Republican
National
Committee

Counsel's Office

December 21, 2001

Rosemary C. Smith
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Dear Ms. Smith:

These comments on the Federal Election Commission's ("the Commission") Proposed Rules relating to the Internet and Federal Elections, 66 Fed. Reg. 50358 ("Proposed Rules") are submitted on behalf of the Republican National Committee ("RNC"). The RNC thanks the Commission for the opportunity to comment on these Proposed Rules, and in the event the Commission holds hearings on the Proposed Rules, we wish to testify.

I. Introduction

The RNC has consistently taken the position that political parties have an important and unique role within the American political system. *See* RNC's January 4, 2000 Comment on the Commission's Notice of Inquiry regarding the Use of the Internet for Campaign Activity. Political parties represent a broad-based coalition of interests and individuals seeking to support and advance the party's philosophy and positions on public policy issues and to elect people of similar political beliefs to positions at all levels of government. The use of Internet websites and e-mail allows party committees at the national, state and local levels to widely disseminate their message at very little cost, and no regulatory action should be taken by the Commission that would in any way discourage Internet usage by political parties and other political organizations. Wherever possible, the Commission should adopt regulations that facilitate and foster greater use of the Internet in American politics.

The United States Supreme Court has made clear that "[t]he Internet is 'a unique and wholly new medium of human communication,'" *Reno v. ACLU*, 521 US 844, 850 (1997), that deserves the highest level of First Amendment protection.[1] *Id.* at 970. The

[1] One Commissioner has correctly noted that "the Supreme Court, in severely limiting the government's ability to regulate indecent speech on the Internet, left open the argument that 'the First Amendment denies Congress the power to regulate the content of protected speech on the Internet [at all].'" Testimony of Commissioner David M. Mason before the U.S. Senate Committee on Rules and Administration (citing *Reno v. ACLU*, 521 US at 863 and Fn. 30). Whether the Commission should promulgate any regulations

Internet has indeed become a vital tool of democracy. The Internet connects people and provides information, and its use should be encouraged for all entities, including political parties, through narrowly tailored regulation by the Commission that acknowledges the unique nature of the Internet and its advantages for the democratic process. Information about issues and candidates can be displayed and sent with negligible marginal costs for the sender – no matter whether the sender is an individual, corporation or labor union, or political party – and the Commission should acknowledge that new reality in any Rulemaking regarding use of the Internet.

The instant Proposed Rules are a step in the right direction. Each of the three proposed rules is an understandable reaction to the way Internet usage has changed political activity, but in turn each of the Proposed Rules leaves out necessary information and/or clarifications. The RNC urges the Commission to adopt the Proposed Rules with the changes and additions outlined below.

II. Proposed 11 CFR 117.1

Proposed 11 CFR 117.1 applies the volunteer exemption of 2 U.S.C. §431(8)(B)(ii) to Internet activity by individuals. We support this Proposed Rule and appreciate the Commission's efforts to encourage volunteer activity on the Internet, which is fully consistent with the language and intent of the Federal Election Campaign Act of 1971, as amended (2 U.S.C. § 431 *et seq.*)(hereinafter "the Act").

Additional clarifying language (also fully consistent with the Act), however, would serve to provide clear guidance to individuals, candidates, and political committees at the grass roots level who may not closely follow Commission Advisory Opinions and other scholarly writings and utterances. Specifically, it is the RNC's understanding that Internet activity by volunteer individuals is not now, and would not be under the Proposed Rules, allocable as a contribution to any candidate referenced, depicted, or otherwise associated with Internet activity undertaken by individuals. It is also our understanding that campaigns, political parties, and volunteers are free to coordinate such Internet activity on an unlimited basis without it being allocable. This current policy, as we understand it, is sensible in light of the realities of Internet communication by volunteers. Codification of the current policy in the context of these Proposed Rules is both logical and necessary for maintaining an educated and informed regulated community. The Commission, in Advisory Opinion 1999-17, affirmed many of the above concepts. The Commission, however, declined to answer some questions regarding third-party Internet activity and that activity's effect on campaigns, noting that the Advisory Opinion context was not the correct venue to answer those questions. The Commission now has a ripe opportunity, in the context of these Proposed Rules, to broadly confirm the permissibility of the broad range of Internet activity outlined in Advisory Opinion 1999-17.

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regarding the Internet is obviously a threshold issue the Commission will need to decide. However, to the extent the Commission chooses to issue regulations in this area, the RNC believes strongly in a deregulatory approach that stimulates and encourages Internet use wherever possible.

Also fully consistent with the language and intent of the Act would be for the Commission to clarify that no disclaimers regarding who "paid for" e-mails (to the extent there is a theoretical marginal cost to sent e-mails) are necessary for solicitations sent by volunteers over the Internet. As many commentators on the Commission's Notice of Inquiry explained, the cost of sending an e-mail, if any, is so nominal that the Commission could clearly take this position consistent with the volunteer exemption. Proposed Rules, 66 Fed. Reg. at 50362.

III. Proposed 11 CFR 117.2

Proposed 11 CFR 117.2 deals with hyperlinks on corporate and labor organization web sites. This Proposed Rule extends part-way to where it should, but then appears to attempt to regulate whether the hyperlink contains express advocacy under 11 CFR 100.22, which would be problematic as outlined below. A threshold issue, however, is why the proposed rule should only apply to corporations and labor organizations. One possible explanation is that the Commission takes the position that hyperlinks on sites and e-mail sponsored by individuals, non-corporate entities, political parties, etc. are never allocable activity, and therefore there would be no reason to clarify the issue through rulemaking. For the benefit of the regulated community, however, clarification of the scope of the "internet hyperlink exemption" would be very helpful.

Much of the legal theory behind this Proposed Rule was explicated by Commissioner Sandstrom and Janis Crum in *Is the Internet a Safe Haven for Corporate Political Speech? Austin v. Michigan Chamber of Commerce in the Shadow of Reno v. ACLU*, 8 CommLaw Conspectus 193 (2000), where they argued that the Supreme Court's reasoning in *Austin* is not applicable to corporate political communications over the Internet. This argument is persuasive, but neither Commissioner Sandstrom's article nor the Notice of Proposed Rulemaking explain why the logic of *Reno v. ACLU* would stop with corporations and labor unions and should not be extended in full to Internet communications by political parties and other political organizations. Specifically, Sandstrom and Crum expand on the Court's analysis of the unique architecture of the Internet, and how that differentiates the medium from traditional channels of mass communication. Sandstrom and Crum at 194. The Court in *Reno* constructed "an almost bulletproof constitutional 'shield' surrounding internet speech," *Id.* at 196, yet strangely, the Commission in these Proposed Rules seems to have acknowledged only a small part of that shield. In fact, if, as acknowledged in this Proposed Rule, the unique nature of the Internet reduces the risk of corruption or the appearance or corruption from corporate and labor money such that it can be used directly, then political parties should enjoy the same rights of Internet usage that corporations and labor organizations are afforded.

Proposed 11 CFR § 117.2(a)(3)(i), which would provide that if "the image or graphic material to which the hyperlink is anchored" expressly advocates the election or defeat of a candidate, as defined at 11 CFR § 100.22, then the hyperlink may not be permissible (or may be an allocable contribution to the benefited candidate to which the

web site is linked), is both unworkable and bad policy.[2] It is now common for hyperlinks to consist of graphics created by candidates, PACs, and other political organizations (for example, a campaign "bumper sticker" type logo). In fact, many sites allow a visitor to, with just a few keystrokes, cut and paste a hyperlink "bumper sticker" imbedded in a logo from a candidate site to a visitor's personal site. It is unrealistic to expect everyday computer users to then somehow remove the hyperlink from the logo so that they can then put the link on their site without running afoul of Commission Regulations.

The simplest (and therefore preferable) approach for the Commission to take would be to exempt *all* hyperlinks – including those imbedded in graphics – from regulation. Alternatively, the RNC suggests that the Commission take a moderate approach whereby if the image or graphic material to which the hyperlink is anchored is cut and pasted or otherwise taken directly from the candidate site, then it should be permissible to use. A third possibility would be for the Commission to distinguish between commercial banner advertisements and other, non-banner ad, hyperlinks.[3] This approach also would – unlike the Proposed Rule – carve out a safe-haven for cutting and pasting hyperlinks from candidate sites (even containing graphics with express advocacy) as opposed to actually purchasing banner advertisements. While any of these three approaches are preferable to the current Proposed Rule, the Commission should clarify and codify that, under any proposed approach, the "internet hyperlink exemption" applies to political parties and other political organizations, and not just to corporations and labor organizations.

IV. Proposed 11 CFR 117.3

Proposed 11 CFR 117.3 deals with press releases announcing candidate endorsements by corporations and labor organizations. While corporations and labor organizations currently may communicate internally with their members without the costs being allocable, this proposed rule allows these entities to post press releases on their main website (available to the general public) if certain conditions are met. Again, the RNC does not disagree with the deregulatory nature, or even the specifics, of the Proposed Rule, but we do not believe it should be limited to corporations and labor organizations.

The current Regulations are clear that press releases may be sent "only to the representatives of the news media that the corporation or labor organization customarily contacts when issuing non-political press releases or holding press conferences for other purposes." 11 CFR 114.4(c)(6)(i). This Proposed Rule, in contrast, would allow the press release to be accessed by the general public (and not a limited press contact list),

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[2] As the Commission knows, 11 CFR § 100.22(b) has been struck down as unconstitutional in numerous courts, including the U.S. Court of Appeals for the First and Fourth Circuits, Federal District Courts in the Second and Fourth Circuits, and an Iowa statute using identical language was held to be unconstitutional by the U.S. Court of Appeals for the Eighth Circuit. *See* Statement of Reasons of Commissioner Bradley A. Smith in MUR 4922. To avoid facial and as applied Constitutional problems with the Proposed Rules, we urge the Commission to make clear that it will not attempt to enforce 11 CFR § 100.22(b) for Internet-based communications.

[3] *See* Commissioner Mason Testimony to Senate Rules at 5.

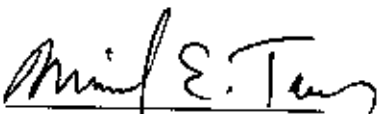
and is therefore a major expansion of the regulation. While we appreciate the tacit acknowledgement by the Commission that the current regulation did not anticipate an Internet environment and may no longer be workable, the Commission should explicate a far broader application of this press release exemption. If corporations are "simply speech intermediaries 'with limited delegations or representational authority,'" Sandstrom and Crum at 198 (citing Kathleen Sullivan, *First Amendment Intermediaries in the Age of Cyber Space*, 45 UCLA L. Rev 1653, 1657-63 (1998)), political parties, in stark contrast, have broad and specific delegations and strong representational authority. *See e.g. Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996). At a minimum, therefore, political parties should be extended the same protections for Internet speech that corporations and labor organizations are afforded.

In addition, the second so-called "restriction" on the press release, that it must be limited to "an announcement of the corporation's or labor organization's endorsement or pending endorsement and a statement of the reasons therefore," (Proposed 11 CFR 117.3 (b)), is an exception that subsumes the whole, especially in an Internet environment. Nothing prevents an exhaustive recitation of the reasons to vote for the endorsed candidate. While a traditional press release is not conducive to lengthy argumentation, the Internet is, by contrast, an optimal vehicle for broad-based political communication and discussion. In light of the foregoing, this broad exemption should not be limited in the Proposed Rules to just corporations and labor organizations.

V. Conclusion

Because the Internet is still an evolving arena for political speech and advocacy, the Commission should, in the course of any proposed regulatory activity, seek to encourage the use of the Internet wherever possible. The RNC believes that many aspects of the Proposed Rules are a positive step in this direction. However, the RNC believes it is critical that the rules encouraging greater Internet use apply equally to all political organizations, including to political parties. Empowering political communication at the grassroots level should be the touchstone for all Commission action in this critical area.

Respectfully Submitted,



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