The New Campaign Finance Sourcebook

Chapter 10

ELECTION LAW AND THE INTERNET

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INTRODUCTION

The Internet today is having a greater effect than ever before on the American electoral process and dramatically re-shaping the way candidates run for office, even at the highest levels—from grassroots organizing to get-out-the-vote activities, advertising to fundraising, and webcasts to virtual town hall meetings. Consider Howard Dean, who began his campaign as an obscure former governor of Vermont, but was briefly propelled to the frontrunner position of the Democratic Party by a groundswell of support. Much of his short-lived success could be attributed to new organizing tools such as Internet "meetups" where over 150,000 people participated in 900 "meetups" in 265 different cities in February of 2004 alone.[ii] Or take Wesley Clark, for example, whose supporters launched a "Draft Clark" campaign that collected signatures and raised millions of dollars in campaign pledges, an effort the retired general said was "pivotal in persuading him to jump into the race."[iii]

The eventual major party nominees reaped benefits from the technology as well. Senator John Kerry's campaign raised an astounding $26.7 million exclusively over the Internet during the first quarter of 2004.[iv] President George W. Bush's campaign developed a database of over 6 million e-mail addresses which allowed it to instantly reach organizers and supporters around the country.[v] In addition, roughly 1.5 million unique users per month were visiting each campaign's website in the months leading up to the 2004 conventions.[vi] These are just a few examples of how the Internet has emerged as not just another communications tool, but a force that has and continues to re-shape the campaign process.

It is not just the candidates who turned to the Internet; non-profit organizations and political action committees increasingly tapped its resources. MTV and MoveOn.org held the first ever online primaries in 2004 attracting hundreds of thousands of online "voters."[vii] And, thousands of websites built by both individuals and organizations cropped up—replete with

video, photographs, blogs, online chatrooms and links to resources—as thousands of Americans used the Internet to both gather information and express their political views.

Part of the explanation for the Internet's rising importance is its pervasiveness. Thus, at the beginning of 2004, approximately 75% of the United States' adult population had home Internet access (not to mention access at work)—up from 66% at the same time in 2003.[viii] Moreover, American Internet users spend more time than any other country's users online.[ix] Recognizing these trends, campaigns are devoting more resources to the Internet; some observers estimate that campaigns will spend over $25 million—an amount previously unheard of—on online ads during the presidential election cycle.[x]

The accessibility and relative low cost of the Internet provide hope that it will become the "greatest tool for political change since the Guttenberg press."[xi] It has become a "democratizing force" in connecting millions of Americans with the political process. Before the birth of the Internet, for example, in order to give money to a campaign, you typically had to know someone who could tell you who to make the check out to and where to send it. Since the average American was not plugged into the major party fundraising system, most were not presented with an opportunity to donate. The Internet has changed this as virtually all federal candidates now allow individuals to make campaign contributions via their websites. The Internet, for example, is largely attributed to the dramatic increase of "smaller donations" to both parties during the 2004 election cycle. As of July 2004, the Bush and Kerry campaigns had each raised roughly $60 million in under $200 donations; this represented a 460% increase over 2000 levels for the Republicans and 570% climb for the Democrats.[xii] The same is true for volunteer activities. The Internet allows people to sign up to volunteer via the Internet. Even just a few years ago, volunteers were drawn from a discrete group of individuals—friends and family of the candidate, party loyalists, or the persistent few who searched through directories to locate telephone numbers for campaign headquarters—now campaigns draw on interested parties who submit their names through the candidate websites.

Whether the Internet realizes its potential as a vehicle for re-engaging an increasingly disassociated public in the democratic decisionmaking process, however, depends partly on the laws created, and adapted, to govern it. And so far, the law has had very little to say. In fact, the Internet remains a medium largely exempted from regulation under the Bipartisan Campaign Reform Act of 2002 ("BCRA") and subsequent Federal Election Commission ("FEC") regulations.

This chapter discusses the evolution of the regulatory framework of election laws on the Internet. First, it discusses the United States' generally non-regulatory policy toward Internet

communications and how that compares with the FEC's approach. Second, it provides an overview of federal election laws. Third, it explains the FEC's legal and regulatory approach to governing political activity over the Internet. Fourth, it highlights non-election law issues relating to the political use of the Internet. Finally, it provides an Appendix that contains a description and analysis of FEC Advisory Opinions and other proceedings concerning the Internet to date.

I. GENERAL UNITED STATES POLICY IS TO DISCOURAGE THE REGULATION OF INTERNET COMMUNICATIONS

To date, the United States government has generally allowed the Internet to develop with little or no regulatory intervention. Both the executive and legislative branches have promoted a strong national policy of fostering the continued growth of the Internet and refraining from unnecessary government regulation:

> It is the policy of the United States (1) to promote the continued development of the Internet and other interactive computer services and other interactive media; [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation*.[xiii]

Specifically, Congress made the following findings:

> (1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens . . . .
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> (2) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity . . . .
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> . . . .
>
> (4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, *with a minimum of government regulation*.[xiv]

Most regulatory agencies have followed this statutory directive when considering regulations pertaining to the Internet. The Federal Communications Commission ("FCC"), in its report on Broadband Internet access, concluded that "[t]he Commission should forbear from imposing regulations and resist the urge to regulate prematurely."[xv] The FCC concluded that "[t]he Internet, from its roots a quarter-century ago as a military and academic research tool, has become a global resource for millions of people. As it continues to grow, the Internet will generate tremendous benefits for the economy and society."[xvi]

In contrast to other federal agencies, the Federal Election Commission ("FEC") initially took a more activist and inconsistent approach towards the applicability of existing laws and regulations to the Internet. Its inconsistency is largely a result of having to apply laws and regulations established in the 1970s to a technology that is only recently coming of age.[xvii] The explosion of political activity over the Internet in the last two years portends a revolution in the way politics are executed. In the 2004 election, every legitimate federal candidate had a web site. Moreover, almost every politically active individual, group, political action committee ("PAC"), trade association, corporation, and union is becoming steadily more dependent on the Internet to both provide and receive everything from messages to money.

The questions of federal election law applicability to Internet activity are myriad. Most center, however, on whether a candidate or political party is receiving something of value and, if so, how it is to be valued, when it must be reported, and what responsibilities the receipt imposes on the candidate or party. As described in more detail below, federal election law sets limits on the amount individuals and PACs may contribute to federal campaigns and determines whether contributions or expenditures made by these groups must be reported to the FEC. It also prohibits contributions and expenditures "for the purpose of influencing a federal election" by corporations, foreign nationals, and government contractors. A "contribution" is defined as the provision of "anything of value" to a federal candidate or committee, while an "expenditure" is considered a payment made for the purpose of influencing a federal election. The difficulty, therefore, lies in determining how exactly these definitions apply to the use of the Internet.

The FEC held a public hearing on March 20, 2002 on issues raised by a Notice of Proposed Rulemaking[xviii] dealing with the use of the Internet for campaign-related activity. Testimony and questioning centered on the unique nature of web pages and the difficulties in determining their value. The Commission indicated that this subject would require a considerable amount of additional work and research before rules can be promulgated. Accordingly, it concluded that, for the time being, it would not move forward on this issue until sufficient resources became available. Therefore, until this rulemaking is completed and

regulations are enacted, the role of the Internet continues to be governed by the patchwork of an ever-evolving set of Advisory Opinions that are periodically issued by the FEC.[xix] From these opinions, some governing principles can be discerned and are discussed below in Section III.

Finally, the courts have agreed with the general United States policy of keeping "government interference in the medium to a minimum" in order to "maintain the robust nature of the Internet communications."[xx] Thus, in *Reno v. ACLU*,[xxi] the United States Supreme Court confirmed that Internet communications deserve a high level of First Amendment protection as it invalidated portions of the Communications Decency Act. In determining that these provisions were unconstitutional, the Court held that the Internet deserved *more* First Amendment protection than television or radio communications.[xxii] It stated that justifications for regulation of speech in broadcast media, including its "history of extensive government regulation," "scarcity," and "invasive" nature, "are not present in cyberspace."[xxiii] The Court also noted that "the vast democratic fora of the Internet" have not been subject to the type of government regulation that has attended the broadcast industry.[xxiv]

II. LEGAL OVERVIEW OF THE FEDERAL ELECTION LAWS

The Federal Election Campaign Act ("FECA") was enacted in 1971 to institute new requirements for federal candidates, political parties and PACs. FECA also places limits on financial contributions made by individuals and committees. It regulates other methods through which support is shown for candidates, such as volunteer activities. FECA also prohibits corporations and labor unions from making contributions or expenditures in connection with federal elections. A major change to these laws recently occurred, however, as President Bush signed BCRA into law, representing the most significant changes to campaign finance laws since the reforms enacted after the Watergate scandal almost three decades ago. [xxv]

A. Individual Limits

FECA permits individuals to contribute up to $2,000 "to any candidate and [the candidate's] authorized political committees with respect to any election for Federal Office."[xxvi] The term "election" under the Act includes "a general, special, primary, or runoff election."[xxvii] An individual may therefore contribute up to $2,000 to a candidate's primary and another $2,000 for a general election campaign. A husband and wife have separate limits.

The law further provides that an individual may make up to a $25,000 contribution per year to the federal account of a national party committee.[xxviii] Additionally, an individual may contribute up to $5,000 per year to any other multicandidate federal political committee,

including a PAC.[xxix] Contributions to the federal committees of state parties are limited to $10,000 per year.[xxx] All of the above contribution limits are subject to an aggregate limit on individual contributions of $95,000 per two-year election cycle (January 1 of odd-numbered years to December 31 of even-numbered years).[xxxi] The limits on individual contributions to candidates and party committees and individual aggregate contribution limits are indexed for inflation starting in 2003.

The passage of BCRA imposed new limitations the way candidates can use personal funds to finance their own campaign. It codifies FEC rules banning the use of campaign funds for "personal use" and limits the repayment of loans candidates make to their own campaigns to $250,000 from amounts contributed after the election.[xxxii] Finally it enacted a set of complicated rules, popularly known as the "Millionaire Amendment," which institute a formula to raise the limits on individual hard money contributions to a campaign if a candidate's opponent spends large amounts of personal funds.[xxxiii]

B. Corporate and Labor Union Participation and Limitations

Despite the restrictions that arise because of the prohibition on use of labor union and corporate treasury funds in connection with federal elections, there are a number of other political activities in which these groups may engage.

1. Soft Money

"Soft money" refers to any contributions to or expenditures on behalf of political entities that are not made in connection with a federal election. Under BCRA, national political party committees (e.g., the Democratic National Committee, Republican National Committee, and the Senatorial and Congressional campaign committees) are not able to accept "soft money." State parties may continue to spend "soft money" on voter related activities but are prohibited from spending the money on "federal election activity" including "public communications" related to a federal candidate.[xxxiv] Significantly, BCRA does not define Internet ads, websites or e-mail as "public communications"; state parties, therefore, may spend 100% "soft money" on these activities.

Since the Supreme Court upheld BCRA in *McConnell v. FEC*, "soft money" contributions have found new outlets in the form of groups organized under § 527 of the Internal Revenue Code. As of July 5, 2004, these groups had raised over $190 million to spend on television advertising, get-out-the vote activities and other means of influencing the election. While democratic leaning groups such as the Media Fund, MoveOn.org and various labor union 527s have attracted the majority of funding (approximately $107 million), conservative groups are catching up. If the FEC does not issue new rulings bringing these groups under the umbrella

of BCRA, the number of 527s raising huge amounts of un-regulated "soft money" to influence federal elections will only increase dramatically in the years to come. This could threaten to significantly undermine the "soft money" ban that was the centerpiece of BCRA.

2. Communications

BCRA clarifies and restricts the way groups may communicate with the general public via broadcast, cable or satellite advertisements that "promote, support, attack or oppose" a clearly identified federal candidate. Groups who run these ads within 60 days of a general election or 30 days of a primary must disclose to the FEC disbursements for direct costs of producing and airing such ads.[xxxv] The groups must also disclose the identification of the spender, principal place of business and the identity of any donors of $1,000 or more to the organization or fund used to pay for the advertisements. Furthermore, BCRA bans the use of corporate and union treasury money for such "electioneering communication."[xxxvi] Significantly, Internet ads, e-mail or websites are not defined as "electioneering communication" under BCRA and, therefore, are not subject to the electioneering communication provision. Accordingly, groups may run "issue" ads on the Internet through the election without being subject to the federal election laws.

Although prohibited from engaging in "electioneering communication" directly with the general public, a corporation or labor union *may* use its general treasury funds to communicate with its *restricted class*,[xxxvii] at any time on any subject. Thus, it can endorse a candidate and mail materials supporting that candidate to its restricted class. A corporation may produce other partisan publications and send them to its restricted class members as well.[xxxviii]

3. PAC Activities

A PAC or "Separate Segregated Fund" ("SSF") (the legal term for a corporate PAC) can be established by a corporation to enable it to engage in political activity which would otherwise be prohibited by federal law. A corporation may establish, administer, and solicit voluntary contributions from certain employees to its PAC. The monies solicited from the individuals by the PAC can in turn be used for federal political purposes.[xxxix] Thus, a corporation can have a voice in the electoral process by organizing a PAC that will contribute to those candidates that it believes will best serve the goals and objectives of the corporation.

a) Raising PAC Funds

Corporations may not contribute corporate funds to the treasury of its PAC. However, in order to make contributions to candidates it must first solicit funds from company personnel. The corporation is, therefore, allowed to pay the costs of such solicitations, which means that all contributions to the PAC can be used for political purposes. The corporation can also pay all

administrative costs of the PAC, including the cost of office space, phones, salaries, utilities, supplies, legal and accounting fees, fundraising and other such expenses incurred in setting up and running the PAC.[xl]

The law permits corporations to solicit all members of its restricted class,[xli] as well as the executive and administrative personnel of its subsidiaries, branches, divisions and affiliates and their families.[xlii] A corporation is prohibited, however, from soliciting or accepting any contribution from any foreign national, even if the individual is a member of the restricted class.[xliii] Moreover, all contributions to the PAC must be *entirely voluntary*. It is up to the individual to decide how much to give or whether to give at all.[xliv]

b) Reporting Obligations Of PACs

PACs are required to register with the FEC,[xlv] and must name a treasurer. The treasurer is responsible for the PAC's records and record keeping, as well as for reporting receipts and disbursements to the FEC on a regular basis.[xlvi] PACs are required to report all expenditures and aggregate receipts.[xlvii] Additionally, they must report the name and address of all individuals contributing more than $50 at one time, and must additionally report an individual's employer and occupation for contributions aggregating over $200.[xlviii]

Under BCRA, the limits on PAC contributions to candidates and parties remained unchanged and will not be indexed for inflation ($5,000 per candidate per election; $5,000 per outside PAC per year; $15,000 per national party committee per year; and $5,000 per state or local party committee per year). Consistent with current law, there are no annual aggregate limits on PACs.

III. LEGAL OVERVIEW OF FEC INTERNET REGULATION

As summarized above, federal election law operates on the presumption that communications to the general public about federal candidates cost money, and that spending may be prohibited, limited, and/or required to be reported. The entire complicated structure of the federal regulation of political activity by individuals, corporations and labor unions, and political committees is based on accounting for the amount spent. Congress assumed in 1975 that, without spending, political speech would consist merely of standing on a street corner and shouting, one of the few forms of public communication not regulated or reportable under the federal election laws.

The rise of the Internet as a medium of mass communication changes these fundamentals of communicating political speech. It thereby presents a conundrum for the FEC, the agency charged with interpreting and enforcing the federal campaign finance laws. Individuals can reach hundreds with list serves and blast e-mails, and organizations can mobilize thousands through a posting on a web site. For profit and non-profit organizations have sprung up to convey political news on the Internet, complete with links to candidate and party web sites, reprints of candidate materials, interviews and debates with candidates, and polling information.

One of the realities of the Internet is that there is usually no incremental cost to keystrokes, and thus none or little for e-mail, speech on web sites, and hyperlinks. Now that some on-line service providers routinely make web-site creation software available to subscribers as part of their regular service package, entire web pages can be created without any identifiable incremental costs. Without a cost to communication, current law has nothing to measure. Thus, the bans on corporate and labor spending for speech on behalf of federal candidates, and limits on in-kind contributions by individuals, are difficult to interpret in the Internet context. Moreover, the entire mechanism for disclosing political expenditures and requiring adequate information about the identity of the speaker is thrown into question as well.

One difficulty is that much of the FEC's regulatory apparatus is ill suited to the Internet. For instance, the FEC has traditionally presumed that there are identifiable costs for the purchase of advertising to reach the general public, that contributions to presidential candidates are only made by check, with signatures in ink on paper, etc. A greater problem for the FEC is that political speakers prior to the Internet were largely parties, candidates, and well-organized groups of persons, all at least passingly familiar with the federal election laws and FEC reporting obligations. Internet political speakers, by contrast, tend to include large numbers of individuals who are completely unaware that federal election law may reach their independent or volunteer activity. Internet speakers also increasingly include small newsletter publishers and news-based web sites, and private non-profit entities or governmental agencies, all of which assume that their activities by their very nonpartisan nature should be exempt from FEC requirements.

The FEC's initial reaction (which has now significantly changed) was to declare that speech on the Internet DOES have a cost, and must be considered and quantified as "something of value" to a federal candidate. Logically, that led to the argument that the creation or use of web sites and pages for disseminating federal election-related speech (including news, commentary, and candidate information) should be subject to regulation under FECA. Likewise, providing a link to a federal candidate's web site would be subject to the federal election laws.

More recently, the Commissioners have taken a more accommodating and realistic view of political activity on the Internet. Commissioner Karl Sandstrom declared that "[i]n regulating the Internet, we should seek to unleash its promise. Only such regulation as is absolutely necessary to achieve the core purposes of the law is merited."[xlix]

More importantly, in Advisory Opinions issued to the Minnesota Secretary of State, Democracy Net, and Election Zone, the Commission concluded that nonpartisan activity on the web (loosely defined as providing campaign-related information and candidates' statements in a way which treats all candidates on an equal basis) is exempt from any FEC reporting requirements. In another Advisory Opinion, issued to the Bush campaign, the FEC found that Internet activity by campaign volunteers acting on their own need not be tracked and reported by the candidate's campaign committee. These new Advisory Opinions reflect a growing consensus at the FEC that Internet activity should not be burdened by traditional campaign finance regulation unless it involves the expenditure of large sums of money for overtly partisan political speech. The cumulative effect of these, and other, Advisory Opinions is discussed in greater detail below.

A. Nonpartisan Political Web Sites

In separate Advisory Opinions issued to the Minnesota Secretary of State, the Democracy Network ("DNet" was a non-profit entity), and Election Zone ("EZone" was a for-profit entity), the Commission declared certain nonpartisan Internet activity to be neither an expenditure nor a contribution.[l] On the other hand, any web site that on its own behalf expressly advocates[li] the election or defeat of a candidate or solicits contributions is subject to federal election laws and must, at a minimum, contain a disclaimer that includes the site sponsor's full name and whether the site was authorized by a particular candidate.[lii] In addition, if a web site owner provides a free link to a campaign web site, it is considered a contribution if the web site owner normally charges a fee for such a link.[liii] (See discussion below for the applicable contribution limits.)

The DNet Advisory Opinion confirmed that a web site, containing nonpartisan political information,[liv] created and operated by non-profit organizations was permissible, but declined to base its decision specifically on a combination of exemptions found in the Commission's regulations (such as the voter guide, press, or candidate debate exemptions).[lv] Instead, the Commission concluded, based on FECA, that the entire DNet web site as designed by DNet was not an "expenditure in connection with a federal election" because it was "nonpartisan activity designed to encourage individuals to vote or to register to vote."[lvi]

Within weeks of the DNet opinion, the Commission confirmed that the same "nonpartisan" exemption applicable to DNet's activity would apply equally to the same activity by a for-profit corporation which had a commercial web site.[lvii] The FEC in the EZone opinion stated that it did not consider DNet's non-profit status as a determining factor in Advisory Opinion 1999-25, and instead focused on the fact that EZone "is not affiliated with any candidate, political party, PAC, or advocacy group," and that its candidate-related content would follow the same nonpartisan, equal treatment, approach as DNet's.[lviii]

The Commission recently held that a nonprofit, nonpartisan corporation—whose purpose was to examine why young voters tend to be less involved in the political process—could study the effect of Internet political advertising on different groups of randomly selected viewers, even though the ads expressly advocated the election or defeat of specific presidential candidates. The Commission determined that this provision of free advertising did not constitute an illegal contribution to the candidates but could not agree upon a rationale for this conclusion.

Republican Commissioners Wold, Mason, and Smith concluded that express advocacy of a candidate's election should be permitted on the Internet if it is clear from the stated purpose and structure of the communication that it is not for the purpose of influencing a federal election. Democratic Commissioners McDonald and Thomas, on the other hand, found the study at issue fell within the exemption for "nonpartisan get out the vote activity."[lix] The FEC has based several Internet Advisory Opinions (e.g., Minnesota Secretary of State, DNet, and Election Zone) on this exemption. Of greater significance to the Internet community, the FEC Commissioners were unwilling to let their lack of consensus on a legal rationale prevent the approval of the Third Millennium request. This Advisory Opinion, therefore, reflects a continuing FEC awareness of the dynamic and developing nature of the Internet, and a desire not to hamper political activity on the web.

B. Political Web Sites Maintained By Individuals

An individual may participate in political activities over the Internet in countless ways but must be wary of the requirements and pitfalls associated with such activity. Thus, an individual may spend an unlimited amount of money creating a web site that discusses issues, legislation, and policy—and basically anything else provided it does not expressly advocate the election or defeat of a federal candidate—without subjecting herself to regulation by any federal election laws. She may instead spend an unlimited amount of money creating a web site expressly advocating the election or defeat of a candidate, provided she does not coordinate with a federal candidate or the candidate's campaign committee. In this case, however, the costs of creating and maintaining the web site are considered "expenditures," which trigger reporting requirements to the FEC if they exceed $250.[lx] Finally, she may create a web site expressly

advocating the election or defeat of a candidate in coordination with a federal campaign committee. Because she coordinated with a campaign, the costs are considered "in-kind contributions" and are counted against her annual contribution limit of $2,000 per candidate per election.[lxi]

If an individual is working as a volunteer for a political campaign, and the campaign does not control the specific volunteer activity, then the personal costs accrued by an individual using the Internet for campaign activity is not considered a contribution to the campaign. As such, these costs would not be counted against an individual's $2,000 contribution limit. A volunteer who is a corporate employee may also use corporate equipment to conduct campaign activity, provided such use is occasional, isolated, and incidental. Otherwise, the campaign must reimburse the costs of the campaign activity to the corporation.[lxii] Finally, a volunteer who re-publishes speeches and issue papers by a candidate from the volunteer's home computer may do so without such re-publication being considered a contribution to the candidate's campaign.[lxiii]

C. Corporate And Union Use Of The Internet

Because federal election law prohibits contributions from corporations and labor unions, neither entity can provide free Internet services that are normally provided for a fee.[lxiv] Likewise, a corporation may not post its candidate endorsements on the web site of its supporting PAC unless access to the endorsements is confined to members of the corporation's restricted class.[lxv] A corporation may post, however, a general description of its corporate PAC, and how to find additional information regarding the PAC, on web site locations for viewing by employees in or outside the restricted class provided there are no PAC solicitations posted.[lxvi] A corporation also may send a newsletter containing a PAC solicitation via e-mail to the secretaries of its executives, provided that a note informing the secretary that the material is intended for the executive accompanies the material.[lxvii]

The publication of campaign material over the Internet by a corporation that is considered a news entity engaged in carrying out a legitimate press function is not considered a contribution, and therefore would not be prohibited under federal election law.[lxviii] This exemption does not apply to non-news entity corporations.[lxix] Corporations engaged in the business of assisting political campaigns and PACs in fundraising over the Internet may do so provided that certain safeguards, such as payment at the usual and ordinary rate, are met.[lxx]

D. Political Action Committees

Publicly available information on particular public officials may be posted on PAC web sites without triggering expenditure requirements beyond those already associated with the operation of PACs. Further, non-connected PACs (but not corporate PACs) may solicit contributions from the general public through a web site.[lxxi] Non-connected PACs may post political speeches that expressly advocate the election or defeat of a specific candidate and need only report the costs of doing so as overhead or operating expenses. Examples of these costs are expenses for registering and maintaining a domain name and web site hosting and any costs relating to the purchase and use of computer hardware and software. These expenses, however, must be reported as independent expenditures if they can be isolated and found to be directly attributable to a clearly identified candidate.[lxxii]

Corporate PACs may engage in such general political speech as well, but must pay for it out of contributed funds *only*. A PAC sending e-mail that expressly advocates the election or defeat of a clearly identified candidate is engaged in independent expenditure activities that must be reported if the costs exceed $200.[lxxiii] Likewise, if a PAC sends 100 or more e-mail containing express advocacy, the e-mail also must contain a disclaimer that includes the sponsor's full name and whether a particular candidate authorized the e-mail.[lxxiv]

PACs may receive contributions via electronic employee payroll deductions provided their employees can electronically revoke or modify their deductions and that the employer keeps records of the transactions.[lxxv] A corporate or trade association PAC may also solicit its restricted class through a PAC web site, but it must ensure (by the use of a password or other security plan) that persons outside the restricted class do not have access to the solicitation.[lxxvi]

E. Internet Political Activity By Federal Candidates

1. Fundraising Over The Internet

Individuals may contribute to political campaigns over the Internet by credit card or electronic check provided that the campaigns receiving the contributions have the appropriate safeguards in place.[lxxvii] For presidential candidacies, such contributions are eligible for federal matching funds.[lxxviii]

When soliciting contributions, federal candidate committees must include certain disclaimers (e.g., "Paid for by," not tax-deductible, and no foreign contributions permitted)[lxxix] and are also obligated to use their "best efforts" to obtain the name, address, occupation, and employer of each person who contributes more than $200 during a calendar year.[lxxx] The

Commission has determined that a committee making a solicitation "may substitute e-mail communications for written or oral communications as a means of exerting best efforts to obtain missing contributor information where the original contribution was received through the Internet, or where the Committee has otherwise obtained reliable information as to the donor's e-mail address."[lxxxi]

2. Disclosure of Sponsorship

Federal law requires campaign materials—whether printed or broadcast—that expressly advocate the election or defeat of a federal candidate to contain a disclosure statement that makes clear who paid for the ad.[lxxxii] Thus, most candidate sponsored web sites bear a similar disclosure statement so as to limit the potential for confusion.

F. Miscellaneous Internet Communications

Although the FEC has not formally extended its X-PAC advisory opinion to entities other than PACs, groups are advised to adhere to the policy for PACs regarding e-mail communication. Under the X-PAC decision, the FEC requires a disclaimer on e-mail if it contains express advocacy and is sent to more than 100 e-mail addresses within a calendar year.[lxxxiii] Text messages sent to cellular telephones, however, are exempt from the disclaimer requirement due to technological limitations. The FEC reasoned that text messages typically can contain a maximum of 160 characters; requiring a disclaimer would require using a significant percentage of the allowable characters, thus leaving little room for the actual content.[lxxxiv]

IV. NON-ELECTION LAW ISSUES RELATING TO THE POLITICAL USE OF THE INTERNET

A. Cybersquatting

"Cybersquatting" refers to the practice of registering Internet domain names containing trademarks or personal names by someone other than the owner of the marks or the person with that name. A domain name, such as "yahoo.com" is the address that identifies a particular web site.[lxxxv] Such names are issued on a "first come, first served" basis, and name registration requires only a modest investment of less than $100.[lxxxvi] Realizing that desirable domain names are scarce, cybersquatters have hastened to acquire as many names as they can, including the names of political candidates.[lxxxvii] Cybersquatters are motivated by a variety of different considerations. Some register a politician's name (or some variation thereof) hoping that it will increase the number of hits on their web sites, many of which are parodies of the web sites of

actual candidates.[lxxxviii] Others, however, do so intending to hold the domain name hostage until the candidate agrees to pay a ransom in exchange for the name.[lxxxix] Regardless of their motives, cybersquatters create a great deal of confusion amongst those who want to learn more about the candidates and their positions on the issues by increasing the "search costs."

As search costs rise, so does the likelihood that online citizens will quit their searches before reaching reliable information provided by a particular candidate. Furthermore, a cybersquatter's control over a domain name that is similar to a candidate's will diminish that candidate's ability to distribute his message because the cybersquatter's site will draw away Internet traffic that was intended for the candidate's official site. Also, the potential for abuse is significant. For example, on at least one occasion, an imposter web site designed to look like that of a particular presidential candidate has taken campaign contributions intended for that candidate.[xc] Accordingly, "electronic democracy" will struggle as a truly transformative force in our political culture until the problems associated with cybersquatting are adequately resolved.

Adversarial proceedings under ICANN's Uniform Domain Name Dispute Resolution Policy[xci] and the Anticybersquatting Consumer Protection Act ("ACPA")[xcii] do not appear to offer candidates much relief. Several potential non-litigation solutions to the cybersquatting problem have been suggested, but not enacted, including: (1) the FEC creating a web site that includes a registry of hypertext links to each federal candidate's web page; (2) the FEC establishing a site that would serve as a common host for the official web sites of all federal candidates; (3) Congress creating a federal right of publicity for political candidates; and (4) the creation of a new top-level domain (e.g., ".pol") that could be used only by registered candidates.

In 1999, the Department of Commerce released its report to Congress.[xciii] The report responded to Section 3006 of the ACPA that directed the Secretary of Commerce, in consultation with the Patent and Trademark Office and the FEC, to study and recommend to Congress "guidelines and procedures for resolving these disputes."[xciv] In a section titled "Considerations Particular to Political Candidates and Campaigns," the report rejected the suggestion of using the FEC "to maintain an authoritative, centralized list of political candidates and campaigns and their Web sites" for several reasons. First, it noted that the FEC's General Counsel had informed the Commerce Department that it had neither the resources nor the legislative mandate to act as the registry administrator. Second, even if the FEC had the resources and mandate, the FEC does not become involved with a candidate until his or her candidacy reaches a certain stage. Finally, the private sector has done an admirable job of creating candidates' site lists.[xcv]

B. Copyright and Trademark Law

Despite the fact that the U.S. government thus far has taken a "hands-off" approach with respect to Internet regulation, operators of political web sites must remain aware that principles of copyright and trademark law still apply online. In a recent case involving alleged copyright infringement by an Internet company, a federal judge stated that "some companies operating in the area of the Internet may have a misconception that, because their technology is somewhat novel, they are somehow immune from the ordinary applications of the laws of the United States, including copyright law. They need to understand that the law's domain knows no such limits."[xcvi]

The copyright issues raised by the operation of a political web site are similar to those raised by the publication of a newsletter. For instance, a publisher of a newsletter must receive permission before using copyrighted photographs; so must an operator of a web site. Furthermore, both newsletters and web sites must receive authorization before reprinting (in whole or in large part) the writings of others, especially if such reprinting does not include any accompanying commentary. Newsletters and web sites differ in an important respect, however; copyright infringement on the Internet can result in much higher damages than copyright infringement in the newsletter context, primarily because the Internet allows for wider distribution of infringing copies than do older technologies.

Trademark issues also arise when one creates a political web site. Logos, graphics, and slogans used by a campaign are eligible for protection under trademark laws because they identify a particular source or provider of goods or services. Thus, if the operator of a political web site was to copy graphics or logos from the web site and then includes them on her web site, that operator could be liable for trademark infringement unless he first obtains permission.

C. IRS Regulation of Exempt Organizations that Engage in Political Activity on the Internet

In 2000, the IRS asked for comments on political activity and the Internet, but has yet to issue any specific guidance on the subject. Until it takes further action, the same IRS rules governing other media apply to the Internet. The IRS defines political activity as any activity that directly or indirectly supports or opposes a particular candidate for elected public office, based on all of the relevant facts and circumstances. Under federal tax rules, Section 501(c)(3) charitable organizations are prohibited from intervening in any campaign for elected public office; Section 501(c)(4) (social welfare), 501(c)(5) (labor unions), and 501(c)(6) (trade associations and chambers of commerce) are allowed to intervene in campaigns if and only if their primary activity remains furthering their exempt purposes; Section 527 (political

organizations) may participate in political activity, but must be organized and operated for the primary purpose of influencing the selection, including the election, of an individual for public office.[xcvii]

The IRS has provided several examples of what constitutes political activity for tax purposes. Political activity includes: endorsing a candidate, making a cash or in-kind contribution to a candidate's campaign (including coordinating activities with a campaign), fundraising for a candidate's campaign, distributing a "voter guide" or "candidate scorecard" that favors one candidate over another, and targeting individuals for voter registration or get-out-the-vote activities based on party affiliation or positions on candidates. The rules do, however, leave ample room for various nonpartisan activities. Examples of activity that does *not* constitute political activity under IRS rules include: nonpartisan voter registration or get-out-the-vote activities (including activities targeted to a particular demographic group if that group has historically been underrepresented), voter education on issues as opposed to on candidates, nonpartisan candidate questionnaires, nonpartisan candidate forums or debates, participation by candidates in events for non-candidacy reasons with no campaign activity permitted, and normal business transactions available to the public.[xcviii]

D. FCC's Role In Regulating Internet Political Activity

The FCC has an enduring policy of promoting the development of the Internet through forbearance from regulation. Beginning in 1966 with *In the Matter of Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*,[xcix] and continuing with *In the Matter of Federal-State Joint Board on Universal Service*,[c] the FCC has refrained from issuing regulations governing the Internet. Accordingly, it has not held the Internet community to the same requirements that it holds broadcast stations and cable systems.

Specifically, the Communications Act and the FCC's Rules require, with several exceptions, broadcast stations and cable systems to provide equal opportunities to opposing legally qualified candidates. The Communications Act and FCC rules also require that during the 45 days before a primary election and 60 days before a general election, a station must offer time to political candidates at no more than the rate charged its most favored commercial advertiser for that amount of time and for that class.[ci] The FCC has not attempted to apply these laws and regulations to the Internet.

APPENDIX I

What follows below are a description and analysis of FEC Advisory Opinions[cii] and other proceedings concerning the Internet to date. The Advisory Opinions, cited to above and described below, may be found on the FEC's web site at <http://herndon3.sdrdc.com/ao/>.

A. General Applicability

FEC Public Hearing On Notice Of Proposed Rulemaking On The Use Of The Internet In Federal Elections, Held March 20, 2002

The FEC held a hearing seeking comments concerning the three areas designated in the proposed rules: 1) applying the volunteer exemption to Internet activity by individuals; 2) permitting hyperlinks on corporate or labor organization web sites; and 3) permitting corporate and labor organization web sites to make available press releases announcing candidate endorsements. The FEC heard testimony from Robert F. Bauer, Perkins Coie LLP Political Law Group; Laurence E. Gold, Associate General Counsel, AFL-CIO; and James Bopp, Jr., General Counsel, James Madison Center for Free Speech. The witnesses' oral testimony and questioning centered mostly on the unique nature of web pages and the difficulties in determining the value associated with such creations. All three witnesses expressed the view that the Commission should tread very lightly when regulating in the area of the Internet. Specifically, they warned that individuals might conclude that Commission regulations, addressing only three narrow aspects, would restrict all other uses of Internet applications not specifically exempted by the new regulations, thereby chilling a huge range of activity.

The Commission indicated that this subject would require a considerable amount of additional work and research before rules can be promulgated. Accordingly, it concluded that, for the time being, it would not move forward on this issue until sufficient resources became available.

Notice Of Proposed Rulemaking On The Use Of The Internet In Federal Elections, Issued October 3, 2001.

The FEC gave unanimous approval to a "Notice of Proposed Rulemaking on the Use of the Internet in Federal Elections."[ciii] This action came after an extended period of work on the part of the FEC in this matter, which began when the Commission published a Notice of Inquiry in November of 1999, seeking comments on a wide variety of Internet related campaign and election issues. After receiving over 1,300 comments from the general public, interest groups, political parties, law firms, labor organizations, Internet companies and a major Internet service

provider, the FEC's Regulation Committee worked to put together these proposed regulations. This Notice of Proposed Rulemaking ("NPRM") seeks comments on proposed rules that would: (1) extend the "volunteer exemption" to individuals using personally-owned "computer equipment, software, Internet services or Internet domain name(s) … to engage in Internet activity for the purpose of influencing any election to Federal office"; (2) permit corporations and labor organizations to establish hyperlinks from their web sites to the web sites of candidates and/or party committees without a contribution or expenditure resulting; and (3) permit corporations and labor organizations to make candidate endorsements available to the general public on their web sites.

Notice Of Inquiry On The Internet And Federal Election Campaigns, Issued November 5, 1999.

Commissioner David Mason proposed in the spring of 1999 that the Commission commence a Notice of Inquiry on the application of Federal Election Campaign Act ("FECA") and FEC regulations to the use of the Internet in federal election campaigns. Commissioner Mason suggested that FEC regulations may need to be removed or altered after the Commission conducts a more thorough review of political activity on the Internet. The Commission responded to Commissioner Mason's proposal by directing its General Counsel to draft a Notice of Inquiry ("NOI"). The NOI, issued by the FEC for public comment in November 1999, raised several specific points of inquiry, including:

- The application of the media exemption to political information on the Internet;
- The Internet as "communication to the general public" under FEC regulations;
- Press releases and candidate endorsements available through the Internet;
- The reportable cost of Internet communications, web sites, etc.;
- The treatment of "hyperlinks"—are they "addresses" (allowed) or "something of value" (regulated or prohibited)?;
- The categorization of candidate speeches or position papers that have been re-published;
- The value of "electronic bumper stickers" on non-campaign web sites;
- The substitution of e-mail for regular mail for "best efforts" donor identification;
- The membership status of Internet-based organizations; and
- The liability of hosts of Internet discussion sites for postings of express advocacy by other participants.

The Commission has received more than 1,300 comments regarding its Notice of Inquiry on this subject.[civ] The Commission had not taken further action on this proceeding at the time this chapter was written.

Advisory Opinion 2000-16 (Third Millennium)

The Commission unanimously held that Third Millennium—a 501(c)(3) nonprofit, nonpartisan corporation that seeks to use the Internet to study and address political apathy of young voters—could conduct a test of the effect of Internet political advertising by running a controlled number of web advertisements expressly advocating the election or defeat of specific Presidential candidates. Specifically, Third Millennium will randomly select groups of viewers who will view advertisements for the major party Presidential candidates: one group will view the Republican candidate's ads, another the Democrat's, and a third will not view any ads. The banner pop ups will be provided as advertising to the candidates free of charge, and Third Millennium will purchase the pop ups from an Internet Service Provider (Juno) using funds provided by a grant from the Pew Charitable Trusts. Third Millennium and Juno will work with the E-Voter Institute to publish the results of the study after the election, focusing on whether the advertising effected voter turnout or candidate preference. The Advisory Opinion is unique in that it contains no reasoning or explanation of the Commission's decision. Individual Commissioners, however, filed "Statements of Reasons" explaining how they reached the Third Millennium outcome.

Republican Commissioners Smith, Wold, and Mason concluded that express advocacy of a candidate's election should be permitted on the Internet if it is clear from the stated purpose and structure of the communication that it is not for the purpose of influencing a federal election (the statutory requirement). This "two-step analysis," these Commissioners concluded, "is consistent with the Commission's recent Advisory Opinions 1999-25 [DNet] and 1999-24 [EZone], which allowed a 501(c)(3) organization, and a limited liability company (LLC), respectively, to engage in web-based activities that involved the transmittal of communications including express advocacy." Accordingly, although Third Millennium's communications will contain express advocacy, they are not for the purpose of influencing an election and are therefore permissible.

Democratic Commissioners McDonald and Thomas expressly disagree with the Republican Commissioners because Third Millennium's activities "are election-related and meant to influence an election." Nevertheless, these Commissioners found the activity at issue falls within the exemption for "nonpartisan registration and get out the vote activity." The FEC has based several Internet Advisory Opinions (e.g., Minnesota Secretary of State, DNet, and

Election Zone) on this exemption. Finally, the Commissioners noted that "it is significant that the proposed project will include a range of candidates beyond the major party candidates and will treat all the candidates equally in obtaining the ads and in their exposure to viewers."

Most importantly for the Internet community in general is that the FEC Commissioners were unwilling to let their disagreements regarding the proper legal rationale prevent the approval of the Third Millennium request. This Advisory Opinion and the accompanying Statements, therefore, continue the FEC's awareness of the unique nature of the Internet and demonstrate its intention not to inhibit political expression and activity on the web.

Advisory Opinion 1999-25 (Democracy Network)

DNet is an interactive web site for candidates and potential voters. Launched in 1996 during the presidential elections as an online project of the League of Women Voters Education Fund and the Center for Governmental Studies, it has provided in-depth voter information on hundreds of campaigns. DNet is a 501(c)(3) not-for-profit corporation. It requested confirmation from the FEC that its provision of candidate-related information on a nonpartisan basis through its Internet web site during the current election cycle was permissible, even if candidates expressly advocated their own election or their opponents' defeat. DNet also sought confirmation that it could link to candidate and party web sites, provide voting and voter registration information, enable substantive discussions and online debates in which candidates directly participate, and provide biographical and other candidate information. The Commission declined to use a mixture of the available exemptions recommended by its staff (such as the voter guide, press, or candidate debate exemptions). Instead, the Commission decided that the entire web site as designed by DNet was not an "expenditure in connection with a federal election" (and therefore not covered by the federal election laws) because it was "nonpartisan activity designed to encourage individuals to vote or to register to vote."[cv]

The DNet Opinion is a Magna Carta for nonpartisan Internet sites with political content. Although DNet was a not-for-profit entity, the FEC clearly stated that its decision was not limited to nonprofit organizations. In fact, the FEC shortly thereafter extended the DNet reasoning to a for-profit LLC with similar nonpartisan content.[cvi]

Advisory Opinion 1999-24 (Election Zone)

Election Zone, a for-profit Colorado LLC, sought confirmation that it could conduct the same type of nonpartisan Internet activity that the Commission approved in Advisory Opinion 1999-25 (DNet), even though Election Zone is a for-profit entity. The Commission confirmed

that "nonpartisan" exemption used in DNet could also apply to nonpartisan activity by a for-profit entity.

Advisory Opinion 1999-7 (Minnesota Secretary of State)

The Secretary of State of Minnesota asked the FEC whether her office's official web page may include links to candidates' web pages. Minnesota law specifically directs the Secretary of State's office to "sponsor or participate in nonpartisan activities to promote voter participation in Minnesota elections," and the Secretary sought to better inform potential voters about candidates and their positions through a nonpartisan program of links to all candidates for public office. The Commission concluded that providing links in a nonpartisan manner to all ballot-qualified candidates running for office in Minnesota is not an impermissible contribution of "something of value" by the State to the federal candidates. Rather, this proposal merely encourages participation in the political process and is therefore nonpartisan activity "designed to encourage individuals to vote or to register to vote."

B. The Internet and Presidential Candidates

Advisory Opinion 1999-36 (Campaign Advantage)

The Commission held that contributions received through an electronic check system are eligible for federal matching funds. In making this determination, the Commission relied on its decision in Advisory Opinion 1999-9 (Bradley) and the recently revised Commission regulations that allow credit and debit card contributions to be matched. The Commission cited with approval the safeguards in the online checking system of Campaign Advantage that screen impermissible contributions. Finally, the Commission noted that similar to the treatment of contributions received by traditional paper checks, Campaign Advantage would be required to provide each contributor's checking account number and bank transit number to the campaigns receiving the contribution.

Advisory Opinion 1999-22 (Aristotle Publishing)

Aristotle Publishing requested guidance concerning the application of FECA, FEC regulations, and the Presidential Primary Matching Payment Account Act to "its proposed methods to assist various political committee and candidate clients in fundraising through the Internet." Specifically, it sought confirmation that its contractual arrangements (involving a negotiated percentage of the contributions) between it and its clients were proper and that its procedures for screening and processing contributions were adequate under the Act.

Additionally, Aristotle asked whether it could "use its own 'merchant ID number' for clients for whom it is collecting and forwarding the credit card contributions."

The Commission found that the contractual arrangements proposed by Aristotle involved adequate compensation and were within the "normal course of business." Further, the Commission concluded that Aristotle's software, which enables candidates for federal office "to receive contributions by credit card through the Internet," provided a compliant "real time" processing system and adequate screening procedures. (These screening procedures required contributors to specify name, address, card number, and amount of contribution and to verify that the contribution derived from personal funds.)

Finally, the Commission held that Aristotle may use its own ID number for contributions not submitted for federal matching funds. The Commission also held, however, that "Aristotle may not use a single merchant account number for contributions to Presidential campaigns that are to be submitted for Federal matching payments" despite Aristotle's proposal of placing all contributions "in a separate banking account and to maintain separate book accounts for each political customer." The Commission declared that because the committee's name would not appear on the contributor's credit card bill, Aristotle's plan did not comply with the Matching Act's requirement that a "contribution be made payable to or endorsed to the Presidential campaign."

Advisory Opinion 1999-17 (George W. Bush for President)

The George W. Bush for President campaign in the summer of 1999 sought the Commission's opinion on a variety of issues surrounding the use of the Internet during the upcoming election cycle. The campaign emphasized the importance of the Internet as a means for stimulating interest in the election process "at a time when citizen involvement seems to be diminishing rather than increasing."

The FEC concluded that a campaign committee may benefit from the on-line political activities of campaign volunteers without having to report or "police" these activities as campaign contributions, as long as the committee does not control the volunteer activity. Importantly, the Commission also found that the contribution status of providing a link to a campaign turned on whether "the owner of the web page providing the link would normally charge for the providing of such a link." Accordingly, the provision of a link is treated as a campaign contribution only if a web site normally charged for the provision of similar links—but in this instance chose to charge less than the normal amount (or nothing at all). In addition, the Commission held that the use of e-mail by a campaign volunteer using his or her home

equipment would never be considered a campaign contribution. E-mail sent by a volunteer using corporate equipment, however, could be considered a contribution if that volunteer's use of corporate facilities for such activity exceeded the Commission's occasional, isolated, or incidental corporate use criteria.

The Bush Advisory Opinion left unresolved the status of individuals acting independently of political campaigns (and therefore not viewed by the FEC as fitting within the "volunteer" exemption). Several Commissioners expressed a willingness to overrule portions of Advisory Opinion 1998-22 (discussed below) and openly expressed the hope that individuals acting independently of campaigns would request a new FEC Advisory Opinion on the subject.

Regulation, 64 Fed. Reg. 32394 (June 17, 1999) (Codified at 11 C.F.R. §§ 9034.2 & 9034.3)

New FEC regulations permit presidential campaigns to receive matching federal funds for qualified contributions made by credit or debit cards, including contributions made over the Internet.

Advisory Opinion 1999-9 (Bill Bradley for President, Inc.)

The Commission unanimously approved the Bradley campaign's request for federal matching funds for contributions received over the Internet through the use of a credit card. The Commission noted "the rising popularity of the use of the Internet" and the Commission's history of interpreting "the Act and its regulations in a manner consistent with contemporary technological innovations . . . where the use of the technology would not compromise the intent of the Act or regulations." The Commission cited "the numerous safeguards built into [Bradley's] proposal, both as to the identification of contributors and the related issues of screening for impermissible contributions," as critical to the Commission's approval. In order to effectuate this Advisory Opinion, the Commission first had to revise its then existing regulations which had stated that contributions made by credit card transactions could not be matched. (America OnLine had submitted parallel comments urging the Commission to change its regulations in order to encourage presidential candidates to raise funds through the Internet.) The new regulations, which allow matching funds for credit card donations, provide retroactive application to otherwise qualified credit card contributions made on January 1, 1999 and thereafter. The Presidential Primary Matching Payments Account Act allows individual contributions of up to $250 to be matched dollar-for-dollar with federal money from the presidential campaign fund.

Advisory Opinion 1995-35 (Alexander for President Committee)

The Alexander for President Committee proposed to use the Internet and related technology to solicit contributions in support of Governor Alexander's presidential bid. The Commission approved the request provided that the standard disclaimer and 'best efforts" regulations were followed. (Under then existing FEC policy, such contributions were not matchable by the U.S. Treasury as part of the Primary Matching Funds Program.)

C. Use Of The Internet By Political Committees, Corporations, And Individuals

Draft Advisory Opinion 2004-19 (DollarVote.org) [July 22nd Vote postponed]

DollarVote sought to implement a new method of contributing to campaigns via its website. DollarVote would post position statements on policy issues and then invite people who support certain policies to make an on-line donation. The funds would then be forwarded to federal candidates who "promise" to support those positions. Contributors and candidates would be charged a fee for the service. The FEC's Office of General Counsel determined that the scheme would violate campaign laws prohibiting corporations from acting as a "conduit" for campaign contributions. Under FEC regulations, only individuals or registered political committees may provide or facilitate contributions to federal candidates. DollarVote did not qualify for an exemption for fundraising companies—which are allowed to help candidates raise money by acting as "agents" of the campaign—because DollarVote, and not the candidates, would control who received the contributions.

Draft Advisory Opinion 2004-22 (On Time Systems, Inc.) [July 22nd vote postponed]

On Time Systems, Inc. sought to implement a new plan called "Give to USA." The proposed plan would allow contributors to "cancel" each other's campaign contributions and instead give the money to charity. Their website would "match" contributors who were giving money to opposing candidates (e.g. a John Kerry contributor would be matched with a George W. Bush contributor). This would allow each person to "cancel" out their contributions and donate the money they would have given to the campaigns to a charity. Employing similar logic to the DollarVote opinion, the FEC's Office of General Counsel concluded that the scheme would impermissibly allow a corporation to function as a "conduit" for campaign contributions.

Advisory Opinion 2004-7 (MTV Networks)

Music Television (MTV) and its parent company, Viacom, Inc., sought to use e-mail, text messaging and its website to conduct an online survey of young people to determine who

they think should be President of the United States. The results of the "Prelection" would be announced both on-air and on-line; participants would also be sent electronic follow-up reminders encouraging them to vote in the general election. In addition, MTV planned to launch a nonpartisan voter education project that included disseminating information on presidential candidates, links to candidates' websites and nonpartisan sources of information on the web. They also proposed to solicit candidates for position papers and statements that would be used for both online and on-air coverage. The Commission recognized that because media outlets increasingly disseminate their news stories through their websites, text messaging and e-mails, these activities would be covered under the "press exemption" and not subject to regulation under campaign finance laws. Additionally, because the proposed activities were covered under the "press exemption," the Commission determined that expending money on the project would not be considered "contributions" or "expenditures" for purposes of FEC regulation.

Advisory Opinion 2002-9 (Target Wireless)

Target Wireless sought an exemption from disclaimer requirements for political advertising sent over their network to PCS digital telephones. Target Wireless provides content described as "politics, news, sports, etc." through wireless telecommunications networks and Internet service providers to wireless PCS digital telephones. Target had been contacted by political candidates about purchasing political advertising. Under this arrangement, the sports or news content would appear along with a political message or slogan on the display screen of the subscriber's telephone. Because of technological limitations, these sorts of messages were limited to 160 characters; including a disclaimer would require using a significant percentage of the allowable characters, thus leaving little room for the actual content. The Commission granted an exception under 11 C.F.R. 110.11(a)(6)(i) which exempts "small items" such "bumper stickers, stickers, pins and buttons" from the disclosure requirement "due to the limited length of messages they are able to contain." In a concurring opinion, two of the commissioners noted that under B.C.R.A., e-mail and Internet communication are not included within the definitions of "public communication" or "mass mailing" and, as such, do not require disclaimers. (See Advisory Opinions 2003-25, 2002-9A)

Advisory Opinion 2002-7 (Mohre/ Careau)

Mohre Communications and Careau & Co., sought to operate an Internet Service Provider (ISP) and Portal. As part of the service, individuals would be required to donate two dollars of the monthly fee they pay for the Internet service to either a Federal political committee or a registered 501(c)(3) organization. The Federal political committees that would receive the donations would be determined by where the subscriber lives. The Commission determined that the proposal was a "commercially reasonable relationship" between the vendor and political

organizations and, therefore, was permissible under Federal election regulations. The Commission stated three primary reasons for making this determination. First, all vendors involved in the proposal (including Mohre and Careau) would receive a portion of the fee earmarked for the political committees as payment for the services they rendered. The amount of compensation must be "commercially reasonable," however, to avoid being considered an illegal corporate campaign contribution. Second, the fees collected for the political committees would be kept in a separate bank account and, thus, never become corporate treasury funds of Careau and Mohre. This avoided a potential commingling of funds which could lead to the impermissible spending of corporate treasury money on federal elections. Finally, the screening procedures for electronic donations were "well within the 'safe harbor'" in terms of identifying individuals and screening impermissible contributions (see Advisory Opinion 1999-9).

Advisory Opinion 2001-4 (Morgan Stanley Dean Witter & Co. PAC)

Morgan Stanley Dean Witter & Co. PAC ("MSDWPAC") sought to extend the Commission's holding in FEC Advisory Opinion 1999-3—permitting the use of electronic signatures by Microsoft's restricted class to authorize payroll deductions of contributions to its PAC—to approval of MSDWPAC's proposal to use the "standard 'click through' process which forms the basis much of Internet commercial transaction activity." The Commission approved MSDWPAC's proposed Internet web site which would enable its restricted class members to authorize payroll deductions via the "click through" process and noted that it had previously approved this method in FEC Advisory Opinions 1999-9 (Bradley) and 1999-22 (Aristotle Publishing) ("click through" method was used to make contributions to Presidential candidate committees).

Advisory Opinion 2000-13 (iNEXTV)

iNEXTV, which controls a network of Internet affiliates that "webcast content, including original content, for special interest public audiences," proposed to include the 2000 Republican and Democratic national conventions in its coverage of governmental affairs on its Executive Branch Television ("EXBTV") affiliate web site. Proposed coverage of the conventions includes gavel-to-gavel broadcasts, interviews with political experts, and discussions by political commentators.

The Commission concluded that "both as to their purpose and function, iNEXTV and EXBTV are press entities for the purposes of the Act." First, the Commission noted that the services provided by iNEXTV and EXBTV are analogous to periodicals or news programs distributed to the general public. The Commission specifically detailed that iNEXTV and EXBTV operate specialized news and information sites, incorporate televised news

programming, employ journalists to general reports on current affairs, and are viewable by the general public. Second, the Commission recognized that EXBTV and iNEXTV satisfy the other requirements of the press exception. Neither entity is under political control, and the proposed convention coverage satisfies the definition of "news story and commentary" set forth in the Act. Therefore, as iNEXTV and EXBTV fall within the press exception, the Commission found that neither entity would "make a contribution or expenditure by engaging in" the proposed coverage.

Advisory Opinion 2000-10 (COMPAC)

The America's Community Bankers Community Campaign Committee ("COMPAC") is the PAC of America's Community Bankers ("ACB"), an incorporated trade association of community banks. ACB and COMPAC sought clarification of the Federal Election Campaign Act and various Commission regulations concerning the Internet solicitation of contributions from the personnel of ACB's member corporations. Specifically, ACB requested permission to provide on its web site a "members-only" link to a COMPAC page that includes a "permission to solicit" form. This form, which could be downloaded by its member corporations, would allow COMPAC to obtain permission to solicit the qualified personnel of those corporations.

The Commission began by noting the distinction between a solicitation for contributions to a PAC and a request for corporate approval of a solicitation. It then held that using ACB's web site to request permission to solicit contributions from its corporate members was permissible, provided that the "request did not otherwise constitute a PAC solicitation." In making this determination, the Commission relied on its decision in Advisory Opinion 2000-07 and reaffirmed that "a corporation may include on its web site certain informational matters about its [separate segregated fund ("SSF")] that did not solicit or encourage contributions." The Commission further noted that the Internet solicitation authorization form must comply with the FEC's traditional requirements for approving solicitation requests as set forth in 11 C.F.R. § 114.8.

Advisory Opinion 2000-7 (Alcatel PAC)

Alcatel USA, Inc. requested clarification of what information may be posted on its Intranet web site, available only to its employees, regarding the Alcatel PAC and its activities, and what type of access restrictions are sufficient. The Commission confirmed that the following information did not constitute a PAC solicitation and could be posted on web site locations for viewing by employees in or outside the restricted class:

> Alcatel USA, Inc. supports the operation of the Alcatel USA, Inc. Political Action Committee ("the Alcatel PAC") as authorized by, and in accordance with, federal law. Under applicable law, participation in the Alcatel PAC is limited to only those Alcatel USA employees who hold high-level administrative, executive or managerial responsibilities in the U.S. The Alcatel PAC funds are used to make contributions to candidates for federal office. Under applicable law, the amounts that may be contributed to and by a PAC are limited, and steps must be taken to ensure that employee contributions to the PAC are strictly voluntary and without coercion. The Executive Committee of the Alcatel PAC decides what federal candidates merit consideration for contributions. Employees desiring additional information on their eligibility or about the activities of the Alcatel PAC may contact . . . .

Advisory Opinion 1999-37 (X-PAC)

X-PAC created a web site consisting of political advertisements that expressly advocate the election or defeat of specific candidates for federal office. Because X-PAC is a PAC rather than an individual, the Commission distinguished Advisory Opinion 1998-22 (Smith) and concluded that the expenses associated with the operation and maintenance of X-PAC's web site, such as the "expenses for registering and maintaining X-PAC's domain name (x-pac.org) and web site hosting, as well as any costs relating to the purchase and use of computer hardware and software," could be reported as overhead and operating expenses, and not as independent expenditures.

Nonetheless, the FEC stated that if these expenses can be "directly attributed to a particular communication that expressly advocates the election or defeat of a clearly identified candidate," then they must be reported as independent expenditures. Specifically, X-PAC intends to e-mail its express advocacy political advertisements to various recipients. The Commission stated that in so doing, X-PAC will be making independent expenditures, thereby triggering the concomitant reporting obligations if the costs of sending the e-mails can be isolated to a clearly identified candidate and they exceed $200 a year. However, if the advertisements are downloaded from X-PAC's web site by its viewers, independent expenditure reporting obligations would not be imposed on X-PAC because X-PAC "has no costs or expenses that are directly attributable to downloading by others."

Finally, the Commission applied direct mailing regulations in holding that e-mail containing substantially similar express advocacy or contribution solicitation messages must include the appropriate disclaimer statement if more than 100 e-mail are sent, even if expenses

do not exceed $200. Thus, "[i]f within calendar year 2000, X-PAC sends e-mails to no more than 100 separate e-mail addresses, and the e-mails have substantially similar content, in either the message text or in any attachments thereto, then the disclaimer requirements discussed herein will not apply to such activity."

Advisory Opinion 1999-3 (Microsoft PAC)

The Commission found that Microsoft's PAC's plan to obtain authorization for payroll deductions of PAC contributions from employees via electronic mail met the FEC's requirement for a "signed approval" from the employees. The Commission noted that Microsoft used electronic signatures to authorize other internal transactions and had developed a system that ensured employee security and privacy. The Commission determined that electronically signed approvals for payroll deductions were consistent with FECA's intent that an employee's prior consent be obtained before such deductions can be made. The Commission's approval was conditional upon (1) the PAC ensuring that employees are able to use either an electronic or written signature to revoke or modify their deductions at any time and (2) Microsoft retaining records of all authorizations, with verification, in the event the Commission seeks review of these materials in the course of an investigation or audit.

Advisory Opinion 1998-22 (Leo Smith)

The Commission concluded that a private individual had created something of value under FECA by establishing a web site that created a link to a candidate's web site and advocated the defeat of one congressional candidate and the election of that candidate's opponent. Accordingly, the Commission determined that the costs associated with the creation and maintenance of the web site was an expenditure under the Act and Commission regulations. The FEC noted that the private individual, Mr. Smith, would have to identify the costs associated with creating the web site, specifying that "overhead costs would include, for example, the fee to secure the registration of domain name, the amounts you invested in your hardware, and the utility costs to operate the site." In addition, the Commission required the web site to contain the appropriate disclaimer including the site sponsor's full name and to state whether any candidate authorized the site.

Enforcement Matter Under Review 4340 ("Tweezerman") 1998

A corporation owned by a candidate for the U.S. House of Representatives established a link from the corporate web page to his campaign's page. The FEC held that the existence of the link was an impermissible contribution by the corporation to the candidate's campaign. The

FEC rejected the contention that the World Wide Web exists by virtue of such links, and that they are a routine and cost free element of Internet communication. The FEC's General Counsel argued that the "reference in the corporation's web site directing users to the campaign site does appear to constitute something of value, i.e., additional exposure to members of the general public, which is tantamount to advertising." The Counsel's theory is quite broad: "More importantly, the mere fact that something is ordinarily provided free of charge does not alone answer the question of whether it has value—certainly something can be free of charge but still have value." The corporation and campaign agreed to pay a civil penalty of $16,000.

This case caused a great deal of concern for organizations that wanted to link to candidates' web sites. This concern has subsided in light of Advisory Opinions such as DNet, Election Zone, and Bush for President.

Advisory Opinion 1997-16 (Oregon Natural Resources Council Action Federal PAC)

A PAC asked the Commission whether it could place its list of endorsed federal candidates on its web page. Because the web site's activities were funded by the PAC's supporting corporate organization and not the PAC itself, the Commission determined that including this information would constitute an impermissible corporate communication to the general public. The Commission therefore concluded that the PAC would have to modify its web site so that it would not be available to the general public and to limit access only to its members (such as by the use of pass codes). This ruling is difficult to square with the FEC rule allowing corporations and labor unions to hold press conferences and announce their endorsements of federal candidates.[cvii] The result would have been different had the web site been paid for by the PAC out of PAC funds, because PACs are allowed to make communications to the general public (but would have to report them as independent expenditures if they cost over $250).

Advisory Opinion 1996-16 (Bloomberg)

The Commission approved a proposal for the production and broadcast of "Electronic Town Meetings," coordinated by Bloomberg, L.P. Bloomberg proposed to invite presidential candidates to appear in a television studio and to respond to questions both from a live television audience and from audience members linked to the program via electronic mail. The one-hour program would then be broadcast by other news organizations.

The Commission concluded that this proposal fell within the press exception for a number of reasons. First, it recognized that Bloomberg was a press entity not owned by a

political party or candidate. Second, it noted that Bloomberg "acts as a news and commentary provider via computer linkage, performing a newspaper or periodical function for computer users." Finally, the Commission concluded that Bloomberg was acting as a press entity in covering this particular event.

Advisory Opinion 1996-2 (CompuServe)

CompuServe, an incorporated on-line information service, proposed to offer free member accounts to all candidates for federal and statewide office. The Commission concluded that such a program would be viewed as a corporate contribution unless all the candidates were assessed the "usual and normal charge" for their on-line accounts. The Commission noted that the news exception was inapplicable because "neither CompuServe, nor its described on-line services, is a facility qualifying for the media exception."

Advisory Opinion 1995-33 (Coastal Employee Action Fund)

The Coastal Employee Action Fund sought the Commission's approval of its plan to communicate with its solicitable personnel through a newsletter sent by e-mail to its executives *and* to the secretaries of those executives who did not use their computers. The newsletter would include "information about current political events, updates on Coastal's government affairs efforts, and PAC activities, including solicitation efforts." The Commission concluded that because the secretaries' receipt of the e-mails would be pursuant to the usual and normal function of routing such communications to their supervisors, the plan was acceptable. The Commission required, however, that the corporation or PAC include a "cover note" informing the secretaries that the solicitation was directed exclusively to their supervisors.

Advisory Opinion 1995-9 (NewtWatch)

NewtWatch PAC proposed to use a web site to distribute its communications regarding Speaker Gingrich and to solicit contributions. The Commission concluded that PAC Web activity of this sort constituted "general public political advertising" under 11 C.F.R. § 110.11. In addition, the Commission found that contribution solicitation via the Internet was permissible, provided that the Committee followed the standard recordkeeping and reporting requirements. In particular, the FEC approved NewtWatch PAC's proposal that contributors be provided with unusually extensive information about the prohibition on corporate contributions and other requirements of federal election law and, after reviewing this information, asked to affirmatively indicate their understanding of these requirements.

[ii] TREVOR POTTER is President and General Counsel and KIRK L. JOWERS is Director of Academic Affairs and Deputy General Counsel of the Campaign and Media Legal Center. Messrs. Potter and Jowers are attorneys of the law firm Caplin & Drysdale in Washington, D.C. and contributors on the Brookings Institution's "New Developments in Campaign Finance Law" Web site (www.Brookings.edu/campaignfinance). Mr. Potter previously served as a Commissioner and as the Chairman of the Federal Election Commission. Mr. Jowers previously served as Deputy General Counsel to the Advisory Commission on Electronic Commerce. The authors gratefully acknowledge the invaluable assistance of Trevor Dryer.

[ii] Matea Gold, *Where Political Influence is Only a Keyboard Away,* L.A. TIMES, December 21, 2003 at A41.

[iii] Matea Gold, *Where Political Influence is Only a Keyboard Away,* L.A. TIMES, December 21, 2003 at A41.

[iv] Associated Press, *Kerry Finds Funds on Internet*, CHICAGO TRIB., April 3, 2004 at 14.

[v] Joseph Menn, *Internet Upstart Turns Insider*, L.A. TIMES, May 30, 2004 at A24.

[vi] Paula Festa, *Bush's Site Neck and Neck with Kerry's in Traffic Race*, CNET NEWS, May 18, 2004 *at* http://www.news.com.com.

[vii] Joseph Menn, *Internet Upstart Turns Insider*, L.A. TIMES, May 30, 2004 at A24.

[viii] *75% of Americans Boast Home Web Access*, Editor & Publisher, *at* http://www.editorandpublisher.com/eandp/departments/online/article_display.jsp?vnu_content_id=1000468326 (March 22, 2004).

[ix] Aimee Picchi, *U.S. Users Show a Net Loss*, AUSTRALASIAN BUSINESS INTELLIGENCE, Nov. 14, 2000.

[x] Nick Anderson, *Political Attack Ads Already Popping Up on the Web*, L.A. TIMES, Mar. 30, 2004 at A13.

[xi] *Hearings on Political Speech and the Internet Before the United States Senate Committee on Rules and Administration* (May 3, 2000) (statement of Senator Mitch McConnell).

[xii] Press Release, Campaign Finance Institute, CFI Analysis of the Presidential Candidates' Financial Reports Filed July 20, 2004 (July 23, 2004) (on file with author).

[xiii] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. § 230(b) (emphasis added); *see also* Telecommunications Act of 1996 § 706 (directing FCC to remove regulatory barriers that discourage the development of advanced telecommunications capability, including Internet access); *see generally Digital Tornado: The Internet and Telecommunications Policy*, OPP Working Paper Series, at ii (March 1997) ("In passing the 1996 Act, Congress expressed its intent to implement a 'pro-competitive deregulatory national communications policy.'") [hereinafter *Digital Tornado*].

[xiv] 47 U.S.C. § 230(a) (emphasis added).

[xv] Federal Communications Commission, *Broadband Today* (Oct. 1999) at 41.

[xvi] *Digital Tornado* at i.

[xvii] Perhaps in reaction to the FEC's early actions in this area, Congressman Tom DeLay introduced an amendment to a bill that sought to exempt all Internet activity from regulation. *See* 145 Cong. Rec. H8250, H8255. The amendment was defeated by a 160-268 vote. *Id.* at H8260. In opposition to the amendment, Congressman Tom Allen acknowledged the virtues of a hands-off policy, but warned of taking that approach to an extreme:

> The Internet is growing at an exponential rate. Congress thus far has taken a hands-off policy to let the Internet grow and flourish. The DeLay amendment, however, could undermine the freedom of the Internet by making it the favored conduit for special interests to fund soft money and stealth issue ads into federal campaigns. Let us not poison the Internet and poison our democracy with this poison pill.

Id. H8256.

[xviii] Notice of Proposed Rulemaking on the Use of the Internet in Federal Elections, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=01-24643-filed.pdf (Oct. 3, 2001). The NPRM was published in the Federal Register on October 3, 2001 and a total of 24 comments were received through the comment period ending December 3, 2001 <http://www.fec.gov/internet.html#comments>.

[xix] *See* Appendix I for a description and analysis of FEC Advisory Opinions and other proceedings concerning the Internet.

[xx] *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

[xxi] 521 U.S. 844 (1997).

[xxii] *Id.* at 868.

[xxiii] *Id*.

[xxiv] *Id*. at 868-69.

[xxv] The Bipartisan Campaign Reform Act of 2002, H.R. 2356, ("BCRA") passed the Senate 60-40 on Wednesday, March 20 and the House 240-189 on February 14, 2002. On March 27, 2002, President Bush signed BCRA into law.

[xxvi] 2 U.S.C. § 441a(a)(1)(A) *as amended by* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155 § 307.

[xxvii] 2 U.S.C. § 431(1)(A).

[xxviii] 2 U.S.C. § 441a(a)(1)(B) *as amended by* Pub. L. No. 107-155 § 307.

[xxix] 2 U.S.C. § 441a(a)(1)(C).

[xxx] *Id. as amended by* Pub. L. No. 107-155 § 102.

[xxxi] Of this **$95,000**, only **$37,500** may be contributed to candidates and **$57,500** to political committees over the two years. Of the $57,500 contributed to political committees, a maximum of **$37,500** may be contributed to PACs, state party committees and other political committees that are not national party committees. 2 U.S.C. § 441a(a)(3) *as amended by* Pub. L. No. 107-155 § 307.

[xxxii] 2 U.S.C. § 439a *as amended by* Pub. L. No. 107-155 §§ 301, 304.

[xxxiii] Pub. L. No. 107-155 §§ 304, 316, 319.

[xxxiv] 11 C.F.R. § 106.5 *as amended by* Pub. L. No. 107-155 § 101.

[xxxv] BCRA requires FEC disclosure for any group who spends an aggregate annual amount of $10,000 or more on such advertisements. Additionally, disclosure must be made within 24 hours of the first and each subsequent $10,000 amount. Pub. L. No. 107-155 § 201.

[xxxvi] *Id.* BCRA exempts from the ban Internal Revenue Code § 501(c)(4) or § 527 organizations making "electioneering communications" with funds solely donated by individuals who are U.S. citizens or nationals or permanent resident aliens unless a communication is a "targeted" communication (i.e. it is received by 50,000 or more persons in state or district where Senate or House election, respectively, is occurring). *Id.* §§ 203-04.

[xxxvii] 11 C.F.R. § 114.3(c). The "restricted class" includes executives, compensated members of a company's Board of Directors, salaried administrative personnel who have policymaking, professional, managerial or supervisory responsibilities, shareholders of the company, and the families of these individuals. It does not include employees represented by labor unions, outside lawyers or other professionals retained by the company who are not employees, uncompensated directors, and former or retired employees.

[xxxviii] *Id.* § 114.3(c)(1).

[xxxix] 2 U.S.C. § 441b.

[xl] 11 C.F.R. § 114.1(b)

[xli] A corporation is also permitted to make two written solicitations per calendar year of employees not in the restricted class. These solicitations must be directed to the employees at their home address. Again, foreign nationals may not be solicited. Soliciting contributions beyond the restricted class is rare because it is burdensome and often unsuccessful.

[xlii] *Id.* § 114.5(g)(1).

[xliii] *See* 2 U.S.C. § 441e(a) (foreign nationals may not make contributions in connection with U.S. elections).

[xliv] *Id.* § 114.5(a).

[xlv] *Id.* § 102.1(c).

[xlvi] 2 U.S.C. § 432(c).

[xlvii] 11 C.F.R. § 102.9.

[xlviii] *Id.* § 104.7(b).

[xlix] Karl Sandstrom, . . . *And the Internet*, The Washington Post, Sept. 5, 1999, at B7,

available at 1999 WL 23301858 [hereinafter Sandstrom]. Likewise, in comments to the Judiciary Committee's Constitution Subcommittee of the United States House of Representatives, FEC Commissioner David M. Mason stated:

> The Internet presents First Amendment questions in a new and beneficial light, especially compared with broadcast communications.
>
> . . . .
>
> The combination of open access and relatively low cost threatens to undermine the rationale behind the campaign finance regime. Just as Internet stock valuations appear untethered to underlying finances, the value of political communications on the Internet is driven more by innovation and presentation—that is to say by ideas—than by placement and spending. When the political impact of a site appears to far exceed its dollar cost, or when marginal costs are extremely low, it is difficult to apply a regulatory regime founded upon limits on finances, intended, we must remember, only to prevent financial corruption.

David M. Mason, *Anonymity and the Internet: Constitutional Issues in Campaign Finance Regulation*, Practicing Law Institute, Corporate Law and Practice Course Handbook Series at 18 (Sept. 1999).

[l] FEC Advisory Op. 1999-25 (Democracy Net); FEC Advisory Op. 1999-24 (Election Zone); FEC Advisory Op. 1999-7 (Minnesota Secretary of State).

[li] Simply stated, if a communication "expressly advocates" the election or defeat of a clearly identified candidate, the communication may be regulated under federal law. "Express advocacy" is a political communication, which includes specific language explicitly advocating election or defeat of a candidate by using specific phrases or so-called "magic words," such as "vote for," or "defeat."

If a communication is not coordinated with a campaign and does not contain "express advocacy," it is not deemed to be "in connection with" a federal election and is therefore not regulated under federal law. Thus, the sponsor may run an unlimited number of such "issue advocacy" communications and may pay for the communication however it chooses, including

from sources (such as corporations and unions) and in amounts otherwise prohibited by federal election laws.

[lii] FEC Advisory Op. 1998-22 (1998) (Leo Smith); *see also* FEC Advisory Op. 1999-17 (Bush for President Exploratory Committee).

[liii] FEC Advisory Op. 1999-17 (Bush); *but see* Enforcement Matter Under Review 4340 (Tweezerman) 1998.

[liv] DNet allows, *inter alia*, all federal, state and local candidates in races it covers, on a nonpartisan basis and at no cost, to post their own unedited information on its site—including contact information, positions on issues, rebuttals to other candidates, biographical information, and endorsements.

[lv] FEC Advisory Op. 1999-25 (Democracy Net). Several FEC Commissioners have commented in various settings about the potential difficulties of applying the press exemption to the Internet. Nevertheless, the Commission recently found that two Internet entities, iNEXTV and EXBTV, "both as to their purpose and function . . . are press entities for the purposes of the Act." FEC Advisory Op. 2000-13 (iNEXTV).

[lvi] *Id.* § 431(9)(B)(ii).

[lvii] FEC Advisory Op. 1999-24 (Election Zone).

[lviii] *Id.*

[lix] FEC Advisory Op. 2000-16 (Third Millennium).

[lx] FEC Advisory Op. 1998-22 (Smith).

[lxi] *Id.*

[lxii] FEC Advisory Op. 1999-17 (Bush).

[lxiii] *Id.*

[lxiv] FEC Advisory Op. 1999-22 (Aristotle Publishing).

[lxv] FEC Advisory Op. 1997-16 (Oregon Natural Resources Council Action Federal PAC).

[lxvi] FEC Advisory Op. 2000-7 (Alcatel); *see also* FEC Advisory Op. 2000-10 (COMPAC).

[lxvii] FEC Advisory Op. 1995-33 (Coastal Employee Action Fund).

[lxviii] FEC Advisory Op. 1996-16 (Bloomberg); *see also* FEC Advisory Op. 2000-13 (iNEXTV).

[lxix] FEC Advisory Op. 1996-2 (CompuServe).

[lxx] FEC Advisory Op. 1999-22 (Aristotle Publishing).

[lxxi] FEC Advisory Op. 1995-9 (NewtWatch).

[lxxii] FEC Advisory Op. 1999-37 (X-PAC); *see also* FEC Advisory Op. 1997-16 (ONRCAF PAC).

[lxxiii] FEC Advisory Op. 1999-37 (X-PAC).

[lxxiv] *Id.*

[lxxv] FEC Advisory Op. 2001-4 (Morgan Stanley Dean Witter & Co.); FEC Advisory Op. 1999-3 (Microsoft); *see also* FEC Advisory Opinion 2000-22 (the Associations) (approving the use of an electronic signature by a corporate representative to authorize solicitations by a trade association for contributions to its PAC).

[lxxvi] FEC Advisory Op. 2000-10 (COMPAC).

[lxxvii] FEC Advisory Op. 1999-9 (Bradley); FEC Advisory Op. 1999-36 (Campaign Advantage).

[lxxviii] 11 C.F.R. §§ 9034.2 & 9034.3; *see* FEC Advisory Op. 1999-36 (Campaign Advantage).

[lxxix] 11 C.F.R. § 110.11(a).

[lxxx] 11 C.F.R. § 104.7(b).

[lxxxi] FEC Advisory Op. 1999-17 (Bush).

[lxxxii] 11 C.F.R. § 110.11(a)(1).

[lxxxiii] FEC Advisory Op. 1999-37 (X-PAC). The FEC stated that disclaimers requirement is triggered by e-mail with "substantially similar content, in either the message text of in any attachments thereto" that is sent to more than 100 recipients. *Id.*

[lxxxiv] FEC Advisory Op. 2002-9 (Target Wireless).

[lxxxv] Richard Lehv, *Cybersquatting in Focus: Are New Rules Needed or Will Existing Laws Suffice?*, N.Y.L.J., Jan. 18, 2000, at S4.

[lxxxvi] Richard J. Grabowski, *Strategies for Securing and Protecting Your Firm's Domain Name*, Legal Tech Newsl., Feb. 2000, at 7.

[lxxxvii] Grabowski, *supra* note 3, at 7.

[lxxxviii] Robert D. Gilbert, *Squatters Beware: There are Two New Ways to Get You*, N.Y.L.J., Jan. 24, 2000, at T5; *see* Phyllis Plitch, *Bounty Hunter, New Law Put Squeeze on Net Domain-Name Cybersquatters*, WALL. ST. J., Dec. 20, 1999, *available in* 1999 WL-WSJ 24926545. For example, George W. Bush's presidential campaign filed a complaint against Zack Exley, a graduate student who purchased sites such as www.gwbush.com and www.gbush.org and posted anti-Bush materials. Almost a year after the complaint was filed, the FEC determined that the Bush complaint did not warrant consideration and dismissed it without considering the merits. Exley was thus left free to continue his activities without fear of running afoul of federal election regulations. *See* Will Rodger, *Election Officials Weigh Legality of Net Campaigning*, INTERACTIVE WEEK FROM ZD WIRE, June 30, 2000. As a preemptive measure, Bush's campaign ultimately registered approximately 260 Bush-related domain names, including negative addresses such as www.bushblows.com. Mark K. Anderson, *Bush-Whacker, New Haven Advocate*, at http://www.newhavenadvocate.com/articles/gwbush4.html (last visited April 25, 2002).

[lxxxix] *Id.*

[xc] Brian Blomquist & Daniel Jeffreys, *FBI Crashes Campaign Web-$cam Site*, N.Y. POST, February 20, 2000, at 26.

[xci] *See* Uniform Domain-Name Dispute-Resolution Policy, http://www.icann.org/udrp/udrp.htm (last visited April 25, 2002).

[xcii] The Anticybersquatting Consumer Protection Act ("ACPA") is based on the premise that a commercial and political presence on the Internet is dependent on having a memorable domain

name. The core of the Act provides that:

> [a] person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person --
>
> (i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section
>
> (ii) registers, traffics in, or uses a domain name that --
>
> (I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark; [or]
> (II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark.

Section 3002(a), 113 Stat. at 1501A-545 to -546.

Thus, the ACPA ultimately requires the aggrieved party to prove "bad-faith intent *to profit*" (emphasis added) on the part of the cybersquatter. Once a court determines that a bad-faith intent to profit exists, a domain name pirate may be held liable for a variety of activities, from mere registration, to actual use, to resale of the Internet address. Damages available under the bill consist of the traditional trademark remedies, including injunctive relief and damages (statutory damages are available in an amount not less than $1,000 and not more than $100,000 per domain name). Section 3003(b), 113 Stat. at 1501A-549. For candidates, however, it typically is not helpful because the candidate's name is not a "mark" and/or the cyber-pirate does not intend to profit from it, but rather to harass or parody the candidate. Moreover, the proceedings could easily take longer than the election cycle to resolve the dispute.

[xciii] REPORT TO CONGRESS: THE ANTICYBERSQUATTING CONSUMER PROTECTION ACT OF 1999, SECTION 3006 CONCERNING THE ABUSIVE REGISTRATION OF DOMAIN NAMES.

[xciv] Pub. L. No. 106-113, 113 Stat. 1501.

[xcv] The report listed Voter.com (www.voter.com), Common Cause (www.commoncause.org), the League of Women Voters (www.lwv.org), and SmartVoter (www.smartvoter.org).

[xcvi] *UMG Recordings, Inc. v. MP3.com, Inc.*, 2000 WL 1262528, at *6 (S.D.N.Y. 2000).

[xcvii] *See* American Bar Association, Exempt Organizations Committee, *Comments of the Individual Members of the Exempt Organizations Committee's Task Force on Section 501(c)(4) and Politics*, May 25, 2004 at 17-19, *available at* http://www.abanet.org/tax/pubpolicy/2004/040525exo.pdf (last visited June 22, 2004).

[xcviii] *See* IRS Pub. 1828; 11 C.F.R. § 100.

[xcix] 7 FCC 2d 11(1966).

[c] Report to Congress, 13 FCC Rcd 8776 (1998).

[ci] For example, if a station normally charges $100 for a particular advertisement but sells it for $90 to a commercial advertiser that purchases 100 ads, the candidate is also charged $90, even if he purchases only one ad. To receive the lowest unit charge, the advertising must contain either the candidate's voice or photo likeness, and the candidate's appearance must be in connection with his campaign. The lowest unit charge is available only to the candidate or his representative. During times outside of the 45 and 60 day periods, stations must charge political candidates rates that are comparable to those charged to commercial advertisers.

[cii] FEC regulations require the FEC to an issue advisory opinion to a public request for an interpretation of the election laws. *See* 11 C.F.R. § 112.2 & .4. These opinions must be approved by a majority of the six-member FEC. *Id.* § 112.4(a).

[ciii] Notice of Proposed Rulemaking on the Use of the Internet in Federal Elections, 66 Fed. Reg. 50,538 (located at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2001_register&docid=01-24643-filed.pdf (Oct. 3, 2001).

[civ] These comments may be accessed at <http://www.fec.gov/internet.html>.

[cv] *See* FEC Advisory Op. 1999-7 (Minnesota).

[cvi] *See* FEC Advisory Op. 1999-24 (Election Zone).

[cvii] *See* 11 C.F.R. § 114.4(c)(6).