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FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 110, and 114

[Notice 2006—8]

Internet Communications

AGENCY: Federal Election Commission.

ACTION: Final Rules and Transmittal to Congress.

SUMMARY: The Federal Election Commission is amending its rules to include paid advertisements on the Internet in the definition of “public communication.” These final rules implement the recent decision of the U.S. District Court for the District of Columbia in *Shays v. Federal Election Commission*, which held that the previous definition of “public communication” impermissibly excluded all Internet communications. The revised definition of “public communication” includes paid Internet advertising placed on another person’s website, but does not encompass any other form of Internet communication. The Commission is also re-promulgating without change its definition of “generic campaign activity” and amending the scope of its disclaimer regulations, both of which incorporate the revised definition of “public communication.” Additionally, the Commission is adding new exceptions to the definitions of “contribution” and “expenditure” to exclude Internet activities and communications that qualify as individual activity or that qualify for the “media exemption.” These final rules are intended to ensure that political committees properly finance and disclose their Internet communications, without impeding individual citizens from using the Internet to speak freely regarding candidates and elections. Further information is provided in the Supplementary Information that follows.

DATES: *Effective Date:* May 12, 2006.

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SUPPLEMENTARY INFORMATION:

Introduction

The Commission is promulgating these final rules to provide guidance with respect to the use of the Internet in connection with Federal elections. The Commission commenced this rulemaking following a decision of the United States District Court for the District of Columbia in *Shays v. Federal Election Commission*, 337 F. Supp. 2d 28 (D.D.C. 2004) (“*Shays District*”), *aff’d*, 414 F.3d 76 (D.C. Cir. 2005) (“*Shays Appeal*”), *reh’g en banc denied* (Oct. 21, 2005), which required the Commission to remove the former wholesale exclusion of Internet activity from its definitions of two terms: “public communication” and “generic campaign activity.” In examining issues relating to Internet communications, the Commission has also decided to address several of its other rules to remove potential restrictions on the ability of individuals and others to use the Internet as a low-cost means of civic engagement and political advocacy.

These final rules follow the publication of a Notice of Proposed Rulemaking (“*NPRM*”) on Internet Communications, in which the Commission sought comments on several proposed revisions to its rules. *See* 70 FR 16967 (April 4, 2005). The Commission received more than 800 comments in response to the *NPRM*, the vast majority of which urged limited, if any, regulation of Internet activities. Additionally, the Commission received a letter from the Internal Revenue Service indicating that “the proposed rules do not pose a conflict with the Internal Revenue Code or the regulations thereunder.”

After reviewing the written comments and testimony provided at a hearing on June 28 and 29, 2005,¹ the Commission has decided to take the following six actions: (1) Revise its definition of “public communication;” (2) re-promulgate the definition of “generic

campaign activity” without revision; (3) revise the disclaimer requirements; (4) add an exception for uncompensated individual Internet activities; (5) revise the “media exemption;” and (6) add a new provision regarding the use of corporate and labor organization computers and other equipment for Internet activities by certain individuals.

The Commission is aware of the heightened importance and public awareness of any change to its rules that could affect political activity and speech on the Internet. The Commission notes that the change to the definition of “public communication” in this rulemaking is a change to a definition that has a narrow impact on the law.² This term defines the scope of covered activity for a limited number of groups who are either already subject to Commission regulation, or who are coordinating with candidates or political parties who are themselves currently subject to regulation. Congress did not use the term “public communication” to regulate the vast majority of the American public’s activity on the Internet or elsewhere. Everyday activity by individuals, even when political in nature, will not be affected by the changes made in this rulemaking.

Through this rulemaking, the Commission recognizes the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach. The Internet’s accessibility, low cost, and interactive features make it a popular choice for sending and receiving information. Unlike other forms of mass communication, the Internet has minimal barriers to entry, including its low cost and widespread accessibility. Whereas the general public can communicate through television or radio broadcasts and most other forms of mass communication only by paying

² The change affects only the following regulatory provisions: the restrictions on funding of Federal election activity by political party committees and State and local candidates (2 U.S.C. 431(20)); the allocation of costs of certain communications by some political committees under 11 CFR 106.6(b); the determination that certain communications must be treated as contributions if coordinated with a Federal candidate or political party committee under 11 CFR 109.21 and 109.37; and the requirement to include disclaimer statements on certain communications pursuant to 11 CFR 110.11.

¹ The comments and a transcript of the hearing are available at http://www.fec.gov/law/law_rulemakings.shtml#Internet05.

substantial advertising fees, the vast majority of the general public who choose to communicate through the Internet can afford to do so.

When paid advertising on another person's website does occur on the Internet, the expense of that advertising sets it apart from other uses of the Internet, although even the cost of advertising on another entity's website will often be below the cost of advertising in some other media.

These final rules therefore implement the regulatory requirements mandated by the *Shays District* decision by focusing exclusively on Internet advertising that is placed for a fee on another person's website. In addition, these rules add new exceptions to the definitions of "contribution" and "expenditure" to protect individual and media activity on the Internet.³

As a whole, these final rules make plain that the vast majority of Internet communications are, and will remain, free from campaign finance regulation. To the greatest extent permitted by Congress and the *Shays District* decision, the Commission is clarifying and affirming that Internet activities by individuals and groups of individuals face almost no regulatory burdens under the Federal Election Campaign Act. The need to safeguard Constitutionally protected political speech allows no other approach.

Transmission of Final Rules to Congress

Under the Administrative Procedure Act ("APA"), 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least 30 calendar days before they take effect. The final rules that follow were transmitted to Congress on March 29, 2006.

Explanation and Justification

I. Unique Characteristics and Uses of the Internet

The Internet has a number of unique characteristics that distinguish it from traditional forms of mass communication.⁴ Unlike television,

³ The terms "contribution" and "expenditure" include gifts, subscriptions, purchases, payments, distributions, loans, advances or deposits of money, or anything of value made by any person for the purpose of influencing any election for Federal office. See 2 U.S.C. 431(8)(A)(i) and 431(9)(A); see also 11 CFR Part 100, Subparts B & D.

⁴ See Enrique Armijo, *Public Airwaves, Private Mergers: Analyzing the FCC's Faulty Justification for the 2003 Media Ownership Rule Change*, N.C.

radio, newspapers, magazines, or even billboards. "the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). In response to the *NPRM*, one commenter noted that a "computer and an Internet connection can turn anyone into a publisher who can speak to a mass audience." For example, an individual with access to a computer and the Internet can create a free blog⁵ at sites such as www.blogger.com, www.blogeasy.com, spaces.msn.com, or www.typepad.com. Additionally, because an Internet communication is not limited in duration and is not subject to the same time and space limitations as television and radio programming, the Internet provides a means to communicate with a large and geographically widespread audience, often at very little cost.⁶ Now that many public spaces such as libraries, schools, and coffee shops provide Internet access without charge, individuals can create their own political commentary and actively engage in political debate, rather than just read the views of others. In the words of one commenter, the Internet's "near infinite capacity, diversity, and low cost of publication and access" has "democratized the mass distribution of information, especially in the political context." The result is the most accessible marketplace of ideas in history.

It is common for businesses, groups, and even individuals, to make their own media—their website space—available to readers without charge. Whereas a newspaper can afford to devote only a limited amount of its print to others without charge, in the form of letters to the editor, and a television station can

L. Rev. 1482, 1494 (May 2004) (discussing broadcast media and the Internet as "imperfect substitutes"); see also Ryan Z. Watts, *Independent Expenditures on the Internet: Federal Election Law and Political Speech on the World Wide Web*, 8 *CommLaw Conspectus* 149, 160 (Winter 2000) (discussing *Reno v. ACLU*, 521 U.S. 844 (1997) and the Internet's differences from traditional media).

⁵ The word "blog" derives from the term "Web log" and is defined as "an online diary; a personal chronological log of thoughts published on a Web page." Webster's New Millennium Dictionary of English, available at <http://www.dictionary.com> (last visited 3/24/06). People who maintain blogs are known as "bloggers."

⁶ See Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 *Santa Clara Computer & High Tech. L.J.* 289, 316–17 (January 2005) ("Internet is unlike traditional print or broadcast media in that messages can have a long shelf life—an Internet message can circulate via e-mail or remain posted somewhere even long after the message's creator has tried to retract it.").

afford to provide only a very limited amount of air time to viewers for similar purposes, some bloggers can and often do publish every message submitted by readers. In fact, one commenter drew upon his own experience as a blogger in noting that much of the emerging Internet culture depends on collaboration for the construction of a blog or website, the generation of content (according to the blogger's testimony, most blogs do not have paid staff to perform such functions), and the sharing of information and online resources. The commenter stated that his website has more than 50,000 registered users contributing to its content, and he estimated that he writes only about 2,000 of the 200,000 words of content published on his website each day.

A number of commenters also noted that the Internet differs from traditional forms of mass communication because individuals must generally be proactive in order to access information on a website, whereas individuals receive information from television or radio the instant the device is turned on, or passively view a billboard while driving or walking down a street. These comments echo the Supreme Court's observation that communications over the Internet are not as "invasive" as communications made through traditional media. See *Reno*, 521 U.S. at 869. For example, a broadcast television viewer or radio listener who turns on his television or radio set is automatically subjected to the limited, available programming. In contrast, a website's information is seen only by those who actively take the steps necessary to find, visit, and view the website.

During 2005, an estimated 204 million people in the United States used the Internet.⁷ In the first half of 2005, an estimated 67 percent of the adult American population used the Internet.⁸ At the end of 2004, 87 percent of American teens (ages 12–17, representing the next generation of voters) were using the Internet,⁹ and on average, 70 million American adults

⁷ See Internet World Stats available at <http://www.Internetworldstats.com/stats2.htm> (last visited 3/24/06).

⁸ See Pew Internet & American Life Project, *How Women and Men use the Internet*, p. I, (2005) available at http://www.pewInternet.org/pdfs/PIP_Women_and_Men_online.pdf (last visited 3/24/06).

⁹ See Pew Internet & American Life Project, *Teens and Technology*, p. I (2005) available at http://www.pewInternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf (last visited 3/24/06).

logged onto the Internet on a daily basis.¹⁰

A growing segment of the American population uses the Internet as a supplement to, or as a replacement for, more traditional sources of information and entertainment, such as newspapers, magazines, television, and radio. By mid-2004, 92 million Americans reported obtaining news from the Internet.¹¹

The 2004 election cycle also marked a dramatic shift in the scope and manner in which Americans used websites, blogs, listservs,¹² and other Internet communications to obtain information on a wide range of campaign issues and candidates.¹³ The number of Americans using the Internet as a source of campaign news more than doubled between 2000 and 2004, from 30 million to 63 million.¹⁴ An estimated 11 million people relied on politically oriented blogs as a primary source of information during the 2004 presidential campaign,¹⁵ and 18 percent of all Americans cited the Internet as their leading source of news about the 2004 presidential election.¹⁶

Individuals not only sought information about campaigns on the Internet, but also took advantage of the low cost of Internet communication as they took active roles in supporting policies and candidates. According to a number of commenters, common Internet activities have included: Posting commentary regarding Federal candidates and political parties on their

own websites; submitting comments regarding Federal candidates and political parties on websites owned by other individuals; creating advertisements, videos, and other audiovisual tools for distribution on the Internet; fundraising; promoting or republishing candidate-authored materials; participating in online “chats” about campaigns; providing hyperlinks from their own websites to campaign websites and other websites; and using e-mail to organize grassroots political activities.

A number of commenters suggested that the potential for a free exchange of information and opinions through the Internet promotes access to information about candidates, ballot measures, and legislation. More than half of the hundreds of commenters expressed concern that the same unique characteristics of the Internet that make it so widely accessible to individuals and small groups also makes it more likely that individuals and small groups whose web activities generally are not regulated by FECA might engage in activities that unintentionally trigger Federal regulation. Whereas the corporations and other organizations capable of paying for advertising in traditional forms of mass communication are also likely to possess the financial resources to obtain legal counsel and monitor Commission regulations, individuals and small groups generally do not have such resources. Nor do they have the resources, as one commenter cautioned, to respond to politically motivated complaints in the enforcement context. Several commenters warned that individuals might simply cease their Internet activities rather than attempt to comply with regulations they found overly burdensome and costly. Thus, some commenters asserted, it is essential that the Commission narrow the scope and impact of any regulation of Internet activity and establish bright-line regulations to delineate any restricted activity in order to avoid chilling political participation and speech on the Internet.

II. Congressional Action, Commission Action, and the Courts

The Bipartisan Campaign Reform Act of 2002, Public Law 107–155, 116 Stat. 81 (2002) (“BCRA”), amended the Federal Election Campaign Act of 1971, as amended (the “Act”), 2 U.S.C. 431 *et seq.*, in various respects. The Commission implemented these changes in the law through a series of rulemakings during 2002.

A number of these changes hinged on the definition of “public

communication.” First, Congress required State, district, and local political party committees and organizations, as well as State and local candidates, to use only Federal funds¹⁷ to pay for any “public communication” that promotes, supports, attacks or opposes (“PASOs”) a clearly identified candidate for Federal office. See 2 U.S.C. 431(20)(A)(iii) and 441i(b) and (f); see also 11 CFR 100.24(b)(3) and (c)(1), 300.32(a)(1) and (2), and 300.71.¹⁸ Congress defined a “public communication” as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” 2 U.S.C. 431(22). When the Commission promulgated regulations to implement these BCRA provisions, it explicitly excluded all Internet communications from its definition of “public communication” and, therefore, none of the Commission’s rules governing the funding of “public communications” applied to Internet communications. See 11 CFR 100.26; *Final Rules on Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money*, 67 FR 49064 (July 29, 2002) (“*Soft Money Final Rules*”).

Second, Congress restricted the funds that State, district, and local political party committees may use for certain types of “Federal election activity” (“FEA”), including “generic campaign activity.” 2 U.S.C. 431(20)(A)(ii) and 441i(b); 11 CFR 100.24(2)(ii) and 300.33(a)(2).¹⁹ Congress defined

¹⁷ “Federal funds” are funds subject to the limitations, prohibitions, and reporting requirements of the Act. See 11 CFR 300.2(g). “Non-Federal funds” are funds not subject to the limitations and prohibitions of the Act. See 11 CFR 300.2(k).

¹⁸ There are four types of “Federal election activity”: Type 1—Voter registration activity during the period that begins on the date that is 120 days before a regularly scheduled Federal election is held and ends on the date of the election; Type 2—Voter identification, get-out-the-vote activity, or “generic campaign activity” conducted in connection with an election in which a candidate for Federal office appears on the ballot; Type 3—A “public communication” that promotes, supports, attacks or opposes a clearly identified candidate for Federal office; and Type 4—Services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual’s compensated time during that month on activities in connection with a Federal election. See 2 U.S.C. 431(20) and 11 CFR 100.24.

¹⁹ State, district, and local party committees and organizations may use an allocated mix of Federal funds and “Levin funds” to pay for “generic campaign activity” conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on

¹⁰ See Pew Internet & American Life Project, Trends 2005, Chapter 4, Internet: The Mainstreaming of Online Life, p. 58 (2005) available at http://www.pewInternet.org/pdfs/Internet_Status_2005.pdf (last visited 3/24/06).

¹¹ See Pew Internet & American Life Project and the University of Michigan School of Information, The Internet and the Democratic Debate, p. 2 (October 27, 2004) available at http://www.pewInternet.org/pdfs/PIP_Political_Info_Report.pdf (last visited 3/24/06).

¹² A “listserv” is a software program that automatically sends electronic mail messages to multiple e-mail addresses on an electronic mail list. See, e.g., <http://www.lsoft.com/products/listserv.asp> (last visited 3/24/06). The term “listserv” is commonly used, however, to denote the electronic mail list itself or the automated forwarding to all addresses on the mailing list of an e-mail sent only to the listserv’s e-mail address.

¹³ See Pew Internet & American Life Project, The Internet and Campaign 2004, available at http://www.pewInternet.org/pdfs/PIP_2004_Campaign.pdf (last visited 3/24/06).

¹⁴ See note 9, above, The Internet and Democratic Debate, p. 2. During the same time period, the number of people reporting television as their primary source of campaign information declined. *Id.*

¹⁵ See Jessica Mintz, *When Bloggers Make News—As Their Count Increases, Web Diarists Are Asking: Just What Are the Rules?* Wall St. J., Jan. 21, 2005 at B1.

¹⁶ See note 10, above, The Mainstreaming of Online Life, p. 2.

“generic campaign activity” as “campaign activity that promotes a political party and does not promote a [Federal] candidate or non-Federal candidate.” 2 U.S.C. 431(21). The Commission incorporated the term “public communication,” along with its exclusion of Internet communications, into the definition of “generic campaign activity” in its rules. See 11 CFR 100.25; *Soft Money Final Rules*.

Third, Congress expressly repealed the Commission’s then-existing rules on “coordinated general public political communication” at former 11 CFR 100.23 and instructed the Commission to promulgate new regulations on “coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees.” See Public Law 107–155, sections 214(b) and (c) (March 27, 2002); *Final Rules on Coordinated and Independent Expenditures*, 68 FR 421 (Jan. 3, 2003) (“*Coordinated Communication Final Rules*”). When the Commission subsequently promulgated regulations implementing this provision, it required that a communication be a “public communication” as defined in 11 CFR 100.26 to qualify as either a “coordinated communication” or a “party coordinated communication.” 11 CFR 109.21(c) and 109.37(a)(2);²⁰ see also *Coordinated Communication Final Rules* at 428–431. Thus, Internet communications were excluded from the regulations pertaining to “coordinated communications” and “party coordinated communications.”

Fourth, Congress revised the “disclaimer” requirements in 2 U.S.C.

the ballot), or the party committee or organization must pay for the communication entirely with Federal funds. See 2 U.S.C. 441i(b)(2)(A); 11 CFR 300.32(b)(1)(ii), 300.32(c) and 300.33. “Levin funds” are a type of non-Federal funds created by BCRA that may be raised and spent by State, district, and local party committees and organizations to pay for the allocable portion of Types 1 and 2 Federal election activity. See 2 U.S.C. 441i(b)(2)(A) and (B); 11 CFR 300.2(i), 300.32(b). These funds may include donations from some sources ordinarily prohibited by Federal law (e.g., corporations, labor organizations and Federal contractors) to the extent permitted by State law, but are limited to \$10,000 per calendar year from any source or to the limits set by State law—whichever limit is lower. See 11 CFR 300.31.

²⁰ An “electioneering communication” may also be a coordinated communication. See 11 CFR 109.21(c)(1). However, because “electioneering communications” are limited to broadcast, cable, or satellite communications, they constitute a subset of “public communications.” See 2 U.S.C. 434(f)(3); 11 CFR 100.29 (defining an “electioneering communication” as a “broadcast, cable, or satellite communication” that refers to a clearly identified candidate for Federal office, is publicly distributed within 60 days before a general election for the office sought by the candidate, or within 30 days before the primary election for that office, and is targeted to the relevant electorate).

441d by requiring a disclaimer whenever a disbursement for “general public political advertising” is either made by any political committee, or expressly advocates the election or defeat of a clearly identified candidate, or solicits any contribution. The Commission relied primarily on the definition of “public communication” in 11 CFR 100.26 when it implemented the new disclaimer requirements, although it also required disclaimers for political committee websites available to the general public and certain unsolicited electronic mailings of more than 500 substantially similar communications. See 11 CFR 110.11(a); *Final Rules on Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds*, 67 FR 76962 (Dec. 13, 2002) (“Disclaimer Final Rules”). As a result, most Internet content was excluded from the disclaimer requirements. See *id.*

The Commission also incorporated the term “public communication” into two other regulations at 11 CFR 300.2(b)(4) and 11 CFR 106.6, and thereby excluded Internet content from those requirements as well. The first of these regulations defines an “agent” of a candidate for State or local office as a person who has actual authority by that candidate to “spend funds for a public communication.” See 11 CFR 300.2(b)(4); *Soft Money Final Rules*. The second of these rules incorporates the term “public communication” into the allocation rules governing certain spending by a separate segregated fund (“SSF”) or a nonconnected committee. See *Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 FR 68056 (Nov. 23, 2004) (“*Political Committee Status Final Rules*”). Whenever an SSF or nonconnected committee pays for a “public communication” that (1) refers to a political party, but does not refer to any clearly identified Federal or non-Federal candidate, or (2) refers to one or more clearly identified Federal candidates, the SSF or nonconnected committee must pay for the communication entirely with Federal funds or by allocating such expenses between its Federal and non-Federal accounts in accordance with 11 CFR 106.6(b) and (f). See *id.*

The *Shays District* decision invalidated the Commission’s definition of “public communication” at 11 CFR 100.26, *Shays District* at 64–65, based on the Commission’s complete exclusion of Internet communications from this definition. After noting that Congress used the phrase “or any other

form of general public political advertising” as a catch-all in BCRA’s definition of “public communication,” the *Shays District* court concluded that “[w]hile all Internet communications do not fall within [the scope of “any other form of general public political advertising’], some clearly do.” *Shays District* at 67.²¹ The *Shays District* court left it to the Commission to determine “what constitutes ‘general public political advertising’ in the world of the Internet,” and thus should be treated as a “public communication.” *Id.* at 70.

The *Shays District* court also found the Commission’s rule defining the term “generic campaign activity” to be similarly underinclusive because it incorporated the regulatory definition of “public communication,” which excluded all forms of Internet communications. *Id.* at 112. Although the *Shays District* court found that the 2002 Notice of Proposed Rulemaking for “generic campaign activity” failed to satisfy the requirements of the APA because it did not provide adequate notice to the public that the Commission might define “generic campaign activity” as a “public communication” in the final rules, the *Shays District* court otherwise approved the definition of “generic campaign activity” as limited to “public communications.” *Id.* at 112, citing the *Soft Money Final Rules* at 35675.

The *Shays District* court remanded the rules defining “public communication,” “generic campaign activity,” and “coordinated communication” to the Commission for further action consistent with its opinion. *Shays District* at 131. The Commission subsequently issued the

²¹ The *Shays District* court analyzed the Commission’s rules under a two-step test set out by the Supreme Court in *Chevron, U.S.A., Inc. v. National Res. Def. Council*, 467 U.S. 837 (1984) (“*Chevron*”). The first step of the *Chevron* analysis examines whether Congress has directly spoken to the precise questions at issue. The second step considers whether the agency’s resolution of an issue not addressed in the statute is based on a permissible construction of the statute. In reviewing the definition of “public communication,” the *Shays District* court found that the rule’s exclusion of all Internet communications did not comport with the plain meaning of the statutory requirement that all forms of general public political advertising be considered forms of “public communication,” and therefore did not satisfy step one of the *Chevron* test. *Shays District* at 69–70. The Commission did not appeal the portion of the *Shays District* decision regarding the definition of a “public communication.” The *Shays District* decision also stated that, in the alternative, the regulatory definition of “public communication” as applied to the “content prong” of the coordinated communication regulations in 11 CFR 109.21(c) was impermissibly narrowed by the coordination regulation, thereby undermining the purposes of the Act and thus providing an independent basis for invalidation under step two of the *Chevron* test. See *Shays District* at 70–71.

NPRM addressing the definition of “public communication” in each of the remanded regulations. In the *NPRM*, the Commission also noted that the term “public communication” is incorporated into two other sections of its regulations, 11 CFR 106.6(b) and (f) (allocation of expenses between Federal and non-Federal activities by SSFs and nonconnected committees), and 11 CFR 300.2(b)(4) (definition of “agent” for non-Federal candidates). The Commission also proposed new exceptions from the definitions of “contribution” and “expenditure” to exempt volunteer and independent activity on the Internet, and proposed an additional clarification that certain Internet activities would qualify for the media exemption. In addition, the Commission proposed revisions to its rules in 11 CFR 114.9 regarding employee use of corporate and labor organization computers, software, and other Internet equipment and services for individual Internet activities.

III. 11 CFR 100.26—Definition of “Public Communication”

A. Proposed 11 CFR 100.26 Published in the *NPRM*

The *Shays District* decision required the Commission to identify those Internet communications that qualify as “general public political advertising,” and thus would be encompassed within the definition of “public communication” in 2 U.S.C. 431(22). While drafting a proposed rule, the Commission recognized the important purpose of BCRA in preventing actual and apparent corruption and the circumvention of the Act as well as the plain meaning of “general public political advertising,” and the significant public policy considerations that encourage the promotion of the Internet as a unique forum for free or low-cost speech and open information exchange. The Commission was also mindful that there is no record that Internet activities present any significant danger of corruption or the appearance of corruption, nor has the Commission seen evidence that its 2002 definition of “public communication” has led to circumvention of the law or fostered corruption or the appearance thereof. Therefore, the Commission proposed to treat paid Internet advertising on another person’s website as a “public communication,” but otherwise sought to exclude all Internet communications from the definition of “public communication.”²²

²² The term “person” is defined to include “an individual, partnership, committee, association, corporation, labor organization, or any other

B. Comments on the Proposed Rule

Most commenters who addressed the *Shays District* court’s requirement that the Commission include some forms of Internet communications as “general public political advertising” expressed general support for the rule as proposed in the *NPRM*.²³ These commenters praised the Commission’s proposed separate treatment of communications on a person’s own website as distinct from communications placed on another person’s website, and nearly all commenters agreed that paid advertisements placed on another person’s website are “general public political advertising.” One commenter noted that Congress had defined “public communication” in 2 U.S.C. 431(22) by listing several examples of media such as television, radio, billboards and newspapers. That commenter observed that communications through the listed forms of media are typically placed for a fee. The commenter concluded that it would be appropriate from a statutory perspective for the Commission to capture within the definition of “public communication” only those Internet communications placed for a fee on another person’s website.

Another commenter generally supported the proposed rule, but recommended that the definition also encompass advertisements provided in exchange for something of value other than money (e.g., an advertising trade or link exchange). Two other commenters, however, cautioned against including any Internet communications that do not involve the exchange of money. In light of the unique nature and variety of Internet communications, these commenters explained, the value of these communications would be difficult to ascertain under the Commission’s traditional tests for normal and usual charge or fair market value.²⁴

organization or group of persons, but such term does not include the Federal Government or any authority of the Federal Government.” 2 U.S.C. 431(11).

²³ Several commenters argued that the Commission should preserve the *status quo* and continue to exclude all Internet communications from the definition of “public communication.” The Commission does not believe that such an approach would comport with the *Shays District* decision.

²⁴ The “usual and normal charge for goods” is defined as “the price of those goods in the market from which they ordinarily would have been purchased at the time of the [contribution or expenditure],” and the “usual and normal charge for services” is defined as “the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered.” 11 CFR 100.57(d)(2) and 100.111(e)(2). See, e.g., Advisory Opinion 2006–01 (Pac for a Change) (discounted rate provided by publisher to

A few commenters expressed concern that the proposed rule would allow corporations and labor organizations to make unregulated in-kind contributions to Federal candidates through coordinated communications on the Internet, although such coordinated communications would be regulated or prohibited if done through other media. One group of commenters listed activities of this nature that they believed would be permitted under the proposed definition of “public communication” in 11 CFR 100.26, including: (1) An individual, political committee, or corporation pays to place banner advertisements²⁵ on another person’s website for a fee; (2) a corporation or labor organization pays for a pop-up advertisement that will appear over another person’s website;²⁶ (3) an individual pays to hire a video production company to produce a video that contains a message written by a candidate for Federal office, purchases an e-mail list, and sends the video to all the addresses on the purchased list; and (4) a State party committee pays to produce a video that refers solely to a candidate for Federal office and distributes the video only through its own website. Each of these activities is addressed below.

C. Revised Rule: Internet Communications Placed on Another Person’s Website for a Fee Are “General Public Political Advertising”

The Commission concludes that Internet communications placed on another person’s website for a fee are “general public political advertising,” and are thus “public communications” as defined in 11 CFR 100.26. Under this rule, when someone such as an individual, political committee, labor organization or corporation pays a fee to

other large-quantity purchasers is the normal and usual charge that candidate’s committee is required to pay to purchase large quantities of the candidate’s book).

²⁵ “Banner advertisements” are advertisements on a Web page that convey messages in text, animated graphics, and sound. They traditionally appear in rectangular shape, but may take any shape. Typically, banner advertisements are linked to the advertiser’s website, which enables a viewer to “click through” the advertisement to view the advertiser’s website for further information on the product or service advertised. See <http://www.netlingo.com/lookup.cfm?term=ad+banner> (last visited 3/24/06).

²⁶ “Pop-up” advertisements usually appear in a separate browser window from the one being viewed. The advertisements are superimposed over the window being viewed, and require the viewer to take some action, such as closing the window in which the pop-up advertisement appears, to continue viewing the underlying browser window. See <http://www.netlingo.com/lookup.cfm?term=pop%2Dup%20ad> (last visited 3/24/06).

place a banner, video, or pop-up advertisement on another person's website, the person paying makes a "public communication." Accordingly, the final rule is largely the same as the proposed rule. While no other form of Internet communication is included in the definition of "public communication," the placement of advertising on another person's website for a fee includes all potential forms of advertising, such as banner advertisements, streaming video, pop-up advertisements,²⁷ and directed search results.²⁸ The rule thus resolves concerns about the first two activities described in the previous paragraph.

The revised definition of "public communication" comports with the *Shays District* decision by removing the wholesale exclusion of all Internet communications from the definition of "public communication." At the same time, the rule is carefully tailored to avoid infringing on the free and low-cost uses of the Internet that enable individuals and groups to engage in political discussion and advocacy on equal footing with corporations and labor organizations (through their SSFs) and other political committees, without the need to raise large amounts of funds.

The forms of mass communication enumerated in the definition of "public communication" in 2 U.S.C. 431(22), including television, radio, and newspapers, each lends itself to distribution of content through an entity ordinarily owned or controlled by another person. Thus, for an individual to communicate with the public using any of the forms of media listed by Congress, he or she must ordinarily pay an intermediary (generally a facility owner) for access to the public through

that form of media each time he or she wishes to make a communication. This is also true for mass mailings and telephone banks, which are other forms of "public communication" under 2 U.S.C. 431(22). A communication to the general public on one's own website, by contrast, does not normally involve the payment of a fee to an intermediary for each communication.

The cost of placing a particular piece of political commentary on the Web is generally insignificant. The cost of such activity is often only the time and energy that is devoted by an individual to share his or her views and opinions with the rest of the Internet community. In this respect, a communication through one's own website is analogous to a communication made from a soapbox in a public square. There is no evidence in the legislative history of BCRA of a Congressional intent to regulate individual speech simply because it takes place through online media.

Communications placed for a fee on another person's website, however, are analogous to the forms of "public communication" enumerated by Congress in 2 U.S.C. 431(23), particularly in light of the growing popularity of Internet advertising. As the public has turned increasingly to the Internet for information and entertainment, advertisers have embraced the Internet and its new marketing opportunities. Internet advertising revenue increased by 33.9 percent between the third quarter of 2004 and the third quarter of 2005 and reached \$3.1 billion for the third quarter of 2005.²⁹ The cost of advertising on the Internet distinguishes it from other forms of Internet communication, such as blogging or publishing one's own website, which are generally performed for free or at low cost.

Moreover, because Congress did not include the Internet in the list of media enumerated in the statutory definition of "public communication," an Internet communication can qualify as a "public communication" only if it is a form of advertising and therefore falls within the catch-all category of "general public political advertising." See 2 U.S.C. 431(22). By definition, the word "advertising" connotes a communication for which a payment is required, particularly in the context of campaign messages. See, e.g., *The American Heritage® Dictionary of the*

English Language (4th ed. 2000) ("The activity of attracting public attention to a product or business, as by paid announcements in the print, broadcast or electronic media."); *The Random House Webster's Unabridged Dictionary* (2d ed. 2005) ("1. The act or practice of calling public attention to one's product, service, need, etc., esp. by paid announcements in newspapers and magazines, over radio or television, on billboards, etc.; * * * 2. paid announcements; advertisements."); J.I. Richards and C. M. Curran, *Oracles on "Advertising": Searching for a Definition*, 31 *Journal of Advertising* at 3 (June 2002) (An extensive survey of advertising and marketing textbooks revealed "certain recurring elements: (1) Paid, (2) nonpersonal, (3) identified sponsor, (4) mass media, and (5) persuade or influence.")

The Commission notes that this definition of "public communication" encompasses the types of advertising that some commenters believed should be covered, such as payments by anyone on behalf of a candidate or political committee for advertising on another person's website. As discussed below, this rule should be read together with other existing regulations regarding coordinated and independent expenditures and communications by corporations, labor organizations, and political committees.

On the Internet, where individuals can build blogs and other websites for free, an individual can communicate with the general public at little or no cost. However, this is not true in the case of paid advertising on another person's website. For example, one of the commenters operates a website and sells advertising space for between \$1,300 and \$5,000 per week.³⁰ Another commenter stated that the "minimum to run a banner ad campaign on most newspaper websites and portals is roughly \$5,000." The *Chicago Tribune*, for example, charges \$5,000 per week for a "header ad" on www.chicagotribune.com, and \$20,000 per week for a "homepage cube." See www.tribuneinteractive.com/chicago/mediakit/rates.htm (last visited 3/24/06). Although paying for an advertisement on *Chicagotribune.com* may be less expensive than paying to place the same advertisement in the *Chicago Tribune* newspaper, both still require substantial funding.

Furthermore, in both cases the advertiser is paying for access to an established audience using a forum controlled by another person, rather

²⁷ Although a pop-up advertisement may not technically be part of the underlying website or account, the Commission determines that it is "placed on" a website such that it qualifies as a "public communication" when a fee is paid for the pop-up.

²⁸ For example, companies such as Google and Yahoo! permit an advertiser to pay a fee to have its website appear as a "sponsored link," or otherwise featured, when specific words are typed into the website's search engine. See <http://www.google.com/intl/en/webmasters/1.html> (last visited 3/24/06) and <http://searchmarketing.yahoo.com/srch/index.php> (last visited 3/24/06). If a fee is paid for such a service, then the resulting display of the product, hyperlink, or other message constitutes a form of "general public political advertising." However, when the search results are displayed as a result of the normal function of a search engine, and not based on any payment for the display of a result, the search results are not forms of "general public political advertising." In addition, where a search engine returns a website hyperlink in its normal course, and features the same hyperlink separately as the result of a paid sponsorship arrangement, the latter is a "public communication" while the former is not.

²⁹ See Interactive Advertising Bureau, "Internet Advertising Revenues Surpass \$3 Billion for Q3; Run Rate for Full Year 2005 on Pace to Exceed \$12 Billion" (Nov. 21, 2005), available at http://www.iab.net/news/pr_2005_11_21.asp (last visited 3/24/06).

³⁰ See <http://www.dailykos.com/special/advertising> (last visited 3/24/06).

than using a forum that he or she controls to establish his or her own audience.

Three commenters requested a clarification regarding the proposed rule's exclusion of all Internet "communications" with the exception of certain paid "announcements," and asked whether the Commission intended to attach any significance to the use of "announcements" instead of "communications" in the exception. The Commission did not intend any distinction through the use of different terms. To avoid confusion, the Commission has substituted "communication" in place of "announcement" in the final rule.

One of the commenters suggested adding a content requirement to the Commission's definition of "public communication" by substituting the term "express advocacy"³¹ for "announcement" and "communication." The Commission is not limiting the definition of "public communication" by requiring any particular content, such as "express advocacy." There is no content requirement in the statutory definition of "public communication," and there is no other basis for providing an additional content standard in the definition itself, whether the communications are made through the Internet or another medium. See 2 U.S.C. 431(22). The content of the communication is addressed separately, such as the requirement that a State, district, or local party committee use only Federal funds to pay for "public communications" that PASO a Federal candidate. See, e.g., 2 U.S.C. 431(20); 11 CFR 100.24(b)(3) and (c)(1), 300.32(a)(1) and (2), and 300.71. Thus, limiting the definition of "public communication" to only those communications containing "express advocacy" would be inconsistent with the Act's recognition in section 431(20) that some "public communications" contain PASO messages, but not express advocacy.

A different commenter suggested substituting "advertising" in place of "communication." The Commission is not adopting this suggestion because it is circular and could inject ambiguity

into the definition of "public communication." The result of the commenter's proposed change would be that "Internet advertising placed for a fee" would be a form of "general public political advertising." That approach would appear to indicate that there are forms of advertising on the Internet other than paid advertising, which is contrary to the Commission's view and to the basis of the revised definition of "public communication," which rests on the definition of "advertising" as a paid communication.

D. No Threshold Payment Amount for "General Public Political Advertising"

Several commenters argued that low-cost "pay-per-click" ads are too difficult to value because the cost of the advertisement is often variable, measured after the fact, and too low to warrant regulation as a "public communication." For example, one commenter pointed to advertising opportunities available for \$10–\$25 per week through BlogAds.com. Commenters urged the Commission to revise the definition of "public communication" to capture only paid Internet ads that cost more than a certain threshold dollar amount. One of these commenters recommended that the Commission seek additional comment to determine the appropriate threshold amount and to index that resulting amount for inflation or re-examine the amount on a regular basis.

The Commission is not establishing a minimum threshold amount in the final rule. There is no stated threshold payment amount in the statutory definition of "public communication," and it is not clear on what statutory basis the Commission could establish one. Nor was the Commission able to establish a record that would justify a particular threshold. Congress could have chosen, but did not, to establish a specific threshold cost below which an advertisement would not be a "public communication." Thus, even late-night advertisements on small radio stations, low-cost classified ads in small circulation newspapers, and low-cost billboards in relatively remote areas are forms of "public communication" under 2 U.S.C. 431(13). Accordingly, all Internet communications placed for a fee on another person's Web site qualify as "public communications."

Nevertheless, as a matter of enforcement policy, the Commission may exercise prosecutorial discretion regarding "public communications" on the Internet that involve insubstantial advertising charges. The amount claimed to have been spent in violation of law is always a factor in the

Commission's enforcement decisions, and here, the Commission will be additionally mindful of the importance of minimizing any potential regulatory burden on the use of the Internet.

E. Advertiser, Not Web Site Operator, Makes the "Public Communication"

One commenter requested that the Commission clarify that the person who makes a "public communication" is the person seeking to place an Internet advertisement on another person's Web site, not the person controlling the Web site on which the advertisement appears. The Commission agrees that this is the intended operation of the rule and notes that the regulations that incorporate the term "public communication" clearly regulate the person paying for the "public communication." See 11 CFR 100.24(b)(3) and (c)(1), 106.6, 109.21, 109.37, 110.11, 300.2, 300.32(a)(1) and (2), and 300.71. For example, if a political party committee pays an Internet advertising company to place a pop-up advertisement on a certain Web site, or to place the pop-up advertisement in a manner that it will be triggered based on some other action of a computer user, the political party committee—not the advertising company or the Web site owner—would be subject to the applicable restrictions on "public communications." The Commission also notes that, as with other media included in the definition of "public communication," the obligation to ensure that permissible sources are used rests with the entity whose funding is restricted by FECA, and not the Web provider.

F. Bloggers Not Addressed Separately

In the NPRM, the Commission noted that its proposed regulations were unlikely to cover blogging activities. Nevertheless, the Commission asked whether it should revise the proposed rule to explicitly exclude all "blogs" from the definition of "public communication." Each of the bloggers who testified at the hearing, and the majority of commenters who addressed this issue, warned against crafting a regulation tied to specific forms of Internet communication like blogging. One commenter noted that while at present blogs might be readily distinguished from other Web sites based on particular software used to generate the blog, that software is likely to change. Moreover, this commenter noted that other forms of communications, such as peer-to-peer

³¹ The term "expressly advocating" is defined in 11 CFR 100.22 to include phrases such as "vote for the President, re-elect your Congressman," and other slogans and words "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)," or that, "when taken as a whole and with limited reference to external events such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates."

“podcasting,”³² may soon replace blogs as the ubiquitous format for low-cost Internet discussion and debate. Another commenter cautioned that providing special protection for bloggers might disadvantage others engaged in different yet analogous forms of Internet communication.

In light of the evolving nature of Internet communications, the Commission is not explicitly excluding from the definition of “public communication” any particular software or format used in Internet communications. The final rules already exclude ordinary blogging activity from the definition of “public communication” because blog messages are not placed for a fee on another person’s Web site. Thus, an explicit exclusion focused on “blogging” is not only unnecessary but also potentially confusing to the extent that it implies that other forms of Internet communication, such as “podcasting” or e-mailing, might be regulated absent an explicit exclusion for each different form of Internet communication.

G. Paid Advertising on a Web Site Is a Form of “General Public Political Advertising” Even Where the Web Site Is Only Available to the Restricted Class of a Corporation or Labor Organization, or the Members of a Membership Organization

The revision to the definition of “public communication” does not affect the regulations governing corporate or labor organization communications within and outside of its restricted class,³³ or with the ability of a membership organization to communicate with its members on any subject.³⁴ The Commission sought

³² “Podcasting” is a form of file distribution that is currently used primarily to distribute audio files, like a radio program, over the Internet in a format that can be received and played through an Apple iPod or similar device. See <http://www.ipodder.org/whatsPodcasting> (last visited 3/24/06).

³³ The “restricted class” of a corporation is its stockholders and executive or administrative personnel, and their families, and the executive and administrative personnel of its subsidiaries, branches, divisions, and departments and their families. 11 CFR 114.1(j); see also 11 CFR 114.1(c). The “restricted class” of a labor organization is its members and executive or administrative personnel, and their families. *Id.*

³⁴ Under the Act and Commission regulations, corporations and labor organizations may communicate with members of their restricted class on “any subject.” See 2 U.S.C. 431(9)(B)(iii) and 441b(b)(2)(A); 11 CFR 100.134(a) and 114.3(a); see also Advisory Opinion 1997–16 (Oregon Natural Resources Council Action). Membership organizations may similarly communicate with their members. *Id.* Corporations, labor organizations, and membership organizations are generally prohibited, however, from making communications to the general public in connection with a Federal election, but they may publicly

comment, however, on the appropriate treatment of advertisements placed for a fee by a third-party advertiser on a corporation’s or labor organization’s Web site that is solely available to its restricted class, or on a membership organization’s Web site available only to its members. Specifically, the Commission asked whether such advertisements should be excluded from the definition of “public communication.” *NPRM* at 16971. For example, if a political party committee pays to place an advertisement on a labor organization’s password-protected Web site that is available only to that labor organization’s restricted class, should that advertisement be considered a “public communication”?

The Commission concludes that it should. There is no basis in the Act or the *Shays District* decision to justify such an exception to the definition of “public communication.” Moreover, three of the four commenters addressing this issue opposed a special exclusion on the grounds that a third-party advertiser does not have a special relationship with members of the restricted class of a corporation or labor organization that could justify treating Web site advertisements to this group of individuals differently than other paid Internet advertisements.³⁵ One of these commenters, a labor organization, explained that “by definition, the payor of this sort of political advertising is a stranger to the restricted class that is the audience, and because that is so, we do not believe that under that circumstance a blanket exemption would be appropriate.”

endorse Federal candidates on their Web sites in the normal course of releasing a press release so long as the press release is distributed in the normal manner and the organizations make efforts to allow only *de minimis* exposure of their Web sites beyond their restricted classes. See 11 CFR 114.4(c)(6) and Advisory Opinion 1997–16. Thus, corporations, labor organizations, and membership organizations may expressly advocate the election or defeat of a clearly identified Federal candidate on the corporate or labor organization Web sites that are solely available to their respective restricted class. See discussion of revisions to 11 CFR 100.132 in section IX, below, and 11 CFR 114.5(g); see also Advisory Opinions 2000–07 (Alcatel USA, Inc.) (corporation permitted to solicit its restricted class by providing a password to members of the restricted class and limiting access to its Web site solely to those password holders) and 1997–16 (membership organization prohibited from making a list of candidate endorsements available on its Web sites unless it limited access to the list to its members only).

³⁵ The other commenter addressing the issue supported an exception covering communications “from corporations and labor organizations to their restricted classes.” These communications, however, would not result in a “public communication” under the proposed or final rules because they are not communications placed on another person’s Web site for a fee.

The Commission agrees that the relationship between a third-party advertiser and members of a corporation’s or labor organization’s restricted class, or members of a membership organization, is not sufficiently distinctive to warrant a special exception to the definition of “public communication.” Therefore, a paid Internet advertisement is a “public communication” even if the advertisement is available only to the restricted class of a corporation or labor organization, or the members of a membership organization.

H. Electronic Mail is Not a Form of “General Public Political Advertising”

The definition of “public communication” proposed in the *NPRM* did not encompass any e-mail communications. None of the commenters specifically addressed this aspect of the proposed rule, other than to state their general agreement with the limited scope of the proposed rule.

The Commission does not consider e-mail to be a form of “general public political advertising” because there is virtually no cost associated with sending e-mail communications, even thousands of e-mails to thousands of recipients, and there is nothing in the record that suggests a payment is normally required to do so.³⁶ All of the forms of “public communication” expressly listed by Congress normally involve at least some charge for delivery, such as telephone charges or postage.

In addition, Congress does not view e-mail in the same manner as mass mailings. The House of Representatives’ franking rules place various franking restrictions on an “unsolicited mass communication,” which relies on a threshold (500 or more communications) that is almost identical to the threshold in “mass mailing” at 2 U.S.C. 431(23). Although mass e-mail communications were subject to the restrictions at the time BCRA was enacted, on September 5, 2003, the Committee on House Administration revised its own franking rules to remove mass e-mail communications from the list of “unsolicited mass communications”

³⁶ Numerous e-mail service providers, such as Hotmail, Google, and Yahoo!, provide free Web-based e-mail accounts that permit a user to receive and send thousands of e-mail messages without charge. See <http://join.msn.com/?page=hotmail/plans&pgmmarket> (last visited 3/24/06), <http://mail.google.com/mail/help/about.html> (last visited 3/24/06), http://dir.yahoo.com/Business_and_Economy/Business_to_Business/Communications_and_Networking/Internet_and_World_Wide_Web/E-mail_Providers/Free_E-mail (last visited 3/24/06).

requiring pre-authorization from the Franking Commission. See "Meeting to Approve New Electronic Communications Policy" at <http://www.access.gpo.gov/congress/house/house08bm108.html>. While not controlling in this rulemaking, the e-mail exclusion is indicative of a Congressional view that e-mail is appropriately regulated differently than postal mail. Accordingly, the revised definition of "public communication" does not encompass e-mail communications.

I. Costs of Producing Videos and Other Content for Communications

Under the Commission's revised rules at 11 CFR 100.26, posting a video on a Web site does not result in a "public communication" unless it is placed on another person's Web site for a fee. Nevertheless, one group of commenters called on the Commission to clarify the treatment of expenses by State, district or local party committees for the production costs of videos and other content displayed only on those committee's own Web sites. The commenters observed that the Commission generally treats the costs of producing campaign-related materials as subject to the same funding limits and source prohibitions as the costs of distributing the materials. For example, the direct costs of producing an "electioneering communication" are treated the same as the costs of distributing the communication and are included within the costs of that communication. 11 CFR 104.20(a)(2) ("costs charged by a vendor, such as studio rental time, staff salaries, costs of video or audio recording media, and talent").

Because the Commission is promulgating regulations that will place funding limits and source prohibitions on some specific content when it is placed for a fee on a third-party's Web site, a State party committee that pays to produce a video that PASOs a Federal candidate will have to use Federal funds when the party committee pays to place the video on a Web site operated by another person. This is entirely consistent with how the party committee would be required to pay for a communication that it distributes through television or any other medium that is a form of "public communication." In such circumstances, the party committee must pay the costs of producing and distributing the video entirely with Federal funds. See 11 CFR 300.32(a)(2).

J. No Separate Definition of "Public Communication" for Web Sites of State, District, and Local Party Committees

Although the revised definition of "public communication" encompasses only those Internet communications that are placed for a fee on another person's Web site, the NPRM sought comment on whether the definition should be further expanded to encompass all Web sites of State, district, and local party committees. The Commission concludes that it should not.

BCRA defines "Federal election activity" to include "a public communication that refers to a clearly identified candidate for Federal office * * * and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office[.]" 2 U.S.C. 431(20)(A)(iii) (emphasis added); see also 11 CFR 100.24(b)(3). State, district, and local political party committees and organizations and their agents, as well as State and local officeholders and candidates and their agents, are prohibited from using any non-Federal funds to pay for this type of FEA. See 2 U.S.C. 441i(b) and (f); 11 CFR 100.24(b)(3) and (c)(1), 300.32(a)(1) and (2), and 300.71.

In the NPRM, the Commission explained that one reason it had originally excluded Internet activities from the definition of "public communication" in 11 CFR 100.26 was to permit State, district, and local party committees to refer to their Federal candidates on the committees' own Web sites or post generic campaign messages without requiring that the year-round costs of maintaining the Web site be paid entirely with Federal funds. NPRM at 16971. The record in this rulemaking demonstrates that State, district, and local party committees generally use their Web sites to promote a variety of party policies and candidates, and that these Web sites are not predominantly focused on Federal elections. Furthermore, given the ease of adding new Web pages to a Web site or altering the content of existing Web pages, both the number of Web pages within a Web site and the content of those pages change frequently, sometimes daily or even hourly. For example, a Federal candidate might be featured on a hyperlink from the home page of a State party committee Web site one day, but that hyperlink may be removed the next day as the party committee replaces it with a more current story.

One commenter supporting the proposed rule argued that it would be difficult, if not impossible, to identify a severable "Federal" portion of a State party committee Web site in light of a

State party committee's frequent changes to its Web site content. Not only would the determination of the appropriate portion require a snapshot of a Web site at one particular time that would render the result somewhat arbitrary and inaccurate in light of the frequently changing content on the Web site, but it could also be easily manipulated because of the ease and low cost of generating new Web pages. For example, any percentage-based system (percentage of Web pages or Web space dedicated to Federal candidates) would require a calculation of the total number of Web pages or files comprising the party committee Web site. The logistical hurdles to this approach, coupled with the difficulty in determining the costs to be allocated, underscore the Commission's decision not to proceed in this fashion.

The commenter also warned that treating a State, district, or local party committee Web site as a "public communication" would deter these party committees from featuring Federal candidates or participating in "generic campaign activity" at all on their Web sites. The commenter explained that even if a party committee's Web site PASOs a Federal candidate on only a small portion of its Web site, such as a few lines on one Web page for a period of a few days, the committee would have to file monthly reports with the Commission for the remainder of the calendar year.³⁷

³⁷ No commenters or witnesses supplied comments that would assist the Commission in determining how a State, district, or local party committee would pay for a Web site that was captured under the definition of "public communication." The statute and regulations do not require a local party committee to pay for all of its "public communications" with Federal funds, only those that PASO a Federal candidate or otherwise constitute FEA, such as "generic campaign activity." The Commission asked in the NPRM how the organizations would go about allocating the costs associated with the Web site if the Commission determined that Web sites for these organizations are "public communications." Some commenters who supported including State, district, and local party committee Web sites in the definition of "public communication" suggested that a time/space allocation would be appropriate. However, the Commission is not convinced that the statute permits time/space allocation of any "public communication" that features PASO information about a Federal candidate. The existence of PASO would require the organizations to pay for the "public communications," i.e., the Web site itself, entirely with Federal funds. Such a result is inconsistent with the Act's regulation of Federal, but not non-Federal activity. For example, such a determination could have a ripple effect on the payment of other costs. The acquisition of the computers or the phone line (two costs that are generally allocated as administrative expenses) arguably could become expenses that would be required to be paid for entirely with Federal funds because one of the uses of the equipment would be to access or maintain a Web site.

Three other groups of commenters, however, advocated for a definition of “public communication” that included the individual Web sites of State, district, and local party committees. They argued that the term “general public political advertising” should be defined differently with respect to different speakers, applying a broad definition of “general public political advertising” to encompass less activity by individuals, but more Internet activity by State, district, and local party committees, other political committees, corporations, and labor organizations.³⁸ One group asserted that State, district, and local party committees should be particularly restricted by a broad definition of “public communication” because Congress used the term “public communication” in BCRA to restrict the use of non-Federal funds by State, district, and local party committees. See 2 U.S.C. 431(20)(A)(iii) and 441i(b).

The Commission disagrees with these latter commenters and is not including content placed by a State, district, or local party committee on its own Web site within the definition of “public communication.” As explained above, a political party committee’s Web site cannot be a form of “public communication” any more than a Web site of an individual can be a form of “public communication.” In each case, the Web site is controlled by the speaker, the content is viewed by an audience that sought it out, and the speaker is not required to pay a fee to place a message on a Web site controlled by another person.

More importantly, Congress defined “public communication” in terms of the types of media used to convey a message (e.g., newspaper, magazine, broadcast, mass mailing, phone bank), not the identity of the speaker using that media. 2 U.S.C. 431(22). There is simply no statutory support for defining

“public communication” differently for different persons, whether they be individuals, groups, or political party committees. Instead, because Congress provided only one broadly applicable definition of “public communication,” the Commission is not free to conclude that a communication made through the same media is a “public communication” when made by an individual, but not when made by a political committee. Conversely, the Commission cannot conclude that a communication is not a “public communication” when made by an individual, but is a “public communication” if made by a party committee through the same media.

The definition of “public communication” at 2 U.S.C. 431(22) is just that: a definition. Congress could have, but did not, define the “public communication” differently with respect to different speakers. Instead, Congress chose to distinguish between different speakers only when establishing the consequences of making a “public communication.” The different treatment of different speakers is therefore provided separately in the Act, rather than in the definition of “public communication” itself. See 2 U.S.C. 431(20)(A)(iii) (including “public communication” in the definition of “Federal election activity”), 2 U.S.C. 441i(b) and (f) (prohibiting State, district, and local party committees, and State and local candidates, but not other political committees or individuals other than candidates or officeholders, from paying for FEA with non-Federal funds), and 2 U.S.C. 434(e)(2) (requiring State, district, and local party committees to report receipts and disbursements for FEA that total at least \$5,000 per calendar year).

IV. 11 CFR 100.25—Definition of “Generic Campaign Activity” Is Not Changed

BCRA defines “generic campaign activity” as “campaign activity that promotes a political party and does not promote a candidate or non-Federal candidate.” 2 U.S.C. 431(21). In 2002, as part of a rulemaking implementing BCRA, the Commission defined “generic campaign activity” to mean “a *public communication* that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate.” 67 FR 49064, 49111; 11 CFR 100.25 (emphasis added). The Act requires State, district, and local party committees that conduct “generic campaign activity” in connection with an election in which a candidate for Federal office appears on the ballot to

finance such activities with Federal funds or a mix of Federal funds and Levin funds. 2 U.S.C. 441i(b) and 431(20)(A); 11 CFR 100.24 and 300.33.

As noted above, the *Shays District* court remanded the Commission’s definition of “generic campaign activity” on two grounds: first, that by incorporating the Commission’s definition of “public communication” it improperly excluded all Internet communications, and second, for lack of notice to the public that the definition would be limited to “public communications” as defined in 11 CFR 100.26. The Commission did not appeal these holdings.

The Commission is addressing the *Shays District* court’s first concern by revising the definition of “public communication” to include paid advertisements placed on another person’s Web site, as explained above. The Commission has addressed the *Shays District* court’s second concern by providing ample notice in the *NPRM* that it was considering defining “generic campaign activity” in terms of a “public communication.” Therefore, the Commission is adopting a final rule that has the same language as the previous rule and the rule proposed in the *NPRM*.

Two commenters addressed the Commission’s proposal to retain the current definition of “generic campaign activity.” Both commenters urged the Commission to adopt a definition that includes activities beyond “public communications.” One commenter suggested that the proposed definition of the term “generic campaign activity” would improperly narrow the application of the term, thereby permitting State, district, and local party committees to use non-Federal funds for many activities that promote the political party (and thereby indirectly promote the party’s Federal candidates) because the promotion does not occur in a “public communication.” Specifically, this commenter urged the Commission to adopt a broader definition, one covering “*all* generic ‘activities’” of State, district, and local political party committees, such as phone banks and mailings to 500 or fewer people, and State, district, and local political party Web sites.

The Commission does not believe that expanding the definition of “generic campaign activity” beyond “public communication” is a sound policy decision or the result required by the Act. First, the Commission has not seen any evidence that its 2002 definition of “generic campaign activity” has led to circumvention of the Act or fostered corruption or the appearance thereof,

³⁸ One of these commenters called for limited rules focused exclusively on communications coordinated with corporations, while excluding all other communications. A different commenter urged the Commission to establish a separate rule for communications by State party committees on the grounds that “campaign finance laws provide for different levels of regulation of individuals, corporations and labor unions, and political committees (including party committees).” The four principal Congressional sponsors of BCRA asserted that the definition of “general public political advertising” applicable to State party committees should encompass all Internet communications “intended to be seen by the general public.” Similarly, a different group of commenters stated that a political committee should be deemed to make a “public communication” whenever it “spends funds to communicate broadly over the Internet—buying Web site ads, sending e-mails, maintaining its own publicly accessible Web site—* * * just as if it were spending funds to communicate by broadcast or mass mailing.”

nor did the commenters point to any specific real-world examples where the definition of “generic campaign activity” has proven too narrow. Second, a broad definition of “generic campaign activity” would exceed the scope of the Act and pose Constitutional concerns by capturing State, district, and local party activities designed to support only State or local candidates, thereby improperly requiring that State, district, and local parties finance these activities with at least some Federal funds. For example, a State party committee that rents a bus to transport the party’s slate of candidates for the State’s executive offices during a State election occurring contemporaneously with a Federal election, would be required to use Federal funds or a mix of Federal and Levin funds to pay for the bus because providing the bus would constitute support of the party and its choice of candidates without clearly identifying any of the candidates. The Commission does not consider these results to be required by the Act.

The commenters also argued that the use of the term “public communication” creates a definition of “generic campaign activity” that is too narrow because it does not cover all communications, specifically “mailing and phone banks directed to fewer than 500 [sic] people.” The plaintiffs in *Shays District* made this same argument. The Commission countered that under such an argument, a series of substantially similar telephone calls made to 500 or fewer persons could be regulated as FEA if they promote a political party, even if they do not mention Federal candidates, whereas the same number of substantially similar telephone calls that do promote or oppose a specific Federal candidate would not be regulated as FEA.³⁹ The *Shays District* court specifically rejected the plaintiff’s argument and agreed with the Commission’s reasoning, stating: “It would indeed be anomalous for Congress to have placed greater strictures on activities that promote political parties than on activities that support or attack a candidate.” *Shays District* at 111. Accordingly, the *Shays District* court found that the Commission’s definition of “generic campaign activity” was appropriate and reasonable in the context of FEA,

³⁹ A telephone bank that supports or opposes a Federal candidate would be regulated as an additional form of FEA, which is a “public communication” that PASOs a clearly identified Federal candidate. 2 U.S.C. 431(20(A)(iii)); 11 CFR 100.24(b)(3).

particularly in excluding activities such as small phone banks and mailings. *Id.*

Therefore, the Commission has decided to retain the current definition of “generic campaign activity” at 11 CFR 100.25. The final rule is unchanged from the language proposed in the *NPRM*. “Generic campaign activity” will continue to mean a “public communication,” as defined in 11 CFR 100.26, that promotes or opposes a political party and does not promote or oppose a clearly identified Federal or non-Federal candidate.

V. 11 CFR 109.21 and 109.37— Definitions of Coordinated Communications and Party Coordinated Communications

To be a “coordinated communication” or a “party coordinated communication,” a communication must be a “public communication” as defined in 11 CFR 100.26.⁴⁰ See 11 CFR 109.21(c) and 11 CFR 109.37(a)(2). In *Shays District*, the court rejected the definition of the term “public communication,” because the effect of the definition was to exclude all Internet communications from the reach of the coordinated communication rules. See *Shays District* at 70.⁴¹

By including Internet advertising placed for a fee on another person’s website in the definition of “public communication” in 11 CFR 100.26, the Commission is addressing the deficiency identified by the *Shays District* court in the coordinated communication rules. Consequently, the Commission is not amending the language of the coordinated communication rules in this rulemaking.

In the *NPRM*, the Commission did not propose any changes to the coordinated communication rule or the party coordinated communication rule. The Commission did, however, invite comments on a number of issues with respect to the two rules. The comments that the Commission received generally

⁴⁰ As noted above, an “electioneering communication” may also be a coordinated communication. See 2 U.S.C. 441a(a)(7)(C); 11 CFR 109.21(c)(1). However, “electioneering communications” are a subset of “public communications.”

⁴¹ The Court of Appeals found that the Commission had provided inadequate justification under the APA for excluding from the coordinated communication rules certain “public communications” that are publicly distributed or otherwise publicly disseminated more than 120 days before an election. See *Shays Appeal* at 100. The Commission initiated a separate rulemaking on the coordinated communication rules to address that issue. See Coordinated Communication Notice of Proposed Rulemaking, 70 FR 73946 (Dec. 14, 2005). The *Shays Appeal* decision did not address the definition of “public communication.”

supported the Commission’s decision to reconsider the coordinated communication rules in a separate rulemaking dedicated to that purpose.

A. In-Kind Contributions

The Commission would also like to reiterate that current regulations at 11 CFR 100.52(d)(1) make clear that the provision of goods or services “without charge or at a charge that is less than the usual or normal charge for such goods or services” is a contribution. The Commission does not view the “public communication” rule it is promulgating to permit vendors who normally charge for advertising space to provide such advertising space at a reduced charge or free of charge without making a contribution.

While the Commission recognizes that online business practices for the charging of advertising space vary greatly from one website to the next, the Commission would also like to make clear that when the customary business practice of a particular website regarding the payment for space is not followed, the vendor is making an in-kind contribution. This is similarly the case when any organization transfers to a political committee a tangible asset, such as an e-mail list. There is no need to show that a coordinated communication resulted from such a transfer for the actual asset to be an in-kind contribution to that committee.

B. Republication of Campaign Materials

The Commission sought comment about the republication of candidate campaign materials on the Internet. Under the existing coordinated communication rules, the content prong can be satisfied by a “public communication that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate’s authorized committee, or an agent of any of the foregoing.” 11 CFR 109.21(c)(2). Several commenters urged the Commission to ensure that the republication of content from a candidate’s website, or the republication of other campaign materials prepared by candidate, would not result in a “coordinated communication” when the republication occurs on a blogger’s or individual’s own website.

Testimony submitted during the rulemaking indicated that the approach outlined in the *NPRM* would be appropriate. As one of the lawyers for the Plaintiffs in the *Shays* litigation pointed out, the restrictions on republication of campaign materials were not promulgated with the Internet in mind. Because an individual need

not incur any cost in downloading information derived from a candidate's website and reproducing that same information on a different website, republication on the Internet is fundamentally different from republication in other contexts, such as if an individual were to pay to reprint a candidate's campaign literature.

The revision to the definition of "public communication" in 11 CFR 100.26 adequately addresses those commenters' concerns, so no changes are required to the definition of "coordinated communication." The definition of "public communication" does not encompass any content, including republished campaign material, that a person places on his or her own website. Therefore, a person's republication of a candidate's campaign materials on his or her own website, blog, or e-mail cannot constitute a "coordinated communication."

The Commission is taking this approach partly in recognition of the ease with which individuals are able to transmit information over the Internet. Exchanging hyperlinks, forwarding e-mail, and attaching downloaded PDF files are common ways most individuals who use the Internet exchange information. The Commission is taking this opportunity to make clear that such activity would not constitute in-kind contributions. The Commission notes that Senator Russ Feingold, one of BCRA's sponsors, stated recently that "linking campaign Web sites, quoting from, or republishing campaign materials and even providing a link for donations to a candidate, if done without compensation, should not cause a blogger to be deemed to have made a contribution to a campaign or trigger reporting requirements."⁴²

However, if a person pays to republish a candidate's campaign materials on another person's website, a "public communication" would result under revised 11 CFR 100.26, and such paid republication would therefore satisfy the content prong of the three-pronged "coordinated communication" test. For example, if a candidate pays to place a banner advertisement on the WashingtonPost.com homepage for one week, and then a different person pays the WashingtonPost.com for the continued display of the same advertisement for an additional week, the content prong of the "coordinated communication" test would be satisfied. The Commission notes, however, that satisfaction of the content prong does

not, in and of itself, translate into a coordinated communication finding. The conduct prong must also be satisfied. See 11 CFR 109.21(d).

The Commission also notes that this provision does not supersede the limitations and prohibitions placed on disbursements for communications by corporations and labor organizations under 2 U.S.C. 441b and 11 CFR Part 114.

VI. 11 CFR 110.11—Scope of Disclaimer Requirements

The Commission's disclaimer rules promulgated in 2002 apply to "public communications," as defined in 11 CFR 100.26, as well as to two specified additional types of Internet communications: unsolicited electronic mail of more than 500 substantially similar communications and Internet websites of political committees available to the general public. See 11 CFR 110.11(a); see also 2 U.S.C. 441d(a).

Whether a "public communication" requires a disclaimer depends on who makes the "public communication" and what the "public communication" says. Under the 2002 rule, a political committee must include a disclaimer on any "public communication" for which it makes a disbursement, as well as on all of its publicly available websites and on all substantially similar, unsolicited e-mail communications to more than 500 people. See 11 CFR 110.11(a)(1). Under the 2002 rule, when persons other than political committees make a "public communication" or send substantially similar e-mail messages to more than 500 persons, they need only include disclaimers when those communications expressly advocate the election or defeat of a clearly identified candidate for Federal office, solicit contributions, or qualify as "electioneering communications" under 11 CFR 100.29. See 11 CFR 110.11(a)(2)–(4). Persons other than political committees are not required to include disclaimers on their websites.

A. Disclaimer Requirements for Websites

Although the disclaimer rule was not at issue in *Shays*, the Commission noted in the *NPRM* that because a disclaimer is required for a certain class of "public communication" as defined in 11 CFR 100.26, the revision to the definition of "public communication" in 11 CFR 100.26 would affect the scope of the disclaimer requirement. The Commission received several comments stating that it would be appropriate to require disclaimers for certain "public communications" that take place over the Internet, provided that the definition

of "public communication" was limited to advertisements placed for a fee on another person's website as proposed in the *NPRM*.

Moreover, Congress has required disclaimers for all forms of "general public political advertising" that contain certain content or are paid for by a political committee. 2 U.S.C. 441d(a). As the Commission explained in its original post-BCRA disclaimer rulemaking, the use of the same catch-all phrase in the definition of "public communication" and the disclaimer requirements "should be interpreted in a virtually identical manner."⁴³ See 2 U.S.C. 441d(a) and 431(22). The Commission is therefore retaining the disclaimer requirement for any "public communication" that includes the content specified in 11 CFR 110.11(a).

In their comments, the Congressional sponsors of BCRA urged the Commission to retain the current additional requirement that all political committee websites include disclaimers. The Commission did not receive any other comments specifically addressing the disclaimer requirement for political committee websites, and did not propose changing that requirement in the *NPRM*. Accordingly, under the revised rules at 11 CFR 110.11, all political committee websites must continue to include the appropriate disclaimer statements.

This treatment of political committee websites is consistent with Congress's broader disclaimer requirements for political committees. In 2 U.S.C. 441d(a), Congress required a disclaimer "[w]henver a political committee makes a disbursement" for a class of communications, regardless of the content of the communication. In contrast, for all other persons, Congress only required a disclaimer if the communication contains specific content, such as a solicitation of contributions or a message expressly advocating the election or defeat of a clearly identified candidate for Federal office. *Id.*

B. No Disclaimer Required for Electronic Mail Unless Sent by a Political Committee

In the *NPRM*, the Commission proposed changing the disclaimer requirement for e-mail communications. The Commission noted that it had originally promulgated the regulatory requirement that disclaimers appear on large quantities of e-mail communications in an effort to focus on

⁴² Senator Russ Feingold, "Blogs Don't Need Big Government" available at <http://www.mydd.com/story/2005/3/10/112323/534> (last visited 3/24/06).

⁴³ See *Disclaimer Final Rules*, 67 FR at 76963.

“spam” e-mail.⁴⁴ *NPRM* at 16972. The Commission also stated that it had become “concerned that the current regulation emphasizes the number of e-mail communications sent, rather than focusing on whether an expenditure was made that would justify governmental regulation.” *Id.* In addition, the Commission was concerned “that the lack of a definition of the term “unsolicited” could have the effect of discouraging individuals from engaging in discussion and advocacy that is core political speech protected by the First Amendment and that is virtually cost-free.” *Id.* Accordingly, while proposing to maintain the requirement that a disclaimer appear on more than 500 substantially similar unsolicited e-mail communications, the Commission proposed defining the term “unsolicited e-mail” as e-mail “sent to electronic mail addresses purchased from a third party.” *Id.*

The commenters had mixed reactions to the Commission’s proposal. Although they generally supported limiting the disclaimer requirement for e-mail communications to e-mail communications sent to a purchased or rented list, many commenters raised concerns about the proposed definition of “unsolicited e-mail.” One commenter asserted that the proposed definition would be confusing, because it differed from the commonly accepted meaning of the term “unsolicited e-mail,” which is not limited to e-mail communications sent to addresses purchased from a third party. A second commenter felt that the proposed definition was too narrow, and urged the Commission to expand it to include communications sent to an e-mail list provided by a candidate or political committee, regardless of whether the list was provided as part of a commercial transaction. A third commenter felt that the proposed definition was too broad, and urged the Commission not to require disclaimers on e-mail involving less than some minimum cost. A fourth commenter felt that the Commission should not attempt to regulate unsolicited e-mail at all, because of the lack of evidence that political e-mail was “a tool of big money” or otherwise harmful, while a fifth commenter urged the Commission to require disclaimers on all e-mail sent by any candidate, political party committee, political committee, or third party who “paid to send electioneering e-mail.”

⁴⁴ “Spam” is a common term for “bulk e-mail sent out over the Internet. These messages are often unsolicited and unwanted by the recipient.” *Modern Dictionary for the Legal Profession*, 866 (3rd ed. 2001).

Commenters also raised concerns about the quantity threshold (*ie.*, “more than 500”) for e-mail communications to trigger the disclaimer requirement. Although one commenter supported maintaining a numerical threshold to serve as a “bright line rule,” another suggested eliminating the threshold entirely and requiring disclaimers on e-mail sent to any address that had been purchased for the purpose of engaging in “political spam,” regardless of the number involved. Still others urged the Commission to replace the quantity threshold with a monetary threshold; suggestions for the monetary threshold ranged from \$250 to \$25,000 in expenditures for e-mail communications.

Several commenters voiced concerns about implementing the Commission’s proposal. One commenter, for example, raised the issue of whether disclaimers would be permanently required for any e-mail communication sent to addresses originally acquired through a commercial transaction. Noting that his and other organizations often rented lists of e-mail addresses, the commenter asked, “Does that mean that four months down the line, when we’ve been having ongoing communication [with a person whose e-mail address was on the rented list,] that because we rented the list originally, and the name was produced through a rented list[,] that * * * we have to put a disclaimer on e-mail to [that person]?” The commenter also noted that the proposed rule could raise recordkeeping issues for organizations that obtain e-mail addresses through a combination of purchase or rental and other means.

Commenters also raised concerns about enforcing the disclaimer requirement on e-mail, particularly given the high volume of e-mail traffic and the low cost of sending large numbers of e-mail communications. In addition, some commenters questioned the Commission’s rationale for requiring individuals to place disclaimers on unsolicited e-mail communications containing express advocacy or soliciting contributions, but not to require disclaimers on Internet blogs containing the same message. Several commenters suggested that the Commission simply eliminate the disclaimer requirement for e-mail communications.

The Commission agrees with some of the concerns expressed by the commenters and has decided to change 11 CFR 110.11(a) by eliminating the requirement that disclaimers appear on e-mail communications by persons

other than political committees.⁴⁵ The Act does not expressly or implicitly require that disclaimers appear on e-mail communications. Congress used virtually the same language in the disclaimer provisions and in the definition of “public communication,” particularly with respect to the phrase “or any other [type/form] of general public political advertising,” and the Commission has previously concluded that the two phrases “should be interpreted in a virtually identical manner.” *See* 2 U.S.C. 441d(a) and 431(22); *Disclaimer Final Rules* at 76963. As discussed above, the Commission is changing the definition of “public communication” to reflect the Commission’s conclusion that the only form of “public communication” on the Internet is advertising that appears for a fee on another person’s Web site. *See* Part III, above.

A political committee, however, must continue to include a disclaimer whenever it sends more than 500 substantially similar e-mail communications. As noted above, Congress requires disclaimers on a broader class of communications for political committee than for all other persons. Since 2002, the Commission has required disclaimers for “unsolicited electronic mail of more than 500 substantially similar communications.” 11 CFR 110.11(a). The Commission notes that political committees have generally complied with this requirement, and that the inclusion of a disclaimer statement poses only a minimal burden for political committees. Also, the Commission is not aware of significant concerns that might warrant the removal of this requirement for political committees at this time. However, in light of confusion that many commenters expressed regarding the meaning of “unsolicited e-mail,” the Commission is removing the requirement that e-mail be “unsolicited.”

The Commission notes that e-mail communications by corporations and labor organizations are otherwise regulated by 11 CFR Part 114. *See* 2 U.S.C. 441b and 11 CFR 114.4. Generally, these entities are prohibited from sending e-mail in connection with Federal elections outside their restricted class. 2 U.S.C. 441b and 11 CFR 114.4.

C. Technical Reorganization

The Commission is making two other changes to 11 CFR 110.11(a) for purposes of clarity. First, the Commission is deleting the first

⁴⁵ *See* note 22 for the definition of “person.”

sentence from paragraph (a). Second, the remaining sentence in that paragraph is being revised to provide that disclaimers are required only on: (1) A “public communication,” as defined in 11 CFR 100.26, made by a political committee; (2) electronic mail of more than 500 substantially similar communications when sent by a political committee; (3) a political committee website available to the general public; and (4) a “public communication,” as defined in 11 CFR 100.26, made by any person that contains express advocacy, solicits a contribution, or qualifies as an “electioneering communication” under 11 CFR 100.29.

D. Bloggers Paid by Candidates

The Commission invited comments on whether it should revise the disclaimer rule in 11 CFR 110.11(a) to require bloggers to disclose payments from a candidate, a political party, or a political committee. The Commission did not propose any change because current Commission rules at 11 CFR 110.11(a) already require a political committee to disclose this type of disbursement on its publicly available reports filed with the Commission. *NPRM* at 16973.

All but one of the comments received on this subject supported the Commission’s proposed approach that would not require bloggers to disclose payments received from candidates. Typical of the reaction was this comment: “The ethics of taking money to express opinions without disclosing those payments can certainly be questioned. But for purposes of the election laws, * * * no disclaimer should be required. Payments by campaigns are disclosed by campaigns. To require more of bloggers when others who receive payments from campaigns are not subject to similar disclosure requirements would not be fair.”

The Commission agrees that the Act does not require a disclaimer when a blogger or other person accepts payment from a Federal candidate. Accordingly, it is not changing the disclaimer rule to require bloggers to disclose payments from a candidate, a political party committee, or other political committee. Please note, however, that disbursements for particular communications, as opposed to more generalized payments to bloggers for consulting or other services, might still require disclaimers. For example, if a candidate or political committee pays a fee to place an advertisement on the website of a blogger, the advertisement would require a disclaimer because it would be a disbursement for a “public

communication” by a political committee.

VII. Other Uses of the Term “Public Communication” in the Commission’s Regulations

The term “public communication” is also used in 11 CFR 106.6(b) and (f) (allocation of expenses between Federal and non-Federal activities by SSFs and nonconnected committees) and 11 CFR 300.2(b)(4) (definition of “agent” for non-Federal candidates). Thus, the revisions to the definition of “public communication” in amended 11 CFR 100.26 affect the application of these two regulations.

A. 11 CFR 106.6—Allocation of Expenses Between Federal and Non-Federal Activities by Separate Segregated Funds and Nonconnected Political Committees

In 2004, the Commission revised its allocation regulations at 11 CFR 106.6 governing the source of funds for certain “public communications” by SSFs and nonconnected committees. Whenever either of these entities pays for a “public communication” that (1) refers to a political party, but does not refer to any clearly identified Federal or non-Federal candidate, or (2) refers to one or more clearly identified Federal candidates, the SSF or nonconnected committee must pay for the communication entirely with Federal funds or by allocating such expenses between its Federal and non-Federal accounts in accordance with 11 CFR 106.6(b) and (f). *See Political Committee Status Final Rules*. Because all Internet communications were exempted from the definition of “public communication,” SSFs and nonconnected committees were not required to comply with the new provisions in 11 CFR 106.6 when funding Internet communications.

In the *NPRM*, the Commission noted that the effect of the proposed revisions to the definition of “public communication” in 11 CFR 100.26 would be to apply the allocation rules in 11 CFR 106.6(b)(1), (b)(2), and (f) to those Internet communications covered by the revised definition of “public communication.” Thus, SSFs and nonconnected committees would be required to use Federal funds to pay for certain “public communications” over the Internet. The Commission invited comment on this result.

The Commission received two comments addressing this issue. Both urged the Commission not to apply the allocation rules in section 106.6 to communications over the Internet. Both comments expressed concern about

whether it would be feasible to ascertain the costs of the communications to which the allocation rules would apply.

Because the revised definition of “public communication” covers only paid Internet advertising placed on another person’s website, and application of the section 106.6 allocation rules to these communications will be based on readily determinable costs, the commenters’ concerns are resolved by the new definition in 11 CFR 100.26. The cost of Internet advertising included within the revised definition of “public communication” will be as discrete and readily identifiable as the costs of other “public communications,” and application of the section 106.6 allocation rules to these Internet communications will therefore not be any more complex than for other forms of communication covered in the definition of “public communication.” Moreover, the costs of paid Internet advertising must be allocated under 11 CFR 106.6 only if the SSF’s or nonconnected committee’s advertising refers to a political party or a clearly identified Federal candidate.

Therefore, the Commission is not amending the language of the allocation rules in 11 CFR 106.6. All SSFs and nonconnected committees must continue to use Federal funds to pay for all covered forms of “public communication,” which now also includes paid Internet advertising placed on another person’s website.

B. 11 CFR 300.2(b)(4)—Definition of an “Agent” of State and Local Candidates

BCRA prohibits candidates for State and local offices, and their agents, from using non-Federal funds to pay for any “public communication” that PASOs a candidate for Federal office. *See* 2 U.S.C. 441i(f). Under the Commission’s regulations, an “agent” of a candidate for State or local office is a person who has actual authority conferred by that candidate to “spend funds for a public communication,” as defined in 11 CFR 100.26. 11 CFR 300.2(b)(4).

In the *NPRM*, the Commission sought comment on whether further revisions to the definition of “public communication” are necessary to address its potential effect on the definition of “agent” in 11 CFR 300.2(b)(4). Specifically, the Commission noted that as a result of the proposed change to the definition of “public communication,” a person would be an agent of a State or local candidate if he or she is authorized by that candidate to pay for any Internet communication that is included within the revised definition of “public

communication.” The Commission received no comments on this issue.

The Commission believes that no further revisions to the definition of “agent” in 11 CFR 300.2(b)(4) are necessary to address the effect of the revised definition of “public communication” in 11 CFR 100.26. The definition of “agent” was based on the anticipated scope of a principal’s activities. Now that the principal (*i.e.*, a State or local candidate) is subject to certain restrictions when making one type of Internet communication, it follows that a corresponding change to the scope of the agent’s anticipated activities is consistent with the original purpose of the definition of “agent.” Therefore, a person will continue to be an agent of a State or local candidate if he or she has actual authority to pay for a “public communication” on behalf of the candidate, which now includes paid Internet advertising placed on another person’s website.

VIII. 11 CFR 100.94 and 100.155—Exceptions to the Definitions of “Contribution” and “Expenditure” for Internet Activity by Individuals

The Act and Commission regulations currently exempt certain activities by individuals from the definitions of “contribution” and “expenditure.” See 2 U.S.C. 431(8)(B)(i) and (ii); 11 CFR 100.74–100.76 and 100.135–100.136. For example, “the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee” is not a “contribution” to the candidate or political committee. 2 U.S.C. 431(8)(B)(i); 11 CFR 100.74. Similarly, “the use of real or personal property, including a church or community room used on a regular basis by members of a community for noncommercial purposes, * * * voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services on the individual’s residential premises or in the church or community room for candidate-related or political party-related activities” is not a “contribution” or “expenditure.” 2 U.S.C. 431(8)(B)(ii). See also 11 CFR 100.35, 100.36, 100.75, and 100.76.

The Internet has changed the way in which individuals engage in political activity by expanding the opportunities for them to participate in campaigns and grassroots activities at little or no cost and from remote locations. Accordingly, in the *NPRM*, the Commission proposed new rules to extend explicitly the existing individual activity exceptions to the Internet to remove any potential restrictions on the ability of individuals

to use the Internet as a generally free or low-cost means of civic engagement and political advocacy. See *NPRM* at 16975–76. Specifically, the Commission proposed two sections, 11 CFR 100.94 and 100.155, to exempt from the definitions of “contribution” and “expenditure” the value of uncompensated Internet activity by volunteers.

All of the numerous commenters addressing this issue supported the Commission’s proposal and favored a broad exemption from regulation for uncompensated Internet activity by individuals. The commenters affirmed that individuals currently use the Internet to engage in both individual and collective grassroots political activity. As one commenter stated, “[t]he Internet provides individuals with the ability to engage in widely disseminative political discourse without requiring the expenditure of large sums of money.” Another commenter stated that campaigns in the 2004 election cycle “relied to an unprecedented degree on using the Internet as an organizing tool, both financially as well as [for] an unprecedented number of volunteers who came to the campaign through the Internet.” This commenter noted that “[p]eople who volunteered through the Internet * * * were volunteering not because they thought they were going to get some job in the administration, not because they wanted to be close to the center of action * * * [but] because they wanted to make a difference.” A different commenter suggested that “[i]ndividual Americans should be able to engage in election related political speech online and spend reasonable sums of their own money to support that speech, without having to disclose their identity, worrying about whether they are violating campaign finance laws, or having to hire a lawyer to advise them.”

One commenter summarized the general benefit to be derived from the proposed exceptions: “[a]doption of this rule would in itself address the vast majority of concerns and objections that have been expressed about this rulemaking. This rule would make clear, appropriately so, that individuals engaging in unfettered political discourse over the Internet using their own computer facilities (or those publicly available) would not be subject to regulation under the campaign finance laws, whether or not such activities are coordinated with a candidate.”

After considering all the comments, the Commission is adding new 11 CFR 100.94 and 100.155, which together

expressly remove Internet activity by an individual or group of individuals from the definitions of “contribution” and “expenditure” when the individual or group of individuals perform uncompensated Internet activities for the purpose of influencing a Federal election.

A. 11 CFR 100.94(a) and 100.155(a)—Exception for Uncompensated Internet Activity

Although the final versions of 11 CFR 100.94 and 100.155 are structured somewhat differently from the rules proposed in the *NPRM*, they have the same scope and application. Thus, under these final rules, any individual or group of individuals who, without compensation, uses Internet equipment and services for the purpose of influencing a Federal election does not make a contribution or expenditure and does not incur any reporting responsibilities as a result of that activity.

1. Exception Not Restricted to Volunteers Known to a Campaign

In the *NPRM*, the Commission sought comment on whether the final rules should apply to all individual Internet activities, regardless of whether such activities are known to a candidate, authorized committee, or political party committee. The Commission proposed regulations that would apply regardless of whether the individual’s Internet activities were known to any of these groups. All commenters addressing this issue supported the Commission’s proposal. As one commenter stated, “[f]or the sake of clarity, the rule should apply to all ‘individuals,’ whether or not they are ‘volunteers’ for a campaign that are ‘known’ to the campaign, or employees of a campaign.”

The Act does not require that a candidate or political committee formally recognize an individual as a “volunteer” for that individual’s activities to be exempt from the definitions of “contribution” and “expenditure.” On the contrary, the plain language of the Act uses the term “volunteer” as relating to the provision of voluntary and uncompensated services, rather than to the formal status of the actor in relation to a campaign. See 2 U.S.C. 431(8)(B)(i) (exempting from the definition of “contribution” “the value of services provided without compensation by an individual who volunteers”) and 2 U.S.C. 431(8)(B)(ii) (exempting from the definition of “contribution” “the use of real or personal property * * * voluntarily provided by an individual to any candidate or any political committee of

a political party in rendering voluntary personal services”). Moreover, one commenter pointed out that, in light of the new opportunities to engage in political activity through the Internet, “it would be an odd result if a campaign volunteer was exempt but someone acting independently was not.”

The Commission agrees. Therefore, the new rules exempt Internet activity by individuals acting both with and without the knowledge or consent of a candidate, authorized committee, or political party committee. The new rules use the phrase “acting independently” to cover any individual who is unknown to, or acting without the consent of, a candidate, authorized committee, or political party, and the phrase “in coordination with” to cover any individual who is a formal or informal volunteer known to, and acting with the consent of, a candidate, authorized committee or political party committee.⁴⁶

Finally, commenters raised concerns that the new rules would not apply to groups of individuals who act collectively. One commenter pointed out that, “While it is true that any ‘group’ comprises individuals, the plain reading of the [proposed] rule suggests that only individuals acting ‘individually’ are protected from regulation of ‘contributions’ or ‘expenditure.’”

In response to this concern, the Commission in the final rules uses the terms “individual or group of individuals.” Individuals are eligible for the exceptions whenever they engage in Internet activities for the purpose of influencing a Federal election alone or collectively as a group of individuals. For example, if several individuals share the responsibilities of operating a blog or other website, then each individual would be covered under new 11 CFR 100.94 and 100.155. The Commission also notes that a group of individuals will not trigger political committee status through Internet activities covered by the new exceptions because those Internet activities would not constitute contributions or expenditures under the Act.⁴⁷

⁴⁶ In Advisory Opinion 1999–17 (George W. Bush for President Exploratory Committee), the Commission concluded that a campaign’s permission “at some level” was essential for the volunteer exception to apply to an individual’s Internet activity on behalf of a presidential candidate. Advisory Opinion 1999–17 is superseded to the extent that it indicates that the campaign or political committee must be aware of or sanction the individual’s Internet activities in order for the individual’s activity to be exempt.

⁴⁷ See 11 CFR 100.5 (“Political committee means * * * any committee, club, association, or other group of persons which receives contributions

2. Republication

In the *NPRM*, the Commission noted that its proposed regulations would protect an individual or volunteer who produces or maintains a website or blog, or conducts other grassroots activity on the Internet. The *NPRM* noted that this activity would not result in individuals or volunteers making a contribution or expenditure and they would not incur any reporting responsibilities. For example, if an individual downloaded materials from a candidate or party website, such as campaign packets, yard signs, or any other items, the downloading of such items would not constitute republication of campaign materials.

Even if this activity is done in cooperation, consultation, or concert with a candidate or a political party committee, no contribution or expenditure would result, and neither the candidate nor the political party committee would incur reporting responsibilities. Additionally, if an individual forwarded an e-mail received from a political committee, the forwarding of that e-mail would not constitute republication of campaign materials or be an in-kind contribution. The Commission has chosen to adopt such an approach in the final rules. In doing so, the Commission recognizes the importance of grassroots activity and the role of the Internet. Under the final rules at 11 CFR 100.94 and 100.155, individuals are free to republish materials using the Internet without making a contribution or expenditure. However, the Commission notes that 11 CFR 100.94(e) would not exempt from the definition of “contribution” any “public communication” that arises as the result of the republication of such materials. For example, if an individual downloaded a campaign poster from the Internet and then paid to have the poster appear as an advertisement in the *New York Times*, the advertisement in the *New York Times* would not be within the exemption of the final rules.

3. Personal Services Exempted

As was noted above, the Act and Commission regulations exempt certain activities by individuals from the definitions of “contribution” and “expenditure.” See 2 U.S.C. 431(8)(B)(i) and (ii); 11 CFR 100.74–100.76 and 100.135–100.136. For example, the Act

aggregating in excess of \$1,000 or which makes expenditures aggregating in excess of \$1,000 during a calendar year”). As discussed below, payments to place advertisements on another person’s website, other than for a nominal fee, are not exempt under the new exceptions for Internet activities by individuals, and such payments could result in expenditures or contributions.

provides that “the value of services provided without compensation by any individual who volunteers on behalf of a candidate or political committee” is not a “contribution” to the candidate or political committee. 2 U.S.C. 431(8)(B)(i). See also 11 CFR 100.74. Consistent with these provisions, the narrative accompanying the exceptions proposed in the *NPRM* made clear that the value of an individual’s uncompensated Internet services would be excepted from the definitions of “contribution” and “expenditure.” See *NPRM* at 16976. Accordingly, under new 11 CFR 100.94 and 100.155, the value of an individual’s uncompensated time and the value of any special skills that individuals may bring to bear on their Internet activities are exempt from the definitions of “contribution” and “expenditure.”

4. Individual Services Must Be Uncompensated

The Commission sought comments, but received none, on whether an exception for individual Internet activity should be extended to individuals who receive some form of payment for their Internet services from a candidate or a political committee. The Commission notes that the Act and Commission regulations exempt only “services provided *without compensation*” from the definitions of “contribution.” 2 U.S.C. 431(8)(B)(i); 11 CFR 100.74 (emphasis added). Likewise, the proposed rule limited the new exceptions to uncompensated services.

Accordingly, these final rules exempt only those Internet services for which an individual does not receive any compensation. Campaign employees, for example, are not eligible for the exceptions in 11 CFR 100.94 and 100.155 for activities for which they are compensated. However, campaign employees are still within this exemption when they engage in uncompensated Internet activities. Moreover, bloggers would not lose eligibility for the exceptions by selling advertising space to defray the operating costs of the blog, but would not be eligible for the exceptions for campaign work for which the blogger is compensated by a campaign committee or any other political committee. For example, if a political committee pays a blogger to write a message and post it within his or her blog entry, the resulting blog entry would not be exempted as “uncompensated Internet activity.” While not exempted under the final rules, such a payment to the blogger would not otherwise restrict the blogger’s activities or create an obligation on the part of the blogger to

report the payment. The expenditure by the political committee is akin to a vendor payment, which the political committee must report to the Commission. Similarly, if a campaign pays a blogger for technical consulting services regarding the campaign's website, the blogger's activities on his or her own blog would remain eligible for the exceptions in 11 CFR 100.94 and 100.155.

If a campaign committee or other political committee reimburses an individual for any out-of-pocket costs that the individual may incur in performing Internet activities, such reimbursements do not constitute compensation under the final rules. Accordingly, individuals may be reimbursed by political committees for any out-of-pocket expenses they incur in performing Internet activities and remain within the exemptions in 11 CFR 100.94 and 100.155. If a political committee pays the costs of setting up a website or controls the overall content, however, the website may need to carry an appropriate disclaimer under 11 CFR 110.11(a)(1).

5. Individual Internet Activity is Exempt Regardless of Who Owns the Computer Equipment and Where the Internet Activities Are Performed

The proposed rules in the *NPRM* covered three situations involving the use of computer equipment and services by an individual for uncompensated Internet activities: (1) The use of computer equipment and services that the individual owns; (2) the use of computer equipment and services available at a public facility; and (3) the use of computer equipment and services on the individual's residential premises.

Some commenters opposed this proposed structure as "overly lengthy and complicated in part because the proposed rule tries to predict how and where individuals will be using computers." Some of these commenters also complained that distinguishing between sources of equipment unnecessarily complicated the proposed rules. "These individuals and volunteers should use whatever computer is normally available to and used by them," stated one commenter. This commenter also stated that "[t]he question is not which computer is used, but whether it is used in the course of uncompensated individual and volunteer activity."

The Commission agrees. Distinguishing between sources of computer equipment and locations where the Internet activities occur could lead to anomalous results. For instance, the proposed rules may have been

interpreted to exempt an individual's Internet activity if the individual used a neighbor's computer in the individual's own home or in an Internet café, but not if the individual uses a neighbor's computer in the neighbor's home. Additionally, the proposed rules may have been interpreted to exempt an individual's Internet activities performed at the individual's residence using a computer supplied by the individual's employer, but not if the Internet activities were performed by the individual at his or her own place of work.

As this result was not the Commission's intent, the final rules do not distinguish between sources of computer equipment nor locations where the Internet activities are performed. Under new 11 CFR 100.94 and 100.155, an individual does not make a contribution or expenditure when using equipment or services for uncompensated Internet activities for the purpose of influencing a Federal election, regardless of who owns such equipment or where the equipment is located. The final rules thus avoid disparate treatment of individuals or volunteers who may not be able to afford the purchase or maintenance of their own computers and websites and explicitly protect individuals who may borrow a computer from a friend, neighbor, family member, or anyone else to engage in political activity.

B. 11 CFR 100.94(b) and 100.155(b)—Definition of "Internet Activities"

In the rule proposed in the *NPRM*, the Commission defined the term "Internet activities" to include "e-mailing, including forwarding; linking, including providing a link or hyperlink to a candidate's, authorized committee's or party committee's website; distributing banner messages; blogging; and hosting an Internet site." *NPRM* at 16978.

The final rules encompass all of the same activity covered by proposed 11 CFR 100.94 and 100.155, but also include the phrase "and any other form of communication distributed over the Internet." The Commission added the phrase "and any other form of communication distributed over the Internet" to ensure that future advances in technology will be encompassed within the final rules. For example, the new rules not only cover such things as sending or forwarding electronic messages; providing a link or other direct access to any person's⁴⁸ Internet site; posting banner messages; and blogging, creating, maintaining, or hosting an Internet site; but also cover

technology that has not yet been developed. Furthermore, the new rules cover "podcasting" and any other form of Internet communication that is, or might be, used for political activity. The Commission notes that the new definition of "Internet activities" contains an illustrative, rather than an exhaustive, list of the activities that are covered.

C. 11 CFR 100.94(c) and 100.155(c)—Definition of "Equipment and Services"

The proposed rules focused on exempting an individual's use of "computer equipment and services" for activities on the Internet and listed examples of the types of computer equipment and services covered by the proposed rules. Specifically, paragraphs (c) of both proposed 11 CFR 100.94 and 100.155 stated that "computer equipment and services" includes, but is not limited to, computers, software, Internet domain names, and Internet Service Providers (ISP).

The Commission has adopted the language in the *NPRM* defining "equipment and services" as including, but not limited to, computers, software, Internet domain names, and Internet Service Providers (ISP). In response to concerns that the proposed language was technology specific, the Commission has added the phrase "and any other technology that is used to provide access to or use of the Internet," to ensure that future innovations in computer equipment and services will be included within the final rules. New sections 100.94 and 100.155 include, but are not limited to, computers, handheld communication devices that provide access to the Internet, software, routers, servers, Internet access purchased from an ISP, subscription fees, blog hosting services, bandwidth, licensed graphics, domain name services, and e-mail services.⁴⁹

⁴⁹ In Advisory Opinion 1998–22 (Leo Smith), the Commission concluded that even if an individual acting independently incurs no additional costs in creating a website that expressly advocates the election or defeat of a clearly identified candidate, at least some portion of the underlying costs of creating and maintaining that website is an expenditure under the Act and must be reported if it exceeds \$250 in a calendar year. Later, in Advisory Opinion 1999–17 (George W. Bush for President Exploratory Committee), the Commission concluded that in the course of developing a website for a campaign, an individual could use "his or her personal property at home, *i.e.*, a home computer" and incur "related costs (such as maintaining Internet service with a provider) that are part of the upkeep" of the website without making a contribution or expenditure, and without incurring any reporting obligations. Advisory Opinion 1998–22 is superseded to the extent that it treated as an "expenditure" an individual's use of computer equipment and services for uncompensated Internet activity.

⁴⁸ See note 22 for the definition of "person."

The Commission notes that while individuals incur no liability for using equipment and services in the course of their uncompensated political activity, this rule change does not exempt all political activity involving the use of technology from regulation. Therefore, for example, a political committee's purchase of computers for individuals to engage in Internet activities for the purpose of influencing a Federal election, remains an "expenditure" by the political committee. Additionally, a corporation would make a prohibited in-kind "contribution" and a prohibited "expenditure" by providing software and Internet access for the specific purpose of enabling its employees to influence a Federal election through political Internet activities. See 2 U.S.C. 441b(a); 11 CFR 114.2. See also discussion of 11 CFR 114.9, below.

D. 11 CFR 100.94(d) and 100.155(d)—Exceptions Applicable to Incorporated Bloggers and Similar Corporations

Corporations and labor organizations are generally prohibited from making "contributions" or "expenditures" in connection with any Federal election. 2 U.S.C. 441b. In the *NPRM*, the Commission sought comment on whether bloggers, acting as incorporated or unincorporated entities, should still be eligible for the exceptions to the definitions of "contribution" and "expenditure." *NPRM* at 16975.

All commenters who addressed this topic supported exempting Internet activity by incorporated bloggers from the definitions of "contribution" and "expenditure." Some commenters observed that bloggers often incorporate mainly for tax reasons or to limit their liability for the operation of their blogs. "Every month now, somebody threatens to sue me," stated one blogger who indicated that the popularity of his website and the nature of the political opinions he expresses on his blog made it necessary for him to incorporate for his own legal protection.

The Commission agrees that providing an exception that applies to all individuals, whether incorporated or unincorporated, is the best approach. Therefore, individuals who choose to incorporate are also eligible for the new exceptions in 11 CFR 100.94 and 100.155 for Internet activities by individuals. Although the activities of some incorporated bloggers may also be exempt under the media exemption (discussed below), the separate exceptions for individual activity may reach some incorporated entities that are not acting within the scope of the media exemption or that are not press

entities at all. See 2 U.S.C. 431(9)(B)(i) and 11 CFR 100.73.

The purposes of the Act would not be furthered by prohibiting individuals' Internet activities simply because an individual incorporates for liability or tax reasons. The Supreme Court has stated that the Act's prohibitions on corporate expenditures and contributions arise from "Congress's concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace." *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 263 (1986). The Court acknowledged, however, that "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens * * * solely because of their incorporated status." *Id.* The Commission concludes that a corporation whose purpose and function is to permit an individual to engage in Internet activity is more akin to a political association than to a business firm formed to amass wealth, and thus should not be subject to the burdens of the prohibitions on corporate contributions and expenditures. Thus, the application of the new exceptions in sections 100.94 and 100.155 to individuals who choose to incorporate for these specific purposes only avoids penalizing individuals for using the corporate form merely to limit their personal liability.

Although all commenters who discussed this issue agreed that Internet activity by individuals who choose to incorporate should be treated the same as Internet activity by unincorporated individuals, the commenters disagreed on the scope of such treatment. Some commenters noted that the Commission permits political committees to incorporate "for liability purposes only," see 11 CFR 114.12, and recommended that the exceptions for Internet activities by individuals only apply to bloggers who incorporate for liability purposes. However, several other commenters asked the Commission to focus on the activities of the resulting corporation and their relation to the Internet activities that are the subject of the exceptions. Specifically, one commenter recommended "permit[ting] the incorporation of small online-only speakers in cases where the business of the corporation consists of the operation of a blog or other forum for online discourse." Other commenters advocated "an exempt category of 'blogger corporation' [defined] as an incorporated entity whose principal purpose is to conduct blogging

activities. Such corporations could be treated as individuals for purposes of the campaign finance rules applicable to Internet activity."

The Commission believes that the best approach to creating an exception tailored to individuals engaged in Internet activity who choose to incorporate, including bloggers, is to focus on the activities of the resulting corporation, rather than delving into the reasons for incorporation. The result of such an approach is that an individual who engages in Internet activity after incorporating is treated the same under the new exceptions as an unincorporated individual who engages in similar Internet activity.

Accordingly, new 11 CFR 100.94(d) and 100.155(d) provide that the exceptions in sections 11 CFR 100.94(a) and 100.155(a) apply to a corporation that meets three criteria: (1) It is wholly owned by one or more individuals; (2) it engages primarily in Internet activities; and (3) it does not derive a substantial portion of its revenues from sources other than income from its Internet activities. The Commission recognizes that incorporated bloggers and other similarly incorporated individuals often generate revenue primarily through the sale of advertising space on their own websites or through other Internet activities, such as providing subscription and membership services, and may also generate ancillary revenue from non-advertising sources, such as T-shirts, mugs, and similar merchandise. The third requirement is therefore added to preserve the exception for such incorporated bloggers and similar corporations, without creating an overly broad exception to the definitions of "contribution" and "expenditure" that would encompass the activities of any corporation engaged in online activities merely as a platform for other commercial activities. See, e.g., Advisory Opinion 2004-19 (DollarVote.org) (concerning a for-profit corporation that provided commercial services to both citizens and candidates via DollarVote.org website). The exceptions in 11 CFR 100.94(d) and 100.155(d) are not limited to blogging activities or any other particular Internet activity. Rather, the language in new sections 100.94(d) and 100.155(d) ensures that the Internet activities of individuals who choose to incorporate are exempt from regulation as "contributions" or "expenditures," regardless of whether the individual chooses to "blog" or to engage in any other form of Internet activity.

E. 11 CFR 100.94(e)(1) and 100.155(e)(1)—Exemption for Communications Placed for a Nominal Fee on Another Person's Website

In the *NPRM*, the Commission noted that, consistent with the proposed revision to the definition of “public communication” to encompass communications placed for a fee on another person’s website, payments for a “public communication” on the Internet could also be a contribution or expenditure. Therefore, the Commission proposed excluding payments for placing communications on another person’s website from the new exceptions for individual Internet activity, unless the communications were placed for a nominal fee, in which case they would be excepted from the definitions of contribution and expenditure. See *NPRM* at 16976.

The Commission has decided to adopt this approach. Accordingly, new paragraphs 11 CFR 100.94(e)(1) and 100.155(e)(1) state that the new rules exempt nominal payments for a “public communication,” as defined in 11 CFR 100.26, from the definitions of “contribution” and “expenditure.” The Commission notes, however, that a payment for a “public communication” would not necessarily result in a contribution or expenditure just because it is not exempted by one of the new exceptions; only those payments made for the purpose of influencing a Federal election or “in connection with” a Federal election would result in a contribution or expenditure. See 2 U.S.C. 431(8) and (9), 441b; 11 CFR 100.52(a), 100.111(a) and 114.2(a).

The allowance for the payment of a nominal fee in connection with uncompensated campaign activity on the Internet is consistent with the rules as proposed in the *NPRM* and the existing volunteer exception that allows for payment of a nominal fee in connection with an individual’s use of real property. See 11 CFR 100.75 (permitting payment of a nominal fee for the use of a community room on an individual’s residential premises). It recognizes, as one commenter noted, that “[t]he Internet has effectively put the power of advertising communication into the hands of every citizen * * * [a]ds on blogs, for example, cost as little as \$10 per week, and ads on search engines such as Google can cost just 10 cents per click.” While the commenter’s remarks describe the low cost of some individual Internet advertisements, the Commission notes the aggregate cost of a communication, rather than the cost on a per click or per view basis, determines whether a fee is nominal.

Additionally, the exemption recognizes that because many individuals who use the Internet cannot, or do not, maintain their own websites, or simply wish to post to a blog in a place where it is more likely to be seen by others, an exemption for any nominal fee to post on another person’s website is appropriate. Therefore, individuals or groups of individuals, acting independently or as volunteers, who post blogs or other content on host sites, would be entitled to the exception just as if the content were posted on their own website.

F. 11 CFR 100.94(e)(2) and (3) and 100.155(e)(2) and (3) “No Exemption for Payments for E-mail Lists Made at the Direction of a Political Committee or Transferred to a Political Committee”

In the *NPRM*, the Commission stated that it would continue to view the purchase of mailing lists (including e-mail lists) as expenditures or contributions when the lists are used to distribute candidate and political committee communications for the purpose of influencing Federal elections. See *NPRM* at 16976. Paying for an e-mail list is often expensive, whereas distributing the e-mail communications is usually free or at negligible cost. The Commission is concerned, however, that the new exceptions for individual Internet activities might be construed to permit individuals to pay for e-mail lists that might then be transferred to, or used by, a political committee without any contribution or expenditure resulting. Therefore, new 11 CFR 100.94(e)(2) and 100.155(e)(2) provide that the exemption for individual Internet activities does not apply to any payment for the purchase or rental of an e-mail address list when that payment is made at the direction of a political committee. Similarly, new 11 CFR 100.94(e)(3) and 100.155(e)(3) provide that the exemption for individual Internet activities does not apply to payments for any e-mail address list that is subsequently transferred to a political committee, whether that transfer is permanent or temporary (*i.e.*, sharing the list of e-mail addresses for a one-time use). Under the new rule, a contribution or expenditure would not result when an e-mail list is purchased by an individual unless either of the conditions in paragraphs (e)(2) or (e)(3) of 11 CFR 100.94 and 100.155 are met.

IX. 11 CFR 100.73 and 100.132—Exception for News Story, Commentary, or Editorial by the Media

In the Act, Congress exempted from the definition of “expenditure” costs

associated with “any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.” 2 U.S.C. 431(9)(B)(i). This exemption, commonly known as the “media exemption,” recognizes “the unfettered right of the newspapers, television networks, and other media to cover and comment on political campaigns.” H.R. Rep. No. 93–1239, 93d Congress, 2d Session at 4 (1974) (emphasis added). The media exemption is implemented in sections 100.73 and 100.132 of the Commission’s rules. See 11 CFR 100.73 (media exemption for contributions) and 100.132 (media exemption for expenditures).

In determining whether the media exemption applies, the Commission has traditionally applied a two-step analysis. First, the Commission asks whether the entity engaging in the activity is a press entity as described by the Act and Commission regulations. Second, in determining the scope of the exemption, the Commission considers: (1) Whether the press entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the press entity is acting as a press entity in conducting the activity at issue (*i.e.*, whether the entity is acting in its “legitimate press function”).⁵⁰

In the *NPRM*, the Commission proposed changing its rules to clarify that the protections in the Act for news stories, commentary, and editorials appearing in traditional media also apply to news stories, commentary, and editorials appearing on the Internet. Specifically, the Commission proposed revising 11 CFR 100.73 and 100.132 to indicate that news stories, commentaries, and editorials that otherwise would be entitled to the media exemption are likewise exempt when they are distributed using the Internet.

The Commission invited comment generally on the proposed changes to the media exemption. The Commission also asked a number of specific

⁵⁰ See *Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312–1313 (D.D.C. 1981); Advisory Opinions 2005–16 (Fired Up! LLC), 2004–07 (MTV, MTV Networks, Viacom, Inc. and Viacom International, Inc.), 2000–13 (Ampex Corporation and iNEXTV Corporation), 1998–17 (Daniels Cablevision), 1996–48 (National Cable Satellite Corporation), 1996–41 (A.H. Belo Corporation), 1996–16 (Bloomberg, L.P.) and 1982–44 (Democratic National Committee and Republic National Committee).

questions, including whether the proposed changes were consistent with or required by the Act; what the appropriate breadth of the exemptions should be; and whether the exceptions should be limited to entities that also have traditional, non-Internet media operations.

Thirty-seven of the comments filed in response to the *NPRM* addressed the proposed changes to the media exemption. All but one of these commenters supported extending the exemption to media activities on the Internet,⁵¹ although they differed with respect to the scope of the exemption. Some commenters, for example, suggested that the Commission extend the media exemption to any independent entity that publishes material, regardless of the medium used, and regardless of whether the entity is a member of the traditional media. Others, however, opined that not everything disseminated on the Internet constitutes media activity within the meaning of the media exemption, and urged the Commission to require entities operating on the Internet to satisfy the same criteria as entities operating in traditional media in order to qualify for the exemption. All of the commenters who addressed the question agreed that applying the media exemption to the Internet would be consistent with the Act, and none of the commenters supported limiting the media exemption to entities that also have traditional, non-Internet media operations.

The commenters' views on regulating bloggers were more diverse. While all commenters who addressed this topic agreed that the media exemption should extend to at least some bloggers, the commenters differed with respect to whether a blanket exemption should be created to cover all bloggers. At one end of the spectrum were those commenters who believed that "all bloggers, whether big, small, incorporated, or moonlighting, deserve the media exemption." They opined that online news provided by blogs is as "vibrant and vital" as any offline publishing; that blogs satisfy public information needs not met by traditional media; that it would be impractical for the Commission to "police" bloggers; and that it would be "harmful" for the Commission to draw lines between individual bloggers.

Several commenters explicitly equated bloggers to the proverbial

speaker on a soapbox in the town square, and argued that any blogger who publishes "campaign-related" opinions should be shielded from regulation under the media exemption. One commenter suggested that the Commission exempt all bloggers from financial reporting and coordination requirements, while still requiring them to disclose on their websites any payments that they receive from candidates or political committees for taking a particular position in connection with a Federal election.

Several commenters recommended against exempting bloggers as a class from regulation. One commenter observed that "crucial questions" must be answered before any blogger or online news source qualifies for the media exemption, such as whether the entity's resources are "devoted to collecting and disseminating information to the public"; whether the entity "inform[s] and educate[s] the public, offer[s] criticism, and provide[s] [a] forum[] for discussion and debate"; and whether the entity "serve[s] as a powerful antidote to governmental power abuses and hold[s] officials accountable to the people." Another commenter urged the Commission to consider a number of "relevant factors" in determining whether a blogger qualifies for the media exemption, such as whether the blogger receives payments from a campaign; whether the blogger solicits money for candidates; and whether the blogger engages in newsgathering or editorializing.

The Commission has decided to revise 11 CFR 100.73 and 11 CFR 100.132 to clarify that the media exemption applies to media entities that cover or carry news stories, commentary, and editorials on the Internet, just as it applies to media entities that cover or carry news stories, commentary, and editorials in traditional media, such as printed periodicals or television news programs. The Commission is also clarifying that the media exemption protects news stories, commentaries, and editorials no matter in what medium they are published. Therefore, the Commission has added "website" to the list of media in the exemption and is also adding "any Internet or electronic publication" to address publication of news stories, commentaries, or editorials in electronic form on the Internet.⁵² In so doing, the

Commission recognizes that the media exemption is available to media entities that cover or carry news stories, commentaries, or editorials solely on the Internet, as well as to media entities that cover or carry news stories, commentaries, and editorials solely in traditional media or in both traditional media and on the Internet.

The application of the media exemption to Internet communications is consistent with past instances in which the Commission has extended the media exemption to forms of media that did not exist or were not widespread when Congress enacted the exemption in 1974. For example, in 1996 the Commission changed its rules to make clear that the media exemption also applies to news stories, commentary, and editorials appearing in cable programming.⁵³ The Commission noted that, "in exempting news stories from the definition of 'expenditure,' Congress intended to assure 'the unfettered right of the newspapers, TV networks and other media to cover and comment on political campaigns.'" ⁵⁴ The Commission found that, "although the cable television industry was much less developed when Congress expressed this intent, it is reasonable to conclude that cable operators, programmers and producers, when operating in their capacity as news producers and distributors, would be precisely the type of 'other media' appropriately included within this exemption."⁵⁵

Similarly, although Congress could not have envisioned the Internet when it created the media exemption more than thirty years ago, much less the revolutionary changes in the area of political communication that the Internet has made possible, the Commission finds it reasonable to conclude that entities providing news on the Internet are precisely the type of "other media" appropriately included within the media exemption. As the Supreme Court noted, "It is not the intent of Congress in [FECA] * * * to limit or burden in any way the First

really truly impossible for any one person to grasp the scope of Internet communication technologies * * * [O]ff the top of my head, I could think of * * * blogging, e-mail, instant messaging, message boards, Yahoo groups, Internet Relay Chat, chat groups, podcasting, Internet radio, Flash animations, Web video, Webcams, peer-to-peer, and social networking software. Then, there is Grokster, * * * And the new Apple operating system has these little applications called widgets * * * and Microsoft promises to do the same. All of these technologies have political applications, obviously, yet they are vastly different."

⁵³ *Final Rules on Candidate Debates and News Stories*, 61 FR 18049 (Apr. 24, 1996).

⁵⁴ *Id.* at 18050 (quoting H.R. Rep. No. 93-1239, 93rd Cong., 2d Sess. at 4 (1974)).

⁵⁵ *Id.*

⁵¹ The lone dissenting commenter supported exempting all Internet publications from regulation, but recommended that the Commission craft a broad exception independent of the media exemption.

⁵² The terms "website" and "any Internet or electronic publication" are meant to encompass a wide range of existing and developing technology, such as websites, "podcasts," etc. See e.g., Testimony of Markos Moulitas Zuniga, Federal Election Commission Public Hearing on Internet Communications at 27-28 (June 28, 2005) ("It is

Amendment freedoms of the press and association. Thus, the exclusion assures the unfettered right of newspapers, TV networks, and other media to cover and comment on political campaigns.” *Massachusetts Citizens for Life*, 479 U.S. at 250 (citing H.R. Rep. No. 93–129 at p.4 (1974)).

The Commission finds as a matter of law that the media exemption applies to the same extent to entities with only an online presence as to those with an offline component as well. The Washington Post, New York Times, CNN and other newspapers and broadcast news sources maintain an online presence in addition to their traditional means of distribution and dissemination. Salon.com, Slate.com, and Drudgereport.com operate exclusively online. The Commission concludes that the media exemption applies with full force to all these types of entities.

The Commission has consistently viewed online, Internet-based dissemination of news stories, commentaries, and editorials to be indistinguishable from offline television and radio broadcasts, newspapers, magazines and periodical publications for the purposes of applying the media exemption under the Act. For example, in Advisory Opinion 2004–07, the Commission determined that the media exemption applied to MTV’s posting on its website of election-related educational materials and the results of a survey of people’s preferences for President of the United States. As the Commission noted, “websites are a common feature of many media organizations. The Commission considers posting news stories, commentaries, and editorials on a press entity’s website to be within the entity’s legitimate press functions.” Advisory Opinion 2004–07 (MTV, MTV Networks, Viacom, Inc. and Viacom International, Inc.). The Commission also concluded that the media exemption would apply to MTV’s contemporaneous announcement and publication of survey results to the public via e-mail and text messages. *Id.* See also Advisory Opinion 2003–34 (Viacom, Inc., Showtime Networks, Inc., and TMD Productions, Inc.) (promotion by Showtime and Viacom on their websites of a television series about a fictional presidential election that depicted some real Federal candidates and officeholders qualified for the media exemption).

The Commission has considered whether an Internet video programming operator that webcast content was entitled to the media exemption when it provided coverage of the Democratic

and Republican National Conventions over the Internet. In Advisory Opinion 2000–13 (Ampex Corporation and iNEXTV Corporation), iNEXTV did not create programming under its own name, but rather operated its own network of specialized news and information sites that offered direct access to governmental and business news events, interviews, and commentary with political figures, and a forum where viewers could state their opinions on specific issues via computer. The Commission concluded that iNEXTV’s activities on the Internet were viewable to the general public and were akin to a periodical or news program. Therefore, iNEXTV’s proposed gavel-to-gavel coverage of the Democratic and Republican National Conventions fit into the categories of news story and commentary that are exempted from the definition of “contribution” and “expenditure” under the Act.

The Commission has also made clear that the press exemption applies to a wide variety of online and offline activities. In Advisory Opinion 2005–16, the Commission determined that the media exemption applied to an entity whose Internet sites were publicly available and carried news stories, commentaries, and editorials that supported or opposed Federal candidates—even where the entity was founded and controlled by a former Federal officeholder and a former State party executive director. The Commission has specifically determined that the press exemption applies regardless of whether the news story, commentary, or editorial contains express advocacy. Media entities routinely endorse candidates, and the media exemption protects their right to do so. See Advisory Opinion 2005–16 (Fired Up! LLC) at 6 (noting that “an entity otherwise eligible for the press exception would not lose its eligibility * * * even if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office.”).

The Commission has also concluded that press entities do not forfeit the press exemption if they solicit contributions for candidates. See Advisory Opinion 1980–109 (James Hansen) (endorsement of a Federal candidate and solicitations to the Federal candidate’s campaign by a publication were covered by the news story exemption); Advisory Opinion 1982–44 (Democratic National Committee and Republican National Committee) (concluding that solicitations for a national party

committee on cable programming were protected by the press exemption).⁵⁶

Moreover, Commissioners have repeatedly concluded that the media exemption applies without regard to whether programming is biased or balanced. See MUR 3624 (Walter H. Shapiro) (concluding that pro-Bush/Quayle broadcast by Rush Limbaugh fell within the media exemption even though the broadcast was arguably biased); Statement of Reasons by Commissioners Wold, McDonald, Mason, Sandstrom, and Thomas in MURs 4929, 5006, 5090 and 5117 (ABC, CBS, NBC, New York Times, Los Angeles Times and Washington Post) (“Unbalanced news reporting and commentary are included in the activities protected by the media exemption.”); Statement of Reasons by Commissioners Wold and Mason in MUR 4946 (CBS News, Fox Network News, CNBC News, MSNBC News, CNN and ABC News) (“politically biased reporting and commentary remain within the “legitimate press function.””). See also Statement of Reasons by Commissioner Weintraub in MURs 5540, 5545, 5562, and 5570 (CBS, Kerry/Edwards 2004, Inc. and Sinclair Broadcasting) at 2 (“It is not the role of the Federal Election Commission to determine whether a news story issued by a press entity is legitimate, responsible, or verified * * * Whether particular broadcasts were fair, balanced, or accurate is irrelevant given the applicability of the press exemption.”).

Commissioners have also concluded that the presence or absence of alleged coordination between a press entity and a candidate or political party is irrelevant to determining whether the Act’s press exemption applies. See, e.g., Statement of Reasons of Commissioners Toner, Mason and Smith in MURs 5540 and 5545 (CBS, Kerry/Edwards 2004) (“Allegations of coordination are of no import when applying the press exemption. What a press entity says in broadcasts, news stories and editorials is absolutely protected under the press exemption, regardless of whether any

⁵⁶ There have been recent instances in which media entities have solicited contributions for Federal candidates. See e.g., *Kerry for Prez: Why Him, Why Now and How to Put Him in the White House*, Philadelphia Daily News, June 16, 2004 (containing a lead editorial that stated “[Y]ou can learn more about Kerry, make a donation or volunteer to help through his web site * * * The commonwealth—indeed the nation—cannot afford another four years of George Bush.”). See also Charles Krauthammer, *The Delusional Dean*, Washington Post, December 5, 2003 at A31 (op-ed by a syndicated columnist containing a solicitation for the Republican National Committee, including instructions on where readers should send contributions).

activities occurred that might otherwise constitute coordination under Commission regulations.”); Statement of Reasons of Commissioner Weintraub in MURs 5540, 5545, 5562, and 5570 (CBS, Kerry/Edwards 2004, Sinclair Broadcasting) (“I believe it is important to emphasize that the press exemption shields press entities from investigations into alleged coordination.”)

More recently, the Commission has determined that the media exemption applied to a blogger that covered and carried news stories, commentaries, or editorials. In Advisory Opinion 2005–16, the Commission analyzed the Internet activity of Fired Up! LLC (“Fired Up”), an entity that maintained a network of Internet websites but had no offline media presence. The Commission found that a primary function of Fired Up’s websites was to provide news and information to readers through commentary on, quotes from, summaries of, and hyperlinks to news articles appearing on other entities’ websites and Fired Up’s original reporting. The Commission viewed the posting of reader comments to the website as similar to letters to the editor and noted that FiredUp retained editorial control over the content displayed on its websites.⁵⁷ The Commission concluded that the activities of Fired Up’s websites were protected by the media exemption.

The Commission has decided not to change its rules regarding the media exemption so as to exempt all blogging activity from the definitions of “contribution” and “expenditure.” The Commission believes that such an exemption for one technology-specific category would be both too broad and too narrow: it would apply equally to blogging activity “that [is] not involved in the regular business of imparting news to the public”⁵⁸ and communications that are not news stories, commentary or editorials within the meaning of the media exemption;⁵⁹ at the same time, it would overlook other forms of Internet communication, such as publishing websites in other formats or “podcasting,” that are

equally deserving of consideration under the media exemption.⁶⁰ Moreover, given that methods of communicating over the Internet “are constantly evolving and difficult to categorize precisely,” the wholesale exemption of any particular method of Internet communication would be ill advised. *Reno*, 521 U.S. at 851.

The Commission concludes that bloggers and others who communicate on the Internet are entitled to the press exemption in the same way as traditional media entities. This is in keeping with the roles that bloggers play in the way that the public receives their news and information. Bloggers were issued press credentials for the National Nominating Conventions in 2004⁶¹ and, more recently, a blogger was issued permanent press credentials as a member of the White House press corps.⁶² Bloggers who are covering and reporting news stories in the same way that traditional media entities have reported on newsworthy events are entitled to the same media exemption protection that applies to media entities such as CNN, NBC, and other traditional media.⁶³

The Commission recognizes that the Internet allows for constant, up-to-the-minute reporting and coverage. The Commission has concluded that online providers of news stories, commentaries and editorials are within the press exemption. This conclusion reflects a broad reading of “periodical publication.” In Advisory Opinion 1980–109 (James Hansen), the Commission stated that a “periodical publication” means “a publication in bound pamphlet form appearing at regular intervals (usually either weekly, bi-weekly, monthly or quarterly) and containing articles of news, information, or entertainment.” However, with the advent of the Internet, frequent updating of the content of a website has become commonplace and is not tied to a publishing schedule but to the fast pace of breaking news and the availability of information. The Commission finds that the term “periodical” within the meaning of the Act’s media exemption ought not be construed rigidly to deny the media exemption to entities who

update their content on a frequent, but perhaps not fixed, schedule. Nor can “periodical publication” be restricted to works appearing in a bound, pamphlet form. To the extent that the conclusions in Advisory Opinion 1980–109 are not applicable to online media, that advisory opinion is hereby distinguished. The Commission notes that media entities such as WashingtonPost.com and Drudgereport.com, as well as many blogs, are updated throughout the day and function consistent with a dynamic definition of periodical publication.

X. 11 CFR 114.9—Use of Corporate or Labor Organization Facilities

In the *NPRM*, the Commission proposed amending its rule regarding the provision of corporate or labor organization facilities⁶⁴ in connection with a Federal election to clarify that an employee’s “occasional, isolated, or incidental use” of computer equipment and Internet services for Federal campaign activities would not be an expenditure or contribution by the corporation or labor organization. Based on the comments received in response to the proposal, the Commission is not amending 11 CFR 114.9 precisely as proposed, but instead is reaching the same result by adding a new safe harbor specifically allowing the use of corporate and labor organization facilities for certain individual Internet activity in connection with a Federal election.

As noted above, corporations and labor organizations are prohibited from making contributions or expenditures, or facilitating the making of contributions by certain persons, in connection with a Federal election. 2 U.S.C. 441b(a); 11 CFR 114.2(a), (b), and (f). However, corporations and labor organizations do not make contributions or expenditures, or facilitate the making of a contribution, by permitting “occasional, isolated, or incidental use” of corporate or labor organization facilities in connection with a Federal election by stockholders and employees of a corporation and officials, members, and employees of a labor organization. See 11 CFR 114.2(f)(i) and 11 CFR 114.9(a) and (b). Under section 114.9, certain classes of individuals may use corporate or labor organization facilities for Federal election purposes, but must reimburse the corporation or labor organization to the extent that, if at all,

⁵⁷ In Advisory Opinion 1982–44 (Democratic National Committee and Republican National Committee) the Commission made clear that “commentary” within the meaning of the press exemption is not limited to commentaries made by the broadcaster. The Commission emphasized that “commentary” was intended to allow third persons access to the media to discuss issues. The statute and regulations do not define the issues permitted to be discussed or the format in which they are to be presented under the “commentary” exemption.”

⁵⁸ *McConnell*, 540 U.S. at 208.

⁵⁹ See *id.* (“Section 304(f)(3)(B)(I)’s effect * * * excepts news items and commentary only.”).

⁶⁰ See note 52 clarifying that the terms “Website” and “any Internet or electronic publication” are meant to address a wide range of technology that may be used by entities entitled to the press exemption.

⁶¹ See <http://www.cnn.com/2004/TECH/internet/07/23/conventionbloggers/> (last visited 3/24/06).

⁶² See <http://www.foxnews.com/story/0,2933,149689,00.html> (last visited 3/24/06).

⁶³ The Commission notes that media entities such as the Washington Post, MSNBC, Fox News, and CNN have bloggers reporting news and commentary on their Web sites.

⁶⁴ The Commission notes that under current 11 CFR 114.9 the term “facilities” covers a wide variety of office equipment and supplies, including, but not limited to, copiers, fax machines, telephones, printers, scanners, and meeting and office space.

its overhead or operating costs are increased by the individual's "occasional, isolated, or incidental use" of the facilities. See 11 CFR 114.9(a)(1) and (b)(1). However, if a stockholder or employee of a corporation, or an official, member, or employee of a labor organization, makes more than "occasional, isolated, or incidental use" of corporate or labor organization facilities, and does not reimburse the corporation or labor organization within a commercially reasonable time at the normal and usual rental charge for the facilities used (rather than merely for the increase in overhead or operating costs), then the corporation or labor organization will have made a prohibited contribution or expenditure. See 11 CFR 114.9(a)(3) and (b)(3).⁶⁵

Although section 114.9 provides only general guidance for determining what constitutes "occasional, isolated, or incidental use," see 11 CFR 114.9(a)(1)(i) and (b)(1)(i), the section does contain safe harbor provisions. The safe harbors provide that any use of corporate or labor organization facilities, regardless of whether it occurs during or after working hours, is considered "occasional, isolated, or incidental use" if the use does not exceed one hour per week or four hours per month. See 11 CFR 114.9(a)(2)(ii) and (b)(2)(ii).

In the *NPRM*, the Commission proposed amending 11 CFR 114.9 to clarify that the term "facilities" includes computers, software, and other Internet equipment and services, but the Commission noted that an individual's use of corporate or labor organization computers and Internet services for campaign activity over the Internet at home, or at locations outside of work, would remain subject to the "occasional, isolated, or incidental use" restriction.

Comments on the Commission's proposal to amend 11 CFR 114.9 were mixed. Some commenters did not think that the rule needed clarification because the language of the current rule is already flexible enough to cover corporate and labor organization computers and Internet services used for political activity. Others commented that an explicit extension of § 114.9 to cover computers and Internet services would be "appropriate" and "reasonable." A number of commenters argued that the safe harbor of one hour a week or four hours a month was not

adequate for election-related personal Internet activities. As one commenter stated, applying the time limitations of the safe harbor provision to Internet activities "is simply not realistic in today's political environment."

Many commenters argued that in light of the unique nature of Internet activities and the portable nature of the computers and other facilities needed to conduct these activities, the Commission should treat the use of corporate and labor organization facilities for Internet activities differently from the use of such facilities for other activities. One commenter stated:

[I]t is now common for companies and unions to permit (and at times encourage or even require) employees to keep and use company- or union-owned laptops during non-working hours. Thus, for many employees, a company- or union-owned computer is their primary or only home computer, and the employees are permitted to make essentially unlimited personal use of those computers—including, for those so inclined, for political speech on the Internet.

In light of these developments, the vast majority of commenters who addressed this topic, including commenters from several reform organizations, argued that the Commission should abolish any time restriction on the use of corporate or labor organization computers and other Internet equipment and services.

The Commission acknowledges that personal use of corporate and labor organization laptops, e-mail, Internet service, and other similar facilities is often permitted, and the Commission agrees with these commenters that it would serve little purpose for Commission regulations to prohibit or overly restrict such common uses of facilities. The Commission agrees with a commenter who said "[c]orporate or labor organization provision of a computer and Internet access is not analogous to the use of a building or facility, either in financial or practical terms. What would be comparable is providing a pen and paper."

Accordingly, the Commission is amending 11 CFR 114.9 to add new safe harbors specifically addressing the provision of corporate or labor organization facilities for Internet activities. See 11 CFR 114.9(a)(2)(ii) and (b)(2)(ii). The new safe harbors provide that a corporation or labor organization may permit its employees, shareholders, officials, and members to use its computer and Internet facilities for volunteer individual Internet activity, as defined in 11 CFR 100.94, without a contribution resulting, provided that the activity does not prevent an employee

from completing the normal amount of work for which the employee is paid or is expected to perform, as specified in 11 CFR 100.54, does not increase the overhead or operating costs of the corporation or labor organization, and the activity is in no way coerced.

Thus, the new provisions of 11 CFR 114.9 complement the provisions of 11 CFR 100.94 and 100.155. Under 11 CFR 100.94 and 100.155, individuals are free to use whatever computer and Internet facilities that are otherwise available to them to engage in uncompensated Internet political activities. Under 11 CFR 114.9, corporations and labor organizations may permit access to their computers and Internet facilities so that stockholders, employees, members, and officials may conduct these activities. The final rules make clear that corporations and labor organizations may not condition the availability of their facilities on their being used for political activity or on support for or opposition to any particular candidate or political party. See 11 CFR 114.9(a)(1) and 114.9(b)(1). Rather, corporations and labor organizations may permit use of their facilities for political activities to the extent these facilities are available for other non-work-related purposes.

In the new safe harbors, the Commission is not quantifying a permissible level of use of corporate and labor organization facilities for Internet activities. As one commenter explained, "any organization, union or corporation, is going to have policies that control [the ability of employees or staff to use corporate facilities and union facilities], that restrict [such use] in order for it to do its ordinary business. And [] you can leave it to these organizations acting sensibly that they are not going to have a workplace where anyone can, to an unlimited amount, [at least] on the job, use their facilities for private pursuits, political pursuits, anything unrelated to the organization's mission." Additionally, because 11 CFR 100.54 applies to the safe harbors at 11 CFR 114.9(a)(2) and 114.9(b)(2), employees must complete their normal work in order to avail themselves of these safe harbors. Thus, individual Internet activities must be undertaken on the individual's own time.

One witness testified that "a lot of us work at all hours of the day, and it's very useful to be able to use the computer at the office for some of our personal work as well, whatever that may be * * * [to be limited to 1 hour per week and 4 hours per month is] basically just forcing people to kind of live an abnormal life." The reference to 11 CFR 100.54 is meant to address this type of situation and confirm that so

⁶⁵ The Commission notes that an individual using corporate or labor organization facilities to engage in personal uncompensated Internet activities will not make a contribution or expenditure because such Internet activities by individuals is exempt under new 11 CFR 100.94 and 100.155, as discussed above.

long as the campaign activity does not, as one witness stated, “interfere with their normal work,” *i.e.* the normal amount of work that the employee usually performs, no contribution will result.

The reference to 11 CFR 100.54 applies to the safe harbors at 11 CFR 114.9(a)(2) and (b)(2). Thus, while there is no specific time limit on Internet activities, employees must complete their normal work in order to avail themselves of these safe harbors. A corporation or labor organization may not subsidize the activity by, for example, reducing an employee’s workload to provide extra time for campaign activities at corporate or labor organization expense. Subject to those conditions, there is no ceiling on the amount of time that an employee may spend in a given day or week engaging in online political activities.

In addition to the safe harbors for the use of corporate or labor organization facilities to engage in Internet activities, the Commission is also preserving the one hour per week/four hours per month safe harbors, which will continue to apply across-the-board to usage of all types of corporate and labor organization facilities. *See* 11 CFR 114.9(a)(2)(i) and 114.9(b)(2)(i).

In the *NPRM*, the Commission sought comment on whether additional rules would be necessary to ensure that corporations and labor organizations did not “coerce” their employees or others into engaging in campaign activities over the Internet. The Commission received unanimous agreement from commenters addressing this issue that the current rules prohibiting corporate and labor organization coercion for contributions or fundraising activities are sufficient to prevent such behavior regarding Internet activities. Since the new safeguards for individual Internet activity encompass more than fundraising activities, however, the Commission is adding new provisions at 11 CFR 114.9(a)(2)(ii)(C) and (b)(2)(ii)(C) to ensure that every individual is free to express his or her own views, without fear of reprisal. The Commission notes that corporations and labor organizations providing their facilities to their employees, stockholders, officials, or members remain subject to the prohibitions contained in 11 CFR 114.2, which includes a prohibition on the use of coercion, including threat of detrimental job action, any other financial reprisal, or force, to urge any individual to make a contribution or engage in fundraising activities on behalf of a candidate or political committee. *See* 11 CFR 114.2(f)(2)(iv); *see also* 2 U.S.C. 441b(3). The

Commission is also adding new paragraph (e) to § 114.9 to indicate that this section does not alter other provisions of 11 CFR part 114 regarding communications to and beyond a corporation’s or labor organization’s restricted class.

The Commission is also making technical amendments to 11 CFR 114.9 to restructure the format of the existing safe harbor. This change does not alter the substance of the rule or the existing safe harbor, but merely provides a clearer rule structure to accommodate the new safe harbor provision.

Certification of No Effect Pursuant to 5 U.S.C. 605(b)

Regulatory Flexibility Act

The Commission certifies that the attached final rules will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the individuals and not-for-profit entities affected by these proposed rules are not “small entities” under 5 U.S.C. 601. The definition of “small entity” does not include individuals, but classifies a not-for-profit enterprise as a “small organization” if it is independently owned and operated and not dominant in its field. 5 U.S.C. 601(4).

State, district, and local party committees affected by these proposed rules are not-for-profit committees that do not meet the definition of “small organization.” State political party committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals, and they are affiliated with the larger national political party organizations. In addition, the State political party committees representing the Democratic and Republican parties have a major controlling influence within the political arena of their State and are thus dominant in their field. District and local party committees are generally considered affiliated with the State committees and need not be considered separately.

Separate segregated funds affected by these proposed rules are not-for-profit political committees that do not meet the definition of “small organization” because they are financed by a combination of individual contributions and financial support for certain expenses from corporations, labor organizations, membership organizations, or trade associations, and therefore are not independently owned and operated.

Most other political committees affected by these rules are not-for-profit

committees that do not meet the definition of “small organization.” Most political committees are not independently owned and operated because they are not financed by a small identifiable group of individuals. Most political committees rely on contributions from a large number of individuals to fund the committees’ operations and activities.

To the extent that any State party committees representing minor political parties or any other political committees might be considered “small organizations,” the number affected by this proposed rule is not substantial. Additionally, the proposed rule preserves the Commission’s general exclusion of Internet communications from the scope of regulation, and only State, district, and local political parties and candidates could be subject to different funding requirements for certain communications. Accordingly, to the extent that any other entities may fall within the definition of “small entities,” any economic impact of complying with these rules will not be significant.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 110

Campaign funds, Political committees and parties.

11 CFR Part 114

Business and industry, elections, labor.

■ For the reasons set out in the preamble, the Federal Election Commission amends Subchapter A of Chapter 1 of Title 11 of the *Code of Federal Regulations* as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

■ 2. Section 100.25 is republished to read as follows:

§ 100.25 Generic campaign activity (2 U.S.C. 431(21)).

Generic campaign activity means a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate.

■ 3. Section 100.26 is revised to read as follows:

§ 100.26 Public communication (2 U.S.C. 431(22)).

Public communication means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term *general public political advertising* shall not include communications over the Internet, except for communications placed for a fee on another person's Web site.

■ 4. The introductory text of § 100.73 is revised to read as follows:

§ 100.73 News story, commentary, or editorial by the media.

Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not a contribution unless the facility is owned or controlled by any political party, political committee, or candidate, in which case the costs for a news story:

* * * * *

■ 5. Section 100.94 is added to subpart C to read as follows:

§ 100.94 Uncompensated Internet activity by individuals that is not a contribution.

(a) When an individual or a group of individuals, acting independently or in coordination with any candidate, authorized committee, or political party committee, engages in Internet activities for the purpose of influencing a Federal election, neither of the following is a contribution by that individual or group of individuals:

(1) The individual's uncompensated personal services related to such Internet activities;

(2) The individual's use of equipment or services for uncompensated Internet activities, regardless of who owns the equipment and services.

(b) *Internet activities*. For the purposes of this section, the term "Internet activities" includes, but is not limited to: Sending or forwarding electronic messages; providing a hyperlink or other direct access to another person's Web site; blogging; creating, maintaining or hosting a Web site; paying a nominal fee for the use of another person's Web site; and any other form of communication distributed over the Internet.

(c) *Equipment and services*. For the purposes of this section, the term "equipment and services" includes, but

is not limited to: Computers, software, Internet domain names, Internet Service Providers (ISP), and any other technology that is used to provide access to or use of the Internet.

(d) Paragraph (a) of this section also applies to any corporation that is wholly owned by one or more individuals, that engages primarily in Internet activities, and that does not derive a substantial portion of its revenues from sources other than income from its Internet activities.

(e) This section does not exempt from the definition of contribution:

(1) Any payment for a public communication (as defined in 11 CFR 100.26) other than a nominal fee;

(2) Any payment for the purchase or rental of an e-mail address list made at the direction of a political committee; or

(3) Any payment for an e-mail address list that is transferred to a political committee.

■ 6. The introductory text of § 100.132 is revised to read as follows:

§ 100.132 News story, commentary, or editorial by the media.

Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), Web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, is not an expenditure unless the facility is owned or controlled by any political party, political committee, or candidate, in which case the cost for a news story:

* * * * *

■ 7. Section 100.155 is added to read as follows:

§ 100.155 Uncompensated Internet activity by individuals that is not an expenditure.

(a) When an individual or a group of individuals, acting independently or in coordination with any candidate, authorized committee, or political party committee, engages in Internet activities for the purpose of influencing a Federal election, neither of the following is an expenditure by that individual or group of individuals:

(1) The individual's uncompensated personal services related to such Internet activities;

(2) The individual's use of equipment or services for uncompensated Internet activities, regardless of who owns the equipment and services.

(b) *Internet activities*. For the purposes of this section, the term "Internet activities" includes, but is not limited to: Sending or forwarding electronic messages; providing a hyperlink or other direct access to

another person's website; blogging; creating maintaining or hosting a website; paying a nominal fee for the use of another person's website; and any other form of communication distributed over the Internet.

(c) *Equipment and services*. For the purposes of this section, the term "equipment and services" includes, but is not limited to: Computers, software, Internet domain names, Internet Service Providers (ISP), and any other technology that is used to provide access to or use of the Internet.

(d) Paragraph (a) of this section also applies to any corporation that is wholly owned by one or more individuals, that engages primarily in Internet activities, and that does not derive a substantial portion of its revenues from sources other than income from its Internet activities.

(e) This section does not exempt from the definition of expenditure:

(1) Any payment for a public communication (as defined in 11 CFR 100.26) other than a nominal fee;

(2) Any payment for the purchase or rental of an e-mail address list made at the direction of a political committee; or

(3) Any payment for an e-mail address list that is transferred to a political committee.

PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

■ 8. The authority citation for part 110 continues to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d, 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h, and 36 U.S.C. 510.

■ 9. Paragraph (a) of § 110.11 is revised to read as follows:

§ 110.11 Communications; advertising; disclaimers (2 U.S.C. 441d).

(a) *Scope*. The following communications must include disclaimers, as specified in this section:

(1) All public communications, as defined in 11 CFR 100.26, made by a political committee; electronic mail of more than 500 substantially similar communications when sent by a political committee; and all Internet websites of political committees available to the general public.

(2) All public communications, as defined in 11 CFR 100.26, by any person that expressly advocate the election or defeat of a clearly identified candidate.

(3) All public communications, as defined in 11 CFR 100.26, by any person that solicit any contribution.

(4) All electioneering communications by any person.

* * * * *

PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY

■ 10. The authority citation for part 114 is revised to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432, 434, 437d(a)(8), 438(a)(8), 441b.

■ 11. In § 114.9, paragraphs (a) and (b) are revised and new paragraph (e) is added to read as follows:

§ 114.9 Use of corporate or labor organization facilities.

(a) *Use of corporate facilities for individual volunteer activity by stockholders and employees.*

(1) Stockholders and employees of the corporation may, subject to the rules and practices of the corporation and 11 CFR 100.54, make occasional, isolated, or incidental use of the facilities of a corporation for individual volunteer activity in connection with a Federal election and will be required to reimburse the corporation only to the extent that the overhead or operating costs of the corporation are increased. A corporation may not condition the availability of its facilities on their being used for political activity, or on support for or opposition to any particular candidate or political party. As used in this paragraph, *occasional, isolated, or incidental use* generally means—

(i) When used by employees during working hours, an amount of activity which does not prevent the employee from completing the normal amount of work which that employee usually carries out during such work period; or

(ii) When used by stockholders other than employees during the working period, such use does not interfere with the corporation in carrying out its normal activities.

(2) *Safe harbor.* For the purposes of paragraph (a)(1) of this section, the following shall be considered occasional, isolated, or incidental use of corporate facilities:

(i) Any individual volunteer activity that does not exceed one hour per week or four hours per month, regardless of whether the activity is undertaken during or after normal working hours; or

(ii) Any such activity that constitutes voluntary individual Internet activities (as defined in 11 CFR 100.94), in excess of one hour per week or four hours per month, regardless of whether the activity is undertaken during or after normal working hours, provided that:

(A) As specified in 11 CFR 100.54, the activity does not prevent the employee from completing the normal amount of work for which the employee is paid or is expected to perform;

(B) The activity does not increase the overhead or operating costs of the corporation; and

(C) The activity is not performed under coercion.

(3) A stockholder or employee who makes more than occasional, isolated, or incidental use of a corporation's facilities for individual volunteer activities in connection with a Federal election is required to reimburse the corporation within a commercially reasonable time for the normal and usual rental charge, as defined in 11 CFR 100.52(d)(2), for the use of such facilities.

(b) *Use of labor organization facilities for individual volunteer activity by officials, members, and employees.*

(1) The officials, members, and employees of a labor organization may, subject to the rules and practices of the labor organization and 11 CFR 100.54, make occasional, isolated, or incidental use of the facilities of a labor organization for individual volunteer activity in connection with a Federal election and will be required to reimburse the labor organization only to the extent that the overhead or operating costs of the labor organization are increased. A labor organization may not condition the availability of its facilities on their being used for political activity, or on support for or opposition to any particular candidate or political party. As used in this paragraph, *occasional, isolated, or incidental use* generally means—

(i) When used by employees during working hours, an amount of activity during any particular work period which does not prevent the employee from completing the normal amount of work which that employee usually carries out during such work period; or

(ii) When used by members other than employees during the working period, such use does not interfere with the labor organization in carrying out its normal activities.

(2) *Safe harbor.* For the purposes of paragraph (b)(1) of this section, the following shall be considered occasional, isolated, or incidental use of labor organization facilities:

(i) Any individual volunteer activity that does not exceed one hour per week or four hours per month, regardless of whether the activity is undertaken during or after normal working hours; or

(ii) Any such activity that constitutes voluntary individual Internet activities (as defined in 11 CFR 100.94), in excess of one hour per week or four hours per month, regardless of whether the activity is undertaken during or after normal working hours, provided that:

(A) As specified in 11 CFR 100.54, the activity does not prevent the employee from completing the normal amount of work for which the employee is paid or is expected to perform;

(B) The activity does not increase the overhead or operating costs of the labor organization; and

(C) The activity is not performed under coercion.

(3) The officials, members, and employees who make more than occasional, isolated, or incidental use of a labor organization's facilities for individual volunteer activities in connection with a Federal election are required to reimburse the labor organization within a commercially reasonable time for the normal and usual rental charge, as defined in 11 CFR 100.52(d)(2), for the use of such facilities.

(e) Nothing in this section shall be construed to alter the provisions in 11 CFR Part 114 regarding communications to and beyond a restricted class.

Dated: March 27, 2006.

Michael E. Toner,

Chairman, Federal Election Commission.

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DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 563e

[No. 2006-16]

RIN 1550-AB48

Community Reinvestment Act—Community Development

AGENCY: Office of Thrift Supervision, Treasury (OTS).

ACTION: Final rule.

SUMMARY: In this final rule, OTS is revising the definition of “community development” in its Community Reinvestment Act (CRA) regulations to reduce burden and provide greater flexibility to meet community needs. The change is designed to encourage savings associations to increase their community development lending, qualified investments, and community development services in distressed or underserved rural areas and designated disaster areas. This change will make OTS's definition of “community development” and the definition of the other federal banking agencies uniform. OTS is also making a technical change to conform the lettering of its definitions