American Federation of Labor and Congress of Industrial Organizations

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January 7, 2000

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

Re: "Notice of Inquiry: Use of the Internet For Campaign Activity,"
64 Fed. Reg. 60360 (Nov. 5, 1999)

Dear Ms. Smith:

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") welcomes this opportunity to comment on the Federal Election Commission's Notice of Inquiry ("NOI") concerning the use of the Internet for campaign activity. We commend the Commission for this initiative and its acknowledgment that application of the Federal Election Campaign Act to this novel and unique medium involves difficult and emergent legal and factual issues. As explained below, we recommend that at least through the end of the 2000 election cycle the Commission forgo a formal rulemaking regarding Internet issues and proceed with as much interpretive and enforcement restraint as possible in dealing with them otherwise. We also describe the legal and policy considerations that we believe should guide the Commission in this area, and we comment specifically on several issues of particular concern to labor organizations and their members.

I. Interest of the AFL-CIO

The AFL-CIO is the national federation of 68 national and international unions representing 13 million union members throughout the United States in the private and public sectors and in virtually every occupation and industry. The AFL-CIO's national and international union affiliates in turn are comprised of tens of thousands of local and intermediate affiliates. The AFL-CIO itself has subordinate affiliates, including 50 state federations, which coordinate

various activities by organized labor on a statewide basis, and 584 central labor councils, which undertake similar activities in cities and other communities. Seven trade and industrial departments coordinating union activities and providing services in various economic sectors are also affiliated with the AFL-CIO.

The AFL-CIO and its affiliates engage in substantial legislative and issue advocacy at the federal, state and local level on matters of particular concern to working families, such as Social Security, Medicare, education, labor standards, health care, pension security, workplace safety and health, trade, immigration, the right to organize, regulation of union governance and the role of unions and corporations in electoral politics. The AFL-CIO and its affiliates also engage in substantial efforts to familiarize their members with these and other issues, the performances of officeholders in addressing them, and the positions candidates for public office have taken on them. And, the AFL-CIO and its affiliates regularly pursue efforts to register and encourage their members to vote. For these reasons, the AFL-CIO has a strong interest in how the Commission interprets and enforces the Federal Election Campaign Act, and the AFL-CIO has participated in numerous FEC rulemaking proceedings over the years.

As part of its internal outreach and public advocacy programs, the AFL-CIO and its affiliates have developed a significant presence on the Internet. The AFL-CIO website, located at www.aflcio.org, today consists of approximately 4,000 display screens that convey information, news, and advocacy concerning all of the issues described above and others, and concerning the AFL-CIO, its programs and the labor movement. The website includes texts of speeches, press releases, and congressional testimony; offers guides to worker-friendly products and services; presents interactive programs, such as one that compares worker paychecks with those of corporate chief executive officers; and solicits viewers' responses on public issues. The AFL-CIO website is changed on an almost daily basis to add and replace material, influence public policy and react to external events.

The AFL-CIO routinely posts its press releases on its website as a supplement to more traditional forms of transmission, and offers comprehensive coverage of its activities in order to elicit media coverage and public and member awareness. A recent important example that is directly pertinent to this NOI is the biannual AFL-CIO convention that took place last October 11-13 (reported on our website at www.aflcio.org/convention99/index.htm). One of the most newsworthy events at the convention was the AFL-CIO's presidential endorsement of Vice President Albert Gore. Under the Commission's current view of FECA's application to the Internet as expressed in its advisory opinions, and particularly AO 1997-16, the AFL-CIO might violate 2 U.S.C. § 441b(a) by including any reference to this widely reported event on its own website, or by posting the text of Vice President Gore's address to convention delegates, at least if this material were not funded by the AFL-CIO's federal separate segregated fund.

The AFL-CIO website includes hyperlinks to the websites of the following entities: all of its national and international union affiliates that maintain websites, and numerous local and intermediate bodies affiliated with those unions; all state federations and central labor councils

that maintain websites; AFL-CIO trade and industrial departments, and their affiliates that maintain websites; allied organizations, AFL-CIO-sponsored programs and constituency groups; labor education programs of many universities and colleges; special organizing and bargaining campaigns; selected federal governmental agencies; selected advocacy organizations of special interest to working families; international labor organizations, international trade secretariats and the national labor federations of many countries; and miscellaneous other groups. The AFL-CIO does not charge for any of these links, nor does it pay any of the linked entities or other entities to provide links to the AFL-CIO. These AFL-CIO links do not necessarily mean that the AFL-CIO endorses all of the content of these linked websites, nor does the AFL-CIO undertake to monitor their content by any systematic means.

The AFL-CIO has also committed to provide material to several independent political/legislative/issues Internet websites. For example, the AFL-CIO will participate in Freedomchannel.com, a non-profit website initiated last November that provides video issue commentary by political candidates and organizations. And, the AFL-CIO has agreed to provide content to a for-profit website, Voter.com, which contains wide-ranging and interactive political and issue material supplied by federal, state and local candidates, political parties, membership, advocacy and issue organizations, businesses and other groups. These websites resemble two websites that the Commission has already determined may operate without violating 2 U.S.C. § 441b(b) and other FECA provisions, the non-profit Democracy Network in AO 1999-25 and the for-profit Election Zone, LLC in AO 1999-24. The AFL-CIO anticipates pursuing similar opportunities to make its voice heard on the Internet.

The AFL-CIO has also recently embarked on an initiative to make an affordable Internet service provider and computer hardware package available to its 13 million members, including Internet access through a union-specific portal. This portal will be customized to the member's own union and contain union-related material in addition to material that is customarily found on portal pages, such as search engines, news and the like. This AFL-CIO "workingfamilies.com" program will link union members to each other and to their unions, and accord them a greater voice in the public arena with legislative updates and e-mail connections to elected officials. When this program becomes fully operational during 2000, it promises to create considerable opportunities for organized labor's membership mobilization program in support of its legislative and political goals, as well as enable union members and their families to participate fully in the electronic marketplaces of products, services and information. (This initiative is described in more detail at www.aflcio.org/convention99/misc_digital_divide.htm.)

II. The Distinct Nature and First Amendment Status of the Internet

The Supreme Court has aptly observed that "the Internet is 'a unique and wholly new medium of worldwide human communications.'" Reno v. American Civil Liberties Union, 521 U.S. 844, 850 (1997) (quoting district court decision). The first question in the NOI – "whether campaign activity conducted on the Internet should be subject to the Act and the Commission's

regulations at all" – recognizes the unprecedented nature of the analytical task now before the Commission. The Internet is the first entirely new means of communication that has arisen since FECA was first enacted nearly 30 years ago; all other developments in communications have comprised either a variation or expansion of those known and widely used in 1971 – for example, cable television. See Explanation and Justification, "Candidate Debates and News Stories," 61 Fed. Reg. 18049 (April 24, 1996).

FECA itself includes a list of the forms of political communication prevalent during the early 1970's. One of the statutory exemptions from the definitions of "contribution" and "expenditure" includes certain campaign materials, activities and means of communication provided to volunteers by candidates and parties -- "pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs," which are essentially inexpensive and of limited communicative reach -- but excludes others -- "broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising," which typically entail much greater expense and distribution. See 2 U.S.C. §§ 431(8)(B)(x) and (xi) and 431(9)(B)(viii) and (ix). The Internet, which of course is not listed in these provisions, conceptually does not clearly fit in either category due to its unique combination of small expense and mass distribution.

The Internet is also uniquely distinct from these familiar vehicles of political communication because it integrates qualities and functions of resource information, commercial transaction and interactivity. As described by the Supreme Court, the Internet offers "a wide variety of communication and information retrieval methods" that "are constantly evolving and difficult to categorize precisely," and that are "located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet." Reno, 521 U.S. at 851. The World Wide Web in particular is "comparable, from the reader's viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services," id. at 853, whose "'content is as diverse as human thought.'" Id. at 870 (quoting district court opinion).

The following features of the Internet in particular demonstrate its qualitative differences from other communications media that the Commission must consider in determining how FECA applies to its usage and content.

First, virtually any individual or group can produce and mass-distribute or make mass-available sophisticated material on the Internet:

> From the publishers' point of view, [the World Wide Web] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.

Id. at 853 (footnote omitted).

Second, "the Internet is not as 'invasive' as radio or television"; rather, "'[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."'" Id. at 869 (quoting district court opinion). A website is "'rather like a telephone number,'" id. at 852 (quoting district court opinion), and the Internet is a "'dial-it medium'" where "'[p]lacing a telephone call . . . is not the same as turning on the radio and being taken by surprise . . . .'" Id. at 870, quoting Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989).

Third, the Internet is not a scarce means of communication with limited outlets, like broadcast media; rather, "[i]t provides relatively unlimited, low-cost capacity for communication of all kinds," a "dynamic, multi-faceted category of communication [that] includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue." Reno, 521 U.S. at 870. And, "'[n]o single organization controls any membership in the Web, nor is there any single centralized point from which individual Web sites or services can be blocked from the Web.'" Id. at 853 (quoting district court opinion) (footnote omitted).

Fourth, the Internet accords no inherent advantage to any website or voice on it, whatever its source. Every website enjoys the same potential "distributional" impact as does any other website, for each has a specific address, and each may be accessed simply by entering that address or by using a search engine that locates a word or subject area in its content. Although there are means available to specially attract viewers, such as advertisements and purchased search features, the fact remains that every website enjoys the same potential audience merely by its presence on the Internet.

Fifth, as indicated by these other features, access to and use of the Internet is extremely inexpensive, and becoming more so. A person who possesses basic computer equipment can create and maintain an Internet website for no more than a few hundred dollars a year, a modest sum that seems certain to diminish even further as competition increases and commercial tie-ins with other services and products become more prevalent. And, the cost of adding or changing a particular message on the Internet – for example, express advocacy – is not a function of space or time on the Internet, as it is in broadcast or newspaper advertising. Rather, there is often no discernible cost whatsoever. And, even if its cost were artificially calculated, say, by applying the ratio of its content to the total content on the website, the sum might amount to pennies or a few dollars over the course of a year. Likewise, the fair market value of website space is arguably nil given the infinity of cyberspace and the inexpensiveness of access to it. Truly, Internet speech is "free" speech.

In this regard, the Internet does not coexist easily with a critical factual premise underlying federal election law: that "virtually every means of communicating ideas in today's mass society requires the expenditure of money," and, in particular, "[t]he electorate's increasing

dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." Buckley v. Valeo, 424 U.S. 1, 19 (1976). Indeed, the fundamentally democratic and leveling aspects of the Internet render it a potentially potent *counterweight* to concentrations of financial power in the political marketplace, and there is no apparent means at present by which corporations, unions or others can utilize their resources to dominate the medium.

In Reno, the Court addressed the Internet for the first time and determined that the First Amendment fully applied to its content; it therefore decided that provisions of the Communications Decency Act that criminalized the Internet transmission of "indecent" and "patently offensive" content to minors violated the First Amendment. The Court concluded:

> The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship.

Id. at 885.

III. The Purposes and Key Requirements of Federal Election Law Relevant to Internet Issues

The constraints on expression and association set forth in federal election law are permissible only insofar as they can bear strict scrutiny, and are narrowly drawn to serve sufficiently important governmental interests. See Buckley v. Valeo, 424 U.S. at 14-30. Two basic prongs of FECA are particularly relevant to Internet issues.

First, FECA proscribes corporate and union treasury campaign contributions and expenditures. 2 U.S.C. § 441b(a). These provisions have a long pre-FECA legislative lineage premised on the goal of "avoid[ing] the deleterious influences on federal elections resulting from the use of money by those who exercise control over large aggregations of capital." U.S. v. United Automobile Workers, 352 U.S. 567- 85 (1957). The "primary purpose" of FECA's campaign finance restrictions is "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." Buckley, 424 U.S. at 25.[1] Where

[1]We note, however, that the Supreme Court has since pointed out "crucial differences between unions and corporations" that enable a state (and, presumably, Congress) constitutionally to prohibit corporations alone, and not unions, from making independent expenditures. See Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 665-66 (1990).

this purpose is not directly served, the First Amendment precludes Congress from regulating the private application of money in the political sphere. See, e.g., Colorado Republican Federal Campaign Committee v. FEC, 518 U.S. 604 (1996) (independent expenditures by political parties); FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 259 (1986) (independent expenditures by non-profit corporations that are formed to disseminate political ideas, lack shareholders and are neither funded nor oporated by corporations or unions); FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) (independent expenditures by political action committee funded by voluntary individual contributions).

Second, FECA requires that covered parties record their contributions and expenditures and report them to the Commission, and requires speakers to disclose their identities and whether or not their speech has been authorized by a candidate or party. See 2 U.S.C. § 434. These disclosure requirements serve the substantial governmental interests of informing the electorate as to the sources and spending of political campaign money "in order to aid the voters in evaluating those who seek federal office"; "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity"; and "gathering the data necessary to detect violations" of the Act's contribution limitations. Buckley, 424 U.S. at 67-68.

IV. The Commission Should Conduct Hearings, Forgo a Rulemaking and Otherwise Proceed With Interpretive and Enforcement Restraint During the 2000 Election Cycle

Broadly, the fundamental question before the Commission is how federal election law must accommodate the distinct nature and First Amendment status of the Internet. The AFL-CIO does not contend that the Commission necessarily can declare that the Internet is not subject to the Act. We acknowledge that such a complete exemption might be the sole province of Congress, inasmuch as FECA, like other statutes and the Constitution itself, must be applied – if it can be as a matter of law -- to circumstances and technologies unforeseeable at the time of its enactment. And, Congress has not declared a moratorium on the application of election law to the Internet, as it has for the taxation of Internet commerce.

However, the Commission does enjoy considerable general administrative and enforcement discretion that enables it to proceed cautiously on Internet issues while it undertakes a more comprehensive consideration of the issues it has raised in the NOI. The NOI is an appropriate first step in undertaking a comprehensive review of how FECA applies to the Internet. Internet technology is changing as quickly as it is expanding. The AFL-CIO does not

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"[B]usiness corporations are by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth" and whose independent expenditures Congress constitutionally may regulate. FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 258 n.11 (1986).

pretend to know how the Internet will operate in three months, let alone three years, including what technical advances will occur and what uses of it will become available. But it most certainly appears that in the near future computers with Internet access will be as ubiquitous in homes as are television sets, radios and telephones, and that unions, corporations and other organizations will sponsor websites and conduct significant business on the Internet just as universally as they now use telephones, fax machines and letterhead to do so.

In particular, we urge the Commission to forgo any effort at rulemaking at least until after the 2000 election cycle. As a practical matter, no such regulations could become effective until late this year, possibly disrupting electoral behavior at its very peak. Instead, the Commission should conduct hearings on the issues raised in the NOI so it can make informed and measured decisions as to how to exercise its authority, and whether new or revised regulations are appropriate. The AFL-CIO would be pleased to participate in such a hearing. It would be useful for the Commission to invite participation not only from the regulated community, but also from experts on Internet technology, Internet service providers, telecommunications industry representatives, political strategists and others who can provide informed assessments of the Internet's operations, its financial structure and its likely evolution.

The AFL-CIO urges the Commission meanwhile to exercise its interpretive authority only if it has a high degree of confidence that actual or alleged conduct raised before it so clearly implicates the requirements and prohibitions of the Act that definitive advice can be issued.[2] We further recommend that during this period the Commission exercise its enforcement authority only insofar as action is clearly warranted to modify, terminate or remedy behavior that is inconsistent with the Act. Moreover, the Commission's approach to remedies and sanctions should give due regard to the uncertainty that now attaches to FECA's application to particular Internet situations, the good faith and reasonableness of a party's action, and the public interest in avoiding any chill on the legitimate exploration of this new technology.[3]

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[2]The Act does obligate the Commission to issue advisory opinions within 60 days after a person submits a written request concerning the application of the Act or a Commission rule or regulation "with respect to a specific transaction or activity by the person." 2 U.S.C. § 437f(a)(1). But the Commission need not respond to a "a general question of interpretation," or a request "posing a hypothetical situation, or regarding the activities of third parties . . . ." 11 C.F.R. § 112.1(b). We note that in AO 1999-17, the Commission took care to adhere to these rules and declined to venture beyond matters concerning actual or intended conduct by the requesting presidential campaign.

[3]The Commission enjoys discretionary latitude in investigating complaints, finding reason to believe and probable cause that a violation of the Act has been committed, conciliating cases, settling and dismissing cases, and initiating enforcement litigation. See generally 2 U.S.C. § 437g. Although a complainant or other party aggrieved by the failure of the Commission to act on a complaint may seek judicial relief after 120 days have elapsed from the filing of the complaint, 2 U.S.C. § 437g(a)(8)(A), the passage of this period, or even the conclusion of the

In sum, as much as possible, the Commission should approach the 2000 election cycle as a laboratory of activity for it to evaluate in advance of any rulemaking or significant interpretive or enforcement initiatives.

V. Particular Issues Raised in the Notice of Inquiry

We now turn to several of the issues specifically raised in the NOI that are of special concern to the AFL-CIO and its members, and explain how we believe the Commission should approach these matters at this time. As a general principle, it is self-evident that the Commission's field of potential regulation in the Internet context remains bound by the four corners of FECA just as it is in other contexts. So, for example, the line between regulable express advocacy and non-regulable issue advocacy applies to the Internet. (We recognize there are divergent views as to where that line falls, and do not address that issue here.)

We note at the outset that the NOI asks whether the concept of "coordination" should be applied to the Internet in the same manner as in other contexts. The AFL-CIO is preparing comments, to be filed later this month, concerning the Commission's separate "Supplemental Notice of Proposed Rulemaking: General Political Communications Coordinated With Candidates," 64 Fed. Reg. 68952 (December 9, 1999). We intend to address coordination on the Internet principally in those comments; in determining how to proceed regarding Internet issues after reviewing the responses to this NOI, the Commission should also give due regard to the relevant comments on coordination it receives in that rulemaking proceeding.

A. Union[4] Communications With the Restricted Class

The Act exempts from its definitions of "contribution" and "expenditure" communications by a union with its members, executive and administrative personnel, and their

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applicable election cycle, does not itself compel Commission action. See Rose v. FEC, 806 F.2d 1081, 1084 (D.C. Cir.1986); Common Cause v. FEC, 489 F. Supp. 738 (D.D.C. 1980). Rather, in deciding whether the Commission's conduct is "contrary to law," a court must determine whether the Commission acted arbitrarily and capriciously, taking into account factors such as the credibility of the allegation, the nature of the threat posed by the alleged offense, the resources available to the agency and the novelty of the issues involved. Rose v. FEC, 608 F. Supp. 1, 5 (D.D.C. 1984); Common Cause v. FEC, 489 F. Supp. at 743-44; In re Federal Election Campaign Act Litigation, 474 F. Supp.1044, 1045-46 (D.D.C. 1979). We submit that the Commission would have ample justification to act with restraint in Internet enforcement actions while it undertakes a comprehensive examination of the Internet's legal implications.

[4]Although the statute and the regulations treat unions and corporations very similarly, we address specifically only unions and do not necessarily believe that the same observations apply in the same manner to corporations.

families, including communications "on any subject," non-partisan voter registration and get-out-the-vote campaigns and solicitations to contribute to a separate segregated fund. 2 U.S.C. §§ 431(9)(B)(iii) and 441b(b)(2). We submit that the Commission must recognize in the Internet context at least as much freedom for unions to engage in communications with their restricted classes as the Commission does with respect to other means of communication.

In AO 1997-16, the Commission embraced this view as a general matter in stating that if a membership corporation restricted access to its website to its members – for example, by giving each member "an individual unique identification number or password" – then it could post its candidate endorsements on the website.[5] We question the technical feasibility of imposing such a requirement universally, given the large number of members of many unions, not to mention of the AFL-CIO itself. This is a matter that bears further study in hearings the Commission should conduct on NOI issues.

But unions should not be disabled entirely from using the Internet for express advocacy communications with their members, given the usefulness and inexpensiveness of Internet communications, its inevitable universality as a communications tool and its user-initiated operation.[6] The Commission could recognize that a union may post any material as a restricted class communication on "members-only" pages on its website access to which requires a "deep link," that is, at least several clicks of a mouse away from a website home page. Such an arrangement could be reasonably construed to conform with FECA if it had appropriate safeguards, such as precluding express advocacy in the website's more immediately accessible links to the "members-only" segment; precluding other affirmative efforts to steer non-members to this segment; including a disclaimer on the express advocacy portion of the segment stating that it is intended only for members of the restricted class and that responses, including PAC contributions, will not be accepted from anyone else; and, for any responsive communications on this portion of the website, requiring self-identification of the respondent's restricted class membership before the union acts upon the response in any manner. Cf. AO 1995-33 (corporate PAC e-mail communications to corporate executives via their non-solicitable secretaries); AO 1978-97 (union membership magazine reaching some non-restricted class members). Some unions place on their websites an electronic version of their regular print membership publications. Insofar as a union wishes to maintain these on the "public" portion of its website,

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[5]We note that the Commission's initial premise is that a website is a form of general public political advertising under 2 U.S.C. § 441d. See AO 1997-16 and 1995-9. Due to the number of websites and the practical obscurity and inaccessibility of most of them, this proposition may not necessarily be universally correct.

[6]In AO 1997-16, the Commission stated that a separate segregated fund could finance with hard money the costs of express advocacy communications on its corporate sponsor's website. Although maintaining this approach would avoid an outright ban on partisan content on a union website, it would still entail significant valuation and reporting problems, as discussed below.

any express advocacy or PAC solicitations could be relocated to the "members-only" segment with an appropriate link and the safeguards described above.

Accordingly, at least to the degree the Commission's regulations now permit for other forms of communication, unions should be permitted on their websites to communicate express advocacy to their members in electronic publications, whether regular or special campaign publications, or in electronic versions of their regular or special campaign print publications, 11 C.F.R. § 114.3(c)(1); solicit contributions to the union's PAC, see 11 C.F.R. § 114.5; solicit contributions to be sent directly to a candidate without any union transmission role, see 11 C.F.R. § 114.2(f)(4)(ii); and urge registration or voting for a particular candidate or party. See 11 C.F.R. § 114.3(c)(4).

Additionally, it seems plain that e-mail communications, which, unlike a website, are privately and specifically directed to particular recipients, should be treated exactly like letters, memoranda and other forms of written communications for all the above restricted class activities (as well as for the twice-yearly solicitations of non-members permitted under 11 C.F.R. § 114.6). And, as with other forms of restricted class communications, no disclaimer should be required. See 11 U.S.C. § 110.11(a)(7).

Finally, we note that the cost of website or e-mail express advocacy communications with a union's restricted class is unlikely to be subject to reporting under 2 U.S.C. § 431(9)(B)(iii), either because their costs would not exceed $2,000; their incremental cost would be so small as not to warrant calculation; or they would be part of a communication "primarily devoted" to other subjects.

B. Union Non-Restricted Class Communications

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 sum. 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.

The NOI raises asks the critical question of how the cost of Internet activity should be measured under FECA. 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.[7]

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 "enhance[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.

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[7]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 "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).

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.

Alternatively, a union could be permitted to include its express advocacy press releases, and electronic versions of its press conferences and candidate appearances, on a designated "media-only" segment of its website similar to that described earlier for "members-only" communications. This would facilitate a union's legitimate interest in maintaining effective media relations while reducing exposure of these communications to the general public.

We also suggest that the Commission consider the requirements of the statute satisfied by a requirement that express advocacy on a website, however it is posted, be accompanied by the usual disclaimer for independent expenditures identifying the speaker and the lack of authorization by any candidate or candidate committee. See 2 U.S.C. § 441d(a)(3); 11 C.F.R. § 110.11(a)(1).

However, no recordkeeping or reports of these "costs" should be required. 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.

With respect to other aspects of the Commission's regulations governing a union's communications with the general public concerning voter registration and get-out-the-vote activities, 11 C.F.R. § 114.4(c)(2) and (3), and the circulation of voting records and voter guides, 11 C.F.R. § 114.4(c) and (5), we submit that the rules applicable to the Internet should impose no greater restrictions than the Commission's regulations impose in other contexts. And, at least with respect to the posting and maintenance of website content that falls under these categories, the considerations discussed above may militate in favor of according greater flexibility to the content of a union website, or at least an exemption from reporting, so long as any express advocacy is accompanied by a proper disclaimer.

The NOI asks whether there are aspects of the Section 114.4(c) regulations that should be revised. Again, with respect to Internet-specific matters we suggest that the Commission defer a rulemaking decision for the time being; but more generally we refer the Commission to our September 24, 1999 letter commenting on Notice of Availability 1999-14 concerning the rulemaking petition submitted by the Iowa Right to Life Committee, in which we have urged the Commission to undertake a rulemaking to revisit its voter guide and voting record regulations in order to take into account adverse judicial decisions and other developments.

C. Union Employees' Use of Union Facilities and Equipment

The Commission's regulations currently allow a union's employees to make "occasional, isolated or incidental" use of union facilities in connection with their volunteer activities for a campaign, with one hour per week or four hours per month deemed to satisfy this standard. 11 C.F.R. § 114.9(b)(1). Nothing more restrictive than this standard should apply to a union employee's use of his or her union-employer's Internet facilities. If that use increases the union's overhead or operating costs, the employee may be required to reimburse the union, as 11 C.F.R. § 114.9(b) provides. And, if the employee uses the union's Internet equipment to produce campaign materials, he or she may be required to reimburse the union for the normal and usual charge for doing so, as 11 C.F.R. § 114.9(d) ordinarily requires, however that charge may be calculated in the Internet market.

D. Hyperlinks

In AO 1999-17, the Commission stated its 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 would normally charge for a link to another site or would charge less than the actual amount charged to the candidate committee. Under this view, then, so long as it was the practice of a particular union not to charge for links, then it could link without violating Section 441b(a), at least absent other circumstances.

The AFL-CIO agrees with this determination, as far as it goes, but there are sound reasons why the Commission should consider a policy that would more effectively exempt links from characterization as contributions under the Act. Links are essential to the integrated structure of the World Wide Web, and they are inherently cost-free to provide, access and use. As a technical matter, a link provides a means for instant access from the linking site to the linked site, triggered by the viewer's click of a mouse on the link itself. As we understand it, the link may come in essentially 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 entity. There is no 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. Yet treating such links as contributions or expenditures would invite complaints and Commission investigations.

Under the Commission's current regulations, a union can provide the address of a candidate or political committee to individuals within and outside 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. Moreover, just as a street address may itself include express advocacy in the addressee's name -- for example, "Gore 2000"-- that fact does not render the provision of the address itself express advocacy. Similarly, a link that consists of an addressee's name should not be considered an express advocacy message by the union.

What *is* pertinent to the analysis is the website content that refers to the link. If *that* content contains express advocacy and the link is part of that message, then the Act's requirements might apply to the communication as a whole (consistent with the discussion above), but the link itself should not be deemed to bear a distinct value for the application of either the contribution and expenditure restrictions or recordkeeping and reporting requirements.

E. The "Media Exemption"

The NOI solicits comment on the applicability to the Internet of the so-called "media," "press" or "news" "exemption," which exempts from the statutory definition of "expenditure" "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(b)(i). The Commission's regulations not only reflect this exemption, see 11 C.F.R. § 100.8(b)(2), but also contain an identical exemption from the statutory definition of "contribution." See 11

C.F.R. § 100.7(b)(2).[8] In enacting the media exemption, Congress disclaimed any intent "to limit or burden in any way the First Amendment freedom of the press and of association. Thus [the exemption] assures the unfettered right of the newspapers, television networks, and other media to cover and comment on political campaigns." H.R. Rep. No. 93-1239, 93rd. Cong., 2d Sess. 4 (1974).

By its terms, the media exemption applies only to news or editorial content "distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication." The Commission early defined a "periodical publication" as one "in bound pamphlet form appearing at regular intervals (usually either weekly, bi-weekly, monthly or quarterly) and containing articles of news, information, opinion and entertainment whether of general or specialized interest"; "ordinarily derives its revenues from subscriptions and advertising"; and has "general distribution" rather than "serve[s] as [an] internal house organ[]." Explanation and Justification, "Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 76734, 76735 (Dec. 27, 1979). See AO 1980-109.

The Commission has routinely treated the media exemption as available only to "a press entity as described by the Act and regulations," and analyzed its scope further by determining whether the entity is "acting as a press entity" in the activity at issue. See AO 1998-17, 1996-48 and 1996-41. See also Reader's Digest Association, Inc. v. FEC, 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981). The Commission has recognized only the conventional media and not the publications or other communications product of principally non-media corporations, even when their activities are similar to those of media corporations. Compare, e.g., AO 1982-44 (cable television station could devote two hours of free broadcast time to each of the major political parties for their third-party "commentary") with AO 1996-2 (CompuServe could not offer free Internet service (at $9.95 a month) to all federal candidates). The Commission approved a non-media corporation's commercial sponsorship of a media corporation's magazine and television series of interviews with presidential candidates only because its media partners would maintain full editorial control. AO 1987-8. AO 1996-48 (approving C-Span's broadcast of video biographies of candidates and their campaign commercials because C-Span and not the campaigns would control the context of their airing).

The Commission has applied the media exemption to a computer-based format, determining that Bloomberg, LP, a multi-media business and financial news provider, qualified in conducting an on-line "electronic town meeting": "the use of audiences composed of non-

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[8]Both regulatory definitions acknowledge, however, that even if a facility is owned or controlled by a political party, political committee or political candidate, the costs of a news story might be exempt if it "represents a *bona fide* news account communicated in a publication of general circulation or on a licensed broadcasting facility," and "is part of a general pattern of campaign-related news accounts which give reasonably equal coverage to all opposing candidates in the circulation or listening area." The regulations are silent regarding "commentary" or an "editorial" appearing in such a publication, and so implicitly exclude them.

reporters, and subscribers and guests at computer terminals, does not alter the basic nature of this meeting either as a news event akin to a press conference or as a form of commentary." AO 1996-16. But it is clear that the Commission deemed Bloomberg's status as a media corporation necessary to this conclusion.

The Internet compels examination of the media exemption in a new light. There are many "publications," such as Salon and Slate, that exist solely on the Internet, yet in periodicity and content resemble magazines or newspapers, and are owned and controlled by corporations. They and many other websites that contain news and information can fairly be considered "periodical publications" even though they do not fit the Commission's now quaint-sounding definition from 1979. Again, anyone can be a "publisher" on the Internet. Reno v. ACLU, 521 U.S. at 853. We would submit, then, that the AFL-CIO website, which includes articles, analyses and reports of current events and not merely news about the AFL-CIO, and which is regularly updated so as to remain current, possesses all of the attributes of a conventional periodical aimed at a particular readership; in this case, working people and their families.

Meanwhile, of course, media corporations that operated before the Internet explosion now almost universally maintain websites that daily gather and transmit news and opinion complementing their broadcast and print outlets, with the additional feature of links to non-media entities, including political committees. These media corporation websites presumably are covered by the media exemption -- unless that exemption is narrowly and literally construed, in which case they are rampantly violating Section 441b(a).[9]

In contrast, the ability of unions and non-media corporations to use the Internet similarly remains in considerable doubt. We recommend that the Commission's hearings explore this subject thoroughly.

Conclusion

For the reasons set forth above, the AFL-CIO respectfully submits that the Commission should forgo a rulemaking on Internet issues at least through the end of the 2000 election; proceed with restraint in its advisory and enforcement activities in the interim; and conduct public hearings on the nature, usage and likely evolution of the Internet so as to obtain sufficient information before deciding whether and how to approach the novel legal issues raised by this new and unique means of communication. The AFL-CIO respectfully requests an opportunity to participate in any such public hearings. Finally, insofar as the Commission must address

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[9] This Internet legal anomaly is further underscored by the aggressive conglomerization of the media industry in recent years. Now, tremendously influential media corporations – some of which are owned or controlled by *non*-media corporations presumably not themselves subject to the media exemption, such as General Electric Corporation, the owner of the National Broadcasting Company – operate beyond the reach of FECA, leaving non-media corporations, and all unions, at a tremendous disadvantage in the political sphere.

Internet-related issues during its general inquiry, we respectfully request that it heed our comments and recommendations.

Yours truly,

Laurence E. Gold

Laurence E. Gold
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