



FEDERAL ELECTION COMMISSION
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MEMORANDUM

TO: The Commission
THROUGH: Robert J. Costa
Acting Staff Director

RJC

FROM: Lawrence H. Norton
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SUBJECT: Amendments to Final Rules and Explanation and Justification for the Internet Communications Rulemaking in Agenda Document No. 06-20

AGENDA ITEM
For Meeting of: 3-23-06
(Continued on March 27, 2006)

SUBMITTED LATE

The Office of General Counsel has prepared the following amendments to the Final Rules and Explanation and Justification contained in Agenda Document No. 06-20. These include the text of the Explanation and Justification for the revisions to 11 CFR 114.9 regarding the use of corporate and labor organization facilities.

Attachment

Explanation and Justification

1
2 On page 4, change the text of footnote 2 to:

3
4 “The change affects only the following regulatory provisions: the restrictions on
5 funding of Federal election activity by political party committees and State and local
6 candidates (2 U.S.C. 431(20)); the allocation of costs of certain communications by
7 some political committees under 11 CFR 106.6(b); the determination that certain
8 communications must be treated as contributions if coordinated with a Federal
9 candidate or political party committee under 11 CFR 109.21 and 109.37; and the
10 requirement to include disclaimer statements on certain communications pursuant to
11 11 CFR 110.11.”

12
13 On page 7, line 8, add a comma after "charge".

14
15 On page 8, lines 2-7, delete the sentence that begins with "For example" through the end of
16 the paragraph and change it to:

17
18 "For example, a broadcast television viewer or radio listener who turns on his
19 television or radio set is automatically subjected to the limited, available
20 programming. In contrast, a website's information is seen only by those who actively
21 take the steps necessary to find, visit, and view the website."

22
23 On page 8, line 11, change ". On" to ", and on". Footnote 9 is retained after the comma.

24
25 On page 11, line 3, add the following sentence to the beginning of the paragraph:

26
27 “A number of these changes hinged on the definition of ‘public communication.’ ”

28
29 On page 13, line 5, delete the text reference to footnote 21.

30
31 On page 20, line 8, change "corporations, labor organizations and political committees," to
32 "corporations and labor organizations (through their SSFs) and other political committees,".

33
34 On page 20, footnote 28, delete "or normally charged".

35
36 On page 22, change lines 15-20 to:

37
38 "The Commission notes that this definition of “public communication”
39 encompasses the types of advertising that some commenters believed should be
40 covered, such as payments by anyone on behalf of a candidate or political committee
41 for advertising on another person's website. As discussed below, this rule should be
42 read together with other existing regulations regarding coordinated and independent
43 expenditures and communications by corporations, labor organizations and political
44 committees."

45
46 On page 26, line 21, change "rest" to "rests".

1 On page 30, line 15, add "almost" before "identical".

2

3 On page 30, line 19, change "Committee" to "Commission".

4

5 On page 34, change footnote 38 to read as follows:

6

7 No commenters or witnesses supplied comments that would assist the Commission in
8 determining how a State, district, or local party committee would pay for a website
9 that was captured under the definition of "public communication." The statute and
10 regulations do not require a local party committee to pay for all of its public
11 communications with Federal funds, only those that PASO a Federal candidate or
12 otherwise constitute Federal election activity, such as generic campaign activity. The
13 Commission asked in the NPRM how the organizations would go about allocating the
14 costs associated with the website if the Commission determined that websites for these
15 organizations are "public communications." Some commenters who supported
16 including State, district, and local party committee websites in the definition of
17 "public communication" suggested that a time/space allocation would be appropriate.
18 However, the Commission is not convinced that the statute permits time/space
19 allocation of any "public communication" that features PASO information about a
20 Federal candidate. The existence of PASO would require the organizations to pay for
21 the "public communications," i.e., the website itself, entirely with Federal funds. Such
22 a result is inconsistent with the Act's regulation of Federal, but not non-Federal
23 activity. For example, such a determination could have a ripple effect on the payment
24 of other costs. The acquisition of the computers or the phone line (two costs that are
25 generally allocated as administrative expenses) arguably could become expenses that
26 would be required to be paid for entirely with Federal funds because one of the uses of
27 the equipment would be to access or maintain a website.

28

29 On page 46, line 8, move footnote 45 to after "e-mail."

30

31 On page 46, line 12, change "expressed concern" to "was concerned".

32

33 On page 49, footnote 46, add "the" before "definition".

34

35 On page 50, line 2, add "11 CFR" before "Part 114".

36

37 On page 59, line 7, delete "potential".

38

39 On page 59, line 10, change "through" to "as".

40

41 On page 60, line 14, change "100.95" to 100.155".

42

43 On page 64, lines 17 and 18, change "any other form" to "other forms".

44

45 On page 65, change the text of footnote 49 to, "See note 23 for the definition of 'person.' "

46

47 On page 70, line 3, change "paragraphs" to "sections".

48

1 On page 70, line 7, change “100.94(e) and 100.155(e)” to “100.94(e)(1) and 100.155(e)(1)”.

2 On page 70, line 15, change "definition" to "definitions".

3 On page 70, line 18, change “paragraphs 100.94(e) and 100.155(e)” to “100.94(e)(1) and
4 100.155(e)(1)”.

5 On page 71, line 21, add the following:

6 "F. 11 CFR 100.94(e)(2) and (3) and 100.155(e)(2) and (3) – No Exemption for
7 Payments for E-mail Lists Made at the Direction of a Political Committee or
8 Transferred to a Political Committee

9 In the NPRM, the Commission stated that it would continue to view the
10 purchase of mailing lists (including e-mail lists) as expenditures or contributions when
11 the lists are used to distribute candidate and political committee communications for
12 the purpose of influencing Federal elections. See NPRM at 16976. Paying for an e-
13 mail list is often expensive, whereas distributing the e-mail communications is usually
14 free or at negligible cost. The Commission is concerned, however, that the new
15 exceptions for individual Internet activities might be construed to permit individuals to
16 pay for e-mail lists that might then be transferred to, or used by, a political committee
17 without any contribution or expenditure resulting. Therefore, new 11 CFR
18 100.94(e)(2) and 100.155(e)(2) provide that the exemption for individual Internet
19 activities does not apply to any payment for the purchase or rental of an e-mail address
20 list when that payment is made at the direction of a political committee. Similarly,
21 new 11 CFR 100.94(e)(3) and 100.155(e)(3) provide that the exemption for individual
22 Internet activities does not apply to payments for any e-mail address list that is
23 subsequently transferred to a political committee, whether that transfer is permanent or
24 temporary (i.e., sharing the list of e-mail addresses for a one-time use). Under the new
25 rule, a contribution or expenditure would not result when an e-mail list is purchased by
26 an individual unless either of the conditions in paragraphs (e)(2) or (e)(3) are met.”

27

28 On page 75, footnote 53, change " 'Internet site' " to " 'website' ". Underline "See, e.g.,".

29

30 On page 81, in footnote 58, capitalize "opinion".

31

32 On page 81, in footnote 61, change "note 3" to "note 53" and change "Internet site" to
33 "website".

34

35 On page 82, line 3, change "Further, the Commission's" to "The Commission".

36

37 On page 82, line 11, delete the first instance of "other".

38

39 On page 83, line 6, insert "advisory" before "opinion".

40

41 On page 83, line 11, add the following Explanation and Justification for 11 CFR 114.9:

42

1 **X. 11 CFR 114.9 – Use of Corporate or Labor Organization Facilities**

2 In the NPRM, the Commission proposed amending its rule regarding the provision of
3 corporate or labor organization facilities¹ in connection with a Federal election to clarify that
4 an employee’s “occasional, isolated, or incidental use” of computer equipment and Internet
5 services for Federal campaign activities would not be an expenditure or contribution by the
6 corporation or labor organization. Based on the comments received in response to the
7 proposal, the Commission is not amending 11 CFR 114.9 precisely as proposed, but instead is
8 reaching the same result by adding a new safe harbor specifically allowing the use of
9 corporate and labor organization facilities for certain individual Internet activity in connection
10 with a Federal election.

11 As noted above, corporations and labor organizations are prohibited from making
12 contributions or expenditures, or facilitating the making of contributions by certain persons, in
13 connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(a), (b), and (f).
14 However, corporations and labor organizations do not make contributions or expenditures, or
15 facilitate the making of a contribution, by permitting “occasional, isolated, or incidental use”
16 of corporate or labor organization facilities in connection with a Federal election by
17 stockholders and employees of a corporation and officials, members, and employees of a
18 labor organization. See 11 CFR 114.2(f)(i) and 11 CFR 114.9(a) and (b). Under section
19 114.9, certain classes of individuals may use corporate or labor organization facilities for
20 Federal election purposes, but must reimburse the corporation or labor organization to the
21 extent that, if at all, its overhead or operating costs are increased by the individual’s
22 “occasional, isolated, or incidental use” of the facilities. See 11 CFR 114.9(a)(1) and (b)(1).

¹ The Commission notes that under current 11 CFR 114.9 the term “facilities” covers a wide variety of office equipment and supplies, including, but not limited to, copiers, fax machines, telephones, printers, scanners, and meeting and office space.

1 However, if a stockholder or employee of a corporation, or an official, member, or employee
2 of a labor organization, makes more than “occasional, isolated, or incidental use” of corporate
3 or labor organization facilities, and does not reimburse the corporation or labor organization
4 within a commercially reasonable time at the normal and usual rental charge for the facilities
5 used (rather than merely for the increase in overhead or operating costs), then the corporation
6 or labor organization will have made a prohibited contribution or expenditure. See 11 CFR
7 114.9(a)(3) and (b)(3).²

8 Although section 114.9 provides only general guidance for determining what
9 constitutes “occasional, isolated, or incidental use,” see 11 CFR 114.9(a)(1)(i) and (b)(1)(i),
10 the section does contain safe harbor provisions. The safe harbors provide that any use of
11 corporate or labor organization facilities, regardless of whether it occurs during or after
12 working hours, is considered “occasional, isolated, or incidental use” if the use does not
13 exceed one hour per week or four hours per month. See 11 CFR 114.9(a)(2)(ii) and (b)(2)(ii).

14 In the NPRM, the Commission proposed amending 11 CFR 114.9 to clarify that the
15 term “facilities” includes computers, software, and other Internet equipment and services, but
16 the Commission noted that an individual’s use of corporate or labor organization computers
17 and Internet services for campaign activity over the Internet at home, or at locations outside of
18 work, would remain subject to the “occasional, isolated, or incidental use” restriction.

19 Comments on the Commission’s proposal to amend 11 CFR 114.9 were mixed. Some
20 commenters did not think that the rule needed clarification because the language of the
21 current rule is already flexible enough to cover corporate and labor organization computers
22 and Internet services used for political activity. Others commented that an explicit extension

² The Commission notes that an individual using corporate or labor organization facilities to engage in personal uncompensated Internet activities will not make a contribution or expenditure because such Internet activities by individuals is exempt under new 11 CFR 100.94 and 100.155, as discussed above.

1 of section 114.9 to cover computers and Internet services would be “appropriate” and
2 “reasonable.” A number of commenters argued that the safe harbor of one hour a week or
3 four hours a month was not adequate for election-related personal Internet activities. As one
4 commenter stated, applying the time limitations of the safe harbor provision to Internet
5 activities “is simply not realistic in today’s political environment.”

6 Many commenters argued that in light of the unique nature of Internet activities and
7 portable nature of the computers and other facilities needed to conduct the activities, the
8 Commission should treat the use of corporate and labor organization facilities for Internet
9 activities differently from the use of such facilities for other activities. One commenter stated:

10 [I]t is now common for companies and unions to permit (and at times
11 encourage or even require) employees to keep and use company- or union-
12 owned laptops during non-working hours. Thus, for many employees, a
13 company- or union-owned computer is their primary or only home computer,
14 and the employees are permitted to make essentially unlimited personal use of
15 those computers – including, for those so inclined, for political speech on the
16 Internet.

17 In light of these developments, the vast majority of commenters who addressed
18 this topic, including commenters from several reform organizations, argued that the
19 Commission should abolish any time restriction on the use of corporate or labor
20 organization computers and other Internet equipment and services.

21 The Commission acknowledges that personal use of corporate and labor organization
22 laptops, e-mail, Internet service, and other similar facilities is often permitted, and the
23 Commission agrees with these commenters that it would serve little purpose for Commission
24 regulations to prohibit or overly restrict such common uses of facilities. The Commission

1 agrees with a commenter who said “[c]orporate or labor organization provision of a computer
2 and Internet access is not analogous to the use of a building or facility, either in financial or
3 practical terms. What would be comparable is providing a pen and paper.”

4 Accordingly, the Commission is amending 11 CFR 114.9 to add a new safe harbor
5 specifically addressing the provision of corporate or labor organization facilities for Internet
6 activities. The new safe harbor provides that a corporation or labor organization may permit
7 its employees, shareholders, officials, and members to use its computer and Internet facilities
8 for volunteer individual Internet activity, as defined in 11 CFR 100.94, without a contribution
9 resulting, provided that the activity does not prevent an employee from completing the normal
10 amount of work for which the employee is paid or is expected to perform, as specified in 11
11 CFR 100.54, does not increase the overhead or operating costs of the corporation or labor
12 organization, and the activity is in no way coerced.

13 Thus, the new provisions of 11 CFR 114.9 complement the provisions of 11 CFR
14 100.94. Under 11 CFR 100.94, individuals are free to use whatever computer and Internet
15 facilities that are otherwise available to them to engage in uncompensated Internet political
16 activities. Under 11 CFR 114.9, corporations and labor organizations may permit access to
17 their computers and Internet facilities so that stockholders, employees, members, and officials
18 may conduct these activities. The final rules make clear that corporations and labor
19 organizations may not condition the availability of their facilities on their being used for
20 political activity or on support for or opposition to any particular candidate or political party.
21 See revised 11 CFR 114.9(a)(1) and 114.9(b)(1). Rather, corporations and labor
22 organizations may permit use of their facilities for political activities to the extent these
23 facilities are available for other non-work-related purposes.

1 In the new safe harbor, the Commission is not quantifying a permissible level of use of
2 corporate and labor organization facilities for Internet activities. As one commenter
3 explained, “any organization, union or corporation, is going to have policies that control [the
4 ability of employees or staff to use corporate facilities and union facilities], that restrict [such
5 use] in order for it to do its ordinary business. And [] you can leave it to these organizations
6 acting sensibly that they are not going to have a workplace where anyone can, to an unlimited
7 amount, [at least] on the job, use their facilities for private pursuits, political pursuits,
8 anything unrelated to the organization’s mission.” Additionally, because 11 CFR 100.54
9 applies to the safe harbors at 11 CFR 114.9(a)(2) and 114.9(b)(2), employees must complete
10 their normal work in order to avail themselves of these safe harbors. Thus, individual Internet
11 activities must be undertaken on the individual’s own time.

12 One witness testified that “a lot of us work at all hours of the day, and it’s very useful
13 to be able to use the computer at the office for some of our personal work as well, whatever
14 that may be...[to be limited to 1 hour per week and 4 hours per month is] basically just
15 forcing people to kind of live an abnormal life.” The reference to 11 CFR 100.54 is meant to
16 address this type of situation and confirm that so long as the campaign activity does not, as
17 one witness stated, “interfere with their normal work,” i.e. the normal amount of work that the
18 employee normally performs, no contribution will result.

19 The reference to 11 CFR 100.54 applies to the safe harbors at 11 CFR 114.9(a)(2) and
20 (b)(2). Thus, while there is no specific time limit on Internet activities, employees must
21 complete their normal work in order to avail themselves of these safe harbors. A corporation
22 or labor organization may not subsidize the activity by, for example, reducing an employee’s
23 workload to provide extra time for campaign activities at corporate or labor organization

1 expense. Subject to those conditions, there is no ceiling on the amount of time that an
2 employee may spend in a given day or week engaging in online political activities.

3 In addition to the safe harbor for the use of corporate or labor organization facilities to
4 engage in Internet activities, the Commission is also preserving the one hour per week/four
5 hours per month safe harbor, which will continue to apply across-the-board to usage of all
6 types of corporate and labor organization facilities. See 11 CFR 114.9(a)(2)(i) and
7 114.9(b)(2)(i).

8 In the NPRM, the Commission sought comment on whether additional rules
9 would be necessary to ensure that corporations and labor organizations did not “coerce”
10 their employees or others into engaging in campaign activities over the Internet. The
11 Commission received unanimous agreement from commenters addressing this issue
12 that the current rules prohibiting corporate and labor organization coercion for
13 contributions or fundraising activities are sufficient to prevent such behavior regarding
14 Internet activities. Since the new safeguards for individual Internet activity encompass
15 more than fundraising activities, however, the Commission is adding new provisions at
16 11 CFR 114.9(a)(2)(ii)(C) and (b)(2)(ii)(C) to ensure that every individual is free to
17 express his or her own views, without fear of reprisal. The Commission notes that
18 corporations and labor organizations providing their facilities to their employees,
19 stockholders, officials, or members remain subject to the prohibitions contained in 11
20 CFR 114.2, which includes a prohibition on the use of coercion, including threat of
21 detrimental job action, any other financial reprisal, or force, to urge any individual to
22 make a contribution or engage in fundraising activities on behalf of a candidate or
23 political committee. See 11 CFR 114.2(f)(2)(iv); see also 2 U.S.C. 441b(b)(3). The
24 Commission is also adding new paragraph (e) to section 114.9 to indicate that this

1 section does not alter other provisions of 11 CFR part 114 regarding communications
2 to and beyond a corporation's or labor organization's restricted class.

3 The Commission is also making technical amendments to 11 CFR 114.9 to
4 restructure the format of the existing safe harbor. This change does not alter the
5 substance of the rule or the existing safe harbor, but merely provides a clearer rule
6 structure to accommodate the new safe harbor provision.

7
8

Final Rules

1
2
3 On page 86, indent the first line.

4
5 On page 87, lines 11 and 13, capitalize "the".

6
7 On page 87, line 19, change "other forms" to "any other form".

8
9 On page 87, line 22, change "Provider" to "Providers".

10
11 On page 88, line 6, capitalize "any".

12
13 On page 88, line 7, delete "or".

14
15 On page 88, lines 8 and 10, capitalize "any".

16
17 On page 89, lines 5 and 7, capitalize "the".

18
19 On page 89, line 13, change "other forms" to "any other form".

20
21 On page 89, line 16, change "Provider" to "Providers".

22
23 On page 90, line 1, capitalize "any".

24
25 On page 90, line 2, delete "or".

26
27 On page 90, lines 3 and 5, capitalize "any".

28
29 On page 90, between lines 6 and 7, add:

30
31 **"PART 110 – CONTRIBUTION AND EXPENDITURE LIMITATIONS AND**
32 **PROHIBITIONS**

33
34 9. The authority citation for part 110 continues to read as follows:

35
36 Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d, 438(a)(8), 441a, 441b, 441d,
37 441e, 441f, 441g, 441h, and 441k, and 36 U.S.C. 510."

38
39 On page 91, change lines 5-9 to:

40
41 **"PART 114 – CORPORATE AND LABOR ORGANIZATION ACTIVITY**

42
43 10. The authority citation for part 114 continues to read as follows:

44
45 Authority: 2 U.S.C. 431(8), 431(9), 432, 434, 437d(a)(8), 438(a)(8), 441b.

46
47 11. In section 114.9, paragraphs (a) and (b) are revised and new paragraph (e) is
48 added to read as follows:"

- 1
- 2 On page 92, line 12, change "such" to "individual volunteer".
- 3
- 4 On page 92, line 16, change "activity" to "activities".
- 5
- 6 On page 93, line 4, change "officials, members" to "stockholders".
- 7
- 8 On page 93, line 5, change "labor organization's" to "corporation's".
- 9
- 10 On page 93, line 7, change "labor organization" to "corporation".
- 11
- 12 On page 94, strikethrough lines 5-9.
- 13
- 14 On page 94, line 10, change "(a)(1)" to "(b)(1)".
- 15
- 16 On page 94, line 13, change "such" to "individual volunteer".
- 17
- 18 On page 94, line 17, change "activity" to " activities".
- 19
- 20 On page 95, line 2, change "corporation" to "labor organization".