 Senate elections); cf. Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance*, 77 TEX. L. REV. 1705, 1708 (1999) (arguing that campaign funds, like water, must always flow somewhere); Robert K. Kelner & Raymond La Raja, Opinions, *McCain-Feingold's Devastating Legacy*, WASH. POST (Apr. 11, 2014), [https://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3\\_story.html](https://www.washingtonpost.com/opinions/mccain-feingolds-devastating-legacy/2014/04/11/14a528e2-c18f-11e3-bcec-b71ee10e9bc3_story.html) (agreeing with critics of the McCain-Feingold Act that the law would “shift political power away from the parties toward outside groups, which were likely to be far more extreme and far less accountable”).

<sup>91</sup> Compare Ctr. for Responsive Politics, *Total Outside Spending by Election Cycle, All Groups*, OPENSECRETS, [https://www.opensecrets.org/outsidespending/cycle\\_tots.php?cycle=2018&view=A&chart=A#viewpt](https://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2018&view=A&chart=A#viewpt) (last visited Sept. 1, 2018) (describing all independent expenditures in the 2016 election cycle), with Ctr. for Responsive Politics, *2016 Outside Spending, by Super PAC*, OPENSECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&chart=V&disp=O&type=S> (last visited Sept. 1, 2018) (describing independent expenditures by Super PACs in the 2016 election cycle).

<sup>92</sup> See Ctr. for Responsive Politics, *Political Nonprofits (Dark Money)*, OPENSECRETS, [https://www.opensecrets.org/outsidespending/nonprof\\_summ.php?cycle=2018&type=type&range=tot](https://www.opensecrets.org/outsidespending/nonprof_summ.php?cycle=2018&type=type&range=tot) (last visited Sept. 1, 2018) (showing on a bar graph that nonprofit groups spent an estimated \$175.9 million in the 2016 election). Another advantage these groups have over other political actors is that they are not currently required to disclose their donors to the FEC. See *infra* note 109 and accompanying text.

advancements have changed the way people receive information.<sup>93</sup> It is unsurprising that more groups with more money to spend, like Super PACs and 501(c)(4) organizations, are spending more on digital media. For reference, digital ads accounted for 1.7% of all political advertisements in 2012.<sup>94</sup> In 2016, digital ads made up 14.4% of all political advertisements.<sup>95</sup> As a result of legal and technological changes new players have increasingly dominated the political market, presenting fresh challenges to the FEC's regulatory framework. The next subsection will discuss some of these challenges, in particular, the capture of FEC regulations by these new players in politics.

## 2. *Defining Active and Passive Capture*

Capture comes in many forms. Capture can refer to any instance in which industry interests prevail over the collective interests of individuals.<sup>96</sup> It can also mean a failed agency practice where “policy is directed away from public interest and toward the interests of a regulated industry.”<sup>97</sup>

In this Note, I identify two types of capture, which I term “passive” and “active.”<sup>98</sup> Passive capture describes a pattern of behavior where regulated entities repeatedly ignore the law and erode the norms around compliance, thereby diluting the effectiveness of the law. In other words, passive capture occurs once the sophisticated

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<sup>93</sup> See Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms*, PEW RESEARCH CTR. (Sept. 7, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/> (finding that 67% of Americans receive some news from social media).

<sup>94</sup> KIP CASSINO ET AL., BORRELL ASSOCS., *THE FINAL ANALYSIS: WHAT HAPPENED TO POLITICAL ADVERTISING IN 2016 (AND FOREVER)* 3 (2017). See also Issie Lapowsky, *Political Ad Spending Online Is About to Explode*, WIRED (Aug. 8, 2015, 4:50 PM), <https://www.wired.com/2015/08/digital-political-ads-2016/> (quoting an earlier version of the Borrell Associates report noting digital spending in 2016 was on track to outpace 2016 spending by 5000%).

<sup>95</sup> KIP CASSINO ET AL., *supra* note 94, at 3; see also Issie Lapowsky, *supra* note 94.

<sup>96</sup> See Shapiro, *supra* note 59, at 223 (one form of capture is where “interests prevail before an agency and as a normative criticism of agency practice”); see also David Freeman Engstrom, *Corralling Capture*, 36 HARV. J.L. & PUB. POL’Y 31, 33 (2013) (describing a “weak” form of capture, in which “regulation that gets kicked out the back end of the administrative process is less publically [sic] interested than it should be but is still on balance social-welfare-enhancing”).

<sup>97</sup> See Engstrom, *supra* note 96, at 31.

<sup>98</sup> Legal academics might situate the types of capture I identify in this Note as “strong form capture,” in which private interests so pervade a regulatory field that entire regulations become meaningless. See, e.g., Engstrom, *supra* note 96, at 33 (paraphrasing Daniel Carpenter & David A. Moss, *Introduction to Preventing Regulatory Capture: Special Interest Influence and How to Limit It* 11–22 (Daniel Carpenter & David A. Moss eds., 2014)) (describing capture as occurring when “interest group rent-seeking is so pervasive and so socially costly”).

groups' deliberate disregard for the law becomes so widespread that it eliminates the regulation's usefulness. In contrast, active capture happens when these groups exploit agency processes to create ambiguity in the law. The groups then take advantage of newly created regulatory uncertainty to engage in preferred political activity without the threat of regulatory enforcement. Whereas others discussing capture look at the phenomenon from the lens of special interest groups engaging in deregulatory tactics,<sup>99</sup> I focus on the effect of the groups' behavior on a regulatory system.<sup>100</sup>

### 3. *New Political Actors Capture Internet Regulations*

In this subsection I demonstrate how FEC inaction has led to the passive and active capture of Internet-related campaign finance disclosure regulations by new political actors. The FEC is authorized to pursue enforcement actions and issue civil penalties if it finds a violation of its rules.<sup>101</sup> The FEC may also review Advisory Opinion Requests, which are compliance questions, certified to the Commission, from individuals or entities that want to engage in particular political activities.<sup>102</sup> I argue that FEC capture of these regulations through use of the enforcement and advisory opinion processes allowed the Internet Research Agency to influence American elections undetected.

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<sup>99</sup> See, e.g., Elizabeth J. Cabraser, *Due Process Preempted: Stealth Preemption as a Consequence of Agency Capture*, 65 N.Y.U. ANN. SURV. AM. L. 449 (2010) (detailing the industry's involvement in FDA regulations, which led to a hallmark federal preemption decision).

<sup>100</sup> An analogous analysis might be the difference between finding discrimination based on intent and finding discrimination based on disparate impact in voting rights cases and redistricting cases. Compare N.C. State Conf. of the NAACP v. McCrory, 831 F.3d 204, 216–24, 227–29 (4th Cir. 2016) (looking at factors such as a history of racial discrimination and racially motivated comments by legislators to find intentional discrimination in passing state voting legislation in violation of the 14th Amendment), with Thornburg v. Gingles, 478 U.S. 30, 46–52 (1986) (looking to factors such as lingering effects of past discrimination, the extent to which minority group members have been elected to public office in the jurisdiction, and how racially polarized the voting is in that particular subdivision to find discriminatory impact that interacted with social and historical conditions to cause unequal voting opportunities in violation of § 2 of the Voting Rights Act of 1965). There are other ways of understanding regulatory capture. For instance, Professor Rachel Barkow identifies two definitions: one where an agency “is completely overtaken” and another where industries have disproportionate influence over an agency's decisionmaking. Rachel E. Barkow, *Explaining and Curbing Capture*, 18 N.C. BANKING INST. 17, 17 (2013). Professor Sidney A. Shapiro derives a further understanding of capture from the latter—where the “agency has failed to serve the public interest, as Congress intended.” See Shapiro, *supra* note 59, at 223. For the purposes of this Note, my view of regulatory capture is closest to Shapiro's.

<sup>101</sup> See *supra* Section I.A.

<sup>102</sup> See *supra* Section I.A.

### a. Passive Capture

The FEC has undergone passive capture that allows entities to ignore the law, change law-abiding norms, and eventually render the law ineffective. Recall the well-publicized deadlock issue, an inaction effect of the FEC's very structure.<sup>103</sup> In recent years, as the Commission has had to respond to novel questions regarding new political actors, the deadlocks have worsened. According to a Congressional Research Service Report, FEC Commissioners deadlocked on 24.4% of closed enforcement matters in 2015, up from 13% in 2008–2009.<sup>104</sup> A recent report from former FEC Commissioner Ann M. Ravel finds that the Commissioners deadlocked on 9.6% of substantive votes in enforcement actions through 2012, but, in 2013 that number skyrocketed to 26.2%.<sup>105</sup> The Commissioners now deadlock on more than 30% of substantive votes in enforcement matters.<sup>106</sup> The FEC's consistent hesitation to pursue complaints greatly diminishes the deterrence value of FEC enforcement actions. Political players now know that there will be “virtually no enforcement of the campaign finance laws.”<sup>107</sup> The absence of a threat of enforcement and punishment has changed the law-abiding norms of regulated entities—new political groups now brazenly disobey the law.

In the Internet communications context, these groups take advantage of FEC deadlocks to flout online disclosure laws. Consider again the example of Checks and Balances for Economic Growth, a 501(c)(4) tax-exempt organization, which did not disclose millions of dollars spent on producing political advertisements that were subsequently placed on YouTube without a disclaimer.<sup>108</sup> It is also clear that the norms around disclosure compliance have broken down. Non-dis-

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<sup>103</sup> See *supra* Section II.A.1.

<sup>104</sup> GARRETT, *supra* note 23, at 9–10.

<sup>105</sup> See RAVEL REPORT, *supra* note 23, at 7.

<sup>106</sup> See *id.* at 9.

<sup>107</sup> Matea Gold, *Trump's Deal with the RNC Shows How Big Money Is Flowing Back to the Parties*, WASH. POST (May 18, 2016), [https://www.washingtonpost.com/politics/trumps-deal-with-the-rnc-shows-how-big-money-is-flowing-back-to-the-parties/2016/05/18/4d84e14a-1d11-11e6-b6e0-c53b7ef63b45\\_story.html](https://www.washingtonpost.com/politics/trumps-deal-with-the-rnc-shows-how-big-money-is-flowing-back-to-the-parties/2016/05/18/4d84e14a-1d11-11e6-b6e0-c53b7ef63b45_story.html) (quoting Republican campaign finance attorney Robert Kelner).

<sup>108</sup> See Complaint at 1–7, Checks & Balances for Econ. Growth, MUR 6729 (FEC 2013) (alleging that a 501(c)(4) organization that spent over \$2 million on political advertisements during the 2012 election cycle should be required to register as a “political committee”); Certification of the Recirculation of the First General Counsel's Report, Checks & Balances for Econ. Growth, MUR 6729 (FEC 2014) (certifying the Commission's deadlocked 3-3 vote in finding there was reason to believe the organization should register as a political committee); see also *supra* Section II.A.2.

closure is rampant among other 501(c)(4) organizations,<sup>109</sup> while campaign committees ignore non-coordination rules and do not report coordinated online communications with Super PACs as in-kind contributions.<sup>110</sup> These 501(c)(4) organizations set an example for other groups independent of campaign committees or political parties, like the Internet Research Agency, signaling that they, too, can disobey Internet disclosure rules without consequence.<sup>111</sup>

### b. Active Capture

Active capture, a method where groups exploit agency processes to create ambiguity in the law, has also adversely affected the FEC. Active capture of Internet disclaimer rules is evident through the online platforms' use of Advisory Opinion Requests by online media companies. Advisory Opinions are official agency responses about campaign finance law applications to a particular context,<sup>112</sup> but can

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<sup>109</sup> See, e.g., Statement of Reasons of Commissioners Caroline C. Hunter and Matthew S. Petersen at 28, Am. Future Fund, MUR 6402 (FEC 2014) (two Commissioners concluding that the organization "cannot and should not be subject to . . . requirements of registering and reporting as a political committee"); Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 27, Am. Action Network, MUR 6589 (FEC 2014) (three Commissioners voting against finding reason to believe the organization violated the law by failing to register and report as a political committee); Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 26, Ams. for Job Sec., MUR 6538 (FEC 2014) (same); Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen at 28, Crossroads GPS, MUR 6396 (FEC 2014) ("Crossroads GPS was not required to register with the Commission and file reports with the Commission as a political committee."). A "political committee" is any "committee, club, association, or other group of persons" that accepts contributions or makes expenditures of more than \$1000 in a calendar year. 52 U.S.C. § 30101(4)(A) (2015). Entities that meet the political committee definition must file regular reports with the Commission containing information about their donors and their expenditures. See 52 U.S.C. §§ 30103–30104.

<sup>110</sup> See, e.g., Markay & Desiderio, *supra* note 37 (describing Clinton for America attorney Marc Elias' strategy to coordinate activity between the Hillary for America campaign and pro-Hillary Super PAC Correct the Record through activity online).

<sup>111</sup> The District Court for the District of Columbia recently issued an opinion that rejected the FEC's longstanding interpretation of a statutory provision that allowed donors to 501(c)(4) organizations to remain anonymous. See *generally* CREW v. Crossroads GPS, 316 F. Supp. 3d 349 (D.D.C. 2018). Although the case does not address the precise issue that the FEC faced in its enforcement action against Checks and Balances for Economic Growth, the decision, if it withstands appeal, would provide for at least some disclosure related to the activities of 501(c)(4) organizations by requiring "not-political committees spending in excess of \$250 in a calendar year on independent expenditures to 'identify all contributors who annually provide in the aggregate \$200 in funds intended to influence elections.'" See *id.* at 55.

<sup>112</sup> See, e.g., *Advisory Opinions*, FED. ELECTION COMM'N, *supra* note 26 ("Advisory opinions are official Commission responses to questions about how federal campaign finance law applies to specific, factual situations.").



also apply to materially similar situations.<sup>113</sup> With a 30% chance the Commissioners will deadlock,<sup>114</sup> on top of the odds of receiving an outright favorable decision, groups considering potentially risky campaign finance activity are disproportionately incentivized to request an Advisory Opinion.<sup>115</sup> Interest groups seeking specific nonenforcement of a regulation can easily inundate the FEC with similar questions that they know the FEC will hesitate on or refuse to answer.

In 2010, the FEC deadlocked on whether the ads on a Google landing page fell under the “small items” exception for disclaimers.<sup>116</sup> The small items exception was meant to apply to items like “[b]umper stickers, pins, buttons, pens, and similar small items upon which the disclaimer cannot be conveniently printed.”<sup>117</sup> A majority of the Commissioners found that, under the circumstances, Google’s AdWords would not be in violation of FEC regulations.<sup>118</sup> But because the Commission could not agree on the analysis or on the question of exemption, tech companies could still take advantage of the legal grey area and continue publishing ads without requiring disclaimers.<sup>119</sup>

Six months later Facebook, represented by the same attorney who brought the Google Advisory Opinion Request, filed a similar

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<sup>113</sup> See, e.g., Fed. Election Comm’n, Opinion Letter on Google Advisory Opinion Request, Advisory Op. No. 2010-19, at 2 (Oct. 8, 2010) (“Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion.”).

<sup>114</sup> Cf. RAVEL REPORT, *supra* note 23, at 9 (noting deadlocks occur in substantive enforcement matter votes 30% of the time in recent years).

<sup>115</sup> See Confessore, *supra* note 62 (“If you’ve got a client who is not as risk-averse, then you can sit down with them and say, ‘Here’s the situation, you have three Commissioners who say this is lawful, and that is something you can rely on between now and November for your campaign strategy.’”) (quoting Michael E. Toner, a Republican election lawyer and former Commissioner); see also Anthony Herman, *The FEC: Where a “Tie” Can Be (Almost) a “Win,”* COVINGTON & BURLING LLP (Mar. 20, 2014), <https://www.insidepoliticallaw.com/2014/03/20/the-fec-where-a-tie-can-be-almost-a-win/> (advising that “[a]ll but the most risk adverse [sic] parties should be comfortable treating the failure to obtain an advisory opinion where the vote is 3-3 as a license to go forward with the activity proposed in the advisory opinion request.”).

<sup>116</sup> See Fed. Election Comm’n, Opinion Letter on Google Advisory Opinion Request, *supra* note 113, at 2.

<sup>117</sup> 11 C.F.R. § 110.11(f)(1)(i) (2016).

<sup>118</sup> Fed. Election Comm’n, Certification of Google Advisory Opinion Letter, Advisory Op. No. 2010-19 (Oct. 8, 2010) (showing the Commission’s vote of 4-2); see also Fed. Election Comm’n, Opinion Letter on Google Advisory Opinion Request, *supra* note 113, at 2 (“The Commission concludes that, under the circumstances described in the request, the conduct is not in violation of the Act or the Commission regulations.”).

<sup>119</sup> See Fed. Election Comm’n, Opinion Letter on Google Advisory Opinion Request, *supra* note 113, at 2 (noting that the Commission could not reach a response as to whether Google’s AdWords fell under the “small items” exception).

request for its paid ads to qualify for the small items exemption,<sup>120</sup> and cited Google's Advisory Opinion for support.<sup>121</sup> Even though the Commission deadlocked and did not come to an official decision on the small items exception, the Facebook Advisory Opinion Request treated and relied on the Google Advisory Opinion as if the Commission had granted it.<sup>122</sup> The FEC again failed to reach a decision on the small items exemption, signaling that although it would not grant the exemption for Facebook ads, the FEC would not pursue an enforcement action against Facebook for not requiring disclaimers on its political ads.<sup>123</sup> Facebook continued to run political ads without disclaimers.<sup>124</sup>

In 2013, Revolution Messaging, LLC, requested a small items exception for mobile phone advertisements.<sup>125</sup> Like Facebook, Revolution Messaging cited to the Google Advisory Opinion in its request, treating it as precedent that "certain limited character advertisements are exempt from disclaimer requirements."<sup>126</sup> Again, the Commissioners deadlocked.<sup>127</sup> Again, they implied nonenforcement of its disclaimer rules for Internet communications.<sup>128</sup>

Like its passive variant, active capture exploits FEC inaction to render favorable results while making specific regulations ineffectual. But active capture also injects ambiguity into campaign finance law,

<sup>120</sup> See generally Request by Facebook, Fed. Election Comm'n Advisory Op. No. 2011-09 (Apr. 26, 2011) (showing that Marc Elias filed Facebook's Advisory Opinion Request in April 2011, six months after the FEC issued the Google Advisory Opinion in October 2010).

<sup>121</sup> *Id.* at 2, 8.

<sup>122</sup> *Id.* at 2 ("[R]ather than force political committees to forego this medium altogether, the Commission *permitted* them to utilize it—without a disclaimer—to communicate with voters.") (emphasis added).

<sup>123</sup> See Fed. Election Comm'n, Closeout Opinion Letter on Facebook Advisory Opinion Request, Advisory Op. No. 2011-09 (June 15, 2011) (showing that the FEC could not come to a conclusion regarding a "small items" exemption for Facebook's ads).

<sup>124</sup> See Sarah Frier & Bill Allison, *Facebook Fought Rules that Could Have Exposed Fake Russian Ads*, BLOOMBERG (Oct. 4, 2017, 5:00 AM), <https://www.bloomberg.com/news/articles/2017-10-04/facebook-fought-for-years-to-avoid-political-ad-disclosure-rules> (noting that Facebook ran ads without disclaimers and left it up to the ad buyers to comply with the disclaimer requirement).

<sup>125</sup> Request by Revolution Messaging, LLC, Fed. Election Comm'n Advisory Op. No. 2013-18 (Sept. 11, 2013).

<sup>126</sup> *Id.* at 4.

<sup>127</sup> Fed. Election Comm'n, Certification of Revolution Messaging, LLC, Advisory Op. No. 2013-18 (Feb. 28, 2014) (showing the Commission's vote of 3-3 to deny the "small items" exception and a vote of 3-3 to approve the "small items" exception).

<sup>128</sup> The FEC has recently begun to backtrack on this line of advisory opinions. Although the Commissioners could not agree on a rationale, the FEC did find that a 501(c)(4) organization was required to include a disclaimer on its paid Facebook advertisement. Fed. Election Comm'n, Opinion Letter on Take Back Action Fund Advisory Opinion Request, Advisory Op. No. 2017-12 (Dec. 15, 2017).

opening up broader questions of whether the FEC can or should enforce certain regulations. This strategy allowed the Internet Research Agency to post political ads on Facebook and Google without disclaimers.<sup>129</sup> Voters have difficulty discerning the source of a political advertisement without disclaimers. Without the identity of the source, it is nearly impossible to discover additional information about the advertisement, assess its value, and act based on that information. Indeed, no one reported the Internet Research Agency to the FEC during the 2016 election cycle.<sup>130</sup>

A skeptic might argue that both passive and active tactics are smart compliance, not capture. From the perspective of these online platforms, they may be right. But this section has analyzed capture not from the lens of a single company or regulated entity; it has taken a broader view of the overall effect of repeated actions by a category of actors.<sup>131</sup> In the specific case of online communications disclaimers,

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<sup>129</sup> A similar pattern of behavior from other actors new to the political scene, such as 501(c)(4) organizations and Super PACs, have also created ambiguity around the FEC's political committee status rules and coordination rules. *See, e.g.*, Fed. Election Comm'n, Opinion Letter on SpeechNow.org Advisory Opinion Request, Advisory Op. No. 2007-32 (Jan. 28, 2008) (remaining undecided about whether a tax-exempt organization is required to register as a political committee); Fed. Election Comm'n, Opinion Letter on National Defense Committee Advisory Opinion Request, Advisory Op. No. 2012-27, at 1, 7 (Aug. 24, 2004) (deadlocking on whether a 501(c)(4) organization need register as a political committee); Fed. Election Comm'n, Opinion Letter on American Crossroads Advisory Opinion Request, Advisory Op. No. 2011-23 (Dec. 1, 2011) (deadlocking on whether the featuring of candidate's voices or camera footage of candidates in a Super PAC's advertisements would be considered coordination such that the Super PAC would be required to report the advertisements as in-kind contributions); Fed. Election Comm'n, Opinion Letter on American Future Fund/American Future Fund Political Action; "Fed. Election Comm'n, Opinion Letter on McIntosh Advisory Opinion Request" McIntosh Advisory Opinion Request, Advisory Op. No. 2012-25 (Jan. 22, 2013) (deadlocking on whether a political committee and its affiliated non-political committee may engage in fundraising efforts uninhibited by coordination restrictions). These Advisory Opinions, which each resulted in nondecisions, have general implications for disclosure and could very likely have contributed to the Internet Research Agency's ability to meddle in elections through digital communications. But because of the limited public information available about the Internet Research Agency's specific activities, it is difficult draw a more direct connection between the effect of the FEC's indecision with regard to these Advisory Opinion Requests and the Internet Research Agency's actions.

<sup>130</sup> *See supra* note 6 and accompanying text (finding no complaints against the Internet Research Agency to the FEC during the 2016 election cycle).

<sup>131</sup> *See supra* Section II.B.3 (defining "capture" in this Note based on its effect). The argument for looking at the effects to determine capture is parallel to the broader view taken earlier in examining structural issues of FEC inaction. A look at the FEC's inaction and capture beyond one incident better diagnoses the core problem that led to Russian infiltration of elections through online communications and can lead to a solution that takes into consideration inaction and capture, as opposed to a piecemeal approach that either targets particular regulated entities or certain substantive areas of the law.

the FEC met requests from online platforms with indecision.<sup>132</sup> This increased the ambiguity of the FEC's regulations and further destabilized enforcement of the rule.

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The FEC's designers, in overemphasizing insularity from partisan influences, led the Commission down the road of inaction and regulatory failure. As this Note argues, agency inaction contributed to the FEC's failure to regulate Internet Research Agency activity.<sup>133</sup> But the passive capture of Internet disclosure laws by independent groups such as 501(c)(4) organizations and the active capture of disclaimer rules by online platforms offer a more specific explanation for the Internet Research Agency's ability to avoid FEC detection in the first place. These increasingly influential groups have collectively preyed on the FEC's inaction and manipulated Internet communications rules to their advantage. The effect was not only a one-off, favorable decision for any one of these actors, but the widespread weakening of disclosure laws for online communications and the unanticipated consequence of the Internet Research Agency's infiltration of American elections. Any solution to prevent, detect, and penalize future foreign interference in U.S. elections must address FEC inaction and remedy FEC capture.

### III

#### ALTERNATIVE LEGISLATION THAT ADDRESSES STRUCTURAL ISSUES

The Honest Ads Act, the leading reform effort for Internet communications, misdiagnoses the root cause of the FEC's failure to enforce online disclosure rules. Its substantive solution, then, cannot address inaction and capture—issues arising from an antiquated structure that lie at the core of the foreign interference problem. This section introduces an alternative legislative solution with the goal of addressing the base issues of inaction and capture.<sup>134</sup>

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<sup>132</sup> See *supra* Section II.B.3.b (discussing how the requests from online platforms regarding online communications disclaimers each ended up with a deadlocked vote).

<sup>133</sup> See *supra* Section II.A.

<sup>134</sup> I describe my legislative proposal as an alternative to the Honest Ads Act. See *supra* note 8 and accompanying text. But because I only outline potential legislation in broad strokes here, it very well may be that the legislation I propose could complement or modify the Honest Ads Act. The point is to have some legislation with goals to remedy the FEC's structural issues, not just the substance of the rules.

### A. *Mitigating Inaction Through Procedural Changes and Multi-Agency Enforcement*

The first goal of any campaign finance legislation addressing the detection and prevention of foreign meddling in American elections should be to mitigate FEC inaction. The requirement that the FEC promulgate a rule on digital platform recordkeeping is the only part of the Honest Ads Act that would force the FEC to act.<sup>135</sup> To address the design mechanisms that insulate the Commission from partisan influence and comprise a root cause of FEC inaction,<sup>136</sup> remedial legislation should begin by encouraging stronger leadership at the FEC and mandating that the Chair serve longer terms. For instance, the Chair could serve a four-year term, so she could be able to carry out a vision for the Commission's direction over an off-year election and a presidential election. This may force agency action. Congress should also restructure the Commission's voting procedures to streamline the enforcement process. The FEC requires an initial vote of the Commissioners to even begin an investigation.<sup>137</sup> By comparison, the Securities and Exchange Commission (SEC), also an independent agency, delegates authority to its staff to open both a Matter Under Investigation (MUI), which is a pre-investigation inquiry equivalent to the FEC Matter Under Review (MUR), and to initiate an investigation independent of an MUI.<sup>138</sup> Only after staff have gathered information and conducted an evaluation of the facts does the matter rise to the level of Commission authorization for enforcement action.<sup>139</sup> Congress could mandate similar procedures to eliminate duplicative votes and reduce opportunities for deadlock.

Other independent agencies, like the SEC or the Federal Communications Commission (FCC) have an odd number of agency heads.<sup>140</sup> Unlike the FEC, which has an even number of Commissioners, an uneven number of Commissioners enhances the ability of each of these agencies to act. The six-Commissioner structure may be a vestige of the FEC's original design that now contributes to FEC inaction, but I do not recommend that Congress change this structural aspect. Unlike the SEC or the FCC, the FEC's indepen-

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<sup>135</sup> Honest Ads Act, S. 1989, 115th Cong. § 8(a) (2017).

<sup>136</sup> See *supra* Section II.A.2.

<sup>137</sup> See RAVEL REPORT, *supra* note 23, at 6–7 (describing the FEC's enforcement process).

<sup>138</sup> See Sec. & Exch. Comm'n, ENFORCEMENT MANUAL 12–17 (2017).

<sup>139</sup> See *id.* at 22–25.

<sup>140</sup> See *About the FCC*, FED. COMM'NS COMM'N, <https://www.fcc.gov/about/overview> (last visited Sept. 1, 2018) (showing five Commissioners); *Current SEC Commissioners*, SEC. & EXCH. COMM'N, <https://www.sec.gov/Article/about-commissioners.html> (last visited Mar. 5, 2018) (noting five Commissioners).

dence from political parties is paramount because the FEC's subject matter is more directly related to electoral politics. The current six-member design evenly balances the influence of the two major parties and insulates the FEC's decisionmaking. By changing the membership, Congress would be sacrificing the FEC's political independence to cure the side effect of inaction.

Legislation should instead focus on more robust, shared enforcement mechanisms. In the case that legislation does not alleviate FEC inaction, Congress should consider granting greater enforcement powers to other agencies to fill in the FEC's regulatory gaps. Campaign finance laws already envision some shared enforcement powers between the FEC and the Department of Justice (DOJ).<sup>141</sup> Congress could require other agencies like the IRS, DOJ, SEC, and FCC to compel regulated entities to report online political activity. All reports could then be referred to the FEC for potential investigation into the foreign or domestic sources of the communications.

### *B. Correcting for Capture with Greater Congressional Supervision*

The second goal for legislation should be to address the capture of Internet disclosure rules. In order to manage capture adequately, Congress should supervise the FEC's decisionmaking regarding the disclosure rules. By supervision, I mean that Congress should monitor the FEC to ensure the agency is appropriately exercising its discretion.<sup>142</sup> With respect to digital disclosure regulations, Congress could fulfill its supervisory role by mandating that the FEC submit a full review of its digital communications advisory opinions and complaints every few years. This is a fairly common congressional oversight mechanism. The Fair Debt Collection Practices Act, for instance, requires that the Federal Trade Commission and the Consumer Finance Protection Bureau submit an annual report of its activities to Congress.<sup>143</sup> Had Congress ordered periodic review of FEC advisory opinions, for example, it could have detected the active capture of online disclaimer rules. Periodic review before Congress could also force the FEC to take stock of recent deadlocked votes and vulnera-

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<sup>141</sup> See *supra* notes 22–25 and accompanying text (describing the enforcement process and noting that the FEC may refer a case to the DOJ for criminal proceedings). The DOJ may also bring its own lawsuits on certain campaign finance-related provisions, without a referral from the FEC. For example, the DOJ may prosecute foreign individuals who attempt to influence American politics without first registering and reporting to the FEC. See Indictment, *supra* note 1, at 11 ¶ 26.

<sup>142</sup> See also Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1687 (1975) (describing Congress as a “negative instrument for checking governmental power”).

<sup>143</sup> See Fair Debt Collection Practices Act, 15 U.S.C. § 1692m (2012).

bilities to passive capture, and to take initiative to address those issues internally.

Following hearings, Congress could mandate amendments to FEC disclosure regulations through legislation. For example, Congress could have required the FEC to promulgate new rules to address the growing ambiguity in online political advertisement disclaimer rules. Had the FEC produced a comprehensive, public record of active capture, constituents and reform advocates could also have been armed with the information to pressure Congress into passing such legislation.

To overcome any further opportunities for inaction or capture, legislation should also include an implementation date. The 1977 Clean Air Act Amendments,<sup>144</sup> which give the Environmental Protection Agency (EPA) Administrator one year to decide whether certain pollutants should be categorized as hazardous, are examples of legislation that mandate agency decisionmaking deadlines.<sup>145</sup> The Honest Ads Act does offer something similar, though limited to the FEC's recordkeeping rules for online platforms.<sup>146</sup>

Congress could also limit the FEC's discretion in producing FEC advisory opinions or rules. To ensure FEC decisions track specific legislative goals, Congress could require the FEC to discuss in every advisory opinion related to the disclosure of online communications how the FEC's opinion furthers the goal of preventing foreign meddling in American elections. Congress did something similar, for instance, with the Safe Drinking Water Act,<sup>147</sup> which specifies that the EPA create standards to regulate certain contaminants.<sup>148</sup> With legislative specificity, I do not go so far as to advocate for a sweeping revival of the nondelegation doctrine for campaign finance.<sup>149</sup> I aim only to describe how Congress can be "an important safeguard against implementation failure" with respect to Internet communications-related disclosure rules, a regulatory area where independent political groups and online platforms have captured the FEC.<sup>150</sup>

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<sup>144</sup> Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (codified as amended in scattered sections of 42 U.S.C.).

<sup>145</sup> See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 479-80 (1987) (highlighting the 1977 Clean Air Act Amendments as an example of the trend toward limitations placed on agency discretion).

<sup>146</sup> See *supra* notes 44-45 (discussing the online platform recordkeeping provisions of the Honest Ads Act).

<sup>147</sup> 42 U.S.C. § 300f-300j-9.

<sup>148</sup> Sunstein, *Constitutionalism After the New Deal*, *supra* note 145, at 480.

<sup>149</sup> For background and discussion of the nondelegation doctrine, see JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION: CASES AND MATERIALS* 352-406 (2d ed. 2013).

<sup>150</sup> Sunstein, *Constitutionalism After the New Deal*, *supra* note 145, at 482.



### C. Addressing Congressional and Non-Congressional Solutions

In the two previous sections I suggest alternative legislation to the Honest Ads Act, the leading campaign finance reform proposal on the issue of online political disclosures. I argue that any campaign finance legislation addressing foreign meddling must have the twin goals of mitigating the effects of FEC inaction and tackling capture of the online disclosure rules. I discuss a congressional solution because at the time of the writing of this Note, there is momentum for potential legislation.<sup>151</sup> But there may be additional merits to a legislative fix.

Congress may be a promising forum for change for many practical reasons. Congress has successfully jolted the FEC into action in the past, and played a significant role in compelling the FEC's Internet communications and disclosure rules. For example, the FEC initiated and completed several rulemakings shortly after the passage of BCRA.<sup>152</sup> Under threat from Congress, the FEC crafted the 2006 Internet rule in a particular way.<sup>153</sup> The FEC has not been as responsive to other branches of government. For instance, critics have repeatedly criticized the FEC for refusing to follow court orders.<sup>154</sup>

Congress is also uniquely qualified to oversee the FEC because of its subject matter expertise.<sup>155</sup> After all, every member of Congress was (and will likely again be) a candidate for federal office, and each has successfully complied with campaign finance regulations in at least one past political cycle. As "consumers" in the campaign finance market, members of Congress are also more likely to be aware of changes in the political landscape and will have greater expertise in reacting to new players in politics.<sup>156</sup>

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<sup>151</sup> See, e.g., Elana Schor, *Dems Press for Election Protection After Mueller Indictment*, POLITICO (Feb. 16, 2018, 6:33 PM), <https://www.politico.com/story/2018/02/16/mueller-indictment-russia-election-protection-congress-416254> (describing mounting political pressure to address the problem of online ad disclosures through legislation).

<sup>152</sup> See, e.g., *supra* note 51 and accompanying text (showing evidence of Congress's influence on the FEC during its 2005 rulemaking).

<sup>153</sup> See *id.* (describing Congress's attempt to pass legislation overruling the FEC, but postponing their legislation indefinitely after the FEC issued its 2006 rule).

<sup>154</sup> See, e.g., Christopher Shays & Martin Meehan, *Two Former Congressmen Explain Why the Federal Elections Commission Can't Be Trusted*, DAILY BEAST (Nov. 6, 2017, 6:27 AM), <https://www.thedailybeast.com/two-former-congressmen-explain-why-the-federal-elections-commission-cant-be-trusted> (noting that the FEC refused to write proper regulations in accordance with court orders).

<sup>155</sup> See JOHN F. MANNING & MATTHEW C. STEPHENSON, *supra* note 149, at 352 (questioning the argument that agencies can provide more expertise than Congress).

<sup>156</sup> Cf. Issacharoff & Karlan, *supra* note 90, at 1710–11 (describing how political candidates are responsive to campaign finance law changes).

Still, I agree that this may not be enough and there may be other entities better suited to address the inaction and capture at the root of the campaign finance online disclosure issue. The FEC, for instance, has taken initiative to amend some of its own rules. But so far, it has only issued an NPRM, and there is currently no indication that the FEC intends to revise its internal procedures to address inaction or employ mechanisms to correct for capture.<sup>157</sup>

To be sure, Congress can suffer from the same partisan and gridlock risks that plague the FEC. There may be other entities better suited to address the structural problems driving the FEC's campaign finance online disclosure issues.<sup>158</sup> Some scholars have proposed solutions from Internet and social media companies themselves. For instance, Professor Nathaniel Persily argues that these companies have greater expertise and, as the gatekeepers of the communications platforms, they are in a better position to detect and prevent foreign interference online.<sup>159</sup> However, this approach overlooks the capture of Internet communications regulations by online platforms. Any private solution would have to address the complicit role of online platforms in the weakening of disclosure rules.<sup>160</sup>

States have also begun drafting their own legislation, bypassing the issue of FEC inaction and capture altogether.<sup>161</sup> The New York State Assembly and the Maryland State Legislature both recently passed legislation to require greater transparency of political ads

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<sup>157</sup> See generally Internet Communication Disclaimers and Definition of "Public Communication," 83 Fed. Reg. 12,864 (Mar. 26, 2018) (to be codified at 11 C.F.R. pts. 100, 110).

<sup>158</sup> Although I focus on alternatives external to the FEC in this section, it is conceivable that the FEC could also take initiative to amend its own rules. But so far, the FEC continues to suffer from inaction and capture. It has again reopened its 2011 ANPRM seeking general comments for updating its Internet disclaimer regulations, but has not yet issued an NPRM. See *supra* note 157 and accompanying text.

<sup>159</sup> Nathaniel Persily, *Good Luck Trying to Regulate the New World of Online Political Ads*, N.Y. POST (Aug. 16, 2016, 6:28 AM), <https://nypost.com/2016/08/16/good-luck-trying-to-regulate-the-new-world-of-online-political-ads/> (arguing that government regulation of political activity is more difficult online, so online platforms will by default become the primary regulators of political campaigns).

<sup>160</sup> As further evidence of their complicity, Internet companies are already making the case to the FEC for flexibility in any new online advertisement regulation. See Harper Neidig, *Internet Giants Urge Flexibility in Online Political Regulations*, HILL (May 29, 2018, 12:39 PM), <http://thehill.com/policy/technology/389714-internet-giants-urge-flexibility-in-online-political-ad-regulations>.

<sup>161</sup> Tony Romm, *Why a Crackdown on Facebook, Google, and Twitter Could Come from the States Before Congress*, WASH. POST (Mar. 2, 2018), <https://www.washingtonpost.com/news/the-switch/wp/2018/03/02/as-d-c-sits-on-the-sidelines-these-states-are-looking-to-regulate-facebook-google-and-twitter/>.

online.<sup>162</sup> California and Washington both have legislation in the works that bolster enforcement of campaign finance laws affecting online communications.<sup>163</sup> State legislation and state regulatory bodies seem promising, or at least faster moving than the bills and regulatory activities at the federal level. But it is still too early to tell.

Congress, through legislative solutions other than the Honest Ads Act, as well as other entities such as private companies and states, could take important steps to address the structural issues that have plagued the FEC in its enforcement of online disclosure rules. Future scholarship should continue to explore all of these solutions to address the complex problem of foreign meddling through online communications.

### CONCLUSION

Congress established the FEC and gave it the essential mandate of safeguarding American elections from corruption. The FEC has fallen short. The consequences of its failures have serious short- and long-term repercussions on American democracy, some of which we are already seeing today.

This Note discusses the problem of foreign meddling in American elections through the use of online media, and challenges the leading reform proposal, the Honest Ads Act. The Honest Ads Act does not address inaction and capture, issues arising from the FEC structure that I identify as problems at the core of the Internet Research Agency's ability to interfere in American elections. Because of inaction and capture, the FEC failed to require disclaimers, which would have allowed the FEC to detect Russian interference earlier in the 2016 election cycle, and provided American voters with valuable information about their news sources. As a solution to these systemic issues, this Note offers a legislative alternative to address problems of both inaction and capture.

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<sup>162</sup> See *id.*; see also Press Release, Governor Andrew M. Cuomo, Governor Cuomo and Speaker Heastie Call for Swift Passage of Election Reforms to Increase Transparency and Protect the Integrity of Our Democracy (Feb. 28, 2018), <https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-and-speaker-heastie-call-swift-passage-election-reforms> (detailing the package of reforms in New York); Ovetta Wiggins & Tony Romm, *Maryland Pioneers State Regulation of Online Political Advertising*, WASH. POST (July 3, 2018), [https://www.washingtonpost.com/local/md-politics/maryland-pioneers-state-regulation-of-online-political-advertising/2018/07/03/5fe1fc32-7ebd-11e8-b660-4d0f9f0351f1\\_story.html?utm\\_term=.431f1199e874](https://www.washingtonpost.com/local/md-politics/maryland-pioneers-state-regulation-of-online-political-advertising/2018/07/03/5fe1fc32-7ebd-11e8-b660-4d0f9f0351f1_story.html?utm_term=.431f1199e874) (noting Maryland laws directed at increasing online political transparency that took effect in early July 2018, and that similar legislation exists in the state of Washington).

<sup>163</sup> See Romm, *supra* note 161.

Although there are many reasons to be pessimistic about any solution, the current political moment may provide a good opportunity to establish these reforms. People across ideologies should have an interest in ensuring that our elections are free from the corrupting influences of foreign entities and that the public views our democracy as being legitimate and fair.