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To: internetnprm@FEC
cc: jdempsey <jdempsey@cdt.org>, Matt Grossmann <matt@addsheet.com>
Subject: NPRM 2001-14: Comments of the Center for Democracy and Technology

December 3, 2001

Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RE: Comments of the Center for Democracy and Technology
Federal Election Commission Notice of Proposed Rulemaking 2001-14: Use
of the
Internet for Campaign Activity

Dear Ms. Smith,

The Center for Democracy and Technology welcomes the opportunity to submit comments in response to the Notice of Proposed Rulemaking (ONPRM) issued on October 3, 2001. The Center for Democracy and Technology is a non-profit, public interest organization dedicated to promoting civil liberties and democratic values for the new digital communications media. CDT's core goals include enhancing speech and protecting privacy and preserving the open architecture of the Internet. CDT does not participate in or comment upon federal election campaigns, but we make extensive use of the Internet to communicate and organize on issues of public policy.

In our January 4, 2000 comments in response to the FEC Notice of Inquiry 1999-24 (ONOID), we joined with other organizations that share our belief that the Internet is a unique communications medium whose very architecture and economics offer an opportunity to reinvigorate political discourse and improve the quality of the electoral process by providing a platform from which individuals can engage in political speech outside the control of candidates, political parties, and the traditional media gatekeepers. At that time we urged the Commission to proceed cautiously and to delay any rulemaking prior to the 2000 election. We also informed the Commission that we were creating an online guide to the diversity of individual political activity on the Internet. Today a tutorial and virtual tour of individual political activity on the Internet can be found on our web site at <http://www.cdt.org/speech/political/guide/>. We believe it makes a strong case for leaving individual political activity on the Internet largely unregulated. We are pleased that the Commission has carefully considered the ramifications of regulating Internet communications pursuant to the Federal Election Campaign Act (FECA) and is taking action to clarify that certain Internet activity is not regulated by the FECA.

Internet Activity by Individuals
Proposed 11 CFR 117.1

We support the Commission's use of the volunteer exemption to remove the cloud of potential regulation from individual Internet activity. We believe that the FEC should continue its efforts to encourage

campaign-related use of the Internet by individuals.

We urge the Commission to make it clear that, by exempting some activities from regulation, it is not suggesting that other online activities are not covered by the exemption and subject to regulation and reporting as expenditures or contributions. We continue to believe that in cases of Internet activity by individuals, the Commission should presume that federal election law is not applicable. Because the Internet involves a quickly changing communications infrastructure with constantly evolving technologies, many of the regulations written today will not fully account for activities that are unanticipated in the current technological environment. Because the current proposed rules have been in development for several years, we expect that any new regulations could not be developed in time to respond to changes in technology and its uses. We therefore recommend that the Commission make a statement to ensure that the future presumption will be in favor of Internet political activity by individuals as not being regulated activity. At the very least, the Commission should say that the exemption of certain activities in this [rule] creates no presumption or suggestion that other activities are covered by the FECA.

The regulations need to be clarified in that the exemption for use of Internet services and equipment owned by an individual does not account for use of computer and Internet services at public access facilities and in other contexts where the same presumptions should apply. Many people use computers at libraries, universities, community centers, or public schools as their primary source of Internet connectivity. Others use these free or low-cost access options as a secondary means of access. It is possible to create and maintain a web site using only a library or school computer and this activity should be just as protected as use of equipment owned by individuals. We recommend that the Commission clarify the rule to make it clear that use of computer and Internet equipment and services at these facilities is not covered by the FECA. First, the Commission should include a specific exemption for the use of school or university computer equipment and services by students and faculty of the school or university. Second, use of public access facilities such as libraries or community centers should be protected. Third, the use of leased equipment or services at a public access location such as an Internet café or copy center should be exempted from reporting.

We recommend that the Commission clarify that many uses of work-supplied computer equipment or services will be considered [occasional, isolated, or incidental.] Many people use Internet accounts or computers supplied by their place of employment as their primary means of Internet access. Businesses may provide their employees with computer equipment for use at home or with laptops. Individuals then use these computers for both business and personal use. Similarly, a business may provide its employees with home connectivity that may then be used for both personal and business purposes. Use of these services and this equipment for web site production or uploading, but not hosting, should be exempted from reporting absent evidence of employer encouragement or coercion. Where individuals normally use their work-supplied computer equipment or services for home Internet access, the use of the equipment or services should be presumed to be incidental.

We recommend that the Commission clarify the exemption for Internet service providers used by an individual in a campaign-related activity. The exemption should cover all equipment owned by an individual residing at any location. It should also cover any equipment leased or provided by an Internet service provider, a web hosting provider, or a storage or maintenance service provider. The Commission should recognize that individual efforts to create web sites should be exempted without regard to the type of service they use, from free web hosting accounts to server co-location.

The regulations leave the fate of small groups utilizing the Internet for political activity unclear. The regulations specify that one individual's use of his or her own equipment is exempted as volunteer activity. Many people engaged in political activity online, however, are participating in small, unincorporated groups. Some connect only in virtual settings and others are groups of friends or neighbors; some have formal membership and others involve flexible and open organization. The Commission should make it clear that the volunteer exemption applies to the efforts of these unincorporated groups. Individuals should be able to share computer equipment and services within these unincorporated groups.

The NPRM is silent on whether this proposed rule supersedes Advisory Opinion 1998-22, despite the fact that the new rule would exempt the activities described in the AO from regulation. We suggest that the Commission explicitly withdraw or revise the AO as it is inconsistent with this proposed rule.

Hyperlinks on Corporation and Labor Organization Web Sites Proposed 11 CFR 117.2

We applaud the Commission's efforts to clarify that providing hyperlinks is not a regulated contribution under federal election law. We appreciate the Commission's efforts to understand the necessity of hyperlinks for the functioning of the web. We urge the Commission to go further to ensure that individuals can easily find political information on the web.

The Commission should make it clear that different types of hyperlinks on the same corporate or labor organization web site will be treated differently. The first currently proposed test suggests that all links on a corporate web site will be treated identically if the site normally charges for a hyperlink of any kind. Many web sites provide free hyperlinks to web sites in addition to paid banner advertising or other paid hyperlinks. It should be clear that as long as a corporation normally provides free hyperlinks of the same nature as a hyperlink they have provided to a campaign web site, they would be exempt regardless of whether they normally charge for hyperlinks of a different nature. A directory should be permitted to include a listing for a campaign web site similar to those provided to other sites, for instance, even if it also sells banner advertising. If the paid and free links are intermingled they should be appropriately identified.

We applaud the Commission's insightful exemption for the text of the URL in determining express advocacy. That exemption should be extended to the name of the web site and other objectively descriptive text surrounding the URL. A link to votenader.com with the text "The Vote Nader Web Site," for instance, should not be considered express advocacy. Descriptions of a site that are similar to card catalog entries should also be permitted. In addition, search engines should be permitted to automatically generate descriptions of a web site based on its content and include that text surrounding the hyperlink even if it contains express advocacy. For example, a search engine spider might collect prominent text on a candidate web site and include it along with a hyperlink as a description of the web site. This activity should be permitted even in cases where the text collected by the spider includes words of express advocacy from the campaign site.

The Commission should exempt hyperlinks that are not provided selectively from regulation as a contribution. If hyperlinks are provided equally to all candidates, the hyperlinks should be permitted even if the corporation normally charges for hyperlinks. If a corporation normally charges for priority hyperlinks in an online directory, for instance, but decides to offer priority listings to official candidate web sites for all candidates free of charge, that

activity should not be considered a contribution.

Restrictions regarding the text surrounding a hyperlink or the graphic material anchored to a hyperlink may prohibit election related archival projects. In the 2000 election, several sites produced comprehensive archives of all material released by every campaign, including banner ads, television ads, and press releases. If a corporation or non-profit organization includes an equally accessible archive of all information released by each candidate, they would be prohibited from linking to a candidate web site under the proposed provisions. The Commission should allow corporations to include a hyperlink to a candidate web site on a page that archives materials from the candidate, provided that the archive contains materials from all candidates.

We recommend that the Commission clarify that campaigns are not liable for inadvertently distributing banner advertisements to corporations for use on their web sites. Many candidates make available "Link to Our Site" sections of their campaign Web sites for distributing html code and images for use in adding a banner ad to one's Web site. If some of these banners are added to corporate Web sites, the campaign should not be held liable if it intended that only individuals download the material.

The Commission's regulations may prohibit candidates and corporations from engaging in "link exchange" agreements that include banner ads. Many Web sites sign up for hyperlink exchange programs that agree to post their banner on other participating Web sites in exchange for posting a banner on their site. The banner is controlled by a third party and rotates between banners from other members of the program. If candidates join this free arrangement, all corporate Web sites participating in the program could potentially be liable if the text of the banner contains express advocacy. The Commission should exempt free link exchanges of this kind from regulation. Again, where paid and free links are provided they should be identified as such.

Press Releases Announcing Candidate Endorsements Proposed 11 CFR 117.3

We support the Commission's conclusion that the routine posting and archiving of endorsement press releases on a Web site should not be viewed as a prohibited corporate expenditure.

Recommended Next Steps

We recognize and appreciate that the Commission is engaged in an initial round of rulemaking on use of the Internet for campaign-related activities and has not attempted to formulate rules for all Internet activity. We would again, caution against such a broad endeavor. However, some of the issues addressed by the proposed rules, are closely related to other issues involving campaign-related Internet activity that should be addressed as soon as possible. We therefore recommend that the Commission undergo a new round of rulemaking regarding Internet political activity after the conclusion of the current round. Several issues should take precedence in this future round of rulemaking:

First, a specific exemption for online voter guides by non-profit organizations and corporations should be created to encourage non-partisan online political activity that could encourage informed participation in federal elections. In our previous comments, we noted the extent and variety of non-partisan political information Web sites and discussed the potential pitfalls of applying existing standards for offline voter guides to these activities. We are concerned that archival projects related to an election, including the reposting of information released by campaigns, could be prohibited by current

Commission guidelines. In cases where campaign information is distributed uniformly and without prejudice, the reposting of materials with express advocacy on corporate or non-profit organization web sites should be permitted.

Second, the Commission should create an exemption for the provision of free web sites and Internet services to all campaigns, in parallel to the exemption for provision of free television time. Corporations or non-profit organizations should be permitted to supply candidates with Internet services or web sites uniformly and without prejudice, even if they normally charge for the provision of these services. Encouraging all candidates for federal elections to use the Internet and create web sites in the public interest and should not be prohibited by federal election law.

Third, the Commission should clarify that corporations are not responsible for content that appears on a message board or in a chat room on their web site. As noted in our previous comments, many corporate web sites provide message boards or chat facilities for Internet users to voice their opinion on election campaigns or particular candidates. The Commission's rulings in the DNet Advisory Opinion (1999-25) and the EZone Advisory Opinion take the appropriate approach and should be extended. Service providers and conduits should not be held responsible or liable for statements made by subscribers. Furthermore, service providers and conduits should not be under any obligation to monitor the activities of their subscribers.

We applaud the Commission for the clarifications provided by the NPRM. With the modifications we've requested we believe this NPRM takes important strides toward supporting the diverse, vibrant, individual political speech found on the Internet.

Respectfully,

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