"Mitchell, Cleta" <CMitchell@foleylaw.com> on 12/03/2001 10:29:50 AM

To: internetmprm@FEC
cc:

Subject: Comments re: NPRM Notice 2001-14

<<108856_1.DOC>> These comments will also be sent via facsimile and U.S. mail.

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December 4, 2001

VIA FACSIMILE AND U.S. MAIL
VIA ELECTRONIC MAIL

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

RE: Notice of Proposed Rulemaking 2001-14

Dear Ms. Smith:

Please accept these comments in response to Notice of Proposed Rulemaking 2001-14, *The Internet and Federal Elections*.

The Commission's proposed regulations governing federal campaign activity on the Internet demonstrate the difficulty of imposing a legal framework established more than a quarter century ago upon the dynamic political communications system in existence today. The communications mechanisms we currently rely upon were never contemplated by the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.* ("the Act"), the people who sponsored it or the complicated regulatory scheme spawned by the Act.

Neither the Internet nor multiple television networks nor cable news outlets with constant and immediate information capabilities existed when the Act was passed by Congress.

Now, the Commission is faced with the arduous task of trying to fit the round pegs of the Act into the square holes of communication realities of the 21st century.

While the Commission clearly is making an attempt to move 'gingerly' in terms of political activity on the Internet, the proposed regulations are based on a flawed premise, namely that the Internet is 'inexpensive'. While electronic mail itself may be an 'inexpensive' method of instant communications for an end user, enormous resources are required to create the

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communications delivery system(s), the communications provider(s) and the profitability necessary to maintain any such system as a viable commercial concern. To declare the internet to be an 'inexpensive' method of communicating is to ignore the underlying costs of building and maintaining the systems. It is like saying that driving down a city street is 'free' or 'inexpensive' because no toll is charged on the driver who travels that particular route. Clearly, there are many costs paid by someone, somewhere for the street itself to be toll-free.

As an example of the problem with the proposed regulations, specifically the regulations proposed at 11 C.F.R. §117.1, the Commission fails to contemplate one of the most common questions arising in political communications involving the Internet, namely, whether it is permissible for an individual who wishes to engage in Internet communications through his or her own small business or when the communications are through use of a computer and/or an Internet service provider whose costs are paid by a small business or corporate entity owned by the individual. The proposed regulations only address 'individual' and 'volunteer' communications by an individual and prohibit the same type of communications if the computer is owned by the individual's 'employer'. What about the millions of people who use computers owned by their own family businesses, partnerships or individual corporate entities? Does this proposed regulation prohibit their political communications on those computers – so that the rule is really one of 'who owns the computers' as the test for whether the communication is permissible or illegal?

These proposed rules deal only with the very tiniest aspect of Internet activity – but do not address the larger issues.

One of the continuing and most daunting questions arising in the context of Internet political communications is whether online fundraising for candidates is subject to the strict application of the Act. While there are well-settled rules regarding offline fundraising, covering everything from disclaimers to best efforts rules to safeguards against illegal excessive and prohibited source contributions, much confusion still abounds within the regulated community as to whether the Commission intends to impose that regulatory framework on Internet political fundraising. Some commercial ventures adhere to the regulations in their online fundraising on behalf of candidates and party committees, bearing the expense of that compliance. Others avoid the requirements (and the costs of compliance) arguing that it is unnecessary and the Commission has shown no indication of an intent to enforce compliance with the regulations within the online fundraising arena. The Commission has *not* indicated its intent in that regard and some believe that the compliance costs are an unnecessary burden for the reason that no penalties will be suffered by ignoring regulations applicable to offline fundraising.

Consideration of the application of the Act to the Internet does more than raise the issue of how and whether to apply the regulations to political communications and activities on the

Internet. It underscores the fact that the existing regulatory framework is an anachronism and should be substantially revised and reduced, transferring emphasis from punitive enforcement to one which instead relies on instantaneous disclosure and mass communications of the sources and uses of political campaign funds.

The Commission's incremental approach to application of very narrow provisions of the regulations and the Act to certain (but not all) political activities and expressions on the Internet does not provide sufficient guidance to the public and the regulated community as to the direction the Commission intends to proceed with larger questions which remain unanswered by these small changes in the regulations.

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Please contact me if there are questions regarding these comments.

Sincerely,

/s/ *Cleta Mitchell*

Cleta Mitchell, Esq.