

Agenda

Item #6



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commissioners
From: Jonathan Wayne, Executive Director
Date: September 21, 2010
Re: Investigation of Cutler Files

On September 7, 2010, the gubernatorial campaign of Eliot Cutler submitted the attached request for an investigation concerning the Cutler Files website (www.cutlerfiles.com). The campaign states that the website expressly advocated for the defeat of Mr. Cutler. Based on the language on the website at that time, the Commission staff agreed. (At that time, the website contained language stating that Mr. Cutler was unfit to be governor and would make a lousy governor.) Accordingly, the staff reached the preliminary view that the website violated 21-A M.R.S.A. § 1014 by not including a statement of who made or financed the expenditure for the communication and a statement whether a candidate authorized the expenditure.

You met on September 9, 2010 to consider a candidate's appeal concerning Maine Clean Election Act funding. Under the heading of other business, I raised the Cutler Files website with you and you authorized the Commission staff to initiate an investigation.

On September 9, 2010, I asked for an opportunity to interview someone whom I believed had knowledge of the website. That person voluntarily consented to an interview. The witness knows the individual(s) involved in the website, but declined to identify them.

On September 9 or 10, the language on the website changed. The creator(s) of the website later told me in an e-mail that they received some informal legal advice and decided to change the language to eliminate express advocacy. I am not sure that you

will agree that express advocacy has been eliminated. There continue to be several references to the office of governor, Mr. Cutler's campaign, and the motivation for Mr. Cutler's campaign. The website addresses members of the public as "voters." The website as a whole seems to be a rebuttal to Mr. Cutler's campaign for governor. It suggests that the candidate lacks attributes which are commonly viewed as qualifications for office (trustworthiness, competence, etc.).

The creator(s) of the website seek to remain anonymous, and have requested an opportunity to present legal objections to the investigation to you through an attorney. First, they state that the costs of the website are de minimis and any Commission action to identify the website creator(s) interferes with their First Amendment rights of political expression. They analogize the website to people expressing their views of candidates on a Facebook page or by commenting on a newspaper webpage. Also, they believe that Section 1014 affords them a 10-day opportunity to correct any violation on the website, which they believe they have accomplished.

After consulting with the Commission's Counsel and Chair, I advised the person(s) responsible for the website that they could use your September 30 meeting as an opportunity to present legal arguments. Preliminarily, the Commission staff disagrees with their point of view, but I need to confer with the Commission's counsel before offering a recommendation because of the First Amendment issues involved. The people responsible created a highly public communication tool that was intended for wide consumption by voters. It is different than a Facebook page. The cost may be small, but that doesn't diminish the informational interest of the public in knowing who is responsible.

The "paid for" information in Section 1014 serves an important public function in educating voters concerning who is financially responsible for paid communications and whether another candidate authorized the communications. This information assists voters in evaluating the content of paid communications. The statute does not contain any monetary threshold that triggers the required disclosure.

Also, you may wish to be skeptical of any suggestion that the person(s) behind the website are unsophisticated. They clearly are capable of research. The burden of including a statement along the lines of "Paid for by _____" is minimal in the context of the language of the website. The person(s) involved received editorial advice from someone with considerable campaign experience who could have easily picked up the phone to call the Commission to discover the disclosure requirements. In other words, the website is anonymous not by accident, but because it was intended to be anonymous.

If, at the September 30 meeting, you reject the legal arguments of the Cutler Files creator(s) and authorize the investigation, it could be completed quickly.

The Commission staff will forward to you a written submission from the Cutler Files and a response from the Commission staff and counsel prior to the September 30 meeting.

Thank you for your consideration of this memo.

DrummondWoodsum

Richard A. Spencer

rspencer@dwmlaw.com

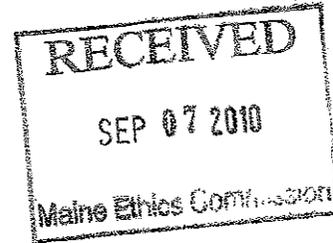
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By E-Mail @ Jonathon.Wayne@Maine.gov
and U.S. Mail

September 3, 2010

Jonathan Wayne
Ethics Director
Maine Commission on Governmental Ethics
135 State House Station
Augusta, ME 04333

RE: Governmental Ethics Complaint filed on behalf of Cutler
2010

Dear Jonathan:

I am writing on behalf of Cutler 2010 to request that the Maine Commission on Governmental Ethics conduct an investigation to determine who has made and financed the anonymous express advocacy communications found on the Cutlerfile website which I brought to your attention earlier this week. This anonymous website contains express advocacy communications that include untruths, half-truths, and are malicious and defamatory as well. We request that the Commission take appropriate legal action against the person or persons who made and/or financed these express advocacy communications for violation of Maine's election laws, including but not limited to:

1. Failure to disclose the name and address of person or persons who made and/or authorized the expenditures for express advocacy communications as required by 21-A MRS §1014;
2. Failure to disclose whether the express advocacy communications were or were not authorized by a candidate, a candidates authorized political committee or their agents as required by 21-A MRS §1014(1)(2);
3. Violation of 21-A MRS §1014 with the intent to misrepresent whether the express advocacy communications were or were not authorized by a candidate as prohibited by 21-A MRS §1014(4);

September 3, 2010
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4. Failure to comply with the reporting requirements of 21-A MRS §§1017 through 1020-A; and/or
5. Failure to comply with the limitations on contributions and expenditures established by 21-A MRS §1015.

Please direct any response to this governmental ethics complaint to Ted O'Meara, the Campaign Manager for Cutler 2010, as I will be out of the office through September 15th.

Thank you for your attention to this matter.

Very truly yours,



Richard A. Spencer

RAS/kmr

cc: Ted O'Meara

21A § 1013-B. Removal of treasurer; filling vacancy of treasurer; substantiation of records of treasurer; notification to commission

A candidate may remove any treasurer that the candidate has appointed. In case of a vacancy in the position of treasurer of a candidate or treasurer of a political committee before the obligations of the treasurer have been performed, the candidate shall serve as treasurer from the date of the vacancy until the candidate appoints a successor and reports the name and address of the successor to the commission. The candidate shall file a written statement of resignation of a treasurer of a candidate or a treasurer of a political committee and until that statement has been filed, the resignation is not effective. An individual who vacates the position of treasurer by reason of removal or resignation shall certify in writing the accuracy of the treasurer's records to the succeeding treasurer. A succeeding treasurer may not be held responsible for the accuracy of the predecessor's records.

21A § 1014. Publication or distribution of political statements

1. Authorized by candidate. Whenever a person makes an expenditure to finance a communication expressly advocating the election or defeat of a clearly identified candidate through broadcasting stations, newspapers, magazines, campaign signs or other outdoor advertising facilities, publicly accessible sites on the Internet, direct mails or other similar types of general public political advertising or through flyers, handbills, bumper stickers and other nonperiodical publications, the communication, if authorized by a candidate, a candidate's authorized political committee or their agents, must clearly and conspicuously state that the communication has been so authorized and must clearly state the name and address of the person who made or financed the expenditure for the communication. The following forms of political communication do not require the name and address of the person who made or authorized the expenditure for the communication because the name or address would be so small as to be illegible or infeasible: ashtrays, badges and badge holders, balloons, campaign buttons, clothing, coasters, combs, emery boards, envelopes, erasers, glasses, key rings, letter openers, matchbooks, nail files, noisemakers, paper and plastic cups, pencils, pens, plastic tableware, 12-inch or shorter rulers, swizzle sticks, tickets to fund-raisers and similar items determined by the commission to be too small and unnecessary for the disclosures required by this section. A communication financed by a candidate or the candidate's committee is not required to state the address of the candidate or committee that financed the communication. A communication in the form of a sign that clearly identifies the name of the candidate and is lettered or printed individually by hand is not required to include the name and address of the person who made or financed the communication.

2. Not authorized by candidate. If the communication described in subsection 1 is not authorized by a candidate, a candidate's authorized political committee or their agents, the communication must clearly and conspicuously state that the communication is not authorized by any candidate and state the name and address of the person who made or financed the expenditure for the communication. If the communication is in written form, the communication must contain at the bottom of the communication in 10-point bold print, Times New Roman font, the words "NOT PAID FOR OR AUTHORIZED BY ANY CANDIDATE."



2-A. Communication. Whenever a person makes an expenditure to finance a communication that names or depicts a clearly identified candidate and that is disseminated during the 21 days before a primary election or 35 days before a general election through the media described in subsection 1, the communication must state the name and address of the person who made or financed the communication and a statement that the communication was or was not authorized by the candidate. The disclosure is not required if the communication was not made for the purpose of influencing the candidate's nomination for election or election.

3. Broadcasting prohibited without disclosure. No person operating a broadcasting station within this State may broadcast any communication, as described in subsections 1 to 2-A, without an oral or written visual announcement of the disclosure required by this section.

3-A. In-kind contributions of printed materials. A candidate, political committee or political action committee shall report on the campaign finance report as a contribution to the candidate, political committee or political action committee any contributions of in-kind printed materials to be used in the support of a candidate or in the support or defeat of a ballot question. Any in-kind contributions of printed materials used or distributed by a candidate, political committee or political action committee must include the name or title of that candidate, political committee or political action committee as the authorizing agent for the printing and distribution of the in-kind contribution.

3-B. Newspapers. A newspaper may not publish a communication described in subsections 1 to 2-A, without including the disclosure required by this section. For purposes of this subsection, "newspaper" includes any printed material intended for general circulation or to be read by the general public, including a version of the newspaper displayed on a website owned or operated by the newspaper. When necessary, a newspaper may seek the advice of the commission regarding whether or not the communication requires the disclosure.

4. Enforcement. An expenditure, communication or broadcast made within 20 days before the election to which it relates that results in a violation of this section may result in a civil fine of no more than \$200. The person who financed the communication or who committed the violation shall correct the violation within ten (10) days after receiving notification of the violation from the commission. An expenditure, communication or broadcast made more than 20 days before the election that results in a violation of this section may result in a civil fine of no more than \$100 if the violation is not corrected within ten (10) days after the person who financed the communication or other person who committed the violation receives notification of the violation from the commission. If the commission determines that a person violated this section with the intent to misrepresent the name or address of the person who made or financed the communication, or whether the communication was or was not authorized by the candidate, the commission may impose a fine of no more than \$5,000 against the person responsible for the communication. Enforcement and collection procedures must be in accordance with section 1020-A.

5. Telephone calls. Prerecorded automated telephone calls and scripted live telephone communications that name a clearly identified candidate during the 21 days before a primary election or the 35 days before a general election must clearly state the name of the person who made or financed the expenditure for the communication, except for prerecorded automated telephone calls paid for by the candidate that use the

Wayne, Jonathan

From: Michael Blessing [cutlerfiles@yahoo.com]
Sent: Wednesday, September 15, 2010 8:46 AM
To: Wayne, Jonathan
Cc: Gardiner, Phyllis; Lavin, Paul
Subject: Re: Notice of Ethics Commission Investigation

Dear Mr. Wayne,

Thank you for your letter of Sept. 13 notifying us of your investigation into potential violations of Maine's campaign laws.

It is certainly not our intention to violate applicable campaign laws. Our goal is merely to provide important information to the public which we strongly believe is being ignored, perhaps intentionally, by the mainstream news media.

We have consulted two lawyers with experience in Maine's campaign laws and offer the following:

1. We have made substantial changes to the website since you viewed it on Sept. 9. We believe the site does not expressly advocate for the election or defeat of Mr. Cutler. All references to his abilities or fitness to be Maine's governor have been removed. The site now carries a disclaimer on each page stating that the site is not authorized by any candidate. If there are other statements which you believe cross the line into advocacy, please let us know and we will remove them as soon as possible.
2. As we understand the law, a violation does not technically occur until 10 days after notification of the potential violation, and only if the potential violation is not corrected. We have made changes to the website within that 10 day time period and are now in compliance.
3. We also understand from the statute that since our website does not expressly advocate the election or defeat of Mr. Cutler, a more complete disclaimer is not required until 35 days before the election. As of this writing, we are 48 days from the Election.

Again, we believe our website is in full compliance with Maine law. As we state on the website, it is neither authorized or financed by a candidate or political party.

Please don't hesitate to contact us again with any questions or concerns.

Thank you.

The Cutler Files

From: "Wayne, Jonathan" <Jonathan.Wayne@maine.gov>
To: cutlerfiles@yahoo.com

9/21/2010

Cc: "Gardiner, Phyllis" <Phyllis.Gardiner@maine.gov>; "Lavin, Paul" <Paul.Lavin@maine.gov>

Sent: Mon, September 13, 2010 3:37:17 PM

Subject: Notice of Ethics Commission Investigation

Wayne, Jonathan

From: Michael Blessing [cutlerfiles@yahoo.com]
Sent: Tuesday, September 21, 2010 6:52 AM
To: Wayne, Jonathan
Cc: Gardiner, Phyllis; Lavin, Paul
Subject: Re: Commission Investigation

Jonathan,

Thanks for your note. Yes, we would arrange to have an attorney present at the Sept. 30 meeting to argue on our behalf that, as we state on our website, it is our First Amendment right to post Cutler Files and that the Commission has no reason to investigate and expose its authors. We certainly understand your right to ensure that Maine's campaign laws are enforced, however we can provide assurance to you that, as we state, the website is the work of individuals unconnected to candidates or political parties and the financing of the site is, as you state, minimal. We can also provide numerous other examples of anonymous postings and Facebook pages by individuals in Maine regarding candidates for office that have not received the attention of the Commission.

Again, thanks for your understanding and we will continue to be in contact with you through our attorneys.

The Cutler Files

From: "Wayne, Jonathan" <Jonathan.Wayne@maine.gov>
To: Michael Blessing <cutlerfiles@yahoo.com>
Cc: "Gardiner, Phyllis" <Phyllis.Gardiner@maine.gov>; "Lavin, Paul" <Paul.Lavin@maine.gov>
Sent: Mon, September 20, 2010 5:45:56 PM
Subject: Commission Investigation

As you may have heard, the Commission Chair has signed a subpoena to require a witness to provide testimony to the Commission staff concerning the Cutler Files website. The testimony would be provided on September 24 (in four days). I received a call from an attorney informally advising the witness. She made the legal argument that it is a violation of your First Amendment rights for the Commission to use its investigative power to identify you, because the website constitutes the speech of one person (assisted by the witness) and the total cost of the website was \$12.95. I am not sure if that is accurate.

After consulting further with the Commission chair and counsel, we do see one alternative to requiring testimony of the witness on September 24.

The Commission is scheduled to meet on Thursday, September 30 at 9:00 a.m. at our office at 45 Memorial Circle in Augusta. I am preparing the agenda for the meeting by 12:00 noon tomorrow.

If you take the legal position that you have had the right to create and maintain the website anonymously (either on First Amendment grounds, or because you've corrected the violation), and you would like to present those legal arguments to the Commissioners through an attorney at their September 30 meeting, I can include your attorney's presentation on the agenda for the September 30 meeting. You would not need to be identified to make these legal arguments. Your attorney could follow up with a letter presenting your legal position as soon as is feasible, and I would forward that to the Commissioners. The Commission's counsel and I would want to provide a written response to the Commissioners before the September 30 meeting. Throughout this process, the Commission staff would not voluntarily identify you or the witness. It would be your opportunity to argue, through your attorney, that there should be no investigation.

If you want to proceed with this alternative, I would need you to confirm by 12:00 noon tomorrow that an attorney will be present to make the presentation on your behalf at the September 30 meeting.

By the way, the Commission staff does not necessarily agree with your contention that the website no longer expressly

9/21/2010

advocates Mr. Cutler's defeat. The website makes a number of references to the office of Governor, to Mr. Cutler's campaign, and to the reasons Mr. Cutler is seeking the position. The website addresses the public specifically as voters. The website largely seems positioned as a rebuttal to claims Mr. Cutler is making in his electoral campaign. I couldn't respond to this issue on September 17 and I need to leave the office for the day, but I wanted to let you know that the staff could be disagreeing with you on this point.

Thank you.

Jonathan Wayne
Executive Director
Maine Ethics Commission
135 SHS
Augusta, ME 04333
287-4179



STATE OF MAINE
COMMISSION ON GOVERNMENT/
AND ELECTION PRACTICE
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

**Additional Materials for
Agenda Item #6**

To: Commissioners
From: Jonathan Wayne, Executive Director
Date: September 28, 2010
Re: Cutler Files Investigation

This memo is to provide you with more background information for your consideration of the First Amendment objections raised by the attorney for the Cutler Files website in his September 26, 2010 letter (attached). This memo supplements the materials contained in the September 21 packet.

Initiation of Investigation

The Cutler Files website (www.cutlerfiles.com) was posted to the internet around Monday, August 30. The website has grown in the past month, as new pages for different topics have been added. My expectation is that the website will not exist after today, because a broader standard for independent expenditure reporting goes into effect tomorrow.

On September 7, 2010, the gubernatorial campaign of Eliot Cutler submitted a request for an investigation concerning the website. The Commission was scheduled to meet two days later. At the meeting, I expressed the view that the website likely violates 21-A M.R.S.A. § 1014 and asked for authorization to investigate. Under that provision, a public communication that expressly advocates for the defeat of a candidate must contain a statement of who “made or financed the expenditure” for the communication and a statement whether the communication was authorized by any candidate.

On September 9, you authorized the staff to investigate the website. I began by interviewing a witness who had knowledge of the website, but who declined to identify its creator(s). After conferring with the Commission’s counsel and chair, I suspended the

investigation to provide the Cutler Files with an opportunity to raise First Amendment objections to you.

Self-Descriptions of Cutler Files Author(s)

The Cutler Files website contains the following self-description:

Who we are: We are a group of researchers, writers and journalists who are frustrated that Maine's mainstream media is either unwilling or incapable of adequately investigating the backgrounds of candidates for higher office. We are not authorized by or affiliated with any candidate or political party, and we have not been compensated in any way for our effort.

In an e-mail that was published on a Maine-based political website, Dirigo Blue, the website's author(s) described themselves as "a bunch of amateurs." The e-mail referred to a "chief researcher and writer." My preliminary investigation indicated that the researcher gathered information on Mr. Cutler in the spring of 2010 or earlier. After the June 8, 2010 primary election, the researcher has tried to disseminate the information concerning Mr. Cutler to the public, and established the Cutler Files website in August as the vehicle. The researcher has received assistance from at least one other person.

In his September 26, 2010 letter, counsel for the Cutler Files states:

[T]he blog was not intended as a campaign vehicle but rather an exercise in citizen journalism – researching, reporting, and analyzing information about a candidate for major office. Just like the mainstream media, the blog both reports facts and offers analysis and opinion based on those facts.

The total amount spent to create and maintain the Cutler Files has been less than \$100.00. No person or entity has been compensated, directly or indirectly, to create the content or design of the site. Technology has advanced so that people with modest technical expertise can create websites and blogs easily and inexpensively. The major expense in creating the blog was the cost of registering and hosting the URL.

The blog is not owned, operated or controlled by any political party, political committee, candidate or candidate's immediate family.

Based on the limited information we have, the staff of the Commission finds it plausible that no current candidate for governor has authorized the website. On the other hand, my expectation is that the people involved are not strictly “civilians” either. They have research and communication skills, and connections to political campaigns that could easily have allowed them to know of and comply with the disclosure requirements of 21-A M.R.S.A. § 1014.

Argument by Cutler Files Counsel Daniel I. Billings

Attorney Dan Billings argues that the Cutler Files author(s) wish to remain anonymous because “they do believe that their identities might detract from the impact of the information set forth in the blog.” (September 26, 2010 letter, at 2) Also, “it is certainly plausible that [Eliot Cutler] might turn his resources towards seeking vengeance on the authors of the Cutler Files.” (*Id.*) He relies on two U.S. Supreme Court decisions to argue that anonymous speech is protected by the First Amendment of the U.S. Constitution. He contends that 21-A M.R.S.A. § 1014

is not narrowly tailored because it applies to all expenditures that expressly advocate the election or defeat of a candidate. Certainly, Maine law cannot have an overriding interest that trumps the broad protections that the Constitution provides political speech when such communication is not done by a party, candidate or committee and such communication cost[s] merely a de minimis amount of money.

(September 26, 2010 letter, at 4) (underlining in original) He argues that the Commission should not enforce 21-A M.R.S.A. § 1014 against the Cutler Files and should terminate its investigation.

Justification for Political “Disclaimer” Requirements

The attribution and disclaimer requirements in 21-A M.R.S.A. § 1014 assist members of the electorate by informing them concerning who is speaking to them about political candidates. This increases their ability to evaluate campaign messages in the closing weeks before an election. The informational interest of the public was recently recognized by the U.S. District Court for the District of Maine in National Organization

for Marriage v. McKee, No. 09-538, Decision and Order, at 30-32 (D. Me. Aug. 19, 2010):

[The attribution and disclaimer requirements] are justified by the governmental interest in providing information to the electorate and permitting the electorate to make informed choices. Indeed, Citizens United refused to import the “express advocacy and its functional equivalent” test into disclosure and disclaimer rules. Whether they deal with express advocacy or not, “the public has an interest in knowing who is speaking about a candidate shortly before an election.” [citing to Citizens United v. Federal Election Commission, 130 S.Ct. 876, 914-16 (2010)]

Decision and Order, at 34-35. In Citizens United, the Court noted the importance of transparency laws in informing the electorate about who is speaking:

The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

Citizens United, 130 S.Ct. at 916.

Preliminary Response by Commission Staff

The Commission staff first had an opportunity to review Mr. Billings’ legal objections to the investigation last night, and we conferred with the Commission’s counsel today. Mr. Billings’ argument that 21-A M.R.S.A. § 1014 should not be applied to communications costing a de minimis amount deserves to be taken seriously. The Commission staff is motivated to continue with the investigation. We do not, however, want to recommend pressing forward without a firmer understanding of how arguments similar to Mr. Billings’ have fared in the courts. The research will take longer than one or two business days, given the competing demands of other pending cases.

My personal view is that Mr. Billings’ letter understates the informational interest of the public in knowing who is behind the Cutler Files seeking to influence Maine voters in the gubernatorial race. The opportunity for informed political debate and discourse has already been diminished to a degree by the Cutler Files’ preference to remain anonymous. Generally, when someone makes sharp personal attacks on a gubernatorial candidate’s qualifications, those attacks are the subject of comment and analysis by other

private speakers such as the press, candidates, and the political parties. The press has been less able to engage with the Cutler Files author(s) and to assess the reliability of their allegations because of the author(s)' determination to remain anonymous. The question is whether the Cutler Files' desire to maximize the impact of its message should trump the public's interest in knowing who is making expenditures (even though small in amount) to communicate with Maine voters in an election campaign by creating this website.

Mr. Billings warns that if the Commission "decides to regulate blogs" such as the Cutler Files, it will get bogged down in a morass of regulating speech on websites. While this bears further consideration, it should be noted that the Maine Legislature has listed "publicly accessible sites on the Internet" as among the "types of general public political advertising" that require disclosure under Section 1014. I have to say that there are meaningful distinctions between the Cutler Files and the other websites Mr. Billings has mentioned.

The staff will continue working on this issue, and we look forward to hearing your thoughts at the meeting regarding how we should proceed. Thank you for your consideration of this memo.

September 30, 2010

**MARDEN, DUBORD,
BERNIER & STEVENS**

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September 26, 2010

Jonathan Wayne, Executive Director
Maine Commission on Governmental Ethics & Election Practices
135 State House Station
Augusta, Maine 04333-0135

RE: Investigation of the Cutler Files

Dear Mr. Wayne:

Thank you for the opportunity to submit legal arguments on behalf of the Cutler Files. Given the important constitutional issues involved with this matter, my client(s) very much appreciate(s) the Commission's respect for his/her/their wish to cooperate with the Commission while retaining anonymity. While it is certainly unusual for the Commission to consider a matter without the identity of one of the parties being known, moving forward in such fashion is appropriate and legally justified.

FACTS

www.Cutlerfiles.com (hereinafter "the Cutler Files") was created approximately one month ago to provide information to the public about Eliot Cutler that has been largely ignored by the mainstream media. While the author(s) would certainly admit to not supporting Mr. Cutler's bid for Governor, the blog was not intended as a campaign vehicle but rather an exercise in citizen journalism -- researching, reporting, and analyzing information about a candidate for major office. Just like the mainstream media, the blog both reports facts and offers analysis and opinion based on those facts.

The total amount spent to create and maintain the Cutler Files has been less than \$100.00. No person or entity has been compensated, directly or indirectly, to create the content or design of the site. Technology has advanced so that people with modest technical expertise can create websites and blogs easily and inexpensively. The major expense in creating the blog was the cost of registering and hosting the URL.

The blog is not owned, operated or controlled by any political party, political committee, candidate or candidate's immediate family.

Your conclusion in your September 21, 2010 memo that the website is anonymous by choice and not by accident is correct. In fact, the issue of anonymity has been addressed on

the front page of the blog since it was originally posted. The person(s) behind the blog do not claim to be unsophisticated. The person(s) simply claim that the blog, whether sophisticated or unsophisticated, is protected by the First Amendment and does not fall within the jurisdiction of the Ethics Commission.

ANONYMOUS SPEECH IS PROTECTED BY THE FIRST AMENDMENT

“Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.” Talley v. California, 362 U.S. 60, 64, 80 S.Ct. 536, 538 (1960). American history illustrates a respected tradition of anonymity in the advocacy of political causes going back to the founding of our Republic. The most famous example of this practice is the Federalist Papers, authored by James Madison, Alexander Hamilton, and John Jay, but signed “Publius.” The Anti-Federalists also tended to publish under pseudonyms: prominent among them were “Cato,” believed to be New York Governor George Clinton; “Centinel,” likely Samuel Bryan or his father, Pennsylvania judge and legislator George Bryan; “The Federal Farmer,” who may have been Richard Henry Lee, a Virginia member of the Continental Congress and a signer of the Declaration of Independence; and “Brutus,” who may have been Robert Yates, a New York Supreme Court justice who walked out on the Constitutional Convention. 2 H. Storing, ed., The Complete Anti-Federalist (1981).

People may choose to speak anonymously to avoid persecution or “an advocate may believe her ideas will be more persuasive if her readers are unaware of her identity.” McIntyre v. Ohio Elections Commission, 514 U.S. 334, 342 115 S.Ct. 1511, 1517 (1995). “Anonymity thereby provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent.” Id. In the case of the Cutler Files, though the authors certainly don’t consider themselves “unpopular”, they do believe that their identities might detract from the impact of the information set forth on the blog. In addition, Mr. Cutler, the subject of the blog and the complaining party in this matter, has shown a willingness to spend hundreds of thousands of dollars of his own money to advance his political aspirations; it is certainly plausible that he might turn his resources towards seeking vengeance on the authors of the Cutler Files.

The United States Supreme Court has left no doubt that anonymous speech is protected by the First Amendment. In Talley v. California, the Supreme Court invalidated a city ordinance prohibiting all anonymous leafleting, holding that the First Amendment protected the distribution of unsigned handbills urging readers to boycott certain Los Angeles merchants who were allegedly engaging in discriminatory employment practices. 362 U.S. 60, 80 S.Ct. 536. California defended the Los Angeles ordinance at issue as a law “aimed at providing a way to identify those responsible for fraud, false advertising and libel.” 362 U.S. at 64, 80 S.Ct., at 538. The Supreme Court rejected that argument because nothing in the text or legislative history of the ordinance limited its application to those unlawful acts. Id.

Anonymous political speech is afforded the First Amendment’s broadcast protection. McIntyre, 514 U.S. at 346, 115 S.Ct. at 1519. In McIntyre v. Ohio Elections Commission, the

Supreme Court held unconstitutional an Ohio statute prohibiting anonymous political campaign literature. *Id.* at 357, 115 S.Ct. at 1524. The plaintiff in *McIntyre* had distributed leaflets at a public meeting in which the local schools superintendent was discussing a school tax levy proposal. *Id.* at 337, 115 S.Ct. at 1514. In the leaflets, plaintiff advocated against the tax proposal, and she left some of the leaflets unsigned. *Id.* After a complaint was lodged against the plaintiff by a supporter of the tax levy, Ohio's Elections Commission fined the plaintiff for failing to sign the leaflets in violation of an Ohio statute prohibiting anonymous political campaign literature. *Id.* at 338, 115 S.Ct. at 1514. The Supreme Court found that the law burdened core political speech and applied "exacting scrutiny" which required the law to be narrowly tailored to serve an overriding state interest. *Id.* at 347, 115 S.Ct. at 1519. In holding the statute unconstitutional, the Supreme Court found that Ohio's informational interest in providing relevant information to the electorate was insufficient to support the disclosure requirement. *Id.* at 348-49, 115 S.Ct. at 1519-20. The Supreme Court also held that while the state had an interest in preventing fraud and libel, the statute was not narrowly tailored to serve those interests. *Id.* The Supreme Court also emphasized the importance of anonymous publications in our national political discourse, noting that "[a]nonymity is a shield from the tyranny of the majority." *Id.* at 357, 115 S.Ct. 1511. The Court found that Ohio had "not shown that its interest in preventing the misuse of anonymous election-related speech justifies a prohibition of all uses of that speech." *Id.*

MAINE'S DISCLOSURE STATUTE IS NOT NARROWLY TAILORED

21-A M.R.S.A. §1014 prohibits anonymous political communications that advocate the election or defeat of a clearly identified candidate¹ and, during the 21 days before a primary or 35 days before a general election prohibits anonymous political communications that merely names or depicts a clearly identified candidate². Like the statute at issue in *McIntyre*, Maine law imposes a broad ban on anonymous political speech which cannot survive the exacting scrutiny imposed on laws that burden core political speech.

It is certainly true that courts have upheld laws that require disclaimers on political communications by a candidate, party or political committee. However, it is important to note that Federal law does not impose a broad ban on anonymous speech like Maine law. Federal law has much more limited disclaimer requirements which take into consideration the identity of the speaker and the nature of the communication namely, whether they are associated with

¹ It is the position of the Cutler Files that the site does not, and has not, expressly advocated the election or defeat of a clearly identified candidate. However, the owner(s) of the site do intend to keep the site online during the 35 days before the general election and there is no question that the site names a clearly identified candidate. As a result, whether or not the site does now, or formerly, expressly advocated the election or defeat of a candidate is immaterial to the issue now before the Commission.

² The statute does not require a disclaimer on items which are so small that including the name and address of the person making the expenditure would not be legible or feasible. This limited exception to Maine's broad ban on anonymous political speech is not sufficient to make the law "narrowly tailored" and is not material to the constitutional analysis of the law.

a party, candidate or committee and such communication was associated with more than a de minimis expenditure of money. See Exhibit A, Special Notices on Political Ads and Solicitations, Federal Election Commission, October 2006.

Assuming arguendo that the State of Maine has an overriding interest to require disclaimers on certain political communications, Maine's law is not narrowly tailored because it applies to all expenditures that expressly advocate the election or defeat of a candidate. Certainly, Maine law cannot have an overriding interest that trumps the broad protections that the Constitution provides political speech when such communication is not done by a party, candidate or committee and such communication cost merely a de minimis amount of money. For example, if an individual spends \$5.00 to make 100 copies of a home-made leaflet advocating for a named candidate, seemingly, Maine law requires that the leaflet include the individual's name and address and the words "NOT PAID FOR OR AUTHORIZED BY ANY CANDIDATE." It is extremely unlikely that a court would find that a law with such a broad application is narrowly tailored³ and would more likely find that application to be a constitutional violation.

21-A M.R.S.A. §1014 SHOULD BE INTERPRETED AS TO NOT APPLY TO INTERNET ACTIVITY CONDUCTED BY INDIVIDUALS AND BLOGGERS

21-A M.R.S.A. §1014 requires disclaimers to be included when "an expenditure" is made to finance a communication. As a result, only communications which constitute "an expenditure" as defined by Maine law require a disclaimer. Expenditure is defined by 21-A M.R.S.A. §1012(3). If a communication does not constitute "an expenditure" as defined no disclaimer is required.

21-A M.R.S.A. §1012(3)(B)(1) states that the term "expenditure" does not include:

Any news story, commentary or editorial distributed through the facilities of any broadcasting station, newspaper, magazine or other periodical publication, unless the facilities are owned or controlled by any political party, political committee, candidate or candidate's immediate family;

This exact language also appears in federal law. See 2 U.S.C. §431(9)(B)(i) and 11 CFR 100.73 and 100.132. This exemption, commonly known as the "news story exemption" or the "media exemption" has been interpreted by the Federal Elections Commission (hereinafter "the FEC") to apply to media entities on the Internet, including websites or any other Internet or electronic publication. See Exhibit B, Internet Communications and Activity, Federal Election Commission, May 2006. The FEC has also ruled that the media exemption applies to entities with only an online presence and to bloggers. Id. The same exemption applies to internet activity conducted by individuals. Id. This interpretation

³ Federal law would not require a disclaimer on such a flyer produced by an individual advocating the election of a candidate for federal office. See Exhibit A.

recognizes that today the Internet is the distribution method for information that was traditionally distributed through broadcast outlets, newspapers, magazines, and other periodicals⁴. In fact, in several national polls, the majority of respondents report that they seek their political information primarily from online sources.

As a result of the FEC's ruling, if the person(s) behind the Cutler Files had instead devoted their time to researching and anonymously writing about the background of First District Congressional Candidate Dean Scontras and published the material on a site called the Scontras Files, the site would be exempt from regulation under federal law⁵.

The Ethics Commission is not required to interpret Maine law in the same manner as the FEC has interpreted federal law. However, there is a strong justification that Maine law should be interpreted the same as the exact language has been interpreted at the federal level. If the Commission decides to regulate blogs like the Cutler Files, there are literally dozens of Maine political websites, online editorials, blogs, facebook pages and postings that would be impacted⁶. The FEC has wisely decided not to get bogged down in such a morass and the Ethics Commission should do the same.

There are many Maine based political sites that discuss candidates including online editorials associated with bricks and mortar publications, often in a harsh and partisan manner. Most political websites have a clear, ideological point of view and could certainly be characterized as express advocacy. I am not aware of a single site that includes the disclaimer required by 21-A M.R.S.A. §1014. The only substantive difference between the Cutler Files and the other Maine political sites and blogs is that the Cutler Files is the subject of a complaint by a candidate that would prefer, for obvious reasons, the information contained on the blog not be available for public consumption and the others, so far, are not. If the Commission decides its jurisdiction extends to political websites and blogs, assuming it survived a legal challenge in the courts, the Commission will be asked regularly to investigate complaints against political websites and blogs by wealthy thin-skinned candidates. In this instance, this presumption is especially outrageous where the complaining party, Mr. Cutler, an attorney, has not challenged the veracity of the facts reported, and thoroughly cited, on the blog. And furthermore, has stated dismissively, when asked by the press about the Cutler Files that it is merely a byproduct of the Internet age.

⁴ Any other interpretation would have created significant constitutional issues. The First Amendment would not allow a government agency to decide what entities are and are not legitimate media entities or for media entities to be treated differently based on the method used for distributing content.

⁵ There is an actually an anonymous blog that focuses on the activities of Senator Susan Collins. See <http://collinswatch.blogspot.com/>. The Collins Watch blog was very critical of Susan Collins during her 2008 campaign without complaint from the Collins campaign or any investigation by the FEC.

⁶ See, e.g., <http://www.pinetreepolitics.com/>; <http://www.asmainegoes.com/>; <http://www.asmainegoeslolz.com/>; <http://www.dirigoblue.com/>; & <http://www.mainepolitics.net/>.

Beyond the fact that the authority of both the Ethics Commission and the FEC are limited by the Constitution, interpreting Maine law in the same manner as the FEC interprets federal law will promote uniformity. Many entities located outside of Maine's borders take interest in, and comment on, Maine politics. Such entities which are familiar with FEC policy on online activities would likely assume that similar rules apply in Maine. For example, video from a recent press conference by Republican gubernatorial candidate Paul LePage was posted on many political websites around the country and this resulted in considerable online commentary about Mr. LePage, including comments on Mr. LePage's fitness for office. None of this commentary included the disclosures required by Maine law.

The Ethics Commission can avoid the constitutional conflict discussed above, and the litigation that is likely to ensue, by interpreting Maine law as the FEC has interpreted federal law. Under such an interpretation, websites owned or controlled by a political party, political committee, candidate or candidate's immediate family, and paid online advertising, would be required to meet the requirements of 21-A M.R.S.A. §1014 but all other sites and blogs, such as the Cutler Files, would not.

CONCLUSION

The United States of America was founded on the premise of free political speech. We wage wars to protect the rights of others to challenge their governments or those seeking to govern. Issues relating to free speech should never be taken lightly, especially when the only reason they are subject to an investigation is because of the complaints of a wealthy candidate for higher office and his legal team. The First Amendment of the U.S. Constitution protects the content published on the Cutler Files. The Cutler Files is a political blog expressly excluded from the jurisdiction of the FEC and, for the sake of both uniformity and in respect of the tenets of free speech, not within the jurisdiction of the Maine Ethics Commission. A contrary holding would put at risk of investigation every online blog, posting, editorial or biased article that seeks to report facts about a candidate for office in a partisan manner. As such, on behalf of my client(s), I respectfully request that the Commission vote to end the investigation of the Cutler Files and to take no further action in this matter.

I will be present at Thursday's meeting and will be prepared to address the Commission as the Commissioners see fit.

Very truly yours,

electronically /s/ 9/26/10

Daniel I. Billings



FEDERAL ELECTION COMMISSION

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Special Notices on Political Ads and Solicitations

Published in October 2006

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Introduction

This brochure has been developed to help clarify the rules relating to the following types of special notices:

- Disclaimer notices;
- Federal election purpose notification;
- Best efforts notifications; and
- IRS disclosure notices.

Each notice may be required (as appropriate) when persons finance communications related to federal elections or solicit funds for federal political committees. ¹ A section-by-section explanation of these rules is provided within.

Please be advised that this brochure is not intended to provide an exhaustive discussion regarding this area of the election law. The citations refer to the [Federal Election Campaign Act \(FECA\)](#), as amended by the [Bipartisan Campaign Reform Act of 2002 \(BCRA\)](#), [Federal Election Commission Regulations](#) (11 CFR) and [Advisory Opinions \(AOs\)](#). If you have any questions after reading the brochure, please contact the FEC:

Federal Election Commission
 999 E Street, NW
 Washington, DC 20463
 (202) 694-1100 (local)
 (800) 424-9530 (toll free)
 (202) 219-3336 (for the hearing impaired)

Disclaimer Notices

What is a Disclaimer Notice?

For the purpose of this brochure, a "disclaimer" notice is defined as a statement placed on a public communication that identifies the person(s) who paid for the communication and, where applicable, the person(s) who

authorized the communication.

When is a Disclaimer Required?

Basic Rule

Political Committees

Political committees must include a disclaimer on (1) all "public communications" (defined below), (2) bulk electronic email (defined as electronic mail with more than 500 substantially similar communications) and (3) web sites available to the general public, regardless of whether the communication expressly advocates the election or defeat of a clearly identified candidate, or solicits funds in connection with a federal election (i.e., contributions for a federal candidate or federal political committee).²

Individuals and Other Persons

A disclaimer must appear on any "electioneering communication" (defined below) and on any public communication by any person that expressly advocates the election or defeat of a clearly identified candidate or solicits funds in connection with a federal election.

Application

Specific examples of public communications that would require a disclaimer include:

- Public communications coordinated with a federal candidate (i.e., in-kind contributions or coordinated party expenditures) that are paid for by a political committee or that contain express advocacy or a solicitation;
- Independent expenditures;
- Electioneering communications;
- A communication that solicits funds for a federal candidate or a federal political committee or that contains express advocacy; and
- Political committees' web sites.

Definitions

Public Communications

As defined in FEC regulations, the term "public communication" includes:

- Broadcast, cable or satellite transmission;
- Newspaper;
- Magazine;
- Outdoor advertising facility (e.g., billboard);
- Mass mailing (defined as more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period);
- Telephone banks (defined as more than 500 telephone calls of an identical or substantially similar nature within any 30-day period); or
- Any other general public political advertising. General public political advertising does not include Internet ads, except for communications placed for a fee on another person's web site

¹¹ CFR 110.11(a).

Electioneering Communications

As defined in FEC regulations, an "electioneering communication" is a broadcast, cable or satellite communication that fulfills each of the following conditions:

- Refers to a clearly identified federal candidate;
- Is publicly distributed within 30 days before a primary election or within 60 days before a general election; and
- In the case of Congressional candidates only, is "targeted to the relevant electorate" (can be received by 50,000 or more persons in the

district or state the candidate seeks to represent)

11 CFR 100.29. See also Federal Register notice 2005-29 [PDF].

Independent Expenditures

An independent expenditure is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate and is not made in cooperation, consultation, or concert with, or at the request or suggestion of, any candidate, authorized committee or their agents, or a political party committee or its agents. 11 CFR 100.16.

Coordinated Party Expenditures

Coordinated party expenditures are expenditures made by national or state party committees on behalf of their nominees in connection with the general election. Such expenditures may be coordinated with the candidate, but are reported only by the party committee that makes the expenditure. These expenditures are subject to a special monetary limit. 11 CFR 110.11(d)(1).

Exempt Party Activities

State and local party committees may engage in certain candidate-support activities without making a contribution or expenditure provided specific rules are followed. These "exempt" party activities refer to the three types of communications listed below:

- Registration and get-out-the-vote drives on behalf of the Presidential ticket;
- Campaign materials distributed by volunteers on behalf of federal candidates; and
- Certain state cards, sample ballots and palm cards listing at least 3 candidates for public office.

11 CFR 100.80, 100.87 and 100.89; 100.140, 100.147 and 100.149 and 110.11(e).

What must the Disclaimer Say?

The actual wording of the disclaimer depends on the type of communication, as explained below. In each example, it is presumed that the ad qualifies as a "public communication" in connection with a federal election.

Messages Authorized and Financed by a Candidate

On a public communication that is authorized and paid for by a candidate or his/her campaign committee, the disclaimer notice must identify who paid for the message. 11 CFR 110.11(b)(1).

Example: "Paid for by the Sheridan for Congress Committee."

Messages Authorized but Not Financed by a Candidate

On a public communication that is authorized by a candidate or his/her campaign committee, but is paid for by another person, the disclaimer notice must identify who paid for the communication and indicate that the candidate authorized the message. 11 CFR 110.11(b)(2).

Example: "Paid for by the XYZ State Party Committee and authorized by the Sheridan for Congress Committee." ³

Messages Not Authorized by a Candidate

On a public communication that is not authorized by a candidate or his/her

campaign committee, the disclaimer notice must identify who paid for the message, state that it was not authorized by any candidate or candidate's committee and list the permanent street address, telephone number or World Wide Web address of the person who paid for the communication. 11 CFR 110.11(b)(3).

Example: "Paid for by the QRS Committee (www.QRScommittee.org) and not authorized by any candidate or candidate's committee."

Coordinated Party Expenditures

Pre-nomination Period

On a public communication that is made as a coordinated party expenditure before a nominee is chosen, the disclaimer notice must identify the committee that paid for the message, but need not state whether the communication was authorized. 11 CFR 110.11(d)(1).

Example: "Paid for by XYZ State Party Committee."

Post-nomination Period

Once a candidate has been nominated for the general election, the disclaimer notice must also state who authorized the communication.

Example: "Paid for by the XYZ State Party Committee and authorized by the Sheridan for Congress Committee."

The committee that actually makes the expenditure is considered to be the person who paid for the public communication even when the committee is acting as the designated agent of a different party committee.

Exempt Party Activities

On exempt activity communications (for example, campaign materials) the disclaimer notice must identify the committee that paid for the message. 11 CFR 110.11(e).

Example: "Paid for by the XYZ State Party Committee."

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How and Where must the Disclaimer Appear?

In order to give the reader sufficient notice about the person(s) paying for or authorizing a public communication regardless of its medium, the disclaimer notice must be "clear and conspicuous" on the committee's communications, solicitations and response materials. The notice will not be considered to be "clear and conspicuous" if:

- It is difficult to read or hear; or
- The notification is placed where it can be easily overlooked.

11 CFR 110.11(c)(1).

Additional requirements are described below.

Printed Materials

On printed materials, the disclaimer notice must appear within a printed box set apart from the other contents in the communication. The print must be of a sufficient type-size to be clearly readable by the recipient of the communication, and the print must have a reasonable degree of color contrast between the background and the printed statement. 11 CFR 110.11(c)(2)(i), (ii) and (iii).

Example:

Paid for by the Save the Seahorses
Committee and authorized by the
McKay for Senate Committee.

As long as the disclaimer appears somewhere within the communication it does not have to appear on the front page or cover of multiple-paged documents. However, in the case of single-sided documents and billboards, the disclaimer must appear on the front. 11 CFR 110.11(c)(2)(iv).

Safe Harbor for "Clearly Readable"

The regulations contain a safe harbor that establishes a fixed, 12-point type size as a sufficient type size for disclaimer text in newspapers, magazines, flyers, signs and other printed communications that are no larger than the common poster size of 24 inches by 36 inches. 11 CFR 110.11(c)(2)(i). Please note, disclaimers for larger communications will be judged on a case by case basis.

Safe Harbor for "Reasonable Degree of Color Contrast"

The regulations additionally provide two safe harbor examples that would comply with color contrast requirement:

- The disclaimer is printed in black on a white background; or
- The degree of contrast between the background color and the disclaimer text color is at least as great as the degree of contrast between the background color and the color of the largest text in the communication.

11 CFR 110.11(c)(2)(iii).⁴

Packaged Materials

When communications are distributed in a package or as a group, the distributing entity must evaluate each item separately in order to determine whether a disclaimer notice is required on that item. A message or ad that would require a disclaimer notice if it were distributed separately must still display the notice when it is included in a package of materials. 11 CFR 110.11(c)(2)(v). Example: A campaign poster is mailed with a campaign brochure and solicitation letter. A disclaimer notice must appear on each of these items.

Radio and Television Communications Authorized by the Candidate**Radio**

A radio broadcast must include an audio statement that is spoken by the candidate. The statement must identify the candidate, and state that he or she has approved the communication. 11 CFR 110.11(c)(3)(i).

Television

Like radio broadcasts, televised communications must include an oral disclaimer spoken by the candidate in which the candidate identifies himself or herself and states that he or she has approved the communication. 11 CFR 110.11(c)(3)(ii).⁵

This disclaimer can be conveyed in one of two ways:

- A full-screen view of the candidate making the statement (11 CFR 110.11(c)(3)(ii)(A)); or

- A "clearly identifiable photographic or similar image of the candidate" that appears during the candidate's voice-over statement. (11 CFR 110.11(c)(3)(ii)(B)).

The communication must also include a "clearly readable" written statement that appears at the end of the communication "for a period of at least four seconds" with a "reasonable degree of color contrast" between the background and the disclaimer statement. 11 CFR 110.11(c)(3)(iii).

Radio and Television Messages Not Authorized by the Candidate

Radio

The disclaimer notice must include the name of the political committee or person responsible for the communication and any connected organization. Example, "ABC is responsible for the content of this advertising." 11 CFR 110.11(c)(4).

Television

The disclaimer described above must be conveyed by a "full-screen view of a representative of the political committee or other person making the statement," or a "voice-over" by the representative. 11 CFR 110.11(c)(4)(ii) and 2 U.S.C. 5441d(d)(2).

The disclaimer statement must also appear in writing at the end of the communication in a "clearly readable manner" with a "reasonable degree of color" contrast between the background and the printed statement "for a period of at least four seconds." 11 CFR 110.11(c)(4).

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When is a Disclaimer Not Required?

Although the FEC recommends that disclaimer notices be included on all campaign materials, the notices are not required in the following situations.

Disclaimer Placement is Inconvenient

In situations where a disclaimer notice cannot be conveniently printed, the notice is not required. This provision affects items such as pens, bumper stickers, campaign pins, campaign buttons and similar small items. Further, a disclaimer notice is not required for communications using skywriting, clothing, water towers or other forms of advertisement where it would be impracticable to display the disclaimer notice. 11 CFR 110.11(f) (See also AO 2002-9)

Internal Corporate/Labor Communications

A disclaimer notice is not required for solicitations or communications made by a separate segregated fund or connected organization to its "restricted class." 11 CFR 110.11(f)(2).

Materials Used for Administrative Purposes Only

A disclaimer notice is not required on checks, receipts or similar items of minimal value that do not include a political message and are used only for administrative purposes. 11 CFR 110.11(f)(1)(iii).

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Additional Statements Required in Fundraising Solicitations

Federal Election Purpose Notification

In order to deposit undesignated contributions into its federal account, a federal committee must inform donors that their contributions will be used in connection with federal elections or that they are subject to the limits and prohibitions of the Act. The committee may satisfy this requirement by including that information in its solicitation materials. 11 CFR 102.5(a)(2)(ii) and (iii).

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"Best Efforts" Notification

Under the Act and FEC regulations, political committees must report the name, address, occupation and employer of any individual who contributes more than \$200 in a calendar year (or in an election cycle, in the case of an authorized committee) (11 CFR 104.3(a)(4)). Committees must make their "best efforts" to obtain and report this information.

To satisfy the "best efforts" requirement, a political committee must include a statement on its solicitations explaining that it is required to make its best efforts to obtain and report contributor information. This statement is referred to as the "best efforts" notification; two examples are listed below:

- Federal law requires us to use our best efforts to collect and report the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 in a calendar year, or
- To comply with Federal law, we must use our best efforts to obtain, maintain, and submit the name, mailing address, occupation and name of employer of individuals whose contributions exceed \$200 per calendar year.

If the committee does not receive the required contributor information, it must make a follow-up request within 30 days. Any contributor information provided or otherwise available to the committee must be disclosed on FEC reports. In some cases, it may be necessary for the committee to amend previous reports. 11 CFR 104.7.

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IRS Disclosure Requirements

Under the Internal Revenue Service Code (26 U.S.C. §6113), certain tax-exempt organizations that are not eligible to receive tax deductible charitable contributions, and whose gross annual receipts normally exceed \$100,000, must disclose in an "express statement (in a conspicuous and easily recognizable format)" that contributions to the organization are not deductible for Federal income tax purposes as charitable contributions. For more information, contact the IRS at (800) 829-3676, (202) 622-7352.

Safe Harbor for "Format of Disclosure Statement"

Print Medium

In the case of a solicitation by mail, leaflet, or advertisement in a newspaper, magazine or other print medium, the following four requirements are met;

- The solicitation includes whichever of the following statements the organization deems appropriate:
 - "Contributions or gifts to [name of organization] are not

deductible as charitable contributions for Federal income tax purposes,"

- "Contributions or gifts to [name of organization] are not tax deductible," or
- "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions";
- The statement is in at least the same size type as the primary message stated in the body of the letter, leaflet or ad;
- The statement is included on the message side of any card or tear off section that the contributor returns with the contribution; and
- The statement is either the first sentence in a paragraph or itself constitutes a paragraph.

Telephone

In the case of solicitation by telephone the following three requirements are met:

- The solicitation includes whichever of the following statements the organization deems appropriate:
 - "Contributions or gifts to [name of organization] are not deductible as charitable contributions for Federal income tax purposes,"
 - "Contributions or gifts to [name of organization] are not tax deductible," or
 - "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions";
- The statement is made in close proximity to the request for contributions, during the same telephone call, by the telephone solicitor; and
- Any written confirmation or billing sent to a person pledging to contribute during the telephone solicitation complies with the requirements under Print Medium Solicitations.

Television

In the case of solicitation by television the following two requirements are met:

- The solicitation includes whichever the following statements the organization deems appropriate:
 - "Contributions or gifts to [name of organization] are not deductible as charitable contributions for Federal income tax purposes,"
 - "Contributions or gifts to [name of organization] are not tax deductible," or
 - "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions";
- If the statement is spoken, it is in close proximity to the request for contributions; if the statement appears on the television screen, it is in large easily readable type appearing on the screen for at least five seconds.

Radio

In the case of a solicitation by radio the following two requirements are met:

- The solicitation includes whichever of the following statements the organization deems appropriate:
 - "Contributions or gifts to [name of organization] are not deductible as charitable contributions for Federal income tax purposes,"
 - "Contributions or gifts to [name of organization] are not tax deductible," or
 - "Contributions or gifts to [name of organization] are not tax deductible as charitable contributions";
- The statement is made in close proximity to the request for contributions during the same radio solicitation announcement.

These safe harbors will remain in effect until further notice from the IRS. Please refer to the IRS by phone at (800) 829-3676, (202) 622-7352 for changes to these safe harbors and with any questions you might have

pertaining to the safe harbors.

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FOOTNOTES:

1 This brochure serves as the small entity compliance guide to Commission regulations regarding Communications and Solicitations, as required by section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

2 The FEC recommends placing disclaimer notices on all campaign materials.

3 Please note that for communications listing several candidates, the disclaimer notice may state that the message was authorized by the candidates identified in the message or, if only certain candidates have authorized it, by those candidates identified with an asterisk ([AO 2004-37](#))

4 These examples do not constitute the only ways to satisfy the color contrast requirement.

5 For additional information on broadcast advertising (e.g., radio, TV), please contact the [Federal Communications Commission](#) at (202) 418-1440 or (202) 418-7096 (for cable broadcasts).

6 The restricted class includes the executive and administrative personnel of the organization, its stockholders, or its members (noncorporate), and their families. See [11 CFR 114.1\(j\)](#). See also [11 CFR 114.5 \(q\)\(1\) and \(2\); 114.7 \(a\) and \(c\)](#).

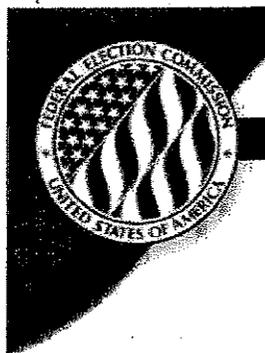
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Internet Communications and Activity

Published in May 2006 (updated June 2007)

Introduction

On March 27, 2006, the Commission approved regulations governing certain types of Internet communications. The rules took effect May 12, 2006. [71 FR 18589 \(4/12/06\)](#) [PDF]. The questions and answers that follow address not only those regulations, but also past Commission precedents regarding use of the Internet in connection with federal elections. Copies of both the regulations and the cited advisory opinions (AOs) are available via the [FEC's web site](#).

If you have any questions after reading this, please call or write:

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Internet Activity Conducted by Individuals

Can I use my computer for political activity in connection with federal elections? How about a library computer, school computer, or neighbor's computer?

Yes. An uncompensated individual or group of individuals may engage in Internet activities for the purpose of influencing a federal election without restriction. The activity would not result in a "contribution" or an "expenditure" under the Act, and would not trigger any registration or reporting requirements with the FEC. This exemption applies to individuals acting with or without the knowledge or consent of a campaign or a political party committee.¹ 11 CFR [100.94](#) and [100.155](#). Possible Internet activities include, but are not limited to, sending or forwarding electronic mail, providing a hyperlink to a web site, creating, maintaining or hosting a web site and paying a nominal fee for the use of a web site. [11 CFR 100.94\(b\)](#). Please note that these exemptions apply regardless of whether the individual owns the computer he/she is using.

What are the rules for sending personal e-mails regarding political topics or federal elections?

Basically, there are no rules for individuals. Individuals may send unlimited e-mails on any political topic without identifying who they are or whether their messages have been authorized by any party or campaign committee. 11 CFR 110.11(a).

May I post comments to a blog in connection with a federal election?

Yes. Uncompensated blogging, whether done by individuals or a group of individuals, incorporated or unincorporated, is exempt from regulation. See 11 CFR 100.94 and 100.155. This exception applies even in those cases where a nominal fee is paid. See also "**How has the Commission applied the Act to online news media?**" under Press Entities below.

Are the rules different if I pay to place an ad on someone else's web site?

Yes. Internet communications placed on another person's web site for a fee are considered "general public political advertising," and are thus "public communications" under the law. 11 CFR 100.26. As such, State, district and local party committees, and State and local candidates, must use federally-permissible funds to pay for them if the communications promote, support, attack, or oppose a candidate for Federal office. Paying to place a communication on another person's website may result in contributions or expenditures under the Act. Other regulations regarding coordinated communications, 11 CFR 109.21 and 109.37, and disclaimer requirements, 11 CFR 110.11(a), would also apply.

May I use my work computer for online political activity?

Yes, subject to your employer's rules for personal use of computers and Internet access, and so long as you are not compensated for the activity. 11 CFR 100.94 and 114.9(a) and (b). See "**May a corporation or union allow its employees or members to use their work computers for individual volunteer activity?**" under Internet Activity by Corporations/Labor Organizations/Trade Associations, see below.

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Internet Activity Conducted by Federal Political Committees

Is a disclaimer required on e-mail or our web site?

Yes. The Act and regulations require FEC-registered political committees to place disclaimers on their public web sites. Moreover, if a political committee sends more than 500 substantially similar e-mails, each message must include a disclaimer. 11 CFR 110.11(a). For specific disclaimer requirements, see 11 CFR 110.11(b) and the Commission's brochure "**Special Notices on Political Ads and Solicitations**."

Do the new regulations affect online fundraising by our committee?

No. Over the years, the Commission has issued several opinions concerning online fundraising by political committees. The AOs make it clear that political committees must adapt online fundraising to comply with the Act's recordkeeping and reporting provisions.

First, committees using the Internet for fundraising must make "best efforts" to obtain and report the identification of donors who contribute more than \$200 during a calendar year. Committees must maintain electronic records and contributor data for three years after the date on which it reported the

contributions. AOs [1999-22](#) and [1995-09](#).

Second, to avoid receiving prohibited contributions, web sites soliciting contributions in connection with a federal election must inform potential contributors of all of the Act's prohibitions, including the prohibitions on contributions from corporations, labor organizations, federal government contractors and foreign nationals,² and the restrictions at [11 CFR 110.19](#) on contributions from minors. AOs [1999-22](#), [1999-09](#) and [1995-09](#) contain detailed examples of Commission-approved language and mechanisms for vetting contributors.

Third, in several AOs, the Commission has said that online contributions may be made via credit card or electronic checks. Such contributions are acceptable for publicly funded Presidential campaigns and are matchable provided that the correct documentation is provided to the Commission. See [11 CFR 9034.2\(c\)\(8\)](#) and AOs [1999-36](#), [1999-22](#), [1999-09](#) and [1995-09](#). The Commission has also permitted businesses to administer online fundraising for political committees, so long as they provide their services at the usual and normal charge and in their ordinary course of business. See below.

Finally, separate segregated funds established by corporations, labor organizations or trade associations should consult "[Are there special rules concerning online fundraising for corporate/labor/trade association PACs?](#)" under Internet Activity by Corporations/Labor Organizations/Trade Associations, see below.

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Internet Activity Conducted by Corporations/Labor Organizations/Trade Associations

Our corporation normally provides commercial services online – may we do so for candidates and political committees?

Yes, this is permissible as long as the corporation charges the usual and normal fee for its services. Failure to do so could result in a prohibited contribution. For example, in [AO 2004-06](#), an online service offering a web platform for arranging local gatherings was permitted to provide both its free and fee-based services to federal candidates and political committees as long as it did so on the same terms it offered to all similarly situated persons in the general public. In contrast, in [AO 1996-2](#), the Commission concluded that a corporation could not provide online accounts--for which it normally charged a fee--to candidates free of charge.

May our corporation/labor union/trade association send out an e-mail to endorse a federal candidate or place an endorsement on its web site?

It depends: As has long been the case, a corporation, union or trade association may only direct express advocacy communications to its restricted class. So, if the organization addressed its e-mail endorsing a federal candidate only to individuals within its restricted class, it would be permissible. By contrast, the organization generally cannot place endorsements or solicitations for a candidate on its web site, unless access to those portions of the site is limited to members of the restricted class.³ See [AO 1997-16](#), [2 U.S.C. §441b\(b\)\(2\)\(A\)](#) [PDF] and [11 CFR 114.3](#).

Are there special rules concerning online fundraising for corporate/labor/trade association PACs?

Yes. Since a corporate/labor/trade association PAC may only solicit contributions from its restricted class, access to online solicitations must be limited to members of that group (e.g., password protected).⁴ [2 U.S.C. §441b\(b\)\(4\)](#) [PDF]. Alternatively, a corporation/labor organization/trade association could maintain an e-mail listserv--i.e., mailing list--to send PAC solicitations to members of the organization's restricted class. [AO 2000-07](#).

May a corporation or union allow its employees or members to use their work computers for individual volunteer activity?

Yes, a corporation or a labor organization may permit its employees, shareholders, officials and members to use its computer and Internet facilities for individual volunteer Internet activity, without making a prohibited contribution. This exemption is contingent on the individual completing the normal amount of work for which the employee is paid, or is expected to perform, that the activity would not increase the overhead or operating costs of the organization, and that the activity is not coerced. The organization may not condition the availability of the Internet or the computer on their being used for political activity or for support for or opposition to any particular candidate or political party. Revised [11 CFR 114.9\(a\)\(2\) and \(b\)\(2\)](#).

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Activity Conducted By Press Entities and Bloggers

How has the Commission applied the Act to online news media?

Under the Act and FEC regulations, a media entity's costs for carrying news stories, commentary and editorials are not considered "contributions" or "expenditures." See [2 U.S.C. §431\(9\)\(B\)\(i\)](#) [PDF] and [11 CFR 100.73](#) and [100.132](#). This exemption, commonly known as the "news story exemption" or the "media exemption" now extends to media entities that cover or carry news stories, commentary and editorials on the Internet, including web sites or any other Internet or electronic publication. See also AOs [2005-15](#), [2004-07](#) and [2000-13](#).

The media exemption applies to the same extent to entities with only an online presence as those media outlets that maintain both an offline and an online presence. See the explanation and justification for revised regulations [11 CFR 100.73](#) and [100.132](#).

Are bloggers considered press entities?

Bloggers and others who communicate on the Internet are entitled to the press exemption in the same way as traditional media entities. However, the Commission has decided not to change its rules regarding the media exemption so as to specifically include **all** blogging activity within the "media exemption." Many bloggers may also be entitled to the new Internet activities exemptions for individuals. [11 CFR 100.94](#) and [100.155](#). This includes incorporated blogs that are wholly-owned by an individual, are engaged primarily in Internet activities and derive a substantial portion of their income from their Internet activities. See the [explanation and justification](#) for revised regulations [11 CFR 100.73](#) and [100.132](#) and [AO 2005-16](#). Whether covered by the media exemption or the individual activity exemption, blogging will generally not be subject to FEC regulation.

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Footnotes

1. Because the activity is exempt from the definitions of "contribution" and "expenditure," a group of individuals that spends more than \$1,000 on such activity does not trigger political committee status under the Act and FEC regulations. See [11 CFR 100.5](#).

2. See [2 U.S.C. §§441b, 441c and 441e](#) [PDF].

3. If the organization routinely posts press releases on its web site, it may post a release announcing its endorsement of a federal candidate in the same manner. 11 CFR 114.4(c)(6).

4. See 11 CFR 114.5(g), 114.7(a) and 114.8(c).

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