

RECEIVED
FEDERAL ELECTION
COMMISSION
SEP 12 2001



FEDERAL ELECTION COMMISSION
Washington, DC 20463

SEP 12 2001

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lois G. Lerner
Acting General Counsel

N. Bradley Litchfield
Associate General Counsel

Rosemary C. Smith
Assistant General Counsel

Paul Sanford
Attorney

AGENDA ITEM
For Meeting of: 9-27-01

SUBJECT: Use of the Internet in Federal Elections; Draft Notice of Proposed Rulemaking

The Office of General Counsel has prepared a draft Notice of Proposed Rulemaking ["NPRM"] on the use of the Internet in Federal elections. In accordance with discussions at several Regulations Committee meetings, the draft NPRM seeks comments on proposed rules that would address three issues relating to the use of the Internet for campaign-related activity: (1) The application of the volunteer exemption in 2 U.S.C. §§ 431(8)(B)(i) and (ii) to Internet activity by individuals; (2) The status of hyperlinks placed on corporate and labor organization web sites; and (3) The status of corporate and labor organization press releases that announce candidate endorsements and are made available to the general public on the corporation or labor organization's web site. The draft NPRM provides for a sixty day comment period.

RECOMMENDATION

The Office of General Counsel recommends that the Commission approve the draft NPRM for publication in the *Federal Register*.

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 114, and 117

[NOTICE 2001 -]

**THE INTERNET AND FEDERAL ELECTIONS;
CANDIDATE-RELATED MATERIALS ON WEB SITES OF
INDIVIDUALS, CORPORATIONS AND LABOR ORGANIZATIONS**

- AGENCY:** Federal Election Commission.
- ACTION:** Notice of Proposed Rulemaking.
- SUMMARY:** The Commission is publishing proposed rules relating to the Internet and Federal elections. These rules address issues raised in a Notice of Inquiry that was published by the Commission in November of 1999. The proposed rules would clarify the status of campaign-related Internet activity conducted by individuals, and of hyperlinks and endorsement press releases on Internet web sites established by corporations and labor organizations. The draft rules that follow do not represent a final decision by the Commission on the issues presented in this rulemaking. Further information is provided in the supplementary information that follows.
- DATES:** Comments must be submitted on or before [insert date 60 days after the date of publication in the Federal Register].
- ADDRESSES:** All comments should be addressed to Rosemary C. Smith, Assistant General Counsel, and must be submitted in either written or electronic form. Written comments should be sent to the Federal

1 Election Commission, 999 E Street, NW, Washington, DC 20463.
2 Faxed comments should be sent to (202) 219-3923, with printed
3 copy follow-up to insure legibility. Electronic mail comments
4 should be sent to internetnprm@fec.gov. Commenters sending
5 comments by electronic mail must include their full name,
6 electronic mail address and postal service address within the text of
7 their comments. Comments that do not contain the full name,
8 electronic mail address and postal service address of the commenter
9 will not be considered. The Commission will make every effort to
0 have public comments posted on its web site within ten business
1 days of the close of the comment period.

2 **FOR FURTHER**
3 **INFORMATION**
4 **CONTACT:**

Rosemary C. Smith, Assistant General Counsel, or Paul Sanford,
Staff Attorney, 999 E Street, NW, Washington, D.C. 20463,
(202) 694-1650 or (800) 424-9530.

5 **SUPPLEMENTARY**

6 **INFORMATION:** The Commission is publishing this Notice of Proposed Rulemaking
7 ["NPRM"] to invite comments on proposed rules that would apply to certain types of
8 campaign-related Internet activity by individuals, corporations and labor organizations. This
9 NPRM follows publication of a Notice of Inquiry ["NOI"] on November 5, 1999, in which
0 the Commission sought comments on a wide range of issues related to campaign activity
1 conducted on the Internet. 64 FR 60360 (Nov. 5, 1999). After reviewing the comments
2 received in response to the NOI, the Commission has decided to issue proposed rules in three

1 areas: (1) Application of the volunteer exemption in 2 U.S.C. § 431(8)(B)(ii) to Internet
2 activity by individuals; (2) Hyperlinks placed on corporate or labor organization web sites;
3 and (3) Press releases announcing candidate endorsements that are made available on
4 corporate and labor organization web sites. The Commission may take additional action on
5 some or all of the other issues raised in the NOI at a later time.

6 **A. Background**

7 Recent election cycles have seen a dramatic increase in the use of the Internet to
8 conduct campaign activity related to federal elections. The use of the Internet for activity
9 relating to federal elections raises issues regarding the application of the Federal Election
0 Campaign Act of 1971, as amended, 2 U.S.C. § 431 et seq. ("FECA" or "the Act").

1 Generally, the FECA requires individuals, candidates, party committees, separate
2 segregated funds ["SSFs"] and nonconnected committees to file disclosure reports regarding
3 their election-related activity, and also sets restrictions or limitations on the amounts that may
4 be contributed to candidates and political committees by individuals, corporations, labor
5 organizations and other entities. Although the FECA was enacted prior to widespread use of
6 the Internet, and has been narrowed by court decisions such as Buckley v. Valeo, 424 U.S. 1
7 (1976) and FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986), several provisions
8 of the Act are broad enough to potentially encompass some types of campaign-related
9 Internet activity conducted by individuals, corporations and labor organizations.

0 For example, the Act's definitions of "contribution" and "expenditure" are broad
1 enough to potentially apply to some Internet activity conducted by individuals. Section
2 431(8) of the Act states that the term "contribution" includes "any gift, subscription, loan,
3 advance or deposit of money or anything of value made by any person for the purpose of

1 influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). Similarly, section
2 431(9) states that the term "expenditure" includes "any purchase, payment, distribution, loan,
3 advance, deposit, or gift of money or anything of value, made by any person for the purpose
4 of influencing any election for Federal office." 2 U.S.C. § 431(9)(A). These definitions have
5 been incorporated into sections 100.7(a) and 100.8(a) of the Commission's regulations.

6 The FECA's definition of "independent expenditure" is also broad enough to
7 potentially apply to some individual Internet activity. Section 431(17) of the Act states that
8 "the term 'independent expenditure' means an expenditure by a person expressly advocating
9 the election or defeat of a clearly identified candidate which is made without cooperation or
0 consultation with any candidate, or any authorized committee or agent of such candidate, and
1 which is not made in concert with, or at the request or suggestion of, any candidate, or any
2 authorized committee or agent of such candidate." 2 U.S.C. § 431(17). This definition is
3 incorporated into 11 CFR 109.1.

4 The FECA is also broad enough to potentially apply to some Internet activity
5 conducted by corporations and labor organizations. Section 441b of the Act states that "[i]t is
6 unlawful . . . for any corporation whatever, or any labor organization, to make a contribution
7 or expenditure in connection with any election" for Federal office. 2 U.S.C. § 441b(a).
8 Section 441b also contains a separate definition of "contribution or expenditure" that applies
9 to corporations and labor organizations. This definition states that "the term 'contribution or
0 expenditure' shall include any direct or indirect payment, distribution, loan, advance, deposit,
or gift of money, or any services, or anything of value . . . to any candidate, campaign
committee, or political party or organization, in connection with" any election to any federal
office. 2 U.S.C. § 441b(b)(2). The definition of "contribution or expenditure" applicable to

1 corporations and labor organizations has been incorporated into section 114.1 of the
2 Commission's regulations. The prohibition on corporate and labor organization contributions
3 and expenditures is in 11 CFR 114.2.

4 The Commission has been called upon to apply these definitions in several past
5 advisory opinions. However, in applying these rules, the Commission has also had to
6 determine whether the statutory and regulatory exceptions to these definitions would place
7 the activity at issue outside the coverage of the Act. For example, the Act states that the
8 definition of "contribution" applicable to individuals does not include

9 the use of real or personal property, including a church or community room
0 used on a regular basis by members of a community for noncommercial
1 purposes, . . . voluntarily provided by an individual to any candidate or any
2 political committee of a political party in rendering voluntary personal
3 services on the individual's residential premises or in the church or community
4 room for candidate-related or political party-related activities

5 2 U.S.C. § 431(8)(B)(ii). See also 11 CFR 100.7(b)(4), (b)(5) and (b)(6). The Commission's
6 regulations contain a parallel exception to the definition of expenditure. Section 100.8(b)(5)
7 states that

8 [n]o expenditure results where an individual, in the course of volunteering
9 personal services on his or her residential premises to any candidate or
0 political committee of a political party, provides the use of his or her real or
1 personal property to such candidate for candidate-related activity or to such
2 political committee of a political party for party-related activity.

1 11 CFR 100.8(b)(5). See also 11 CFR 100.8(b)(6) and (b)(7). This provision can also be
2 interpreted as an exception to the definition of “independent expenditure,” since that
3 definition incorporates the term “expenditure.” 2 U.S.C. § 431(17), 11 CFR 100.16.

4 Section 441b also contains exceptions that could place some corporate and labor
5 organization Internet activity outside the scope of the Act. Section 441b(b)(2) states that the
6 definition of “contribution or expenditure” applicable to corporations and labor organizations
7 does not include, inter alia,

8 (A) communications by a corporation to its stockholders and executive or
9 administrative personnel and their families or by a labor organization to its
10 members and their families on any subject; [and] (B) nonpartisan registration
1 and get-out-the-vote campaigns by a corporation aimed at its stockholders and
2 executive or administrative personnel and their families, or by a labor
3 organization aimed at its members and their families

4 2 U.S.C. § 441b(b)(2). The Commission has promulgated rules describing several types of
5 corporate and labor organization activity that are exempt from the prohibition on
6 contributions and expenditures. See 11 CFR Parts 114.3 and 114.4.

7 The Commission’s advisory opinions provide some guidance on the application of
8 these definitions and their exceptions to campaign activity conducted on the Internet.
9 However, the scope of these opinions is limited to the specific factual situations presented.
0 The Commission initiated this rulemaking in order to provide more comprehensive guidance
1 to the regulated community on these issues. This NPRM will focus on the application of the
2 contribution and expenditure definitions and exceptions described above to Internet campaign
3 activity conducted by individuals, corporations and labor organizations.

B. The Notice of Inquiry

The Notice of Inquiry sought comments on a wide range of issues relating to the use of the Internet for campaign activity. 64 FR 60360 (Nov. 5, 1999). One threshold question raised was whether campaign activity conducted on the Internet is properly subject to the Act and the Commission's regulations at all. In addition, the NOI asked commenters to submit comments on whether Internet campaign activities are analogous to campaign activities conducted in other contexts, or are instead so different that they require different rules. The Commission also asked commenters to discuss aspects of the Commission's current regulations that may affect or inhibit the use of the Internet in ways that may not have been anticipated or intended when the regulations were promulgated, and which may now be inappropriate when applied to Internet activity.

More than 1300 commenters submitted comments on the Notice of Inquiry. The Commission received comment from individuals, state and national political parties, and from advocacy organizations that focus on a wide range of public policy issues, such as the First Amendment and civil rights. The Commission also received comments from advocacy organizations that focus on Internet and technology issues, including several devoted to the development of the Internet as a tool for advancing democracy and for educating the public about political candidates and issues. Several for-profit Internet ventures submitted comments, including one major Internet service provider. In addition, the Commission received comments from national labor organizations, the publisher of a journal on law and technology, and from several law firms that represent clients involved in various Internet activities, including one that represents several candidates and party committees. These comments are summarized below.

1 1. General comments on the NOI

2 a. Whether to undertake a rulemaking

3 Many of the commenters expressed views on the general question of whether the
4 Commission should undertake a rulemaking relating to the use of the Internet for campaign
5 activities. At the time the Notice of Inquiry was published in November of 1999, some
6 commenters urged the Commission to refrain from comprehensive rulemaking until after the
7 2000 election. Other commenters said that the Commission should conduct further inquiry
8 before issuing new rules and allow ample time for the major stakeholders to address the
9 issues raised.

10 The commenters expressed widely differing views on the preferred scope of the
1 rulemaking. One commenter urged the Commission to adopt a comprehensive approach to
2 regulation of political activity on the Internet, rather than issuing guidance piecemeal through
3 advisory opinions. Another commenter encouraged the Commission to promulgate new and
4 separate rules governing the use of the Internet that minimize the requirements placed on web
5 sites and individuals. In contrast, the third commenter said the Commission should not be
6 drawn into effort to develop a comprehensive framework for regulating every type of Internet
7 political activity, because the Commission will not be able to keep up with fluid and evolving
8 industry standards.

9 b. Ways in which the Internet differs from traditional media

10 Several commenters argued that the Internet differs from traditional communications
1 media, in support of the assertion that the assumptions of the campaign finance laws are
2 inapplicable to the newer medium. According to these commenters, the Internet differs in the
3 following respects:

- (1) The Internet is abundant. There is no "scarcity," i.e., no limit on the number of communicators, as there is with other media;
- (2) The Internet is inexpensive, which allows everyone to participate. Thus, the traditional models regarding cost upon which the FECA is based do not apply.
- (3) The Internet is interactive and multidirectional. Unlike other media, Internet users can easily talk back to those who supply Internet communications.
- (4) The Internet is user-controlled, i.e., each user selects the content with which he or she will come in contact, whereas the FECA assumes a limited number of people will control the content to which the end users are exposed.
- (5) The Internet is decentralized. There are no gatekeepers, and no web sites or speakers have any inherent advantage over any other web sites or speakers. Each one has the same distribution potential; and
- (6) The Internet is global. Thus, it provides immediate access, and would be difficult to regulate.

The commenters asserted that the FECA is based on the traditional mass media model, where candidates must buy advertisements or rely on news coverage to reach the public. In contrast, the commenters argue, candidates advertise directly on the Internet by creating web sites, thereby avoiding the added cost of buying advertising. One commenter interpreted the Supreme Court's opinion in Reno v. ACLU, 521 U.S. 844 (1997), to say that the factors permitting government regulation in other contexts are not present in cyberspace.

1 A number of nonprofit groups also praised the Internet's ability to provide efficient,
2 timely information about candidates. These commenters said that the Internet promotes
3 cleaner, more informed elections by reducing the importance of money and the need for
4 fundraising, thereby improving the quality of debate and increasing competition.

5 c. General recommendations for Commission action

6 Many of the commenters submitted general recommendations for Commission action.
7 Hundreds of commenters, for example, stated their opposition to any regulation of the
8 Internet or any involvement of the Commission with the Internet. Over 340 commenters
9 stated that the Commission should generally avoid any regulation of Internet activities, with
10 many of the commenters explaining that the Internet cannot or should not be regulated
11 because the medium is a form of constitutionally-protected speech. Other commenters said
12 that the Commission should refrain from issuing regulations restricting the Internet, and
13 instead establish an unambiguous legal framework that allows maximum freedom to
14 participate in political activity with minimal government involvement, in order to foster
15 development of the medium. Many of these commenters said that if the Act is applied to the
16 Internet, the resulting regulatory burdens will stifle participation by individuals and small
17 groups. They also believe that the regulatory safeguards applicable to traditional media are
18 unnecessary for the Internet, because the low costs and wide accessibility of the Internet
19 allow individuals to put forth their views on a relatively equal basis with the largest
20 traditional publisher, effectively preventing misuse. Most of these commenters indicated that
21 web sites run by individuals or small organizations should be subject to less regulation and
22 scrutiny than campaign-directed sites or commercial sites run for profit.

One commenter said that the purposes of the FECA would best be fulfilled by a hands-off approach to regulation of the Internet, particularly for individuals, volunteers and membership associations. Another commenter said that regulating political activity on the Internet could deter individual and grassroots efforts that would possibly gain visibility only on the web. A third commenter said that the FEC should take into account the policy underlying the First Amendment, the FECA and section 230 of the Telecommunications Act of 1996, which the commenter asserted is to promote democratic institutions by increasing the quantity, diversity, and opportunities for political speech.

Several commenters cited constitutional considerations in arguing that the Commission should not regulate political activity on the Internet. One commenter said that only regulations that address the compelling state interest in protecting elections from the corrosive effect of private wealth are justified. This commenter argued that the low cost of the Internet prevents corruption. Another commenter took a similar position, and said that regulations would discourage individual participation in political debate, and would limit much needed information dissemination. A third commenter urged the Commission to adopt a presumption that the use of the Internet is not regulated by the FECA, and narrowly tailor any new rules based on record evidence, to ensure that they withstand constitutional scrutiny.

Another commenter expressed opposition to the rulemaking unless it is to establish that Internet activities are fully protected by the First Amendment, and exempt from reporting requirements and limits. This commenter urged the Commission to treat all forms of Internet communication as the modern equivalents of personal correspondence, pamphlets, newspapers and other forms of political speech, and argued that nobody that is not already being regulated should come under FEC jurisdiction because of Internet activity.

1 However, not all of the commenters were opposed to Commission regulation of
2 Internet political activity. A number of commenters expressed concern that in the absence of
3 specifically applicable regulations, political parties and organizations would use the Internet
4 to circumvent the FECA or otherwise abuse the freedoms of the medium, and urged the
5 Commission to promulgate rules explicitly applying the Act to political activity conducted on
6 the Internet. One commenter said that the Internet is a means of communication like any
7 other, and warrants no special exemption from regulation. Another said that Internet
8 campaign activities are analogous to other campaign activities and therefore come under the
9 Commission's authority. Two commenters urged the Commission to treat candidate web
10 sites the same as any other campaign-related expense, in order to serve the intent of the
11 statute to level the playing field between incumbents and challengers. Some commenters
12 drew a distinction between solicited and unsolicited material, and requested restrictions on
13 "spam," or unsolicited e-mail and other unsolicited material.

14 One commenter said that while the Commission should not restrict First Amendment
15 rights, it likewise should not grant broad permanent exemptions that would threaten on-line
16 privacy or other compelling state interests, or that would undermine existing disclosure
17 requirements. Another commenter said the Commission should apply some of the current
18 regulations to Internet activity, but should not unduly limit activity such as hyperlinks, banner
19 ads and other communications. Instead, this commenter urged the Commission to proceed
20 slowly, and adopt a flexible regulatory approach. Finally, one commenter recognized the
21 Commission's interpretive authority, but urged the Commission to exercise that authority
22 only when it has a high degree of confidence that the Internet activity being conducted
23 implicates the Act.

C. The Proposed Rules

After reviewing the issues raised and the comments received in response to the NOI, the Commission has decided to propose rules to address three issues: (1) Application of the volunteer exemption in 2 U.S.C. § 431(8)(B)(ii) to Internet activity by individuals; (2) Hyperlinks placed on corporate or labor organization web sites; and (3) Candidate endorsements announced on corporate and labor organization web sites. The comments received relating to these specific areas are summarized below, followed by a description of the proposed rules.

1. Internet activity by individuals

a. The Notice of Inquiry

The NOI invited comments on how the Act should be applied to web sites created by individuals that contain references to candidates or political parties. The Commission has addressed issues relating to Internet campaign activities by individuals in two past advisory opinions. Advisory Opinion ["AO"] 1998-22 involved a web site operated by an individual using a computer jointly owned by the individual and his wholly-owned limited liability company, or "LLC." Because the individual administered the site himself using existing equipment, Internet services and domain names, he incurred no additional costs in operating the site. Nevertheless, the Commission concluded that if an individual creates a web site that contains express advocacy of a clearly identified candidate, the costs of the site are an expenditure under the Act and must be reported if they exceed \$250 in a calendar year. 2 U.S.C. § 434(c), 11 CFR 109.2. The Commission also said that even if the costs of the site are part of the expenses of maintaining several unrelated sites, they can be apportioned, so that a portion of the costs can be treated as part of the independent expenditure. AO 1998-22.

1 However, in AO 1999-17, the Commission concluded that costs incurred by a
2 campaign volunteer in preparing a web site on behalf of candidate on his or her home
3 computer are exempt from the contribution definition under the volunteer exception in
4 section 100.7(b)(4) of the regulations. The Commission said that the volunteer exception
5 applies to "individuals known to the campaign who, with the campaign's permission (at some
6 level) engage in volunteer activity." Id. The Commission also said that the costs of
7 electronic mail sent by a campaign volunteer using his or her own computer equipment
8 would be covered by the volunteer exception, and thus would not result in a contribution to
9 the campaign. Id.

10 The NOI asked whether costs incurred by individuals in posting candidate-related
11 materials should be covered by the FECA, and if so, how the value of the individual's
12 contribution or independent expenditure should be determined? In addition, the NOI asked
13 whether an individual posting the materials should be required to treat a portion of the cost of
14 the computer hardware, software, or Internet services as part of the contribution or
15 expenditure. Finally, the NOI sought comments on the extent to which uncompensated
16 Internet activity by individuals should be covered by the volunteer exemption.

7 b. Comments

8 The Commission received numerous comments on the application of the Act to web
9 sites created by individuals. Most commenters argued that costs incurred by individuals
0 engaged in Internet activities should not be considered contributions or independent
1 expenditures under the FECA. Many of these commenters thought Internet activity
2 conducted by individuals should be covered by the volunteer exception. Some commenters
3 argued that the Internet is easily accessible and that posting information involves minimal

1 costs. Others claimed that Internet users must take some affirmative action to view materials
2 on the Internet. Another group of commenters asserted that the primary purpose of most
3 politically-oriented Internet activities is to share ideas and information. For these reasons,
4 they proposed that only sites directly funded or controlled by a campaign should be treated as
5 contributions or expenditures.

6 These commenters generally agreed with the argument that the volunteer exception
7 should cover web sites created by individuals and electronic mail transmitted by individuals,
8 and that the volunteer exception should exempt these activities from the contribution limits
9 whether or not the individual is working on his or her own, or is volunteering directly for a
0 campaign. Several commenters criticized AO 1998-22, saying that the opinion was wrongly
decided and should be superseded because it fails to grasp that the Internet is a medium in
which speech is cheap. These commenters expressed the opinion that the low cost of Internet
communication clearly puts individual web sites within the volunteer exception. Thus, they
assert, it is inappropriate to treat the costs of Internet access as an expenditure. Another
commenter also urged the Commission to vacate AO 1998-22, saying that individuals should
not be required to count all expenses for personal and home computer equipment towards the
FECA thresholds.

Three commenters urged the Commission to relax the disclosure requirements for
individual Internet activity conducted independently from the candidate. They suggested that
the Commission not require an individual to include a disclaimer or submit disclosure reports
unless the individual's spending exceeds a substantial threshold. One commenter suggested a
threshold of \$10,000, while another suggested \$25,000.

1 In contrast, other commenters argued that the Commission should apply the
2 contribution and expenditure definitions to Internet activity consistent with the application of
3 these definitions to other activities that are not significantly different. A few commenters
4 suggested that the Commission issue a per se rule that individuals will not be required to
5 register or report unless their direct out-of-pocket expenses for express advocacy exceed
6 \$250. One commenter suggested that Internet-related services, such as Internet access, web
7 site creation and web site maintenance, should be treated as in-kind contributions, but only
8 when they are provided directly to candidates and political campaigns.

9 Several commenters submitted comments on the types of individual expenses that
10 should be considered contributions or expenditures for purposes of the Act. Two
11 commenters expressed the opinion that the cost of a computer and other electronic media
12 should not be considered contributions or expenditures unless there is evidence that the
13 individual is working with a candidate or has purchased equipment for the sole purpose of
14 supporting a candidate. Two other commenters urged the Commission not to include
15 allocated "sunk" costs, i.e., costs that have already been incurred and cannot be recovered,
16 unless they were incurred principally to support or oppose candidates. Similarly, several
17 commenters argued that only the incremental costs incurred while engaging in Internet
18 political activity should be counted towards an individual's expenditure reporting threshold.

9 c. Proposed 11 CFR 117.1

10 To clarify the application of the Act to campaign-related Internet activity by
11 individuals, the Commission is proposing to add new section 117.1, which would describe
12 certain types of individual Internet activities that would not be treated as contributions or
13 expenditures. Section 117.1(a) would contain an exception from the definition of

1 “contribution” in section 100.7(a) of the current regulations. Section 117.1(b) would contain
2 a parallel exception from the expenditure definitions in sections 100.8(a) and 109.1.

3 Proposed sections 117.1(a) and (b) would state that no contribution or expenditure
4 results where an individual, without receiving compensation, uses computer equipment,
5 software, Internet services or Internet domain name(s) that he or she personally owns to
6 engage in Internet activity for the purpose of influencing any election to Federal office.
7 These exceptions would apply whether or not the individual’s activities are known to or
8 coordinated with any candidate, authorized committee or party committee. See 11 CFR
9 100.23. In addition, Internet services personally owned by an individual would include
0 Internet access and web hosting services provided by an Internet service provider [“ISP”], if
1 these services are provided to the individual pursuant to an agreement between the ISP and
2 the individual acting in his or her individual capacity. The individual’s use of servers,
3 storage devices and other equipment owned by the ISP pursuant to such a service agreement
4 would also be covered by the exception, regardless of where that equipment is physically
5 located.

6 However, the proposed exceptions would not apply to equipment, services or software
7 owned by an individual’s employer, even if the individual was using them as part of
8 volunteer activity conducted on his or her own time. (Note, however, that if the use of a
9 corporation’s or labor organization’s computer facilities is “occasional, isolated or
0 incidental” under 11 CFR 114.9(a) or (b), no contribution or expenditure would result, so
1 long as the individual reimburses the corporation or labor organization for any associated
2 increase in overhead or operating costs.)

1 The effect of the proposed contribution and expenditure exceptions would be that
2 individuals would be able to engage in a significant amount of election-related Internet
3 activity without being subject to the Act. The costs incurred in activities that fall within the
4 contribution exception would not count toward the limits on individual contributions to
5 candidates and party committees. Furthermore, the costs of activities that fall within the
6 expenditure exception would not be independent expenditures under 11 CFR sections 100.16
7 and 109.1. As a result, individuals would not be required to disclose these costs when they
8 exceed \$250 in a calendar year, 2 U.S.C. § 434(c), nor would they be required to include
9 disclaimer statements, 2 U.S.C. § 441d. See 11 CFR 109.2, 109.3 and 110.11.

0 The status of costs that are not covered by these exceptions would depend, among
1 other things, on whether the costs at issue would constitute a "contribution" or "expenditure"
2 under the FECA, and whether the individual that incurs the costs coordinates his or her
3 activity with a candidate, authorized committee or party committee, or instead conducts the
4 activity independently. 11 CFR sections 100.16 and 100.23. Coordinated expenditures that
5 are not covered by the contribution exception would be in-kind contributions subject to the
6 individual contribution limits, and independent expenditures that are not covered by the
7 expenditure exception would be subject to the \$250 reporting threshold in 2 U.S.C. § 434(c).
8 See also 11 CFR 109.2, AO 1998-22. The Commission invites comments on the exceptions
9 from the contribution and expenditure definitions in proposed sections 117(a) and (b).

2. Hyperlinks on corporation and labor organization web sites

a. The Notice of Inquiry

 Many corporations and labor organizations operate web sites to communicate with
their restricted class and the general public. As explained above, section 441b of the Act

prohibits corporations and labor organizations from making contributions or expenditures in connection with federal elections. Thus, the Act generally prohibits these entities from using web sites that are available to the general public to assist or advocate on behalf of any federal candidate.

The Notice of Inquiry sought comments on the circumstances under which a candidate-related or election-related hyperlink on a corporate or labor organization web site should be treated as a prohibited contribution or independent expenditure. The NOI observed that a hyperlink on a corporate or labor organization's web site may be something of value to the linked candidate, political committee or political party, since the link will inevitably steer visitors from the corporation or labor organization's site to the linked site. In AO 1999-17, the Commission concluded that a hyperlink to a candidate or committee's web site is a contribution under the Act if those providing the link do so at less than the amount that they would usually charge for the link. Thus, if a corporation or labor organization provides a free hyperlink to a candidate or committee's web site when it would ordinarily charge for the link, this could be viewed as a contribution or expenditure under the Act.

On the other hand, the costs of providing the link are often negligible or nonexistent, and the practice in some areas of the Internet industry may be to charge nothing for these links. Thus, the usual and normal charge for providing a link may be zero. The NOI sought comments on whether, in light of these considerations, a hyperlink on a corporate or labor organization web site should be considered a contribution or expenditure.

b. Comments

One commenter argued that, under the Supreme Court's decision in Reno v. ACLU, 521 U.S. 844 (1997), Internet communications are not communications with the general

1 public, and thus, the prohibition on corporate and labor organization expenditures would not
2 apply. See 11 CFR 114.2(a). However, most of the comments implicitly or explicitly
3 assumed that Internet communications are communications with the general public for
4 purposes of the Act. The Commission recently approved final rules that treat Internet
5 communications as "general public political communication" for purposes of the contribution
6 limits in section 441a. 11 CFR 100.23(e)(1). See also 66 FR 23537 (May 9, 2001).

7 On the general question of whether corporate and labor organization Internet
8 communications should be treated as contributions or expenditures, several commenters took
9 the position that the existing regulations generally applicable to corporation and labor
0 organization activity should also apply to Internet political activity by these entities. Thus,
1 these commenters believe that web sites owned, maintained or operated by a corporation or a
2 labor organization should be forbidden from advocating for or assisting a candidate. One
3 commenter specifically argued that the actions of corporations and labor organizations should
4 be more strictly regulated than the activities of individuals.

5 In contrast, one commenter asserted that the Commission should mirror the volunteer
6 exemption that applies to individuals for corporations, and rule that most corporate political
7 speech on the Internet is not "something of value" that can be considered a contribution
8 subject to regulation under the FECA.

9 Two commenters went further, arguing that section 441b does not apply to corporate
0 and labor organization communications on the Internet. These commenters assert that section
1 441b only prohibits corporations and labor organizations from making contributions of
2 "anything of value" in connection with a federal election. Thus, in their view, section 441b
3 only prohibits communications entailing a measurable monetary sum. These commenters

1 claimed that Internet communications generally do not involve substantial costs.

2 Consequently, they reasoned, section 441b does not apply to Internet communications. These
3 two commenters also urged the Commission to consider the requirements of the FECA
4 satisfied if express advocacy on a labor organization web site includes the proper disclaimer.

5 Some of the comments submitted regarding hyperlinks on individual web sites were
6 also relevant to hyperlinks on web sites operated by corporations and labor organizations.
7 Thirty commenters argued that hyperlinks are merely pointers that present an option for a
8 viewer, but do not add value to a site or advocate the contents of the target site. Nineteen
9 commenters suggested that hyperlink restrictions could reduce the value of the entire Internet.
0 Eighteen commenters took the position that regulation is unnecessary because hyperlinks cost
1 next to nothing to create. Ten commenters opposed hyperlink regulations because they
2 believe hyperlink regulations would be difficult to enforce. Several commenters
3 recommended that a hyperlink be treated as a contribution only in specific circumstances,
4 such as when it is presented in a fraudulent or misleading manner or when it is provided
5 without charge when a charge would normally be assessed for similar services.

6 Other commenters urged the Commission to treat hyperlinks like footnotes, endnotes,
7 numbers in a phone book, maps or signs offering directions to campaign headquarters,
8 providing a friend or caller with a phone number, or the mere provision of information or a
9 path to information, much like providing someone with a telephone number or an address.
0 These commenters argued that links should not be treated as an implied endorsement,
1 because the user must take proactive steps to pursue further information. Two commenters
2 characterized hyperlinks as the backbone of the web, and argued that treating them as
3 contributions or something of value will discourage web site operators from linking to

1 official candidate sites. Another commenter characterized hyperlinks as part of the Internet
2 infrastructure.

3 Other commenters expressed similar views. One commenter asserted that the mere
4 establishment of hyperlinks, even if coordinated, should not be regulated. Another
5 commenter argued that if a hyperlink is placed on a site without any attempt to distinguish
6 candidates or their political affiliation, the link should be treated as nonpartisan voter drive
7 activity under section 431(9)(B)(ii) of the FECA, regardless of the type of web site on which
8 it is posted. A third commenter took the position that a link cannot be treated as a
9 contribution or expenditure because it does not contain substantive content. The commenter
0 argued that hyperlinks may facilitate access to communication that contains express
1 advocacy, but they cannot themselves be a communication containing express advocacy.

2 One commenter said the standard of "usually charged for" cited in AO 1999-17 is
3 inadequate, because some web sites have both paid and unpaid links. This commenter urged
4 the Commission to specifically state that hyperlinks are not "something of value," and only
5 treat a link as a contribution when (1) the web site routinely charges for similar links, (2) the
6 web site has provided the particular links in a partisan manner, and (3) the text of or content
7 around the link contains express advocacy. Another commenter urged the Commission to
8 use categories to apply the "less than usual and normal charge" standard. Under this
9 approach, a link to a particular candidate's web site would not be a contribution to that
0 candidate unless the site charges less than it would for links to another candidate's web sites.

Other commenters favored less regulation of hyperlinks. One commenter suggested
that the Commission establish a presumption that a hyperlink is not a contribution absent
facts to the contrary. Under this approach, if a web site provided a link for which it would

1 normally charge a fee, the Commission would treat this as one factor tending to rebut the
2 presumption that the link is not a contribution. Another commenter took a more absolute
3 position, saying that there is no definitive way to determine the value of a hyperlink.
4 Consequently, this commenter believes, they should not be regulated on any type of web
5 sites.

6 c. Proposed 11 CFR 117.2

7 The Commission is proposing to add provisions to the regulations that would address
8 the placement of hyperlinks on corporate and labor organization web sites. New section
9 117.2 would state that the establishment and maintenance of a hyperlink from the web site of
0 a corporation or labor organization to the web site of a candidate or party committee for no
1 charge or for a nominal charge would not be a contribution or expenditure, even if the
2 corporation or labor organization selectively provides hyperlinks to one or more candidate(s),
3 political committee(s), or political parties without providing hyperlinks to any opposing
4 candidate(s), political committee(s) or political parties.

5 However, three conditions must be met in order for the hyperlink to be exempt from
6 the contribution and expenditure definitions. First, the hyperlink will only be exempt if the
7 corporation or labor organization does not charge or charges only a nominal amount for
8 providing hyperlinks to other organizations. Second, the hyperlink may not be a coordinated
9 general public political communication under section 100.23 of the Commission's rules.
0 Finally, if the hyperlink is anchored to an image or graphic material, that material may not
1 expressly advocate under section 100.22. Similarly, the text surrounding the hyperlink on the
2 corporation or labor organization's web site may not expressly advocate. However, if the
3 hyperlink is anchored to the text of the URL of a candidate or party committee's web site, the

1 text of the URL is not subject to the express advocacy limitation. Thus, even if the text of the
2 URL itself expressly advocates, the hyperlink would be exempt, so long as the other
3 conditions are met. The Commission invites comments on proposed section 117.2.

4 3. Press Releases Announcing Candidate Endorsements

5 a. The Notice of Inquiry

6 Under section 114.4(c) of the current regulations, corporations and labor
7 organizations may distribute certain candidate-related and election-related materials to the
8 general public without violating section 441b of the FECA. Under paragraph (c)(6) of
9 section 114.4, a corporation or labor organization may endorse a candidate, and may also
10 publicly announce the endorsement and state the reasons therefore through a press release and
11 press conference, so long as disbursements for the press release and press conference are de
12 minimis. The corporation or labor organization's disbursements will be considered de
13 minimis if the press release and notice of the press conference are distributed only to the
14 representatives of the news media that the corporation or labor organization customarily
15 contacts when issuing nonpolitical press releases or holding press conferences for other
16 purposes. 11 CFR 114.4(c)(6).

17 In AO 1997-16, the Commission applied this exception to a corporate endorsement
18 posted on the corporation's web site. The Commission concluded that communication of the
19 endorsement via the web site would, in effect, be communication with the general public, and
20 thus would be a prohibited corporate expenditure under 2 U.S.C. § 441b(b)(2)(A) and
21 11 CFR 114.4. However, the Commission said that an endorsement could be posted on a
22 corporation or labor organization's web site if access to the endorsement were limited to the

restricted class using a password or similar method, or if the corporation or labor organization's separate segregated fund paid the costs of posting the endorsement.

The NOI sought comments on whether a corporation or labor organization that routinely posts press releases on the Internet should be allowed to post a press release announcing a candidate endorsement on a portion of its site that is accessible to the general public, or should be required to limit access to members of the restricted class.

b. Comments

Several commenters addressed the subject of endorsements on corporate and labor organization web sites. One commenter argued that corporations that routinely post press releases on their own web sites should be allowed to post endorsements. Another commenter took the position that posting a press release should be allowed provided the press release is used in a similar way to any other press release. This commenter reasoned that if other press releases are generally available to the public, endorsement press releases should also be accessible to the general public. Another commenter suggested that corporations and labor organizations should be allowed to post candidate endorsement press releases on their web sites so long as they make no special effort to direct web traffic to the endorsement portion of their sites. This commenter also urged the Commission to supersede AO 1997-16.

In contrast, two commenters suggested that corporations and labor organizations be required to place endorsement press releases in a discrete "media only" area of their web sites designated solely for media communications. These commenters said this area could be a deep link page, to limit exposure. However, under these circumstances, the commenters argued, corporations and labor organizations should be allowed to place candidate

1 endorsements on their web sites, since this reflects the way they communicate with the news
2 media in the Internet age.

3 c. Proposed 11 CFR 117.3

4 The Commission proposes to add section 117.3 to new Part 117 to address the issue
5 of endorsements on corporate and labor organization web sites. Proposed section 117.3
6 would state that, for the purposes of the provisions governing endorsements in section
7 114.4(c)(6) of the current regulations, a corporation or labor organization may make a press
8 release announcing a candidate endorsement available to the general public on its web site,
9 provided that four conditions are met: (1) The corporation or labor organization ordinarily
10 makes press releases available to the general public on its web site; (2) The press release is
11 limited to an announcement of the corporation or labor organization's endorsement or
12 pending endorsement and a statement of the reasons therefore; (3) The press release is made
13 available in the same manner as other press releases made available on the web site; and (4)
14 The costs of making the press release available on the web site are de minimis.

15 This provision would enable a corporation or labor organization to post a press
16 release announcing a candidate endorsement on its web site without limiting access to the
17 press release to its restricted class. Thus, section 117.3 would partially supersede AO 1997-
18 16. However, the corporation or labor organization would be required to limit the press
19 release to an announcement of the corporation or labor organization's endorsement and a
20 statement of the reasons for the endorsement. Section 117.3 would not allow the corporation
21 or labor organization to post express advocacy materials such as banner advertisements for a
22 candidate on its web site. The Commission invites comments on this proposal.

1 **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

2 I certify that the attached proposed rules, if promulgated, would not have a significant
3 economic impact on a substantial number of small entities. The basis of this certification is
4 that the proposed rules are permissive in nature, in that they allow individuals, corporations
5 and labor organizations to engage in activity that might otherwise be limited or prohibited
6 under the FECA. Therefore, the rules would impose no economic burdens on these entities.

7 **List of Subjects**

8 11 CFR 100

9 Elections.

10 11 CFR 114

11 Business and Industry, Elections, Labor.

12 11 CFR 117

13 Elections, Internet.

1 For the reasons set forth in the preamble, the Federal Election Commission proposes
2 to amend Subchapter A of Chapter I of Title 11 of the Code of Federal Regulations as
3 follows:

4 **PART 100--SCOPE AND DEFINITIONS (2 U.S.C. 431)**

5 1. The authority citation for Part 100 would continue to read as follows:

Authority: 2 U.S.C. 431, 434(a)(11), 438(a)(8).

6 2. Section 100.7 would be amended by adding a new sentence at the end of paragraph
7 (b)(4), to read as follows:

8 **§ 100.7 Contribution (2 U.S.C. 431(8)).**

9 * * * * *

10 (b) * * *

11 (4) * * * See 11 CFR 117.1 for rules governing an individual's
12 use of computer equipment, software, Internet services or Internet domain
13 name(s) that he or she personally owns to engage in Internet activity in support
14 of or in opposition to any candidate or any political committee of a political
15 party.

16 * * * * *

17 3. Section 100.8 would be amended by adding a new sentence at the end of paragraph
18 (b)(5), to read as follows:

19 **§ 100.8 Expenditure (2 U.S.C. 431(9)).**

20 * * * * *

21 (b) * * *

1 (5) * * * See 11 CFR 117.1 for rules governing an individual's
2 use of computer equipment, software, Internet services or Internet domain
3 name(s) that he or she personally owns to engage in Internet activity in support
4 of or in opposition to any candidate or any political committee of a political
5 party.

6 * * * * *

7 **PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY**

8 4. The authority citation for Part 114 would continue to read as follows:

9 **Authority:** 2 U.S.C. 431(8)(B), 431(9)(B), 432, 434(a)(11), 437d(a)(8), 438(a)(8)
0 and 441b.

1 5. Section 114.1 would be amended by adding new paragraph (a)(2)(iv), to read as
2 follows:

3 **§ 114.1 Definitions.**

4 (a) * * *

5 (2) * * *

6 (iv) The establishment and maintenance of a hyperlink under the
7 conditions described in section 117.2 of this chapter;

8 * * * * *

9 6. Section 114.4 would be amended by adding a new sentence at the end of paragraph
0 (c)(6)(i), to read as follows:

1 **§ 114.4 Disbursements for communications beyond the restricted class in connection**
2 **with a Federal election.**

3 * * * * *

4 (c) * * *

5 (6) * * *

6 (i) * * * The press release may be made available
7 through the corporation's or labor organization's web site under the
8 conditions described in section 117.3 of this chapter.

9 * * * * *

10 7. Part 117 would be added to read as follows:

11 **PART 117 -- USE OF THE INTERNET FOR CAMPAIGN ACTIVITY**

12 Sec.

1 117.1 Individual volunteer activity that is not a contribution or expenditure.

2 117.2 Hyperlinks from corporation or labor organization web sites.

3 117.3 Corporate and labor organization endorsements beyond the restricted class in
4 connection with a federal election.

5 **Authority:** 2 U.S.C. 431(8), 431(9), 437d(a)(8), 438(a)(8) and 441b.

6 **§ 117.1 Individual volunteer activity that is not a contribution or expenditure.**

7 (a) Contribution. Notwithstanding the provisions of section 100.7(a) of this chapter, no
8 contribution results where an individual, without receiving compensation, uses computer
9 equipment, software, Internet services or Internet domain name(s) that he or she personally
0 owns to engage in Internet activity for the purpose of influencing any election for Federal
1
2

1 office, whether or not the individual's activities are known to or coordinated with any
2 candidate, authorized committee or party committee.

3 (b) Expenditure. Notwithstanding the provisions of sections 100.8(a) and 109.1 of this
4 chapter, no expenditure results where an individual, without receiving compensation, uses
5 computer equipment, software, Internet services or Internet domain name(s) that he or she
6 personally owns to engage in Internet activity for the purpose of influencing any election for
7 Federal office, whether or not the individual's activities are known to or coordinated with any
8 candidate, authorized committee or party committee.

9 **§ 117.2 Hyperlinks from corporation or labor organization web sites.**

0 (a) Notwithstanding the provisions of section 114.1(a) of this chapter, the establishment
1 and maintenance of a hyperlink from the web site of a corporation or labor organization to the
2 web site of a candidate, political committee or party committee for no charge or for a nominal
3 charge is not a contribution or expenditure, provided that:

- 4 (1) The corporation or labor organization does not charge or charges only a
5 nominal amount for providing hyperlinks to other organizations;
- 6 (2) The hyperlink is not coordinated general public political communications
7 under section 100.23 of this chapter; and
- 8 (3) The following materials do not expressly advocate under section 100.22 of
9 this chapter:
 - 0 (i) The image or graphic material to which the hyperlink is anchored; and
 - 1 (ii) The text surrounding the hyperlink on the corporation or labor
2 organization's web site, other than the text of a Uniform Resource
3 Locator to which the link is anchored.

