American Federation of Labor and Congress of Industrial Organizations

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Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking: "The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations," 66 Fed. Reg. 50358 (Oct. 3, 2001)

Dear Ms. Smith:

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") welcomes the opportunity to submit comments on the Federal Election Commission's notice of proposed rulemaking concerning three aspects of the use of the Internet for federal election campaign activity. The AFL-CIO believes that it is appropriate and helpful for the Commission to begin to explicate formally the application of the Federal Election Campaign Act to this important and growing new communications medium.

On January 7, 2000, the AFL-CIO submitted detailed comments regarding the Commission's related "Notice of Inquiry," which invited comments on a substantial range of Internet issues but did not then make regulatory proposals. We incorporate here those comments, particularly as they addressed (in sections similarly entitled) (1) the interest of the AFL-CIO in these issues, including the nature of our use of the Internet, (2) the distinct nature of the First Amendment status of the Internet compared with other forms of communications regulated under FECA, and (3) the purposes and key requirements of federal election law relevant to Internet issues.

Since the AFL-CIO filed those comments nearly two years ago, we have witnessed and participated in the second year of the 2000 election cycle and the first year of the 2002 cycle. That experience has confirmed the views we expressed in those earlier comments, as the Internet has played an even more prominent part in the waging of federal election campaigns, the media coverage of those campaigns, and the furtherance of public advocacy by unions, corporations and other organizations on many legislative and policy issues.

We comment on each of the three proposed new regulations in turn.

I. Internet Activity by Individuals

Proposed 11 C.F.R. § 117.1 would exempt from the statutory definitions of "contribution" and "expenditure" an individual's use of his or her own computer equipment and website to engage in "Internet activity for the purpose of influencing any [federal] election," regardless whether the activity is coordinated with a candidate or party committee.

The AFL-CIO supports this proposed regulation as far as it goes. We are concerned, however, that there be no negative implication that it would be impermissible for an individual to use computer equipment and a website that is owned by another individual (who otherwise would be covered by the new rule if he or she so used them, and who so consents), or that is afforded to the individual (alike as to others) at a public library, community center or learning institution (leaving aside whatever rules those entities might have for such usage), in order to create or convey material over the Internet for the purpose of influencing a federal election. Cf. 11 C.F.R. § 100.7(b)(5)and (6). The new regulation ought to expressly apply as well to these circumstances, since they are in all material respects indistinguishable from an individual's use of personally owned equipment, and the rule should not disfavor individuals who cannot afford to purchase or maintain their own computer equipment or website.

II. Hyperlinks on Corporation and Labor Organization Web Sites

Proposed 11 C.F.R. § 117.2 would exempt from the definitions of "contribution" and "expenditure" the establishment and maintenance by a corporation or a labor organization of hyperlinks to the websites, selectively chosen, of candidates, political committees and party committees for no charge or a nominal charge if certain conditions are met. This proposal would codify, with some elaboration, AO 1999-17, where the Commission embraced the view that a hyperlink to a candidate committee website would be considered a contribution under the Act only if the owner of the linking website charged the committee less than its ordinary charge for such a link. Although the notice summarizes the pertinent comments that responded to the Notice of Inquiry in helpful detail, the Commission provides no explanation why it is proposing this new rule.

The Act prohibits unions from making any "contribution" or "expenditure" in connection with a federal election. 2 U.S.C. § 441b(a). The phrase "contribution or expenditure" includes specified disbursements and transactions, and "anything of value." 2 U.S.C. § 441b(b)(2). FECA precludes unions, then, not from making communications per se (beyond their restrictive classes), but from making communications entailing a measurable monetary expense.

The AFL-CIO believes that the provision of a hyperlink in itself should not be regulated, let alone subject to conditions. Links are essential to the integrated structure of the World Wide Web. Ordinarily, a link takes either of two forms, either the Internet address (URL) of the linked site, which automatically creates the link by the mere act of its inclusion on a website, or a narrative, iconic or other graphic representation of the linked website. A link is inherently cost-free to provide, access and use, in contrast to much other website content that entails measurable design costs and personnel resources.

Under the Commission's current regulations, a union or a corporation can provide the address of a candidate or political committee to individuals at least within its restricted class, even if doing so would assist in transmitting contributions. 11 C.F.R. § 114.2(f)(2)(ii). See also AO 1993-18. A website link is tantamount to an address, and should be treated as nothing more. Although the link could also be compared to providing transportation to a candidate's headquarters, and thereby facilitating a volunteer recruitment or contribution, that characterization proves too much, as a link inherently has numerous capacities and no expense is ordinarily incurred in utilizing it. Nor is there a complete analog to a link in other communications contexts because no other mechanism both informs the viewer of the existence of materials created by a candidate or other entity and provides the viewer with free and instant access to them. And, because websites are dynamic, and linkers typically do not and cannot reasonably be expected to monitor all linked content, a link to express advocacy may occur without the linker's knowledge or intent.

For these reasons, we submit that the provision of a link either does not constitute "anything of value" within the meaning of the pertinent FECA definitions, or the associated expense is so de minimis as to warrant a regulatory exemption. On that view, none of the proposed conditions ought to apply, both because the item at issue is exempt to begin with, and because the expense factor remains the same whether or not the linking party charges for other links, coordinates the link with a candidate or party, or posts other, express advocacy material on the website that is related to the link.

Having said that, we acknowledge that the first proposed condition, dealing with the union's or corporation's link-charging practices, would likely have little or no adverse impact on a union's opportunity to provide links. And, although the second condition, that there be no coordination within the meaning of 11 C.F.R. § 100.23, would impose no significant burden either, it is simply an unwarranted inhibition of communications with a candidate or party committee given the link's lack of monetary value.

We have several reservations regarding the third condition. First, the proposed prohibition on express advocacy material that either surrounds the link or appears on the link itself, if it is other than the Uniform Resource Locator, presumes that express advocacy, however de minimis the cost (with the exception of press releases; see below), is unlawful on a union or corporate website. For reasons that we explained in detail in our comments on the Notice of Inquiry, the Commission need not and should not embrace that view.

Second, proposed 11 C.F.R. § 117.2(a)(3) incorporates the Commission's regulatory definition of "express advocacy," the second part of which – 11 C.F.R. § 100.22(b) – several courts, correctly in our view, have held to be unconstitutional. No such unlawful definition should be incorporated in any new Commission regulation.

III. Press Releases Announcing Candidate Endorsements

Proposed 11 C.F.R. § 117.3 would provide that, for purposes of 11 C.F.R. § 114.4(c)(6), a corporation or a labor organization may post a press release announcing a candidate endorsement on its website available to the general public if it satisfies certain conditions. We believe the proposed regulation is unduly restrictive, and suggest that in issuing the rule in final form the Commission explain its rationale in doing so consistent with the following discussion.

As the Commission has stated, "endorsement of a candidate by a corporation does not by itself constitute a prohibited contribution or expenditure for purposes of 2 U.S.C. § 441b." AO 1984-43. Application of Section 441b(a) to at least some union express advocacy on the Internet that is accessible to the general public is arguably impermissible as a matter of law or unnecessary to vindicate the purposes underlying that proscription.

For other means of communication, the Commission does not require that regulated parties allocate their capital or other sunk costs as a component of the cost of a particular communication. The same principles should apply to the Internet. The AFL-CIO and its affiliated unions that have websites use them almost exclusively for content that is *not* election-related and within FECA's purview; and, this is surely the norm for the use of websites by most ongoing institutions other than political committees themselves. Accordingly, only the incremental costs attributable to express advocacy (and perhaps other candidate-coordinated public communications) are relevant to the application of Section 441b; and, as discussed earlier, those costs are typically negligible at most.[1]

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[1] We note that the low cost of Internet usage may mean that others' activities will not trigger other FECA provisions, despite their actual impact. For example, an individual does not become a "candidate" regulated by FECA until he or she receives contributions or makes expenditures aggregating in excess of $5,000. 2 U.S.C. § 431(2)(A). A group of persons does not become a

The Commission has long recognized that certain union and corporate public communications, even though entailing a demonstrable expense, are not precluded by Section 441b(a). First, a union or corporation may publicly communicate its endorsement of a federal candidate by issuing a press release and holding a press conference, so long as the related disbursements are de minimis, distribution of the press release or notice of the press conference is confined to the entity's customary press list used for other purposes, and the press release or press conference is not coordinated with the candidate. 11 C.F.R. § 114.4(c)(6). As the Commission noted when it first enunciated this policy, two Supreme Court decisions – U.S. v. United Automobile Workers, 352 U.S. 567 (1957), and U.S. v. Congress of Industrial Organizations, 335 U.S. 106 (1948) – "at least inferentially" support a union's constitutional right to make such a public communication; so, the Commission applied the Act's prohibition on partisan union and corporate expenditures to the general public to accommodate those concerns. See AO 1984-23. And, in issuing its current regulation on the subject, the Commission discounted concerns that this policy would "enhanc[e] the publicity corporate endorsements will receive" because in each instance actual press coverage would depend upon "the news media's determination as to the newsworthiness of the event." Explanation and Justification, "Corporate and Labor Organization Activity: Express Advocacy and Coordination With Candidates," 60 Fed. Reg. 64260, 64270 (Dec. 14, 1995).

This rule for union and corporate announcements of endorsements followed the Commission's longstanding rule permitting press coverage of candidate appearances before the restricted class of a union or corporation. Under this regulation, a union or corporation that sponsors such an appearance may open the event to the press, so long as all news media representatives are accorded equal access. 11 C.F.R. § 114.3(c)(2). See also 60 Fed. Reg. at 64266.

The union or corporate sponsor of such a press release, press conference or candidate appearance may incur, then, a very small cost to produce a potentially far-reaching and potent communication, utilizing the amplification and transmission services of print and broadcast media that ultimately decide who will actually hear the partisan message. Similarly, express advocacy on a union website may entail a de minimis cost, and, analogously, other Internet users then make the individual decisions whether to access the website and view that express advocacy message. Arguably, then, the same considerations that underlie the Commission's rules regarding union-generated publicity concerning candidate appearances and endorsements support similar dispensation for the maintenance of express advocacy messages on union websites.

"political committee" until it receives contributions or makes expenditures aggregating in excess of $1,000 during a calendar year. 2 U.S.C. § 431(4)(A). And, any person other than a political committee who makes independent expenditures need not report them until their aggregate amount or value exceeds $250 during a calendar year. 2 U.S.C. § 434(c)(1).

Insofar as proposed 11 C.F.R. § 117.3 implements that approach, we support it. However, the analysis above supports a rule that contains none of the three proposed conditions, and that permits the website endorsement regardless whether or not it takes the form of, or is denominated as, a "press release."

Further, as with the press release posting now covered by the proposed rule, the Commission should require no recordkeeping or reports of associated "costs" of such deep-linked material. Compelling the calculation of the costs attributable to express advocacy on websites that principally, if not almost entirely, contain other content, and the allocation of these costs among candidates pursuant to 11 C.F.R. Part 106, will likely produce reports of negligible sums, hardly information of use to the Commission or the general public. And, the equipment and personnel costs incurred in tracking such expenses (even assuming there is any measurable cost) will likely be highly disproportionate.

We emphasize that this analysis addresses only the inclusion of express advocacy content on a union website, not other Internet activities that entail a demonstrable, and more readily calculable, cost, such as the purchase of advertising in the form of banners or otherwise on other websites that communicate express advocacy or invite viewers to access the express advocacy segment of the union's website; or the purchase of special search capability from Internet search engines (such as Yahoo and Excite) that send Internet searchers directly to the express advocacy portion of the union's website.

We further observe that the Commission's enforcement resources easily could be overwhelmed by the cost of responding to and investigating alleged failures to comply with an absolute prohibition of express advocacy website content funded by unions or corporations, given the existence of millions of constantly changing websites. And, such enforcement would create a significant incentive for mischievous complaints filed in order to harass these entities that would require the Commission to make individual enforcement judgments over nominal disbursements. This could severely diminish the Commission's effectiveness and invite a loss of public confidence in the Act.

Conclusion

We appreciate the Commission's consideration of our views, and we would welcome the opportunity to appear at any hearing the Commission may convene regarding this notice of proposed rulemaking.

Respectfully submitted,

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