

FEC OKs Members of Congress Appearing in Online Commercial Content

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The Federal Election Commission (FEC) recently issued an advisory opinion permitting Pray.com to feature members of Congress in the company's online audio and video content, notwithstanding that those members also may be candidates for reelection or election to other federal offices. The opinion raises a number of considerations for both commercial companies and nonprofit groups regarding their interactions with federal elected officials and candidates.

Pray.com is a for-profit corporation that operates a commercial website and digital device app providing its users with religious content. Like many other digital content providers, Pray.com offers a mix of free content and paid premium content. At issue in the FEC advisory opinion was whether Pray.com could offer its users free content featuring members of Congress discussing religious faith issues without making a prohibited in-kind contribution to members who are also candidates.

Under the federal campaign finance law, corporations (including both for-profit and nonprofit entities) are prohibited from making contributions to federal candidates. Other types of entities (primarily PACs) are subject to contribution limits. Certain public communications that are coordinated with candidates are considered in-kind contributions, and a candidate's participation in the production or dissemination of public communications is generally considered a form of coordination.

In a very "by-the-book" analysis, the FEC relied primarily on its coordinated communications rule in concluding that Pray.com's content would not constitute in-kind contributions. This is because the FEC's coordinated communications rule only applies to "public

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communications.” With respect to online content, the FEC’s definition of a “public communication” only covers communications “placed for a fee on another person’s website” or digital platform. Here, because Pray.com was proposing to post the content featuring members of Congress only on the company’s *own* website and digital app, the content would not qualify as “public communications” subject to the FEC’s coordinated communications rule.

As a secondary reason for permitting Pray.com to proceed with its proposed content, the FEC also reasoned that the purpose of the content was “to advance [the company’s] commercial interests rather than to influence a federal election.” Specifically, Pray.com would be inviting members of Congress to participate irrespective of their political party and status as candidates. Moreover, the members would only be discussing religious faith issues, which the FEC noted is “the very content that Pray.com is in the business of providing to its users.”

The Pray.com advisory opinion illustrates a number of considerations that apply outside of the specific facts at issue in the opinion:

Candidate vs. Official Capacity Activities. There has been a long-standing distinction in how federal and state campaign finance laws treat activities involving candidates versus elected officials participating in their official capacity. The law generally permits officials to participate in a private organization’s activities, such as speaking about policy or societal issues or performing a ceremonial role, as part of their official representational functions.

On the other hand, an activity featuring a candidate who is not an elected official, or an elected official in his or her capacity as a candidate, will generally raise concerns about in-kind campaign contributions. These are not categorical rules, however, and each situation must be examined according to the particular facts and circumstances.

Commercial Activities. The FEC generally does not regulate a company’s commercial activities, as noted in the Pray.com advisory opinion. For example, a company that sells partisan political paraphernalia is not required to report its sales or revenues as campaign expenditures or contributions. However, commercial activities involving candidates are more fact-dependent.

For example, during the internet’s nascency, the FEC prohibited CompuServe from providing accounts for its paid services for free to candidates in an effort to promote the company’s business. More recently, however (and as we wrote about previously), the FEC permitted Microsoft to provide candidates and other election-sensitive customers with a tailored package of online security enhancements at no additional charge. Like the distinction between candidate and official capacity activities, the distinctions in how the FEC applies its commercial activities doctrine require a fair amount of legal analysis.

Internet Exemption. The FEC’s conclusion in Pray.com relied mostly on the agency’s “internet exemption,” which broadly exempts online communications from regulation unless they are placed for a fee on another person’s online platform. This does not necessarily provide a “get out of jail free” card, however, for any online content that is posted at no charge.

For example, certain FEC commissioners have raised questions about whether unpaid digital content such as videos posted for free on social media involving high production costs, or a political organization's social media profile page, are entirely unregulated. Legislative proposals such as H.R. 1 also could supersede the FEC's existing regulatory approach regarding online content and throw the legal basis for the Pray.com advisory opinion into disarray.

Paid Advertising. In the Pray.com advisory opinion, the FEC limited its advisory opinion only to addressing the specific content featuring members of Congress that Pray.com would post on its own website and digital app. The opinion nonetheless acknowledged that Pray.com also was contemplating purchasing paid advertising, either on other digital platforms or on broadcast media, to promote the content featuring members of Congress. Whether or not those paid ads would be regulated presents a far more challenging legal question. The FEC punted and invited Pray.com to submit a separate request if the company really wanted to ask that question.

Congressional Ethics Rules. The federal campaign finance law is not the only legal consideration that applies to activities involving members of Congress. As noted in a footnote in the FEC's advisory opinion, the other major consideration is the congressional ethics rules (which the FEC has no jurisdiction over). For example, under the ethics rules, members of Congress generally may not act in their official capacity to further a particular private commercial enterprise. Activities such as the ones proposed by Pray.com require additional analysis under the ethics rules.