

ALERT

FEC Adopts New Rules for Internet Communications and Candidate Salaries

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In its final meeting of 2023 held last Thursday, December 14, the Federal Election Commission (FEC or Commission) adopted a series of significant rulemakings and policy recommendations to Congress. The first rulemaking, titled “Technological Modernization,” updated a host of existing regulations to adapt the agency’s rules to technological advancements like third-party commercial fundraising platforms and internet communications by organizations. The second, titled “Candidate Salaries,” made significant amendments to the Commission’s existing regulations that permit campaign committees to pay salaries to candidates. Both regulations are scheduled to take effect March 1, 2024. The Commission also approved a set of legislative recommendations to Congress.

Internet Communications by Nonprofit Organizations and Others

The current regulation, known as the “Internet Exemption” first adopted in 2006 under the leadership of then-Commissioner Michael Toner, exempts from regulation free postings on the internet, but does regulate paid advertising on a third-party’s website or platform. The Technological Modernization rulemaking will expand regulation (at 11 CFR 100.26 and 11 CFR 110.11) of paid online advertisements to include express advocacy messages that are “placed **or promoted** for a fee on another person’s website, digital device, application, or advertising platform.” The amended regulation will further clarify that “A public communication is **promoted for a fee** where a payment is made to a website, digital device, application, or advertising platform in order to increase the circulation, prominence, or availability of the communication on that website, digital device, application, or advertising platform.”

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In summary, the rule adopted by the Commission:

- Reiterates the 2006 rule that the only online communications by individuals and organizations that are regulated as “public communications” are express advocacy messages disseminated through paid advertising;
- Expands the scope of regulated internet advertising beyond traditional paid advertising to also reach payments to platforms to “boost” viewership of express advocacy messages (even if the message was originally posted online for free);
- Clarifies that “staffing” and related costs incurred to create express advocacy messages that are disseminated for free on the internet, including websites and social media platforms, are **not** regulated as “public communications,” “contributions,” or “expenditures” (including “independent expenditures,” “coordinated communications” or “in-kind” contributions); and
- Clarifies, for the first time, that payments to “influencers” who re-disseminate a person’s or organization’s messages – again for free on social media platforms – likewise are not regulated as “public communications”.

By way of background, the Commission previously had floated the concept of “promoting” an electoral message for a fee as part of its rulemaking clarifying disclaimer rules for small digital ads. But the new term (combined with other new terms) was viewed as ambiguous and potentially too expansive, possibly regulating for the first time the internal staff costs that nonprofit and other organizations incur to create and post messages. That potential problem triggered a strong reaction in the regulated community. In response, the Commission issued a Supplemental Notice of Proposed Rulemaking seeking additional public comment and several comments were submitted, including a comment by Wiley Rein LLP on behalf of Citizens United.

In the final rule adopted unanimously (6-0) by the Commission, the term “**promoted for a fee**” has been added to the regulation, but the Commission was quite careful to define the term narrowly, limiting its scope to regulate payments to advertising platforms and websites to “**boost**” an express advocacy message on that platform’s own system. The new rule now expands regulation of online electoral messages that are (a) traditional paid advertising for space and dissemination on a platform, website, or app, **or** (b) boosted for a fee on a platform, website, or app. The Commission gave explicit instructions, however, that the new regulation will not capture online messages disseminated for free even though “the speaker incurs staffing, technology, or design costs to create the communication,” or “where the speaker’s only costs are to create the communication or to place or promote the communication ‘using a forum that he or she controls to establish his or her own audience.’”

These changes will be of particular importance for nonprofit organizations and other entities because they often pay staff to produce electoral messages that the staff then disseminates for free on the internet – whether on the organization’s own website or a free social media platform.

As Vice Chair Sean Cooksey observed in the Commission's discussion of the new rulemaking, there has been a simmering debate within the Commission regarding the applicability of the Internet Exemption to the "input costs" incurred by organizations, especially nonprofit organizations, to create and disseminate electoral messages. That debate started in earnest in 2014 in an enforcement matter involving nonprofit organization Checks and Balances for Economic Growth (MUR 6729). In that case, the nonprofit organization had paid to produce express advocacy videos that it posted for free on YouTube. A complaint was filed arguing that the videos constituted regulated expenditures. The FEC's Office of General Counsel recommended that the Commission dismiss the complaint based on the Internet Exemption. But a group of three commissioners voted to find a violation on the basis that the nonprofit organization's internal costs incurred by an incorporated nonprofit organization, including payments to staff to create and post the electoral messages on YouTube, were regulated expenditures. Three other commissioners issued a statement expressing dismay that a well-settled rule would be so abruptly countermanded. That debate simmered in a number of enforcement matters and advisory opinions for the next decade.

As Vice Chair Cooksey concluded at the meeting, "this rulemaking that we are voting on today answers many of those questions and puts those debates to rest." No commissioner expressed a contrary view. All voted for the rulemaking. Thus, nonprofit organizations and other entities should take comfort that this rulemaking has resolved their freedom to create and disseminate electoral messages online under the protections afforded by the Internet Exemption of 2006.

Payments to Internet Influencers

The Technological Modernization rulemaking was approved unanimously and therefore definitively sets the new rules for internet communications. However, two Commissioners – Ellen Weintraub and Shana Broussard – issued a statement expressing philosophical disagreement with the exemption for paid influencers. The rule adopted by the Commission is based upon the reasoning that an influencer is an individual who uses free social media platforms like a soapbox to speak for free to a broad audience, similar to a celebrity endorsement with a fan base, and therefore is not a form of "paid advertising" contemplated by the statute, even though the influencer might be paid by a campaign in the same way a campaign staff person might be paid and then post campaign information on her own website. The Commission had received a comment urging this reasoning by a liberty-minded organization Tech Freedom. But Commissioners Weintraub and Broussard reasoned that paying influencers to speak on your behalf, even on free social media platforms, is a modern form of "paid advertising" and is a big business. Despite this disagreement, the two Commissioners voted for the new rule and it governs. It is possible that their expressed dissent might be calculated to invite a legal challenge to the rule.

Other Tech Modernization Proposals

The Technological Modernization rulemaking also updates a host of other regulations to accommodate the use of new technologies in connection with fundraising, financial transactions, and record-keeping. These new rules will be of particular interest to Treasurers, professional reporting vendors, and fundraising websites and platforms.

Among the updates the Commission adopted are new regulations:

- Recognizing and permitting the use of electronic records and electronic signatures;
- Permitting electronic transmissions of filings and submissions to the agency;
- Requiring regulated political committees that maintain electronic records to provide to the Commission, free of charge, any software needed to access the committee's electronic records (upon request by the agency);
- Clarifying rules with respect to electronic financial transactions;
- Defining "commercial payment processor" as an entity whose usual and normal business is to process payments for others and does so in its ordinary course of business;
- Codifying in the regulations a clear set of rules for "commercial payment processors";
- Clarifying that a contribution made through a "commercial payment processor" is not "earmarked" through the processor;
- Clarifying that a "commercial payment processor's" duty to transmit funds to a political committee is triggered upon receiving the contributor's authorization, rather than actual receipt of the funds;
- Eliminating the requirement to report deposits and transfers from a third-party commercial merchant account;
- Permitting committees to maintain an electronic "record" of electronic contributions received, rather than a full-sized photocopy of a check or written instrument, although a photocopy will still be required if the contribution is received in the form of a check or written instrument;
- Permitting committees to make disbursements by electronic transfer and to maintain electronic records of such disbursements, rather than copies of checks;
- Permitting corporate-sponsored PACs to accept contributions by electronic payment, including combined SSF contributions and dues payments;
- Permitting that contribution designations, redesignations, and attributions can be made electronically;
- Updating the text of numerous regulations referencing outmoded forms of transactions and communications (such as telegrams, typewriters, facsimiles, microfilm, etc.) and substituting modern technologies (such as computers, internet service, etc.); and
- Updating regulations referencing "websites" to include appropriate extensions such as "websites and internet applications" or "website, digital device, application, or advertising platform."

Finally, of particular interest to state and local political party committees, the new rule also updates the definition of "federal election activity" (FEA), which is activity of state and local political parties regulated by the FEC even when conducted with a focus on state and local elections, to exclude *de minimis* costs incurred by a state, district, or local party committee for political activity through electronic applications (i.e., apps). The old rule excluded *de minimis* costs incurred for party committees to post electoral information on their party websites, and the new rule extends that protection to applications, which are an increasingly effective tool for political communications by state and local party committees.

Some of the new rules merely make explicit the permission to use electronic transactions that have been occurring for many years, but the clarifications are helpful. The Commission considered, but elected not to change current rules, with respect to contributions of electronic things of value like prepaid cards and cryptocurrency (currently allowed as an in-kind contribution).

Candidate Salaries Paid from Campaign Funds

Since 2003, FEC regulations have permitted candidates to receive salaries from campaign funds under certain circumstances. The rule was first adopted in order to lower barriers for candidates of modest means. Over the last 20 years it has facilitated salary payments to about 50 candidates, usually in amounts of less than \$40,000, to supplement foregone income during candidacy. The rule has always existed in tension with a statute that prohibits the “personal use” of campaign funds, but the rule has never been challenged in court and has been generally accepted by Congress, the regulated community, and reform organizations, likely due to its salutary objectives.

This rulemaking was initiated by a petition submitted by a former congressional candidate, Nabilah Islam (now a state senator in Georgia). The topic became a priority of Commissioner Broussard, who worked closely with Commissioner Dickerson to forge the amendments. The Commission set out to improve the regulation out of concern for helping candidates of modest means replace foregone income while guarding against abuse or gratuitous enrichment.

The new regulation, adopted by a 5-1 vote, will do the following:

- Reduce the amount of the salary a candidate may receive, from 100% of the salary of the office sought (typically a congressional salary) under the former rule to 50% of the lesser of the minimum congressional salary **or** the average annual income the candidate earned during the five years before becoming a candidate;
- The salary will be calculated and paid on a daily rate while the individual is a candidate;
- Any other or outside earned income will reduce the amount of the campaign salary;
- The candidate will be eligible to receive salary beginning at the time s/he files a Statement of Candidacy, rather than the old rule that sets the start date at each state’s varying deadline to file for ballot access under state law;
- The candidate will be eligible to continue receiving salary payments until 20 days after winning or losing an election (primary or general) or otherwise ceasing to be a candidate; and
- The campaign committee will be prohibited from paying debts for candidate salary if they seek to compromise debts to other vendors.

Apparent in the amendments is a careful calibration between the policy goals of supplanting foregone income, on the one hand, and preventing abuse, on the other. These calibrations might better insulate the rule against a legal challenge, perhaps invited by Commissioner Trey Trainor’s vote against the rule and statements articulating the rule’s tension with the statutory Personal Use Prohibition.

The Commission made no changes to the FEC's current rules on health care insurance for candidates (currently not permitted from campaign funds) or child care expenses (currently allowed when required by campaign responsibilities).

Legislative Recommendations to Congress

The FEC also approved a set of legislative recommendations to Congress. The recommendations include:

- Make the FEC's Administrative Fine Program permanent;
- Establish an itemization threshold for conduit contributions;
- Increase the rate of pay for FEC Commissioners, staff director, and general counsel;
- Amend the Foreign National Prohibition to include conduct constituting "substantial assistance";
- Amend the Foreign National Prohibition to include state and local ballot initiatives, referenda, and recall elections (a proposal recently reported to the U.S. House of Representatives by the House Committee on Administration);
- Expand electronic filing requirements;
- Prohibit fraudulent PAC practices (i.e., "Scam PAC" legislation);
- Expand the current prohibition against fraudulently misrepresenting one's campaign authority;
- Expand the Personal Use Prohibition to cover PACs;
- Prohibit "aiding and abetting" conduct under the statute that prohibits making a contribution in the name of another person;
- Require clear disclosures to contributors regarding recurring contributions;
- Extend the time period for a complainant to file a suit for agency delay;
- Extend the time period for a respondent to respond to a complaint from five to ten days (reflective of the fact that respondents frequently request extensions);
- Increase and index for inflation PAC and State/Local party contribution limits to candidates, as well as other limits, thresholds and exemptions currently set at fixed dollar amounts;
- Permit political committees to make disbursements by methods other than by check (a topic the Commission has permitted in the new rulemaking outlined above);
- Extend the time for the Commission to establish special reporting dates for special elections;
- Update other outdated FECA statutes.

Post Script: Not the Final Word on the Internet Exemption

The Commission's rulemaking refining the definition of regulated "public communications" and refining the Internet Exemption is a welcome development and concludes a technological modernization rulemaking process that started 10 years ago, in 2013! This Commission should be congratulated for its ability to work together to forge much-needed, constructive new regulations. Commissioners Broussard and Dickerson have

been credited with negotiating the details of the two rulemakings, and Chair Dara Lindenbaum can take credit for a productive year at the Commission.

The Commission's changes to the Internet Exemption, however, might not be the final word on the scope of the rule. A lawsuit is pending before the U.S. Court of Appeals for the District of Columbia, styled *Campaign Legal Center v. Federal Election Commission*. At issue is the scope of "input costs" exempted for free online electoral messages. Although the Campaign Legal Center did not challenge the validity of the Internet Exemption, it has been trying to deeply narrow the scope of the exemption and the "input costs" that might qualify. The District Court's ruling in favor of Campaign Legal Center suggested that few, if any, "input costs" would be exempt, prompting the FEC to appeal. At oral argument in November 2023, Judge Harry Edwards expressed sensitivity to the decades of rulemaking proceedings and professional judgments of the Commission regarding the proper scope of the rule, while Judge Cornelia Pillard asked several questions about whether a nonprofit organization's payments to its own staff might be regulated expenditures. The range of the panel's questions and the lack of a clear answer by the litigants to those questions at the hearing leaves open a number of possible judicial results, some with profound implications for the future of the Internet Exemption and free online electoral speech. It is possible the court might not agree with the unanimous Commission's most recent clarifications. Wiley will continue to track the court case and issue alerts on developments.