

Wiley Submits Internet Rule Comments to FEC on behalf of Citizens United

January 2023

On behalf of Citizens United and Citizens United Foundation, Wiley attorneys Lee Goodman and Andrew Woodson submitted comments to the Federal Election Commission (FEC) in response to the agency's proposal to expand regulation of free internet communications. The comment opposed an agency proposal to regulate the internal production and staff costs of organizations that post political content for free on their own websites and other social media platforms.

The agency published a Supplemental Notice of Proposed Rulemaking (NPRM) in December, giving the public thirty days to comment on a proposal to expand the definition of regulated "public communications" to include internet communications "promoted for a fee" as a form of general public advertising. FEC regulations in place since a 2006 rulemaking regulate internet communications that are "placed for a fee" on a third-party website or platform. The FEC is testing whether new methods of disseminating political content – specifically whether fees paid to "promote" or "boost" content otherwise posted online for free – constitute a new form of online "advertising" that should be subject to the same regulation as traditional paid advertising. Two kinds of paid promotions are likely to be implicated by the proposed rule: (1) payments to social media platforms to boost content originally posted for free, and (2) payments to celebrities or internet influencers to endorse or republish candidate messages to their online audiences. Both methods of promotion have many alternatives and nuances the agency must consider.

In addition to covering modern internet promotional methods, the agency's NPRM presented questions indicating that the agency might intend for the new rule to have an even broader reach. For example,

Authors

Lee E. Goodman
Partner
202.719.7378
lgoodman@wiley.law
Andrew G. Woodson
Partner
202.719.4638
awoodson@wiley.law

Practice Areas

Election Law & Government Ethics

the NPRM proposes to regulate free postings on the internet any time “a person is paid to create or generate content containing express advocacy or soliciting a contribution, which then appears on a third party’s website, digital device, application, or advertising platform.” That broad language, Citizens United warned, could subject the internal overhead, staff and production costs incurred by a non-profit organization to create content and publish it on its own website or a social media platform. According to the comment Wiley submitted on behalf of Citizens United, “if adopted in its broadest form, the Supplemental NPRM would sharply reduce substantive freedoms currently protected under the FEC’s Internet Exemption by regulating as contributions or expenditures (a) the technology and staff costs incurred by individuals and organizations to “create or generate content” (i.e., to produce internet messages) and (b) to “republish” or “boost” (i.e., to post or re-post or disseminate) online communications, for which no advertising fee is paid to a third-party advertising platform.”

The FEC’s internet NPRM follows the agency’s adoption of a new set of rules for disclaimers on paid internet advertisements in December. Wiley previously summarized the new rule. The point of the follow-on NPRM was to explore an expansion of the scope of internet communications that are subject to the new disclaimer rules as well as other regulations. Lee Goodman discussed the new disclaimer rules and the NPRM on the Facts About PACs Podcast.