

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR: 5491

DATE COMPLAINT FILED: July 26, 2004

DATE OF NOTIFICATION: July 28, 2004

DATE ACTIVATED: November 8, 2004

EXPIRATION OF SOL: July 1, 2009

COMPLAINANT:

Campaign Legal Center

RESPONDENTS:

Jerry Falwell Ministries, Inc.
The Liberty Alliance, Inc.

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 441b

2 U.S.C. § 441d

11 C.F.R. § 114.10

11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter involves the activities of Respondents Jerry Falwell Ministries, Inc. ("JFM") and Liberty Alliance, Inc. ("LA"), which are non-profit corporations.¹ The Complainant alleges that JFM and LA violated 2 U.S.C. §§ 441b and 441d by posting on their website and circulating on the Internet a communication that expressly advocated the election of a federal candidate, contained a solicitation for contributions to a multicandidate committee with which

¹ JFM and LA are incorporated in Washington, D.C., with their principal place of business in Lynchburg, Virginia. JFM is a 501(c)(3) corporation and LA is a 501(c)(4) corporation. According to news reports, the Internal Revenue Service has received letters requesting an investigation into these same activities.

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they are not affiliated, and failed to include a disclaimer. *See Complaint.*

The response first asserts that LA and not JFM is responsible for the activity at issue. Furthermore, it contends that the posting and circulation of the communication do not violate the prohibition on corporate expenditures because: (1) the communication qualifies for the press exemption; (2) LA meets the requirements for "qualified nonprofit corporation" ("QNC") status; and (3) the Act does not prohibit an organization such as LA from soliciting contributions for an unrelated political committee. The response also argues that the website and the communication do not require disclaimer notices under the Act.

It appears most likely that LA is the party responsible for the website and the communication, but this is readily confirmable. The communication does not appear to qualify for the press exemption. Additionally, LA has not established that it would qualify for QNC status in the District of Columbia Circuit, where it is incorporated.

Accordingly, this Office recommends that the Commission find reason to believe Liberty Alliance, Inc. violated 2 U.S.C. § 441b; take no action at this time as to Jerry Falwell Ministries, Inc.; and find no reason to believe that Liberty Alliance, Inc. violated 2 U.S.C. § 441d.

II. FACTUAL SUMMARY

A communication from Dr. Jerry Falwell, entitled *Falwell Confidential*, expressly advocating the re-election of President Bush and soliciting contributions to the Campaign for

1 Working Families ("CWF"), a federal PAC, appeared on a publicly accessible website,
2 www.falwell.com during the 2004 presidential campaign.

3 The *Falwell Confidential* is Dr. Falwell's weekly commentary on the website. See
4 <http://www.falwell.com> (last accessed Jun. 1, 2005).² The *Falwell Confidential* communication
5 at issue, "Gary Bauer on the Political Frontlines" (dated July 1, 2004), states, *inter alia*, "[f]or
6 conservative people of faith, voting for principle this year means voting for the reelection of
7 George W. Bush. The alternative, in my mind, is simply unthinkable." See Complaint, Exhibit
8 2.

9 The same *Falwell Confidential* communication also includes a solicitation for
10 contributions to CWF and a hyperlink to the CWF website.³ *Id.* The solicitation states, in part:

11 I am urging everyone reading this column today to take a moment to
12 send a financial gift to the Campaign for Working Families in order to
13 help in the crucial election of President Bush and conservative political
14 leaders across this nation This organization can accept
15 contributions up to \$5,000 per person Please right now, pick up
16 your phone and call 703-671-8800 or visit the Campaign for Working
17 Families website (https://www.cwfpac.com/cwf_contribution.htm) to
18 make a generous donation

19
20 The website also allows members of the public to subscribe to the *Falwell Confidential*
21 by email. See <http://www.falwell.com/?a=fcpop> (last accessed Jun 1, 2005). The particular
22 *Falwell Confidential* at issue here was also emailed to persons who had previously signed up to
23 receive the *Falwell Confidential*. The *Falwell Confidential* appears to have been widely

² The homepage of the website contains a statement under the *Falwell Confidential* title that reads "Insider weekly newsletter to The Moral Majority Coalition and The Liberty Alliance." This statement, however, was absent from the *Falwell Confidential* communication at issue, (see Complaint, Exhibit 2), and appears to have been added sometime after November 16, 2004. See also Attachment 1 (Falwell.com homepages from Nov. 16, 2004 and Jun. 2, 2005).

³ CWF apparently is not affiliated with JFM or L.A.

disseminated. In his National Liberty Journal website, Dr. Falwell invited his readers "to join a half million weekly subscribers by signing up for this weekly news update – at no cost – at my Web site: www.falwell.com." See <http://www.nljonline.com> (last accessed Apr. 20, 2005).⁴

III. LEGAL ANALYSIS

A. The Party Responsible for the *Falwell Confidential*

The party responsible under the Act for the *Falwell Confidential* communication is the one that pays the costs of the website and for the posting and circulation of the communication. 2 U.S.C. § 441b. The Falwell.com site states that LA is the sponsor of the site and registration information shows that the domain name was registered to LA. See <http://www.falwell.com> (last accessed Apr. 20, 2005); http://www.networksolutions.com/en_US/whois (search for Falwell.com, last accessed Apr. 20, 2005). The response emphasizes that LA is the sole sponsor of the site and that "JFM does not own or control" the site. Resp. of JFM/LA at 3. Furthermore, a news article attached to the complaint reports Jerry Falwell Jr., Dr. Falwell's son, as saying that "the Web site was registered and paid for by a tax-exempt organization affiliated with the church called Liberty Alliance, which by law was permitted to partake in some political lobbying." Complaint, Exhibit 3, *Falwell Accused of Violating Tax rule*, Associated Press, Jul. 17, 2004. Nevertheless, the appearance of the website and some of the other site and registration information give rise to some uncertainty about who actually pays for the site.

⁴ Falwell.com states that JFM "has expanded over the years to include" other entities such as the *National Liberty Journal* newspaper ("NLJ"). JFM and NLJ have the same address. It does not appear, however, that there are any formal organizational links between the incorporated JFM and NLJ. The NLJ website lists Jerry Falwell as the publisher and editor of the NLJ and Dun & Bradstreet lists the NLJ's owner as Matthew Braud. See Jerry Falwell's National Liberty Journal at <http://www.nljonline.com> (last accessed May 24, 2005). The NLJ site does not post the *Falwell Confidential*. The site no longer invites readers to click on the Falwell.com link for subscription to the weekly *Falwell Confidential*. Instead, the NLJ homepage now has a link that says, simply, "Falwell Confidential" that takes you directly to the Falwell.com homepage. *Id.*

1 The upper left corner of the site's homepage features prominently the logo of Jerry
2 Falwell Ministries, with the letters "jfm" in lower case but in a font larger than any other regular
3 content font type on the page.⁵ The logo is part of a frame containing several links including
4 "JFM News," "JFM Links" and "JFM store." See <http://www.falwell.com> (last accessed Jun. 1,
5 2005). The frame appears on every page of the website. The overall appearance of the
6 homepage is such that it appears to be the website of JFM; the reader must scroll down to find a
7 disclaimer stating that the site is "sponsored" by LA. The disclaimer on an earlier version of the
8 website stated, "Liberty Alliance/The Faith and Values Coalition." See Attachment 1, Nov. 16,
9 2004 homepage. Included in the frame on the top of the page is an "About Us" link. The
10 "About Us" page begins with a paragraph and seven bullet points about the mission and purpose
11 of LA, but concluding "Thus Liberty Alliance also proudly supports the work of Jerry Falwell
12 Ministries." It then continues with the equivalent of more than two printed pages about the
13 mission and purpose of JFM. When the "About Us" section is printed, the header at the top of
14 each page reads "About Jerry Falwell Ministries." JFM does not appear to have its own website.

15 Finally, though the web record shows that the domain name was registered to "Liberty
16 Alliance, 141 Oakdale Cir Suite C, Lynchburg, VA 24502," it also lists "Jerry Falwell, Jerry
17 Falwell Ministries, 1971 University Blvd, Lynchburg, VA 24502," as the administrative,
18 technical and billing point of contact for the website. See http://www.networksolutions.com/en_US/whois (search for Falwell.com, last accessed Apr. 20, 2005).

20 The response, the reported statement by Falwell Jr. that LA paid for the site, and LA's
21 very existence as a 501(c)(4) organization (apparently formed to undertake activities that JFM
22 could not undertake without endangering its 501(c)(3) tax status) make it seem most likely that

⁵ The site contains rotating banner advertisements that appear near the top of the page for Falwell-related products, services or organizations, which sometimes include text larger than the JFM logo.

1 LA, not JFM, is the proper respondent in this matter. This should be readily confirmable with
2 limited discovery. Therefore, we recommend the Commission take no action at this time
3 regarding Jerry Falwell Ministries, Inc.

4 **B. The Press Exemption**

5 The Act exempts from the definition of expenditure "any news story, commentary, or
6 editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or
7 other periodical publication, unless such facilities are owned or controlled by any political party,
8 political committee, or candidate." 2 U.S.C. § 431(9)(B)(i). Because the *Falwell Confidential*
9 communication at issue contained express advocacy and a solicitation for contributions to a
10 political committee, any expenditure for the communication would be prohibited unless the
11 communication qualified for the press or some other exemption.⁶

12 The response asserts that the *Falwell Confidential* qualifies for the press exemption
13 because it is Dr. Falwell's personal commentary and appears weekly on "various online and print
14 periodical publications." Resp. of JFM/LA at 6. The response also asserts that no political party,
15 political committee or candidate controls LA, JFM, or Dr. Falwell."⁷ *Id.* at 10. The response
16 then concludes that because LA posts the *Falwell Confidential* and articles by other writers "LA
17 is merely acting as a member of the press in the same way as Newsmax.com,

⁶ Under the Act, corporations may not, *inter alia*, make expenditures in connection with federal elections. 2 U.S.C. § 441b. An independent expenditure is an expenditure for a communication expressly advocating the election or defeat of a clearly identified candidate which is not made with the cooperation or prior consent of, or in consultation with or at the request or suggestion of, any candidate or authorized committee or agent of a candidate. 11 C.F.R. § 100.16. Corporations may not make expenditures to finance express advocacy communications to those outside their restricted class. 11 C.F.R. § 114.2(b).

⁷ Though unaddressed in the response, we have found no evidence that a political party, political committee or candidate "owns" the entities.

1 WorldNetDaily.com, and other media that publish Dr. Falwell's personal opinion."⁸ Resp. of
2 JFM/LA at 7-8.

3 The Falwell.com website contains primarily information on various activities, issues, and
4 projects of the JFM entities, as well as articles or statements from Dr. Falwell. The homepage
5 features links to pages relating to JFM activities, appeals for donations to the Liberty University
6 Foundation, an announcement for an upcoming JFM conference, information on Bible studies,
7 and a section on registering to vote online. See <http://www.falwell.com> (last accessed Apr. 20,
8 2005). The homepage also contains a link to "JFM News," a listing of items and articles
9 primarily relating to JFM issues or activities, including several reprints of articles or statements
10 by Dr. Falwell and other writers. Also on the homepage is a "Television" link that takes the
11 viewer to the program guide for the Liberty Channel ("LC") (a "Streaming Video" link in the
12 frame also provides a link to LC). The LC is a cable and satellite network with which
13 Dr. Falwell appears to be associated.⁹ Yet another link on the homepage says "JFM Links."
14 Clicking that link reveals a number of pages that appear to be those of Falwell-related entities
15 such as Liberty University ("LU") and Liberty Baptist Theological Seminary, as well as the LC
16 and NLJ; and other links to a number of pages that appear to be those of unrelated entities (e.g.,
17 Eagle Forum and Concerned Women for America.)

⁸ The response states that both Newsmax.com and WorldNetDaily.com, two daily Internet newspapers, had also posted (with minor modifications) the article by Falwell; the response also provided copies of those articles. Resp. of JFM/LA at 5 and Exhibits 1-2.

⁹ The LC appears to originate as the over-the-air broadcast signal of WTLU-TV in Lynchburg, Virginia. Neither that station nor the LC appears to be a corporate entity in its own right, but appears to be operated by Liberty University, a Virginia corporation. See http://www.liberty.edu/Media/1109/%5B791%5DGraduate_Seminary_Catalog_2003-2004.pdf (last accessed May 24, 2005). Dr. Falwell is the founder and chancellor of Liberty University. See <http://www.liberty.edu/> (last accessed May 24, 2005). The LC may have some link to the corporate entity known as "Liberty Broadcasting Network Inc.," which Dun & Bradstreet reports as "affiliated" with Liberty University. Among the programs available on the LC is the *Old Time Gospel Hour*, a weekly worship service from Thomas Road Baptist Church in Lynchburg, of which Dr. Falwell is the pastor. See <http://www.libertychannel.com/programguide.html> (last accessed May 24, 2005); and <http://www.trbc.org/> (last accessed May 24, 2005). According to the "About Us" section on Falwell.com, OTGH is telecast and available on the Internet.

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1 The LC and *NLJ* both have separate home pages with separate URLs. Moreover, both
2 *NLJ* and LU, the apparent operator of the LC, appear to be separate business entities (although
3 Dun & Bradstreet lists the same address for both). As already noted with respect to *NLJ*, Dun &
4 Bradstreet searches failed to disclose any formal business link between either *NLJ* or LU and LA
5 (although all of the entities obviously have informal ties through Dr. Falwell).

6 The weekly *Falwell Confidential* does not appear on the *NLJ* or LC websites and the
7 response does not claim that the *Falwell Confidential* communication at issue appeared on either
8 of those websites. As discussed in footnote 4, *supra*, the *NLJ* website referred to the weekly
9 *Falwell Confidential* in the context of an invitation to readers to subscribe to the email version
10 and within that context provided a link to the Falwell.com homepage. We do not know whether
11 the weekly *Falwell Confidential* or the particular *Falwell Confidential* at issue appeared in the
12 print edition of the *NLJ*, but the response does not claim that it did. Because the *Falwell*
13 *Confidential* is a written communication rather than an audiovisual communication, we assume
14 that it did not appear on LC programming; again, the response does not claim otherwise.

15 The question presented is whether the *Falwell Confidential* posting on the Falwell.com
16 website was distributed through the facilities of a "broadcasting station, newspaper, magazine, or
17 periodical publication," or the online equivalent of any of those media. *See* Advisory Opinion
18 2000-13 (iNEXTV) (Commission finding that a website was "akin to a periodical or news
19 program"); Advisory Opinion 1996-16 (Bloomberg) (Commission noting that Bloomberg "acts
20 as a news and commentary provider via computer linkages, performing a newspaper or
21 periodical publication function for computer users"). If it was not so distributed, it cannot
22 qualify for the "press exemption." 2 U.S.C. § 431 (9)(B)(i).

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1 Taken as a whole, Falwell.com cannot be said to be the online equivalent of any of the
2 media specified in the statute. Instead, it appears to be no different from other corporate or union
3 websites that feature periodic news, events, and/or commentary sections relating to the activities
4 or concerns of the corporation or union. See e.g., Marriott's "News Releases" section at
5 http://marriott.com/news/default.mi?WT_Ref=mi_left (last accessed Apr. 20, 2005); the
6 American Postal Workers Union, AFL-CIO's "News & Events" section (including periodic
7 commentaries by the president of the APWU called the "Burrus Updates") at [http://www.apwu.](http://www.apwu.org/news/index.htm)
8 [org/news/index.htm](http://www.apwu.org/news/index.htm) (last accessed Apr. 20, 2005); the International Longshoremen's
9 Association, AFL-CIO's "News from the ILA" section at [http://www.ilaunion.org/news/news.](http://www.ilaunion.org/news/news.asp?l=1)
10 [asp?l=1](http://www.ilaunion.org/news/news.asp?l=1) (last accessed Apr. 20, 2005); the AFL-CIO's "Media Center" section at [http://www.](http://www.aflcio.org/mediacenter)
11 [aflcio.org/mediacenter](http://www.aflcio.org/mediacenter) and its "Bush Watch" section at [http://www.aflcio.org/issuespolitics/](http://www.aflcio.org/issuespolitics/bushwatch/index.cfm)
12 [bushwatch/index.cfm](http://www.aflcio.org/issuespolitics/bushwatch/index.cfm) (last accessed April 20, 2005); Perdue Farms' "Company News" at
13 [http://www.perdue .com/corporate/perdue_newsPR.asp?l1=3&l2=0](http://www.perdue.com/corporate/perdue_newsPR.asp?l1=3&l2=0) (last accessed Apr. 20,
14 2005); and ExxonMobil's "News Room" section (including the "Op-Eds" commentaries that
15 also appear in *The New York Times*, *The Washington Post* and other periodicals) at
16 [http://exxonmobil.com/ Corporate/ Newsroom/News_Room.asp](http://exxonmobil.com/Corporate/Newsroom/News_Room.asp) (last accessed Apr. 20, 2005).

17 If Falwell.com is the online equivalent of a newspaper, broadcasting station, magazine, or
18 other periodical publication, then it is hard to see how those other websites and all other similar
19 corporate or union websites would not similarly be described as such. Under those
20 circumstances, the Act's limits on corporate and labor campaign activity would be swallowed by
21 the press exemption. But the Supreme Court has already said that the "press exemption" does
22 not extend to all corporate publications, rejecting the argument that such publications are
23 automatically exempt from the statutory prohibition on corporate and labor union expenditures

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1 and concluding that "a contrary position would open the door for those corporations and unions
2 with in-house publications to engage in unlimited spending directly from their treasuries to
3 distribute campaign material to the general public, thereby eviscerating § 441b's prohibition."
4 *See FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986) ("MCFL").

5 Although it is similar to the organizational websites of other corporations and labor
6 organizations, the Falwell.com website does not resemble NewsMax.com or WorldNetDaily, the
7 two online periodical publications cited for comparison in the response. The site also does not
8 resemble other online periodical publications such as Salon.com, Slate.com, or
9 Drudgereport.com. NewsMax.com describes itself as "America's News Page" and its homepage
10 features the various sections that one would expect to find on a news site, *e.g.*, headline news,
11 editorials, classifieds, and money news. *See* <http://www.newsmax.com> (last accessed Apr. 20,
12 2005). WorldNetDaily describes itself as "A Free Press For A Free People" and includes
13 sections for news, commentary, letters, classifieds ads, health, and weather. *See*
14 <http://www.worldnetdaily.com/> (last accessed Apr. 20, 2005). The Salon website features a "Hot
15 Topics" section which includes subsections for news, politics, books, comics, technology,
16 business, arts and entertainment. *See* <http://salon.com> (last accessed Apr. 20, 2005). The Slate
17 website features sections on news, politics, arts, business, sports, technology, shopping, travel,
18 and food. *See* <http://slate.com> (last accessed Apr. 20, 2005). Finally, the Drudge Report website
19 features news headlines and links to major news services, newspapers, and commentators. *See*
20 <http://www.drudgereport.com> (last accessed Apr. 20, 2005). In short, these websites feature
21 primarily media content unlike Falwell.com, which features primarily information about the
22 various activities, issues and projects of the various Jerry Falwell Ministries organizations.

1 Dr. Falwell's close involvement with other entities that may well be media entities, or the
2 Falwell.com website's links to websites of some of those entities, does not alter the analysis
3 because the test is whether the dissemination of the communication at issue was accomplished
4 through the facilities of such an entity. So far as we can tell, the *Falwell Confidential*
5 communication at issue was not so disseminated. Assuming purely *arguendo* that NLJ and LC
6 are such entities, the *Falwell Confidential* does not appear to have been distributed through them
7 or their websites. It was instead distributed "through the facilities of 'Falwell.com'" and thus it
8 was not distributed through those entities' facilities any more than a commentary by the CEO of
9 General Electric posted on www.ge.com could be said to be distributed through the facilities of
10 NBC News, whose ultimate corporate parent is General Electric, simply because within ge.com
11 there exists a link to msnbc.com. Indeed, even corporate entities that are primarily engaged in
12 media businesses do not always qualify for the press exemption. In Advisory Opinion 2004-7, at
13 7-8, involving MTV Networks, a division of Viacom International, the Commission determined
14 that certain email communications or text messages distributed by MTV or Viacom would not
15 fall within the press exemption and would violate 2 U.S.C. § 441b if the communications
16 contained express advocacy.

17 Based on the above analysis, the *Falwell Confidential* posting on the Falwell.com website
18 would not qualify for the press exemption. For the same reasons, the email of that posting would
19 also not qualify for the press exemption. The emailed version contains precisely the same
20 content as the version that appears on the website. Moreover, the only way to sign up to receive
21 the *Falwell Confidential* emails is by first visiting the Falwell.com website. Consequently, the
22 emails are wholly derivative of the website, and thus are not distributed through the facilities of

1 any "broadcasting station, newspaper, magazine, or periodical publication," any more than the
2 content of the website is.¹⁰

3 **C. Qualified Nonprofit Corporation Status and Corporate Expenditures**

4 A corporation's express advocacy of a federal candidate and its solicitation for
5 contributions to an unaffiliated multicandidate committee from the general public would
6 constitute prohibited corporate expenditures unless the corporation is exempt from the Act's
7 prohibition on corporate expenditures as a "qualified nonprofit corporation" under 11 C.F.R.

8 § 114.10(c)(1)-(5).¹¹ This regulation implements 2 U.S.C. § 441b in light of the Supreme
9 Court's decision in *MCFL*.¹²

10 LA would not qualify for QNC status under 11 C.F.R. § 114.10 because it has received
11 corporate contributions and lacks a policy of not accepting corporate contributions.¹³ Resp. of
12 JFM/LA at 14-15. Nevertheless, case law in the Fourth Circuit, where LA has its principal place
13 of business, and in the District of Columbia, where LA is incorporated, take different approaches
14 to the QNC issue that differ both from the Commission's regulations and between the two

15 ¹⁰ The conclusion in AO 2004-7 cited above involved emailed content. The Commission found that emailed content that was derivative of (albeit not identical to) *exempt* content nonetheless did not itself qualify for the press exemption. It would be incongruous to say that here, where the emails were derivative of non-exempt content, that they somehow became entitled to the press exemption merely because they were sent via electronic mail.

¹¹ A QNC that makes independent expenditures exceeding \$250 in a calendar year must certify its QNC status and report the expenditure. 11 C.F.R. § 114.10(e)(1)-(2).

¹² In *MCFL*, the Supreme Court concluded that the prohibition on independent expenditures in 2 U.S.C. § 441b cannot constitutionally be applied to nonprofit corporations having certain essential features. 479 U.S. at 238.

¹³ To qualify for QNC status, a corporation: (1) must be a social welfare organization as described in 26 U.S.C. § 501(c)(4); (2) must have as its only express purpose the promotion of political ideas, *i.e.*, issue advocacy, election influencing activity or research training or educational activities tied to the corporation's political goals; (3) cannot engage in business activities; (4) cannot have shareholders or persons who would have an economic disincentive to disassociate themselves from the organization if they disagree with its political activity; and (5) cannot have been established by a business corporation or labor union and must not accept direct or indirect contributions from such organizations, or has a written policy against accepting such donations. 11 C.F.R. § 114.10(c)(1)-(5).

1 circuits.¹⁴ As discussed below, it appears that LA could establish QNC status in the Fourth
2 Circuit, but has not provided information sufficient to establish that it would do so in the District
3 of Columbia Circuit.

4 The Fourth Circuit, in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir.
5 1999), *cert. denied*, 528 U.S. 1153 (2000) ("*NCRL I*"), determined that a nonprofit corporation,
6 North Carolina Right to Life ("*NCRL*"), that lacked a policy against accepting corporate
7 contributions and received between zero and eight percent of its total revenues from
8 corporations, was not precluded from qualifying for a state MCFL exemption because the
9 corporate funds were "but a fraction of its overall revenue" and were not "of the traditional
10 form." *See also Beaumont v. FEC*, 278 F.3d 261, 273 (4th Cir. 2002), *rev'd on other grounds*,
11 539 U.S. 146 (2003) (citing with approval the decision in *NCRL I* and finding that NCRL was
12 constitutionally exempt from 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(b) and that 11 C.F.R.
13 § 114.10 was unconstitutional as applied to NCRL).¹⁵ The response claims that in the last five

14 ¹⁴ We analyze both Fourth Circuit and District of Columbia Circuit precedent here because either Virginia or the District of Columbia could serve as a forum if this matter were litigated.

¹⁵ On appeal, the Supreme Court only addressed the constitutionality of the ban on direct contributions. *See Beaumont*, 539 U.S. at 151.

1 years, LA received a *de minimis* percentage (less than one percent) of its total revenues from
2 business corporations. Resp. of JFM/LA at 15. In light of this minimal amount of corporate
3 contributions, LA would appear to have a valid QNC defense in the Fourth Circuit.

4 Taking a different approach, the District of Columbia Circuit has focused on the *amount*
5 of corporate contributions the nonprofit received during the year rather than on the *percentage* of
6 corporate contributions to the nonprofit's total revenues. *FEC v. National Rifle Association*,
7 254 F.3d 173, 192 (D.C. Cir. 2001). The court ruled that the general prohibition on
8 corporate-financed independent expenditures would apply to the corporate contributions the
9 NRA received in 1978 (\$7,000) and 1982 (\$39,786) because such contributions were
10 "substantial" but could not constitutionally apply to the NRA in 1980 because its receipt of
11 \$1,000 in corporate contributions that year was *de minimis*. *Id.* Because we do not know the
12 amount of corporate contributions LA received in 2004, we cannot determine whether LA would
13 have a valid QNC defense in this circuit.

14 Because the *Falwell Confidential* communication would not qualify for the press
15 exemption, and because LA would not qualify for QNC status under Commission regulations
16 and questions remain as to whether it would qualify as a QNC under all applicable court
17 precedent, LA's posting and circulation of an express advocacy communication and solicitation
18 of contributions to the general public may have constituted prohibited corporate expenditures.
19 Accordingly, there is reason to believe that Liberty Alliance, Inc. violated 2 U.S.C. § 441b.

20 D. Disclaimer Notices

21 It does not appear that disclaimer notices would be required for either the Falwell.com
22 website or the *Falwell Confidential* communication. Based on current regulations, disclaimer
23 notices are required for "public communications." for "unsolicited electronic mail of more than

1 500 substantially similar communications" and for Internet websites of political committees
2 available to the general public. 11 C.F.R. § 110.11. The term "public communications" does not
3 include communications over the Internet and thus the *Falwell Confidential* communication
4 would not qualify as a "public communication."¹⁶ 11 C.F.R. § 100.26. The email version of the
5 *Falwell Confidential* communication would not require a disclaimer because it was sent only to
6 persons who subscribed to receive the communication, and thus it was not "unsolicited electronic
7 mail." Finally, the Falwell.com website would not require a disclaimer because the site does not
8 belong to a political committee. Accordingly, this Office recommends that the Commission find
9 no reason to believe that Liberty Alliance, Inc. violated 2 U.S.C. § 441d.

10 **IV. DISPOSITION**

11 Because this matter involves communications over the Internet, this Office must
12 consider, as in similar past matters, whether the amount spent on the website and communication
13 and the level of dissemination of the communication warrant further enforcement action. In
14 several recent matters, the Commission found reason to believe that violations had occurred in
15 connection with express advocacy communications, endorsements, or solicitations of
16 contributions on corporate websites. but decided to take no further action as a matter of
17 prosecutorial discretion because of the level of dissemination of the communication and/or the
18 likely minimal costs associated with the Internet communications. See e.g., MURs 5522
19 (Wisconsin Right to Life, Inc. ("WRTL"), 2005); 5281 (American Muslim Council, 2004); and

¹⁶ In *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) (granting in part and denying part the respective parties' motions for summary judgment), the district court invalidated the content standard of the coordinated communications regulation, including the provision referencing the definition of "public communication" which excludes communications over the Internet. The court subsequently denied the Commission's petition for a stay pending appeal, but confirmed that the regulations remained in effect. See *Shays v. FEC*, Civ. No. 02-1984 (CKK), slip op. at 2 (D.D.C. Oct. 19, 2004). In light of the court's decision regarding the definition of "public communication," at 11 C.F.R. § 100.26, the Commission approved a notice of proposed rulemaking seeking public comment on issues related to Internet communications. See *Internet Communications*, 70 Fed. Reg. 16967 (2005) (to be codified at 11 C.F.R. Parts 100, 110, 114) (April 4, 2005).

1 MUR 4686 (New York State AFL-CIO, 1999). Although the amount spent on the Falwell.com
2 website may turn out to be small, the apparently wide distribution of the *Falwell Confidential*
3 stands in marked contrast to the relatively small dissemination assumed in cases such as WRTL.
4 Thus, we cannot at this point recommend dismissal of this matter based simply on the likelihood
5 of low cost.¹⁷

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15 **V. RECOMMENDATIONS**

- 16 1. Find reason to believe that Liberty Alliance, Inc. violated 2 U.S.C. § 441b.
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18 2. Find no reason to believe that Liberty Alliance, Inc. violated 2 U.S.C. § 441d.
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20 3. Take no action at this time with respect to Jerry Falwell Ministries, Inc.
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22 4.
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25 5. Approve the appropriate Factual and Legal Analysis.
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¹⁷ See, e.g., MUR 5048 (Sharp Shooting Indoor Range and Gun Shop, Inc., 2002) (where radio advertisement cost only \$225).

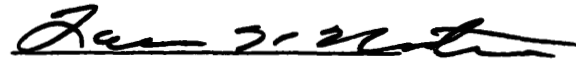
See also MUR 4838 (Citizens for Paul Feiner, 1999)
and MUR 4837 (Boyd for Congress, 1999) (where advertising cost was \$2,000,

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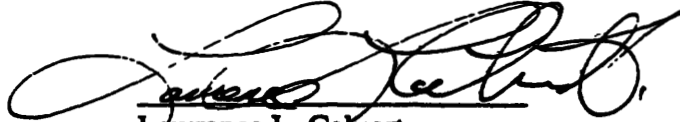
6. Approve the appropriate letters.

Date

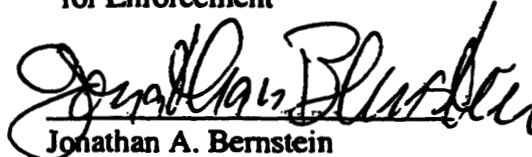
6/6/05



Lawrence H. Norton
General Counsel



Lawrence L. Calvert
Deputy Associate General Counsel
for Enforcement



Jonathan A. Bernstein
Assistant General Counsel



Dominique Dillenseger
Attorney

Attachment:

Falwell.com homepages (11/16/2004 and 6/2/2005)

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