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Regulations

Notice of Proposed Rulemaking on Use of the Internet in Federal Elections

On September 27, 2001, the Commission approved a Notice of Proposed Rulemaking (NPRM) seeking comments on proposed regulations concerning the use of the Internet for campaign-related activities.¹ The proposed rules would address:

- Campaign-related Internet activity conducted by individuals; and
- Hyperlinks and endorsement press releases placed on web sites established by corporations and labor organizations.

The NPRM was published in the October 3, 2001, *Federal Register* ([66 FR 50358](#)) and is open to public comments until December 3, 2001.

Internet Activity by Individuals

The Federal Election Campaign Act (the Act) exempts from the definition of contribution certain individual volunteer activities. 2 U.S.C. §431(B)(ii). The Commis-

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¹ On November 5, 1999, the Commission published a Notice of Inquiry seeking comments on a wide range of issues related to the use of the Internet for campaign activity. [64 FR 60360](#).

Court Cases

Virginia Society for Human Life, Inc. v. FEC

On September 17, 2001, the U.S. Court of Appeals for the Fourth Circuit upheld a district court decision that 11 CFR 100.22(b) is unconstitutional. The regulation defines "express advocacy" as a communication that, when taken as a whole and with limited reference to external events (such as proximity to an election), can only be interpreted by a reasonable person as unambiguously advocating the election or defeat of a clearly identified candidate.¹

The appeals court, however, found that the district court's

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¹ The FEC adopted the regulation at 11 CFR 100.22(b) based on its reading of the Ninth Circuit's decision in *FEC v. Furgatch*, in which the court concluded that "speech need not include any of the words listed in Buckley [v. Valeo, such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," etc.] to be express advocacy under the [Federal Election Campaign] Act, but it must, when read as a whole, and with limited reference to external events, be susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate."

Regulations

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sion proposes to clarify the status of individual Internet activity for the purpose of this exemption by adding new section 11 CFR 117.1, which would describe Internet activities not considered contributions or expenditures. Proposed section 117.1 would state that no contribution or expenditure would result when an individual used computer equipment, software, Internet services or Internet domain names for the purposes of influencing a federal election so long as the individual:

- Received no compensation; and
- Personally owned the computer equipment, software, Internet services and Internet domain names.

For the purposes of the proposed regulation, Internet services personally owned by the individual would include Internet access and web hosting services provided by an

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<http://www.fec.gov>

Internet service provider (ISP). The ISP must, however, provide such services as part of an agreement between the ISP and the individual acting in his or her capacity as an individual.² The proposed exceptions would not apply to equipment, services or software owned by an individual's employer, even if the individual used them as part of volunteer activity conducted on his or her own time.³

Under the proposed exceptions at section 117.1, the costs associated with the Internet activities described above would not count toward the individual's contribution limits and would not be independent expenditures. Individuals would not be required to disclose these costs when they exceeded \$250 in a calendar year, nor would they be required to include disclaimer statements. 2 U.S.C. §§434(c) and 441d. See also 11 CFR 109.2, 109.3 and 110.11. The exceptions would apply whether or not the individual's activities were known to or coordinated with any candidate, authorized committee or party committee. See 11 CFR 100.23.

Hyperlinks on Corporate and Labor Organization Web Sites

The Act prohibits corporations and labor unions from making

² *The individual's use of servers, storage devices and other equipment owned by the ISP and made available to the individual as part of the agreement would also be covered by the exception, regardless of where the equipment was physically located.*

³ *Note that if the use of a corporation's or labor organization's computer facilities is "occasional, isolated or incidental," no contribution or expenditure from the corporation or labor organization would result so long as the individual reimbursed the corporation or labor organization for any associated increase in overhead or operating costs. 11 CFR 114.9(a) and (b).*

contributions or expenditures to influence federal elections. 2 U.S.C. §441b. Proposed section 11 CFR 117.2 would exempt from the definitions of contribution and expenditure 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. The web site may be accessible to the general public, and the corporation or labor union may selectively provide hyperlinks to a candidate, political committee or political party without providing hyperlinks to any opposing candidate, committee or party.

However, three conditions must be met in order for the hyperlink to be exempted:

1. The corporation or labor union must not charge for providing a hyperlink to other organizations, or must charge only a nominal amount.
2. The hyperlink may not be a coordinated general public political communication under 11 CFR 100.23.
3. The hyperlink may not be anchored to an image or graphic material that expressly advocates the election or defeat of any candidate. Similarly, the text surrounding the hyperlink may not contain express advocacy. 11 CFR 100.22. The exemption still applies, however, if the hyperlink is anchored to the text of the URL of a candidate's or party committee's web site, and the text of the URL expressly advocates the election or defeat of a federal candidate.

Endorsement Press Releases on Corporate and Labor Organization Web Sites

Under the current regulations, corporations and labor unions may publicly announce their endorsement of candidates through press releases and press conferences so long as the disbursements for these

activities are *de minimis* (very small). The press release and notice of the press conference must be distributed only to the representatives of the news media that the corporation or labor organization ordinarily contacts for non-political purposes. 11 CFR 111.4(c)(6).

The Commission proposes adding new section 117.3 to address endorsement press releases on corporate and labor organization web sites. The new section would allow a corporation or labor organization to make a press release announcing a candidate endorsement available to the general public on its web site provided that four conditions were met:

1. The corporation or labor organization ordinarily made press releases available to the general public on its web site;
2. The press release was limited to an announcement of the endorsement and a statement of the reasons for the endorsement;
3. The press release was made available in the same manner as other press releases made available on the web site; and

4. The costs of making the press release available on the web site were *de minimis*.⁴

The proposed regulation would not allow a corporation or labor organization to post on its web site express advocacy materials, such as banner advertisements for a candidate.

The Commission invites comments on any of these proposals. The full text of the NPRM is available on the FEC web site at <http://www.fec.gov/register.htm> and from the FEC faxline, 202/501-3413 (request document 244).

All comments should be addressed to Rosemary C. Smith, Assistant General Counsel, and must be submitted in either written or electronic form by December 3, 2001. Written comments should be sent to the Federal Election Commission, 999 E Street, NW., Washington, DC 20463. Faxed comments should be sent to 202/219-3923, with a printed copy follow-up to insure legibility. Electronic mail comments should be sent to internetnprm@fec.gov and must include the full name and postal service address of the commenter. Comments that do not contain this information will not be considered. No oral comments can be accepted. ♦

—Amy Kort

Definition of “Political Committee” Rulemaking held in Abeyance

On September 27, 2001, the Commission voted to hold in abeyance the proposed rulemaking on the definition of “political committee.”

⁴ Proposed section 117.3 would partially supersede AO 1997-16, in which the Commission found that an endorsement that was posted on a corporation’s web site and available to the general public was a prohibited corporate expenditure under 2 U.S.C. §441b(b)(2)(A) and 11 CFR 114.4.

The Commission had approved an Advance Notice of Proposed Rulemaking (ANPRM) seeking comment on several proposals that would revise the rules governing the definition of “political committee” at 11 CFR 100.5. The Notice, which was published in the March 7, 2001, *Federal Register* (66 FR 13681), addressed:

- Possible revisions to the definitions of “contribution” and “expenditure,” which may trigger political committee status;
- Whether a “major purpose” test should be incorporated into the definition, and, if so, how this test should be applied; and
- The treatment as political committees of so-called 527 organizations (organizations established under section 527 of the Internal Revenue Code).

The rulemaking will be indefinitely suspended pending, among other things, possible legislative or court action and the completion of other rulemaking projects. ♦

—Phillip Deen

Court Cases

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injunction, which prohibited the FEC from enforcing the regulation against any party throughout the country, was too broad. Instead, the appeals court limited the injunction to bar the FEC from enforcing the regulation against the Virginia Society for Human Life, Inc. (VSHL). The appeals court also rejected the VSHL’s cross-appeal, which asked the court to require the FEC to repeal the regulation. The appeals court found that ruling 11 CFR 100.22(b) unconstitutional and barring the FEC from enforcing the regulation against Plaintiffs gave the VSHL complete relief.

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Federal Register

Federal Register notices are available from the FEC’s Public Records Office, on FEC web site at <http://www.fec.gov/register.htm> and from the FEC faxline, 202/501-3413.

Notice 2001-14

The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations; Notice of Proposed Rulemaking (66 FR 50358, October 3, 2001).

Court Cases

(continued from page 3)

Background

The VSHL is a nonprofit, tax-exempt membership corporation, which accepts corporate contributions. The group had planned to distribute voter guides to the general public in connection with the 2000 federal election cycle. The guides outlined the VSHL's stance on abortion-related issues and tabulated candidates' positions on these issues. The VSHL also planned to produce radio advertisements that would compare the positions of the candidates for President and U.S. Senator for Virginia on abortion-related issues. The VSHL planned to run these ads in Northern Virginia or the District of Columbia one week before the election.

On January 6, 1999, the VSHL submitted a petition for rulemaking to the FEC, requesting that it repeal 11 CFR 100.22(b). The VSHL argued that the definition of "express advocacy" was overly broad, and, thus, some of its planned activities might constitute prohibited corporate expenditures. See 2 U.S.C. §441b. The Commission did not vote to open a rulemaking. On August 9, 1999, the VSHL asked the U.S. District Court for the Eastern District of Virginia, Richmond Division, to require the FEC to act on its petition and to prohibit the Commission from enforcing 11 CFR 100.22(b).

District Court Decision

On January 4, 2000, the district court issued an injunction prohibiting the FEC from enforcing 11 CFR 100.22(b) "against the VSHL or against any other party in the United States of America." Relying on *Buckley v. Valeo*, the district court concluded that the regulation at 100.22(b) was unconstitutional. The district court said that the *Buckley* court defined express advocacy as "communications that in express terms advocate the election or defeat

of a clearly identified candidate for federal office." The court found that by allowing the FEC to regulate advocacy based upon the understanding of the audience rather than the actual message of the advocate, the regulation at 100.22(b) failed the *Buckley* test. Moreover, the district court concluded, the regulation empowered the FEC to regulate issue advocacy, which was "clearly forbidden by *Buckley*." See the March 2000 *Record*, page 8.

Appeals Court Decision

Plaintiff's Standing and Timing of Judicial Intervention. On appeal, the FEC argued that the VSHL lacked standing to sue. The FEC maintained that, because it had adopted a policy of not enforcing 11 CFR 100.22(b) in the Fourth Circuit, the VSHL faced no credible threat of prosecution.² The FEC also argued that the case was not appropriately timed for judicial intervention because the VSHL's allegations about its planned activities were not sufficiently concrete.

The appeals court, however, held that the VSHL had standing and that its allegations created a controversy that was concrete enough for the court to address. First, the court found that the VSHL faced a threat of prosecution, despite the FEC's policy in the Fourth Circuit. The FEC's policy statement was only recorded in FEC meeting minutes, which "do not carry the binding force of law." If sitting Commissioners were to change their minds, or new Commissioners were to disagree with the policy, the court reasoned, then the FEC could again enforce the regulation in the Fourth Circuit. Moreover, some of the VSHL's planned activity could occur outside of the Fourth Circuit where it would not be protected

even if the policy remained in place. Similarly, the court found that the case was ripe for judicial decision because the VSHL could not have engaged in its planned activities—nor could it engage in similar activities in the future—without the threat of penalty.

Constitutional Issues. The appeals court, relying on *Buckley*, agreed with the district court that the regulation violates the First Amendment and is unconstitutional because it "shifts the focus of the express advocacy determination away from the words themselves to the overall impressions of the hypothetical, reasonable listener or viewer."

The FEC argued that a too narrow reading of the express advocacy requirement would allow corporations and unions to circumvent, with "little more than careful diction," the Federal Election Campaign Act's prohibitions against corporate expenditures. 2 U.S.C. §441b. The appeals court, however, stated that it was bound by previous Supreme Court decisions and that a broader reading of "express advocacy" must come "from an imaginative Congress or from further review from the Supreme Court."

Scope of Injunction. The appeals court found that the district court abused its discretion by issuing a nationwide injunction against the FEC's enforcement of the regulation. The appeals court found that a nationwide injunction:

- Exceeded what was necessary to give full relief to the VSHL because an injunction covering the VSHL alone adequately protected it from prosecution;
- Deprived the FEC of the opportunity to argue its case in other courts of appeals;
- Conflicted with the principle that a federal court of appeals's decision is only binding within its circuit; and
- Deprived the Supreme Court of the benefit of decisions from several courts of appeals.

² *The Commission adopted this policy because it found that the Fourth Circuit's decision in FEC v. Christian Action Network "in effect invalidated the regulation."*

The appeals court concluded that the injunction to bar the Commission from enforcing the regulation must be limited to protect only the VSHL anywhere in the country.

Repeal of Regulation. The appeals court rejected the VSHL's request that it order the FEC to open a rulemaking to consider the repeal of 11 CFR 100.22(b). The court found it had given the VSHL complete relief by ruling the regulation unconstitutional and authorizing an injunction that prohibited the FEC from enforcing the regulation against the VSHL.

The appeals court remanded the case to the district court in order to have the injunction amended so that its protection is limited to the VSHL.

U.S. Court of Appeals for the Fourth Circuit, 00-1252 and 00-1332. ♦

—Amy Kort

FEC Announces Spring Conferences

Conference for Candidate and Party Committees

Date: To Be Announced
Location: Washington, D.C. Area
(To Be Announced)

Conference for Corporations

Date: April 22-24, 2002
Location: Washington, D.C.
(Loews L'Enfant Plaza)

Conference for Trade Associations

Date: May 22-24, 2002
Location: Washington, D.C.
(Loews L'Enfant Plaza)

Conference for Member and Labor Organizations

Date: June 26-28, 2002
Location: Washington, D.C.
(Loews L'Enfant Plaza)

Advisory Opinions

Advisory Opinion Request

AOR 2001-16

Extension of 70-day window for transferring funds for allocable expenses after suspension of party fundraising due to national emergency (Democratic National Committee, September 28, 2001) ♦

Outreach

Regional Conference in San Francisco for Candidates, Parties and PACs

In February, the Federal Election Commission will hold a comprehensive, two and one-half day conference in San Francisco. This conference is designed to help federal political committees and U.S. House and Senate candidates understand and comply with the federal campaign finance law. The conference will provide an overview of the basic provisions of the federal election law and discuss specific requirements that apply to candidates, political parties and corporate, labor and trade association PACs (as well as their sponsoring organizations).

The conference will consist of a series of workshops presented by Commissioners and experienced FEC staff. A representative from the Internal Revenue Service will be available to answer election-related tax questions.

The conference will be held February 5-7, 2002, at the Grand Hyatt Hotel in San Francisco, California. The registration fee for the conference is \$375, which covers the cost of the conference, reception, materials and meals. The registration fee must be received by

January 14. A late registration fee of \$10 will be added as of January 15, 2002. A full refund will be made available for all cancellations made before that date.

A room rate of \$218 is available for hotel reservations made by January 14. Call the Grand Hyatt Hotel at 415/398-1234. After January 14, room rates are subject to availability. The hotel is located downtown on Union Square, near cable cars, Chinatown and the shopping district.

Registration

Conference registrations will be accepted on a first-come, first-served basis. Attendance is limited, and other FEC conferences have sold out in the past, so please register early.

For registration information:

- Call Sylvester Management Corporation at 800/732-9004;
- Visit the FEC web site at www.fec.gov/pages/infosvc.html#Conferences; or
- Send an email to toni@sylvestermanagement.com. ♦

—Amy Kort

Public Appearances

November 3, 2001
First Saturday Society
Royal Oak, Michigan
Commissioner Smith

November 7, 2001
American University
Washington, D.C.
Vice Chairman Mason

November 12, 2001
Center for National Security Law,
University of Virginia
Charlottesville, Virginia
Commissioner Smith

Administrative Fines

Committees Fined for Nonfiled and Late Reports

The Commission recently publicized its final action on 42 new Administrative Fine cases, bringing the total number of cases released to the public to 282.

Civil money penalties for late reports are determined by the number of days the report was late, the amount of financial activity involved and any prior penalties for violations under the administrative fine regulations. Penalties for nonfiled reports—and for reports filed so late as to be considered nonfiled—are also determined by the financial activity for the reporting period and any prior violations. Election sensitive reports, which include reports and notices filed prior to an election (i.e., 12 Day pre-primary, October quarterly and October monthly reports), receive higher penalties. The committees and the treasurers are assessed civil money penalties when the Commission makes its final determination. Unpaid civil money penalties are referred to the Department of the Treasury for collection.

The committees listed in the chart at right, along with their treasurers, were assessed civil money penalties under the administrative fine regulations.

Closed Administrative Fine case files are available through the FEC Press Office, at 800/424-9530 (press 2) and the Public Records Office, at 800/424-9530 (press 3). ♦

—Phillip Deen

Committees Fined and Penalties Assessed

1. American Hotel Motel PAC	\$3,000
2. American Society for Clinical Laboratory Science	\$1,000
3. Bayne for Congress	\$4,500
4. Big Mack for Congress	\$79
5. Bob Shrauger for Congress	\$1,400
6. Carroll 2000	\$2,700 ¹
7. Chicago Board of Options Exchange Inc. PAC	\$1,000
8. Clark for Senate	\$1,350
9. Committee for Responsible Government of Temple-Inland Inc. (Committee for Good Government of Temple-Inland Inc.)	\$600
10. Cosgrove for Congress Committee	\$900
11. Countrywide Credit Industries Inc. PAC	\$1,000
12. CSX Corporation Good Government Fund	\$600
13. DeWayne Graham for Congress Committee	\$900
14. Duncan/Hilleary Congressional Celebration Committee	\$0 ²
15. Exxon Mobil Corporation PAC (12 Day Pre-General)	\$9,000
16. Exxon Mobil Corporation PAC (30 Day Post-General)	\$800
17. Friends of Barry Ford	\$375
18. Friends of Houghton	\$9,000
19. Friends of Mike Forbes	\$650
20. Friends of Ron Packard	\$900
21. Garza for Congress Committee	\$2,000
22. Hochberg for Congress	\$9,500
23. John Fee for Congress	\$1,300 ³
24. Jon Amores for Congress	\$450
25. Lauren Beth Gash for Congress	\$9,900
26. Lehigh Valley Democratic Committee	\$1,800
27. National Auctioneers Association PAC (AUCTIONPAC)	\$1,000
28. National Fisheries Institute Fisheries PAC (FISHPAC)	\$1,000
29. New York State Committee of the Working Family Party	\$2,700
30. Paul Rappaport for U.S. Senate	\$600
31. PECO Energy Company PAC (Philadelphia Electric Company PAC)	\$1,125
32. Plasterers Local 8 PAC Fund/Operative Plasterers & Cement Mason International Assn. of the U.S. & Canada 8	\$1,000
33. Pryce for Congress	\$6,000
34. Rely on your Beliefs Fund	\$1,300
35. Rosenthal for Congress	— ⁴
36. Tico Perez for Congress Campaign	\$0 ²
37. Transport Workers Union—Local 100 Political Contributions Committee	\$4,000
38. Tricon Global Restaurants Inc. Good Government Fund	\$1,000
39. Trinity Industries Employee PAC Inc.	\$2,000
40. Service Employees International Union Local 99 Federal PAC	\$504
41. Service Employees International Union Local 434-B Federal COPE	\$2,700
42. YOB 2000 (Y2K)	\$1,850

¹ Partial payment made.

² Penalty reduced due to lack of activity on the report.

³ This civil money penalty has not been collected.

⁴ The Commission took no further action in this case.

Alternative Dispute Resolution

ADR Program Update

On September 26, 2001, the Commission made public three additional cases resolved under the Alternative Dispute Resolution (ADR) program. In each case, the ADR office concluded that the allegations against the respondents were unsubstantiated. The Commission concurred and agreed to dismiss matters arising from complaints against:

- The Moran for Congress Committee, committee treasurer Robert Morrison, and the Honorable James P. Moran concerning the alleged personal use of campaign funds;
- Michael J. Becker and Claire W. Clemens concerning alleged perjury during an investigation of a previous matter under review; and
- The Susan Davis for Congress Committee, committee treasurer Carolyn Witt and Susan Davis concerning the alleged use of nonfederal funds for a federal election.

Closed ADR-negotiated settlement summaries are available from the Public Records Office at 999 E Street, NW., Washington, DC 20463. The Public Records Office may also be contacted at 800/424-9530 (press 3).◆

—Amy Kort

Information

FEC Expands Acceptance of Credit Cards

The Federal Election Commission now accepts American Express, Diners Club and Discover Cards in addition to Visa and MasterCard.

While most FEC materials are available free of charge, some campaign finance reports and statements, statistical compilations, indexes and directories require payment. Walk-in visitors and those placing requests by telephone may use any of the above-listed credit cards, cash or checks. Individuals and organizations may also place funds on deposit with the office to purchase these items. Since prepayment is required, using credit cards or funds placed on deposit can speed the processing and delivery of orders. For further information, contact the Public Records Office at 800/424-9530 (press 3) or 202/694-1120.◆

—Amy Kort

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