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December 3, 2001

Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street, NW
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Re: Comments to Notice of Proposed Rulemaking (Internet)

Dear Ms. Smith:

The Chamber of Commerce of the United States ("Chamber") respectfully submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") published in the Federal Register on September 27, 2001.[1]

The Chamber is the world's largest not-for-profit business federation, representing over 3,000,000 businesses and business associations. The Chamber's members include businesses of all sizes and industries, 96 percent of which are small businesses with 100 or fewer employees. The Chamber furnishes a myriad of services for its members including: research, issue briefings, policy forums, small business resources, government and grass roots lobbying, litigation, and electoral activity.

The Chamber's Internet site (www.uschamber.com) provides a comprehensive view of these services as well as other relevant information. The website allows the Chamber to provide information at a *de minimis* cost to people who are actively seeking it. As such, it is a model of efficient information dissemination.

However, the NPRM as it is currently written denies these efficiencies to the Chamber and all other corporations and labor unions which desire to use the Internet to engage in general political activity. The Chamber submits these comments because comprehensive deregulation of Internet political activity is consistent with the realities of the Internet. Furthermore, the NPRM's current piece-meal approach leaves many questions about corporate and labor union

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[1] The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations. 66 Fed. Reg. 50,358 (proposed Oct. 3, 2001) (to be codified at 11 C.F.R. pts. 100, 114, & 117).

Internet-based political activity unanswered, and will surely spawn additional questions. Without a comprehensive scheme of deregulation, the Chamber will be required, as it has been forced to do in the past, to engage in the time-consuming and sometimes unreliable Advisory Opinion process, or rely upon the disjointed body of Advisory Opinions for answers to pressing questions.[2]

## I. INTRODUCTION

With each passing year, the American public's use of the Internet continues to expand. The universe of Internet users in the United States now numbers approximately 170 million,[3] up from roughly 100 million in early 1999.[4] This increase in Internet use cuts across every gender, racial, age, and income demographic group. Consequently, as one recent study noted, "the Internet population looks more and more like the overall population of the United States."[5] To borrow the words of Andrew Kohut, Director of the Pew Research Center, these numbers "show that the Internet is a great trove of political information that has the potential of empowering many more citizens to directly access unfiltered data."[6]

For the Internet to fully develop its potential as a tool for increasing public participation in the democratic decision-making process, it must be allowed to develop with as little government interference as possible. Overregulation of the Internet could stifle this powerful but nascent technology, thereby muting its impact as a transformative force in our politics.

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[2] *See* FEC Advisory Op. 1980-128; *see e.g.* FEC Advisory Op. 1978-18; *see also Chamber of Commerce v. FEC*, 69 F.3d 600 (DC Cir. 1995), *amended on denial of reh'g*, 76 F.3d 1234 (DC Cir. 1996).

[3] Michael Pastore, *Americans Increase Internet Use in 2000*, CyberAtlas, *at* http://cyberatlas.internet.com/big_picture/geographics/article/0,,5911_594751,00.html (Feb. 21, 2001). For up-to-date Internet usage statistics, refer to Nielsen//NetRatings, *at* http://209.249.142.16/nnpm/owa/NRpublicreports.usageweekly.

[4] Michael Pastore, *May 1999 Usage Stats*, *at* http://cyberatlas.internet.com/big_picture/traffic_patterns/article/0,1323,5931_152561,00.html.

[5] LEE RAINIE ET AL., THE PEW INTERNET & AMERICAN LIFE PROJECT, MORE ONLINE, DOING MORE 2 (2001), *available at* http://www.pewinternet.org/reports/pdfs/PIP_Changing_Population.pdf.

[6] Andy Glass, *Voters Went Online [to] Track Bush-Gore Campaign*, Cox News, *available at* http://www.coxnews.com/2000/columnists/a_glass/11-17-00story4649.html (Nov. 17, 2001).

In its September 27, 2001 Notice of Proposed Rulemaking ("NPRM"), the Federal Election Commission ("FEC" or "the Commission") issued the following proposed rules regarding the use of the Internet in federal elections: (1) exempt Internet political activity by individuals from the Federal Election Campaign Act's[7] ("FECA" or "the Act") definitions of "contribution" and "expenditure"; (2) permit corporate and labor union web sites to include hyperlinks to candidate and party committee web sites; and (3) allow corporations and labor unions to post press releases announcing candidate endorsements on their web sites. While we commend the Commission for proposing rules that loosen the regulatory grip on certain Internet political activities, we believe the proposed rules do not adequately deregulate Internet political communications by corporations, labor organizations and political action committees ("PACs").

By proposing to exempt individuals who engage in Internet political activity from the purview of the FECA, the Commission tacitly acknowledges that Internet communications are fundamentally different from communications using traditional media.[8] The distinguishing qualities of the Internet effectively remove the possibility that online political communications will have a corrupting influence on the political process. We therefore urge the Commission to adopt a broader and more consistent scheme for deregulating Internet political activity by extending the proposed exemption for individual Internet political activity to online political speech by corporations and labor organizations.

These comments proceed in the following manner: Part II describes the characteristics that differentiate the Internet from traditional media that the FECA was originally designed to regulate. Part III discusses the regulations and corporate express advocacy on the Internet.

## II. DISTINCTIVE CHARACTERISTICS OF THE INTERNET

"The Internet is a unique and wholly new medium of worldwide human communication."[9] One Congressman has declared that "[t]he Internet is potentially

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[7] 2 U.S.C. § 431-55.

[8] This acknowledgement is evidenced by the NPRM exempting individual Internet use from the definitions of "contribution" and "expenditure," the implication of which is that Internet political activity is neither and, therefore, should not be regulated.

[9] *Reno v. ACLU*, 521 U.S. 844, 850 (1997) (citations and internal quotes omitted).

the greatest tool for political change since the Guttenberg press."[10] The Internet possesses a number of distinctive characteristics that set it apart from other modes of communication, such as radio, television, or print media.

First, "the Internet is not as 'invasive' as radio or television."[11] Under Supreme Court precedent, radio and television have been subject to less First Amendment protection than have other modes of communication due to the fact that they are "uniquely pervasive" and, thus, "can intrude on the privacy of the home without prior warning as to program content."[12] As the Supreme Court noted, Internet content, by contrast, can be accessed only through "a series of affirmative steps."[13] Thus, "[c]ommunications over the Internet do not 'invade' an individual's home or appear on one's computer screen unbidden. Users seldom encounter content 'by accident.'"[14] In this regard, it is misleading to say that a web site is "a communication with the general public." It is more accurate to say that the general public must communicate with the web site.

Second, unlike communication via broadcast or print media, Internet communications involve *de minimis* marginal costs. Internet service providers ("ISPs") frequently provide free software and free server space for its users to create an online presence. Thus, instead of having to purchase airtime from a radio or television station, advertising space from a newspaper or magazine, or materials for direct mail, a person who engages in Internet communications need only employ cost-free keystrokes to establish a web site through which he or she may communicate with thousands and perhaps millions.

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[10] *Hearings on Political Speech and the Internet Before the United States Senate Committee on Rules and Administration* (May 3, 2000) (opening statement of Sen. Mitch McConnell), *available at* http://rules.senate.gov/hearings/2000/05300chair.htm.

[11] *Reno*, 521 U.S. at 869.

[12] *Sable Communications of Cal., Inc. v. Fed. Communications Comm'n*, 492 U.S. 115, 127 (1989).

[13] *Reno*, 521 U.S. at 867.

[14] *Id.* at 869.

Finally, "the Internet can hardly be considered a 'scarce' expressive commodity."[15] In contrast to the frequency spectrum, whose scarcity justifies government regulation of broadcasters, the Internet "provides relatively *unlimited*, low-cost capacity for communication of all kinds."[16] The amount of Internet bandwidth continues to multiply at a prodigious rate,[17] as does the amount of information available online.[18] Accordingly, the scarcity rationale cannot be used to justify government regulation of Internet communications.[19]

The Internet's unique features make it an ideal tool for obtaining information about political candidates and public policy and for publicizing one's own views regarding important political issues. In attempting to adapt FEC regulations to this new medium of political expression, the Commission must fully account for these fundamental differences between the Internet and traditional media.

## III. CORPORATE EXPRESS ADVOCACY ON THE INTERNET

Federal election law is premised upon the notion that "virtually every means of communicating ideas in today's mass society requires the expenditure of money."[20] Therefore, the FEC regulatory apparatus seeks to stem the potential "distorting effects of immense aggregations of wealth"[21] on the political process by placing limits on the sources and amounts of political contributions and imposing disclosure requirements on political spending.

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15 *Id.* at 870.

16 *Id.* (emphasis added).

17 Michael Pastore, *Internet Bandwidth Expands Around the Globe*, CyberAtlas, *at* http://cyberatlas.internet.com/big_picture/hardware/article/0,,5921_900241,00.html (Oct. 9, 2001).

18 For analyses documenting the increase in the number of web sites on the Internet, see http://www.netfactual.com/index.php3 (last visited Nov. 8, 2001).

19 *See Reno*, 521 U.S. at 870.

20 *Buckley*, 424 U.S. at 19.

21 *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

As demonstrated above, however, Internet communications differ significantly from broadcast and print communications. Consequently, as Commissioner David Mason has noted, the assumptions underlying the federal campaign finance system "may not be valid on the Internet."[22] This is especially true with respect to Internet political communications by corporations.[23]

This section explains why the FECA's ban on corporate contributions should not prohibit corporations from engaging in Internet political communications, including displaying express advocacy on publicly accessible portions of their web sites. In short, corporations should be allowed to exercise their First Amendment rights by engaging in express advocacy on the Internet because: (1) corporations enjoy First Amendment rights; (2) the FECA's rationale for prohibiting corporate express advocacy is not relevant in the Internet setting; (3) the proposed rules are impractical, and (4) corporate express advocacy on the Internet does not constitute a "contribution or expenditure" under the FECA.

### A. Corporations Have First Amendment Rights

The freedom of speech protected by the First Amendment to the Constitution applies not only to individuals but to corporations as well. For instance, in *First Nat'l Bank of Boston v. Bellotti*,[24] the Supreme Court struck down a Massachusetts law that barred corporations from making expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters" on the ground that it "abridge[d] expression that the First Amendment was meant to protect." In reaching this decision, the Court stated that speech regarding governmental affairs is "indispensable to decision-making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing

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22 *Hearings on Political Speech and the Internet Before the United States Senate Committee on Rules and Administration* (May 3, 2000) (statement of FEC Comm'r David M. Mason), *available at* http://rules.senate.gov/hearings/2000/05300mason.htm (hereafter *Commissioner Mason Statement*).

23 The analysis that follows will refer exclusively to corporations, though it is equally applicable to labor organizations.

24 435 U.S. 765, 768, 776 (1978).

the public does not depend upon the identity of its source, whether corporation, association, union, or individual."[25]

In *Buckley v. Valeo*,[26] the Supreme Court held that "limit[ing] the actuality and appearance of corruption resulting from large financial contributions" was a sufficiently compelling state interest to justify political contribution ceilings and restrictions. In *Austin v. Michigan Chamber of Commerce*,[27] the Court concluded that this "compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form." The *Austin* Court reasoned that "the unique state-conferred corporate structure that facilitates the amassing of large treasuries" may, if left unchecked, enable a corporation to have a disproportionately large "political presence, even though the power of the corporation may be no reflection of the power of its ideas."[28] Thus, the Court determined that independent expenditures by corporations may be restricted.

Nevertheless, the Supreme Court has stated that "[r]egulation of corporate political activity . . . has reflected concern not about use of the corporate form per se, but about the potential for unfair deployment of wealth for political purposes."[29] Therefore, notwithstanding the FECA's prohibition against corporate contributions or expenditures in connection with federal elections,[30] a corporation's ability to engage in express advocacy may be restricted only in instances where its "state-conferred corporate structure" gains it an undue advantage in the political marketplace.

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25 *Id.* at 777; *see United States v. CIO*, 335 U.S. 106, 154-55 (1948) (Rutledge, J., concurring) (noting that corporations enjoy "the First Amendment's protection against restrictions upon the circulation of their media of expression" (citing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936))).

26 424 U.S. 1, 26 (1976).

27 494 U.S. at 659 (citations omitted).

28 *Id.* at 659, 660 (citation omitted).

29 *Fed. Election Comm'n v. Mass. Citizens for Life*, 479 U.S. 238, 259 (1986) (hereafter, *MCFL*).

30 2 U.S.C. § 441b.

Furthermore, the Supreme Court has determined that a corporate "expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b."[31] Thus, independent corporate political communications that do not expressly advocate the election or defeat of particular candidates may not be subjected to prohibitions and/or reporting requirements.

### B. FECA's Anti-Corruption Rationale Is Not Applicable to Corporate Internet Political Statements

The rules proposed by the Commission tacitly acknowledge that Internet political communications do not provide significant value to their intended beneficiaries. This is demonstrated by the Commission's proposed application of the volunteer exception in 2 U.S.C. § 431(8)(B)(ii) to "campaign-related Internet activity by individuals"[32]—even if it is coordinated with a candidate—thereby exempting such activity from the FECA's definitions of "contribution" and "expenditure."[33]

The assumption underlying the volunteer exception is that the value of services furnished by an individual using his or her own property is too inconsequential to justify government regulation. In the NPRM, the Commission points to comments given in response to an earlier Notice of Inquiry ("NOI")[34] that highlight that "posting information [online] involves minimal costs" and "that the Internet is a medium in which speech is cheap."[35] The inexpensive nature of Internet communications is further underscored by the Commission's preliminary determination that the volunteer exception exempts individual Internet political

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31 *MCFL*, 479 U.S. at 248-49.

32 66 Fed. Reg. at 50,362.

33 Similarly, corporate and union communications to restricted class members, even if coordinated with candidates, are entirely exempt from the FECA. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. § 114.3. Therefore, e-mails to the restricted class coordinated with candidates and containing express advocacy already are exempt.

34 Use of the Internet for Campaign Activity, 64 Fed. Reg. 60,360 (Nov. 5, 1999).

35 66 Fed. Reg. at 50,362.

activities "whether or not the individual's activities are known to or coordinated with any candidate."[36] This conclusion plainly recognizes that, as one commenter argued, "the low cost of the Internet prevents corruption."[37] The Commission thus has concluded that Internet political speech by individuals should fall within the volunteer exception because of the negligible costs associated with Internet communications.

For this same reason, the Commission should similarly acknowledge that Internet political activities—conducted by means of web sites, e-mail, and message boards—by corporations should be exempted from the FECA's definitions of "contribution" and "expenditure." As stated above, the FECA prohibits corporate contributions and expenditures in order to restrict "the influence of political war chests funneled through the corporate form"[38] and thereby prevent corporations from gaining an unfair advantage over other participants in the political arena. However, a corporation engaging in express advocacy on the Internet would be unable to leverage its wealth to obtain a dominant role in the online political debate because online communications involve only *de minimis* marginal costs.

With respect to the inexpensiveness of Internet communications, Commissioner Mason has stated that "[w]hen the costs of speech is so low as to be insignificant, the government's interest in preventing corruption becomes similarly insignificant."[39] Since only meager amounts are involved in Internet political speech, it is difficult to imagine that a candidate would feel any undue obligation or pressure to reward a corporation that advocates his or her election by means of the Internet. Corporations that engage in online express advocacy would thus not be able use their "political war chests" to obtain favors from candidates they support. Nor would they be able to use their sizeable financial resources to drown out other voices in the Internet political debate.

If the Commission decides to take a more incremental approach regarding the deregulation of Internet political activity conducted by corporations, then it should

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36 *Id.*

37 *Id.* at 50,361.

38 *Austin*, 494 U.S. at 659.

39 *Commissioner Mason Statement*, *supra* note 22.

treat corporate and labor organization web sites in the same manner that it proposes to treat volunteer web sites, while maintaining the prohibition against corporations sending e-mails containing express advocacy beyond their restricted classes. In other words, corporations should at least be permitted to post express advocacy communications on publicly accessible portions of their web sites, even if they continue to be restricted in their use of e-mail for transmitting political messages. This distinction can be justified on the ground that e-mail is potentially a more invasive mode of communication than is a web site.

An e-mail message can be likened to a billboard located near a public street. In both instances, the viewer encounters a message that he or she did not necessarily seek out. In fact, the message is displayed without any advance warning. Thus, an e-mail message, like a public billboard, is capable of securing a large captive audience for its message. Unlike a billboard, only *de minimis* costs are involved with sending an e-mail.

An Internet web site, by contrast, is more like a billboard posted on private property that is located in a cul-de-sac. In this case, the only persons who view the message are those who take affirmative steps to reach the places where the message is located. By traveling to the billboard, viewers signify their desire to access these messages. Thus, not only is a web site less invasive than e-mail, but the very manner by which information is conveyed and obtained on an Internet web site would limit the influence that a corporation would be able to exert in the online political world.

Limiting corruption or the appearance of corruption is the only governmental interest sufficient to justify the regulation of political speech. As the above discussion makes clear, the potential for corruption that would arise if corporations were permitted to use their web sites to engage in express advocacy is nonexistent because of the negligible costs involved. Therefore, the Commission should permit corporations to engage in express advocacy on the Internet, or alternatively, at least allow corporations and labor organizations to post messages expressly advocating the election or defeat of particular candidates on their web sites if they so chose.

### C. Proposed Rules Regarding Hyperlinks and Press Releases are Impractical

The proposed rules regarding hyperlinks and press releases—though they move in the right direction towards greater deregulation of Internet political activity—do not

go nearly far enough. If implemented in their current form, these proposed rules would raise numerous practical difficulties for corporations. For this reason, the proposal outlined in the previous section should be adopted instead of the proposed rules.

The proposed 11 C.F.R. § 117.2 would permit "the establishment and maintenance of a hyperlink from the web site of a corporation or labor organization to the web site of a candidate or party committee for no charge or for a nominal charge," provided (1) "the corporation or labor organization does not charge or charges only a nominal amount for providing hyperlinks to other organizations," (2) "the hyperlink [is] not . . . a coordinated general public political communication," and (3) the image or graphic to which the hyperlink is anchored or the text surrounding the hyperlink do not contain express advocacy.[40] With respect to the third condition, "if the hyperlink is anchored to the text of the URL of a candidate or party committee's web site, the text of the URL is not subject to the express advocacy limitation."[41]

The proposed 11 C.F.R. § 117.3 would allow a corporation to announce its candidate endorsements on its web site, provided (1) "[t]he corporation or labor organization ordinarily makes press releases available to the general public on its web site," (2) "[t]he press release is limited to an announcement of the corporation or labor organization's endorsement . . . and a statement of the reasons therefore," (3) "[t]he press release is made available in the same manner as other press releases made available on the web site," and (4) "[t]he costs of making the press release available on the web site are *de minimis*."[42]

Both proposed rules pose serious problems. To begin, the proposed rule regarding hyperlinks is internally incoherent. For example, it would not permit a corporate or labor organization web site to anchor a candidate web site hyperlink to a graphic stating "Vote for Smith" but would allow this same hyperlink to be anchored to the URL www.voteforsmith.com. In both instances, the same words of express advocacy appear on the web site. However, the former instance is strictly forbidden under the proposed rule, while the latter is perfectly acceptable. This disparate

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40 66 Fed. Reg. at 50,364.

41 *Id.*

42 *Id.* at 50,365.

treatment of identical language presented in slightly different form makes no sense and should not be adopted.

The proposed rule regarding press releases also raises a number of difficult questions. Under current regulations, a corporation or labor union may issue a press release endorsing a candidate but may not include a call to action in that press release. Would a corporation or labor organization that posts on its web site a press release announcing a candidate endorsement run afoul of this regulation if it included on the press release a hyperlink anchored in a URL that contained express advocacy, such as www.voteforsmith.com? Would the inclusion of the hyperlink be deemed a call to action by the corporation or labor organization?

The more administratively feasible approach would be to permit corporate and union Internet express advocacy on web sites. As stated above, the *de minimis* costs associated with Internet speech combined with the non-invasive nature of this mode of communication virtually eliminate the possibility of corruption. Moreover, under this approach, the regulated community would not be forced to deal with the impracticalities presented by the proposed rules.

### D. Corporate Express Advocacy on the Internet Does Not Fall Within the FECA's Definition of "Contribution or Expenditure"

The FECA prohibits a corporation from making a "contribution or expenditure" in connection with a federal election.[43] The term "contribution or expenditure" includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value."[44] With respect to Internet political activity, the relevant question is whether such activity is encompassed by the catch-all term "anything of value."

In the above definition, "anything of value" is directly preceded by a list of items each of which contemplates a monetary outlay of some sort or a service with an ascertainable monetary value. Therefore, under the doctrine of *ejusdem generis*,[45]

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[43] 2 U.S.C. § 441b(b).

[44] *Id.* § 441b(b)(2).

[45] This canon of statutory construction requires "that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things

the term "anything of value" must also refer to a transaction or service that can be readily assigned economic value.

As stated above, the marginal costs associated with Internet speech are virtually nonexistent. The Commission received hundreds of comments in response to its November 5, 1999 NOI emphasizing that Internet communications involve no measurable expense. Nowhere in the NPRM does the Commission attempt to challenge this claim. In fact, the rules proposed by the Commission operate on the premise that Internet political communications provide little ascertainable value to a candidate. Thus, it can be presumed that the Commission agrees that Internet speech is essentially cost-free.

With Internet communications entailing no discernible costs, there is nothing for the federal election law to measure. Thus, under the statutory definition, Internet political activity conducted via a corporation's web site can hardly be considered "anything of value." Accordingly, corporate express advocacy on the Internet does not fall within the FECA's definition of "contribution or expenditure" and, therefore, is not subject to the Act's ban on corporate contributions and expenditures.

## CONCLUSION

The rules proposed by the NPRM recognize that the Internet is a unique mode of communication—one that is cheap, significantly less invasive, and more abundant than traditional media. The Internet's distinctive characteristics essentially negate any potential for corruption resulting from online political communications. Thus, instead of taking a minimalist approach that will confront the regulated community with various administrative difficulties, we urge the Commission to adopt a more

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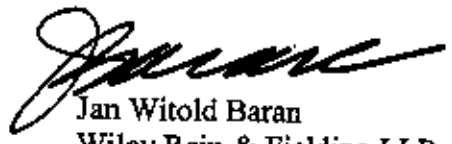
of the same general kind or class as those specifically mentioned." BLACK'S LAW DICTIONARY 517 (6th ed. 1990).

comprehensive deregulatory tactic towards Internet political communications by permitting corporations and labor organizations to engage in Internet express advocacy, or alternatively, allowing the display of express advocacy on publicly accessible portions of corporate and labor organization web sites.

Sincerely,



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