

ALERT

FEC Looks to End Year With Significant Changes to Regulations on Nonprofit Internet Communications and Candidate Salaries

December 13, 2023

The agenda for the Federal Election Commission's (FEC or Commission) final meeting of 2023 this Thursday, December 14, signals several significant rulemakings and policy recommendations to Congress. The first rulemaking, titled "Technological Modernization," proposes a number of updates and clarifications to 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," proposes significant amendments to existing regulations that permit campaign committees to pay salaries to candidates. The Commission also will take up a set of legislative recommendations to Congress.

Internet Communications by Nonprofit Organizations and Others

The Technological Modernization rulemaking will be of particular importance for nonprofit organizations and other entities because they often pay staff to produce electoral messages that they then disseminate for free on the internet. The current regulation, known as the "Internet Exemption" first adopted in 2006, exempts from regulation free postings on the internet, including the "input costs" incurred to produce them by individuals, groups, and non-political committees. But a debate emerged within the FEC regarding the applicability of the Internet Exemption to organizations, including nonprofit organizations, after the Supreme Court's ruling in *Citizens United v. FEC* in 2010. The debate focused on the disbursements incorporated nonprofit organizations paid to staff to create and post political messages on free social media platforms.

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The rule proposed for consideration this week would:

- Clarify 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, would **not** be regulated as “public communications,” “contributions,” or “expenditures” (including “independent expenditures,” “coordinated communications” or “in-kind” contributions);
- Clarify, 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”;
- Reiterate the 2006 rule that the only online communications by individuals and organizations that would be regulated as “public communications” would be those express advocacy messages disseminated through paid advertising; and
- Clarify that payments to internet platforms to “boost” viewership of a message (even if originally posted for free) would be deemed to constitute a form of “paid advertising” and therefore a regulated “public communication.”

Other Tech Modernization Proposals

The Technological Modernization draft on the agenda also proposes to update a host of other regulations to accommodate the use of new technologies in connection with fundraising, financial transactions, and record-keeping. These new rules, if adopted, will be of particular interest to Treasurers and professional reporting vendors.

Although not a comprehensive list, the updates up for consideration this week will include the following changes to FEC regulations:

- Recognizing and permitting the use of electronic records and electronic signatures;
- Permitting electronic transmissions of filings and submissions to the agency;
- Clarifying rules with respect to electronic financial transactions;
- 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”;
- 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; and
- Eliminating the requirement to report deposits and transfers from a third-party commercial merchant account.

Wiley will publish a complete list of the new technology rules after adoption.

Candidate Salaries Paid from Campaign Funds

Current FEC regulations permit candidates to receive salaries from campaign funds under certain circumstances. The rule was first adopted in 2003 in order to lower barriers for candidates of modest means.

The regulations proposed for consideration this Thursday would amend the current regulation in several material respects:

- The proposed rule would reduce the amount of the salary a candidate may receive, from 100% of the salary of the office sought (typically a congressional salary) 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, calculated and paid on a daily rate;
- Any other or outside earned income would reduce the amount of the campaign salary;
- The candidate would be eligible to receive salary beginning at the time s/he files a Statement of Candidacy, rather than the current rule that sets the start date at each state's varying deadline for filing for ballot access under state law;
- The candidate would 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 would be prohibited from paying debts for candidate salary if they seek to compromise debts to other vendors.

The proposed regulations do not propose 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 will take up a set of legislative recommendations to Congress. The recommendations up for consideration on Thursday will include:

- Making the FEC's Administrative Fine Program permanent;
- Establishing an itemization threshold for conduit contributions;
- Amending the Foreign National Prohibition to include "substantial assistance";
- Amending 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);
- Expanding electronic filing requirements;
- Prohibiting fraudulent PAC practices (i.e., "Scam PAC" legislation); and
- Expanding the Personal Use Prohibition to cover PACs.

There are a number of other legislative recommendations up for consideration.

More Information to Come

The FEC will take up these matters at this Thursday's open meeting, the FEC's last meeting of the year. Watch for your Wiley Alert this Friday summarizing the FEC's final actions.