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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**AGENDA ITEM**  
For Meeting of: 9-11-97

September 4, 1997

**MEMORANDUM**

TO: The Commission

THROUGH: John C. Sarina  
Staff Director

FROM: Lawrence M. Noble  
General Counsel

N. Bradley Litchfield  
Associate General Counsel

Michael G. Marinelli  
Staff Attorney

SUBJECT: Draft AO 1997-16

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for September 11, 1997.

Attachment

1 ADVISORY OPINION 1997-16

**DRAFT**

2  
3 Nancy DenDooven, Treasurer  
4 ONRC Action Federal PAC  
5 5825 North Greeley  
6 Portland, OR 97217-4145  
7  
8

9 Dear Ms. DenDooven:

10  
11 This responds to your letters dated July 24, and July 3, 1997, on behalf of the  
12 Oregon Natural Resources Council Action ("ONRC Action") and Oregon Natural  
13 Resources Council Action Federal PAC ("the Committee") regarding the application of  
14 the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission  
15 regulations to proposed methods of making the Committee's Federal candidate  
16 endorsements available to its restricted class.

17 The information provided in your request indicates that ONRC Action is a  
18 501(c)(4) tax-exempt corporation, organized under the laws of Oregon, and is the  
19 connected organization of the Committee.<sup>1</sup> Your request also includes ONRC Action's  
20 By-laws, its governing document.

21 ONRC ACTION MEMBERSHIP STRUCTURE

22 The membership of ONRC Action consists only of individuals.<sup>2</sup> Your request  
23 indicates that ONRC Action has approximately 5,000 members at the present time.

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<sup>1</sup> The purpose of ONRC Action, according to its bylaws, is to "aggressively defend natural resources throughout the Greater Oregon Ecosystem from environmental destruction." Among the goals of the organization are "[to] establish policies that encourage environmental sustainable practices by business, governments and individuals," "[to] work to eliminate government subsidies which cause environmental degradation" and "[to] involve its members and environmentalists...in advocacy, education and other activities to achieve its goals." See ONRC Action bylaws, Article I, Section 1.

<sup>2</sup> Non-profit organizations and businesses may contribute to ONRC Action and receive recognition for their support, but they are explicitly barred from actual membership in the organization. ONRC Action Bylaws Article II, Section 8.

1 Membership in the organization is open to those individuals whose annual dues are paid  
2 current, and membership may be suspended or terminated by the Board of Directors for  
3 cause or for violation of the organization's ideals or purposes. ONRC Action Bylaws,  
4 Article II, Sections 1 and 6. Each member of ONRC Action is required to pay annual  
5 dues, the amount of which is determined by the Board of Directors. ONRC Action  
6 Bylaws, Article II, Section 2.<sup>3</sup>

7 Under its bylaws, ONRC Action's Board of Directors oversees the general  
8 management of the organization. ONRC Action Bylaws, Article III, Section 5. This  
9 Board is elected at the annual meeting of the members. Each paid member is entitled to  
10 one vote. ONRC Action Bylaws, Article III, Section 3. The Board consists of a  
11 maximum of fifteen members who serve for two year terms. ONRC Action Bylaws,  
12 Article III, Section 1.

13 The Board selects from its membership all of the officers of the organization  
14 including its chief executive officers: the President, a Secretary and a Treasurer. ONRC  
15 Action Bylaws, Article IV, Section 1. These officers form the Executive Committee,  
16 which exercises all the powers of the Board in the management of the property and  
17 business of the organization when the Board is not in session.

#### 18 ONRC ACTION'S PROPOSED COMMUNICATIONS

19 You state that the Committee and ONRC Action wish to modify the way in which  
20 they currently communicate the list of Federal candidates endorsed by the organization to  
21 its qualified members, the restricted class. You state that the Committee's endorsements

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<sup>3</sup> The solicitation materials included with your request indicate that the minimum, annual membership dues payment is \$35.

1 are presently mailed to the organization's restricted class members and faxed to its usual  
2 media contacts.<sup>4</sup> The release of endorsements has resulted in many requests for  
3 additional information, both from its members and the general public.<sup>5</sup> You explain that  
4 your three areas of concern all have the same basic concept. You would like to make  
5 your endorsements available to ONRC Action's restricted class through inexpensive and  
6 available technology, but you understand that there is no simple or certain method to limit  
7 access to the restricted class only.<sup>6</sup>

8 Your request proposes three methods to making endorsements available.

9 1. ONRC Action has a web site on the Internet that members regularly access for  
10 various purposes related to its work. You propose having the Committee's endorsements  
11 made available on this web site. Printed copies of the information available on the web  
12 site have been included in your request. You explain that this web site is maintained by a  
13 volunteer staff and, since it is not restricted in any manner, it is accessible to the public.

14 2. You explain that your press releases regarding the Committee's endorsements  
15 are distributed to your normal list of media contacts. Given the amount of public interest  
16 that these endorsements generate, you state that media reporting of the endorsements

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<sup>4</sup> Your request states that the Committee makes endorsements for most Federal races that meet its selection criteria: "greenness," electability, and statesmanship. The endorsement policy does not require an endorsement in every race. You state that the Committee makes endorsements in primary and general elections, and in special elections as well. You explain that there is no selection criteria difference for the primary, as opposed to general elections.

<sup>5</sup> You further explain that a separate state PAC, Oregon Natural Resources Council Action State PAC, makes all the endorsements of state and local candidates. Thus, for the purposes of this advisory opinion, you are only interested in making your Federal candidate endorsements more accessible to your members and callers.

<sup>6</sup> For example, you explain that should an access code be used to limit the ability to connect to a special "members only" section of the organization's Internet web site, any person from the general public who has the correct code will also be able to obtain the Committee's endorsements.

1 results in a large volume of phone calls asking for the complete endorsements.<sup>7</sup> You  
2 wish to know if you can provide this information, if the caller is not a member. In cases  
3 where a caller responds affirmatively to your inquiry as to whether he/she is a member,  
4 you ask if relying on the caller's response would constitute sufficient identification  
5 verification before releasing the endorsement information.

6 3. Finally, you state that, due to the large volume of calls and because you have  
7 no permanent receptionist (phones are answered by all staff or the position is filled by  
8 volunteers), the organization would like to record a voice mail box with the complete list  
9 of endorsements. You explain that the voice mail computer system was purchased  
10 several years ago and has the capacity for approximately 1000 voice mail boxes. With  
11 less than 20 employees, there is excess capacity on the system that the organization  
12 would like to use. Any time spent setting up the box, or recording the message, would be  
13 paid by the Committee.

#### 14 ACT AND COMMISSION REGULATIONS

15 The Act prohibits corporations from making any contribution or expenditure in  
16 connection with Federal elections. 2 U.S.C. §441b. Contributions include direct or  
17 indirect payments or gifts of money or any services, or anything of value, to any  
18 candidate for Federal office. 2 U.S.C. §441b(b)(2); 11 CFR 114.1(a)(1). This general  
19 prohibition also has an exception that allows a corporation, including an incorporated  
20 membership organization, to communicate with its "restricted class" (its stockholders,  
21 executive and administrative personnel, and their families), but not the general public, on

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<sup>7</sup> You assert that these calls do not originate with the organization. Instead, they are from its members and interested non-members who call its main phone number regarding the Committee's endorsements.

1 "any subject" including messages containing express advocacy of the election or defeat of  
2 Federal candidates. 2 U.S.C. § 441b(b)(2)(A) and 11 CFR 114.1(j); 114.3(a). See also  
3 *United States v. United Auto Workers*, 352 U.S. 567 (1957) and *United States v.*  
4 *Congress of Industrial Organizations et al.*, 335 U.S. 106 (1948). For purposes of these  
5 communications, the restricted class of an incorporated membership organization also  
6 includes its membership. *Id.*

7       Communications containing express advocacy which may be made to the  
8 restricted class include, but are not limited to, publications. For example, printed material  
9 expressly advocating the election or defeat of one or more clearly identified candidate(s)  
10 or candidates of a clearly identified political party may be distributed by a corporation or  
11 by a labor organization to its restricted class provided that: (i) the material is produced at  
12 the expense of the corporation or labor organization; and (ii) the material constitutes a  
13 communication of the views of the corporation or the labor organization, and is not the  
14 republication or reproduction, in whole or in part, of any broadcast, transcript or tape or  
15 any written, graphic, or other form of campaign materials prepared by the candidate, his  
16 or her campaign committee, or their authorized agents. A corporation or labor  
17 organization may, under this section, use brief quotations from the speeches or other  
18 materials of a candidate that demonstrate the candidate's position as part of the  
19 corporation's or labor organization's expression of its own views. 11 CFR 114.3(c)(1)(i)  
20 and (ii).

21       A corporation or labor organization also may endorse a candidate and  
22 communicate the endorsement to its restricted class through the publications described  
23 above or during permissible candidate appearances, as otherwise described in 11 CFR

1 114.3(c)(2). However, Commission regulations provide that no more than a *de minimis*  
2 number of copies of the publication, which includes the endorsement, may be circulated  
3 beyond the restricted class. 11 CFR 114.4(c)(6). The corporation or labor organization  
4 may publicly announce the endorsement through a press release or press conference, or  
5 both. Disbursements for the press release or press conference must be ~~*de minimis*~~. The  
6 disbursements will be considered *de minimis* if the press release and notice of the press  
7 conference are distributed only to the representatives of the news media that the  
8 corporation or labor organization customarily contacts when issuing non-political press  
9 releases or holding press conferences for other purposes. In addition, the public  
10 announcement of the endorsement may not be coordinated with the candidate, or the  
11 candidate's authorized committee(s). 11 CFR 114.4(c)(6).

*stat*  
*pres*

*(this is unconstitutional)*

12 A separate segregated fund may, using voluntary contributions, communicate with  
13 the general public on any subject, including express advocacy messages supporting or  
14 opposing Federal candidates. However, communications to the public may not solicit  
15 contributions to the separate segregated fund itself. 11 CFR 114.5(i).

*changed*

16 Under Commission regulations, a membership organization must possess certain  
17 attributes. It must (i) expressly provide for "members" in its articles and bylaws; (ii)  
18 expressly solicit members; and (iii) expressly acknowledge the acceptance of  
19 membership, such as by sending a membership card or inclusion on a membership  
20 newsletter list. 11 CFR 100.8(b)(4)(iv)(A), 114.1(e)(1).

21 On the question of what constitutes membership for purposes of the Act, the  
22 Supreme Court has suggested that members of non-stock corporations are to be defined,  
23 at least in part, by analogy to stock holders of business corporations and members of

1 labor unions. See *FEC v. National Right to Work Committee*, 459 U.S. 197, 202 (1982),  
2 see also *Chamber of Commerce v. FEC*, 69 F. 3d 600 (D.C. Cir. 1995); *petition for*  
3 *rehearing denied*, 76 F. 3d 1234 (1996).<sup>8</sup>

#### 4 MEMBERSHIP STATUS OF ONRC ACTION

5 The facts and background to this request indicate that ONRC Action is a  
6 membership association for purposes of the Act.<sup>9</sup> The Commission further concludes that  
7 ONRC Action's Board of Directors, rather than the Executive Committee, is the highest  
8 governing body of ONRC Action for purposes of the Commission regulations.<sup>10</sup> Lastly,  
9 the Commission concludes, in the situation presented here, that the membership of

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<sup>8</sup> In 1993, the Commission revised its membership regulations to further define the term "members." However, the court in *Chamber* determined that portions of those regulations were invalid, concluding that they defined the term "member" in an unduly restrictive fashion. See *Chamber* at 604. (There were not four votes at the Commission to seek further judicial review of this decision.) The regulation at 11 CFR 114.1(e)(2), now invalid in the District of Columbia Circuit, had defined members to mean:

all persons who are currently satisfying the requirements for membership in a membership association, who affirmatively accept the membership association's invitation to become a member, and who:

- (i) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but not merely the payment of dues);
- (ii) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association; or
- (iii) Are entitled to vote directly for all of those on the highest governing body of the membership association.

<sup>9</sup> For example, Article II of ONRC Action's Bylaws meets the requirements of the regulations at 11 CFR 100.8(b)(4)(iv)(A)(i) and 114.1(e)(1) by expressly providing for membership. Your request includes materials which illustrate the organization's solicitation of members. See 11 CFR 100.8(b)(4)(iv)(A)(ii) and 114.1(e)(1). The request materials indicate that members receive a monthly newsletter and other conservation related or recreational materials. Therefore, the requirement that membership be expressly acknowledged is also met. *Id.*

<sup>10</sup> This conclusion is based on the limitations on the power of the Executive committee and the delegated nature of the powers from the Board.

1 ONRC Action would be considered "members" for purposes of the Act and Commission  
2 regulations.<sup>11</sup>

### 3 APPLICATION TO ONRC ACTION'S COMMUNICATIONS

4 The Committee, as the separate segregated fund of ONRC Action, can make  
5 contributions and expenditures with regard to Federal elections, subject to the Act's limits  
6 and disclosure requirements. The cost of making public the Committee's candidate  
7 endorsements, if paid for by the PAC, and depending on whether the distribution activity  
8 was coordinated with the various candidates endorsed, would be considered either an  
9 independent expenditure on behalf of the candidates endorsed or an in-kind contribution  
10 to them. See 11 CFR 109.1 and 114.2(c). However, the facts of your request indicate  
11 that ONRC Action's funds, facilities and personnel would be used for this purpose,  
12 except for setting up voice mail messages. Therefore, the endorsement distribution  
13 proposals would be viewed as corporate, rather than PAC activity. Because of the  
14 general availability of access to the Internet, communication via a web site would be  
15 considered a form of communication to the general public. See Advisory Opinions 1996-  
16 16 and 1995-35. As distinguished from its communications to its own restricted class, a

- and a prohibited contributor?

<sup>11</sup> The Commission notes that all members of ONRC Action pay dues and all have the right to vote for the highest governing body, or for those who choose the members of that body. Thus, the membership criteria of ONRC Action would have satisfied even the more restrictive standard struck down in *Chamber*. See footnote 8. For a discussion of the application of the *Chamber* decision by the Commission to one particular type of organization, a commodity trading exchange, see Advisory Opinion 1997-5.

Following the *Chamber* decision, the Commission has published an advance notice of proposed rulemaking which may lead to regulation changes concerning the definition of membership. See FEC Advanced Notice of Proposed Rulemaking, published in the *Federal Register* on July 31, 1997, at pages 40982 through 40985. The conclusion of this opinion regarding membership could be modified or superseded by the adoption of any new regulations on membership criteria, but the opinion may be relied upon until any change is made. If a change is made, it will become effective on a specific date announced in the *Federal Register*. In addition, the Commission's written explanation and justification for any new rules will identify each past advisory opinion that is modified or superseded.

1 corporation's endorsement communications to the general public are limited by the Act  
2 and Commission regulations. Endorsements containing express advocacy of a candidate  
3 may be incorporated into a press release distributed to the news media representatives  
4 customarily contacted for these purposes and may be announced through a press  
5 conference that complies with the *de minimus* rule. However, your first proposal, to  
6 make the Committee's Federal candidate endorsements available on ONRC Action's web  
7 site, without any limitation on access, is prohibited.

8 Your request emphasizes the *de minimus* cost of an expansion of the web site for  
9 this purpose. However, *de minimus* expense is only one element of an analysis under  
10 section 114.4(c)(6). The regulation also discusses *de minimus* circulation outside the  
11 restricted class of corporate or labor organization publications which include candidate  
12 endorsements. Relevant to your request is Advisory Opinion 1984-23, which is cited in  
13 the Explanation and Justification of the current regulations on corporate and labor  
14 endorsements. See 60 *Fed.Reg.* 64260, 64270 (December 14, 1995). In that opinion, a  
15 membership organization (also a trade association) wished to publicize its endorsements  
16 of candidates in its newsletter and trade journal. The Commission concluded that the list  
17 of endorsements could be published in the newsletter because the number of non-  
18 members who received the association newsletter was *de minimus* (less than 1%).  
19 However, the Commission determined that use of the trade journal for the same purpose  
20 was prohibited by section 441b since the circulation beyond the membership class was  
21 over 10% and was not *de minimus*. Similarly, communication of the list of endorsed  
22 candidates in the organization's web site, without some limit on access, could not be

State  
de minimus  
endorsements  
rule

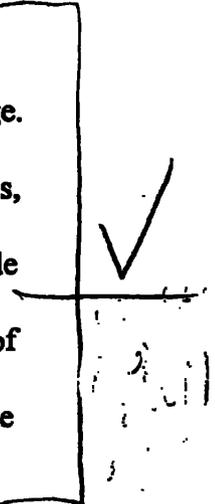
See 11 C.F.R. 11

conclusion

1 viewed as only a *de minimus* corporate communication by electronic means outside the  
2 restricted class.

*conclusion*

3 However, if ONRC Action uses a method to limit access to the list of  
4 endorsements to members only, then such endorsements could be placed on its web page.  
5 Although your request states there is no simple or certain way to completely limit access,  
6 certain methods may limit circulation of the endorsements to a *de minimus* group outside  
7 the restricted class.<sup>12</sup> Of course, if the PAC were to pay (and disclose) the costs of  
8 the modification and maintenance of the web site associated with releasing the candidate  
9 endorsements on the site, your proposal would be permissible under section 114.5(i).



10 The above discussion applies to the second and third parts of your proposal.

11 Again, section 114.4(c)(6) delineates permissible methods for transmitting endorsement  
12 information outside the restricted class to the general public. The Commission concludes  
13 that giving such information over the phone to non-members, even if the call is not  
14 solicited, is prohibited by 11 CFR 114.4(c)(6) and 2 U.S.C. §441b. As with its web site,  
15 ONRC Action is required to use some meaningful identification system to screen out  
16 non-members. In these circumstances, it would be sufficient if the caller gives his or her  
17 name and ONRC Action verifies that the name given is on ONRC's membership list.

18 Your proposal to use a voice mail box system similarly may not be permissible unless  
19 non-members are screened out. However, if all the costs associated with the PAC's use

*page not*

<sup>12</sup> For example, each member could be provided with an individual, unique identification number or password to enter the portion of the web site containing the endorsements. This method is used by various web organizations and Internet services.

The Commission notes that the membership application forms included in your request ask that a member provide an e-mail address. A further option open to ONRC Action and the Committee, is to send the list of endorsements by e-mail to members only. See Advisory Opinion 1995-33.

1 of the voice mail system are assumed by the PAC, this proposal would be permissible.<sup>13</sup>  
2 Otherwise, if appropriate safeguards are not taken, your proposed activity could result in  
3 an unlawful corporate expenditure, or, depending on the circumstances, a prohibited, in-  
4 kind corporate contribution to the candidates involved.

5 This response constitutes an advisory opinion concerning the application of the  
6 Act, or regulations prescribed by the Commission, to the specific transaction or activity  
7 set forth in your request. See 2 U.S.C. §437f.

8 Sincerely,

9  
10 John Warren McGarry  
11 Chairman

12  
13 Enclosures (AOs 1996-16, 1995-35, 1995-33 and 1984-23)

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16  

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<sup>13</sup> You state that the Committee would pay for any time spent adjusting the voice mail system and that no additional costs would be assumed by ONRC Action. However, your request is not sufficiently clear regarding any apportioning between ONRC Action and the Committee of any other costs such as, for example, usage and maintenance costs associated with the voice mail system. For this reason, the Commission cannot determine whether the third part of your proposal is permissible under the Act and Commission regulations.