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Re: Comments to Notice of Proposed Rulemaking (Internet)

Dear Ms. Smith:

The National Association of Business Political Action Committees ("NABPAC") respectfully submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") published in the Federal Register on September 27, 2001.

NABPAC is the only national organization dedicated to promoting, defending, professionalizing political action committees ("PACs") and political action specialists. NABPAC is not a political committee, nor does it contribute to candidates. Rather, it is a trade association for corporations and business associations. NABPAC's objective is to advance the interests of its membership and protect the rights of millions of Americans who participate in the democratic decision-making process through voluntary contributions to PACs. NABPAC provides comprehensive membership services to PAC and grassroots professionals through continuing educational workshops, annual conferences, informative publications, and peer-to-peer advising. NABPAC's membership consists of nearly 250 PAC and government affairs professionals from 128 corporations and associations throughout the country who represent some of the nation's smallest and largest PACs.

I. INTRODUCTION

As the number of Americans who regularly go online for news and information continues to expand, so does the Internet's potential as an instrument for increasing public involvement in the political process. By means of this electronic medium, a

¹ The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. 50,358 (proposed Oct. 3, 2001) (to be codified at 11 C.F.R. pts. 100, 114, & 117).

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person can obtain vast amounts of information about political candidates and important public issues and communicate with others regarding political matters using e-mail, chat rooms, and message boards. According to a number of comments received by the Commission in response to its November 5, 1999 Notice of Inquiry ("NOI"),² "the Internet promotes cleaner, more informed elections by reducing the importance of money and the need for fundraising, thereby improving the quality of debate and increasing competition."³ Thus, according to one U.S. Senator, "[t]he Internet is potentially the greatest tool for political change since the Guttenberg press."⁴

A number of unique characteristics distinguish the Internet from traditional modes of communication, such as radio, television, and the print media. To begin, Internet communication involves virtually no incremental costs. Any person who owns a computer and a modem can create a web site, post a message on an online bulletin board, or send an e-mail using mere keystrokes, which in themselves have no measurable value.

Next, unlike radio, television, and direct mail—all of which display their messages to captive audiences without providing advance notice—the Internet is a non-invasive medium. In other words, an online user encounters particular content only after he or she has taken deliberate steps to obtain such information. Finally, unlike traditional media, the Internet is a virtually unlimited resource where the speech of one person does not interfere with the speech of another.

Because of the Internet's distinctive features, the application of the Federal Election Campaign Act ("FECA")⁵—which "is based on the traditional mass media model, where [speakers] must buy advertisements or rely on news coverage to reach the public"⁶—to Internet political communications raises serious concerns. As one NOI

² Use of the Internet for Campaign Activity, 64 Fed. Reg. 60,360 (Nov. 5, 1999).

³ 66 Fed. Reg. at 50,360.

⁴ *Hearings on Political Speech and the Internet Before the United States Senate Committee on Rules and Administration* (May 3, 2000) (opening statement of Sen. Mitch McConnell), available at <http://rules.senate.gov/hearings/2000/05300chair.htm>.

⁵ 2 U.S.C. § 431-55.

⁶ 66 Fed. Reg. at 50,360.

commenter pointed out, "the factors permitting government regulation in other contexts are not present in cyberspace."⁷

In an attempt to adapt the FECA to the realities of the Internet, the Commission proposes the following new rules: (1) exempt Internet political activity by individuals from FEC regulation; (2) allow corporations and labor organizations to place on their web sites hyperlinks to candidate and party committee web sites; and (3) permit corporations and labor organizations to post press releases announcing candidate endorsements on their web sites.

These proposed rules are overly narrow in scope and, thus, do not adequately deregulate Internet political communications. In these comments, we note additional types of Internet political activity that require deregulation.

II. PAC INTERNET ACTIVITY

The NPRM provides no relief for PACs. PAC Internet activity is currently regulated by the FECA as interpreted by FEC Advisory Opinions. However, the Advisory Opinions have attempted to force a square peg into a round hole. They have neglected to account for the fundamental differences between the Internet and traditional forms of media that the FECA was originally designed to regulate. The result has been unnecessary and unjustified regulation.

In its current form, the NPRM also fails to account for these differences. Specifically, corporate, labor organization, trade association, and membership organization PACs will continue to be required to employ cumbersome usernames and passwords in order to solicit contributions over the Internet. Furthermore, connected and non-connected PACs will be forced to carry-on the administratively arduous task of ascertaining whether their *de minimis* Internet expenditures are "directly attributed" to particular candidates for reporting purposes.

A. The Internet's User-Driven Nature Negates Any Potential Coercion Resulting From Publicly Available PAC Information, Including Solicitations

According to the FECA, corporations, labor organizations, trade associations, and membership organizations may only solicit contributions to their PACs from

⁷ *Id.*

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members of their "restricted class."⁸ Two FEC Advisory Opinions have extended this limitation to preclude PAC solicitations that are publicly available on the Internet.⁹ Both opinions state that solicitation materials may be placed on the Internet only if access to them is limited to members of the restricted class via user-specific passwords.¹⁰

These Advisory Opinions fail to recognize that Internet-based communications,¹¹ unlike communications using traditional media, require the recipient to take affirmative steps to access the information.¹² The communication is not forced upon the recipient as is the case with traditional media. This fundamental difference eliminates the justification for limiting PAC solicitations.

⁸ See 2 U.S.C. § 441b; 11 C.F.R. §§ 114.5, 114.7, 114.8. The regulations provide the following definition of restricted class:

A corporation's restricted class is its stockholders and executive and administrative personnel, and their families, and the executive and administrative personnel of its subsidiaries, branches, divisions, and departments and their families. A labor organization's restricted class is its members and executive or administrative personnel, and their families [T]he restricted class of an incorporated membership organization, incorporated trade association, incorporated cooperative or corporation without capital stock is its members and executive or administrative personnel, and their families.

¹¹ 11 C.F.R. § 114.1(j).

⁹ FEC Advisory Opinion 2000-7; FEC Advisory Opinion 1997-16.

¹⁰ FEC Advisory Opinion 2000-10 stated that this requirement also applies to a trade association that, pursuant to 11 C.F.R. § 114.8(d)(3), includes a sample solicitation in its request for the prior approval of member corporations to solicit their restricted classes. If no solicitation is included, the Advisory Opinion concluded that the prior approval form could be posted on a publicly accessible area of the trade association's website. The requestor of the Advisory Opinion explained that once posted on the website, the prior approval form would be printed and either mailed or faxed back to the trade association. The NPRM should go beyond the particular facts of this Advisory Opinion and embrace the FEC's approval of electronic signatures discussed in note 43, *infra*, to allow prior approval forms to be both posted and submitted online.

¹¹ For purposes of these comments, "Internet-based communications" means web-page postings, and not email.

¹² The Internet, by analogy, is a library and individual web sites are books. Like a person searching for a book in a library, a person looking for a particular web site must make an affirmative effort in order to find that site.

The PAC solicitation limits were intended to protect non-restricted class members from pressure to contribute to PACs that do not necessarily represent their political views.¹³ Members of the restricted class are presumed to have political views consistent with those of their respective corporations, labor organizations, trade associations, and membership organizations. Therefore, soliciting PAC contributions from them poses no potential harm, but is a means by which politically like-minded people can jointly participate in the political process. On the other hand, a non-restricted class member, such as an hourly corporate employee who is not a stockholder, does not necessarily share the views of the management or ownership of the organization that is soliciting contributions to its PAC. Therefore, PAC solicitations of non-restricted class members are limited to protect them from pressure to support PACs with which they are not politically aligned.¹⁴

However, the user-driven nature of Internet communications eliminates any possible coercive effect that Internet-based PAC solicitations may have. In the traditional media model, PAC solicitations are communicated by foisting them upon the recipient. A barrage of unwanted advertisements, mailings, or pamphlets may lead the recipient to believe he or she is being pressured to make a contribution. In stark contrast, the user of an Internet-based PAC web site has evidenced a desire to obtain information (including how to contribute) by the very fact that he or she was required to take affirmative steps navigating the Internet in order to view the information.

This unique self-selecting quality of information delivery is the key to understanding why limiting information flow on the Internet is not necessary to perfect the policy aims of the FECA. The possible pressure exerted by an unwanted solicitation is no longer a factor when an individual actively seeks the solicitation. Therefore, access-limiting devices such as usernames and passwords are unnecessary for the FECA's purposes. They merely serve as hurdles to information that people are both desirous of and entitled to see. Accordingly, the NPRM should lift the current restrictions on the ability of corporate, labor organization, trade

¹³ See, e.g., 2 U.S.C. § 441b(b); 11 C.F.R. § 114.5(a); H.R. Conf. Rep. No. 94-1057, at 64 (1976); 117 Cong. Rec. 43379-81 (1976) (statement of Representative Hansen).

¹⁴ Nothing prevents non-restricted class members from contributing to the PAC of a corporation, labor organization, trade association, or membership organization. See 11 C.F.R. § 114.5(j). Furthermore, non-restricted class members can, in fact, be solicited on a semi-annual basis. See 11 C.F.R. § 114.6.

association, and membership organization PACs to display any information (including solicitation materials) on publicly available websites.¹⁵

B. The Anti-Corruption Rationale Does Not Exist in the Context of Allocating and Reporting Internet Expenditures

The FECA requires all PACs to report and itemize independent expenditures (or coordinated expenditures) that exceed \$200 during a calendar year.¹⁶ If an expenditure can be "directly attributed" to a "clearly identified candidate," then the expenditure must be attributed to each candidate based upon the benefit reasonably expected to be received by the candidate.¹⁷ If not, then the expenditures need only be included in the PAC's general accounting of overhead expenses.¹⁸

Without recognizing the inherent differences between Internet-based and traditional means of communication, a FEC Advisory Opinion applied this reporting framework to expenditures for communications made on the Internet.¹⁹ The practical result is that PACs must determine if portions of their expenditures are "directly attributable" to a "clearly identified candidate." They must then engage in a valuation of what are often *de minimis* expenditures to determine if they have exceeded the \$200 itemization threshold.

Again, this requirement is a relic of the FECA's scheme to regulate traditional media that has been rendered an unnecessary administrative burden in the context of the Internet. The Supreme Court has held that reporting requirements are valid only

¹⁵ Two other FEC Advisory Opinions, 2001-4 and 1999-3, have permitted the requestors to engage in Internet-based payroll deduction programs that employ passwords and other security provisions to maintain the programs' financial integrity. The wisdom of restricting access to payroll deduction websites is obvious and is not disputed in these comments. To the contrary, the NPRM should include a provision that allows Internet-based payroll deduction programs like those approved in the two Advisory Opinions. In so doing, all PACs, not just the Advisory Opinion requestors, could institute similar programs with the appropriate legal guidance.

¹⁶ See 2 U.S.C. § 434(b); 11 C.F.R. § 104.3(b)(3).

¹⁷ See 11 C.F.R. § 106.1(c)(1).

¹⁸ *Id.*

¹⁹ FEC Advisory Opinion 1999-37.

if they operate to stem corruption or the appearance of corruption.²⁰ The corrupting effect of expenditures is based upon the theory that a candidate may feel indebted to a PAC that spends large sums of money to help the candidate get elected.²¹

Yet, the corrupting effect of Internet-based communications is virtually non-existent for two reasons that are unique to the Internet. First, most costs associated with Internet activity are *de minimis*, and therefore incapable of exacting a quid pro quo from a candidate. Second, the passive nature of the Internet necessarily means that Internet-based communications only reach people who are actively seeking the information in the first place.

When compared to expenditures made in traditional media that are dramatically more expensive and reach people who are not otherwise looking for information about the candidate, Internet-based communications provide only a negligible benefit to a candidate. Therefore, the possible corrupting effect that justifies itemized reporting of these expenditures is correspondingly insignificant. Accordingly, the NPRM should exempt PACs from the requirement that they separately valueate and report expenses associated with independent Internet-based communications.²²

C. Trade Association PACs Should Be Permitted to Receive and Maintain Prior Approvals in Electronic Form

Under current regulations, a trade association PAC may solicit contributions from the restricted class of a member corporation only if (1) "[t]he member corporation involved has *separately and specifically approved* the solicitation[]," and (2) "[t]he member corporation has not approved a solicitation by any other trade association

²⁰ *Buckley*, 424 U.S. 1.

²¹ *Cf. Buckley*, 424 U.S. at 67.

²² Because some types of Internet communications are not passive, *e.g.*, emails and pop-up ads, Commissioner Mason's suggestion found in his testimony to the Senate Committee on Rules should also be considered. See *Senate Hearings on Internet Political Speech*, *supra* note 23, available at <http://rules.senate.gov/hearings/2000/05300mason.htm>. He has suggested that posting information on the Internet should not be regulated, but that expenditures for advertising particular sites should. This distinction is based on the passive nature of most Internet communications whereby "simple publication (as opposed to advertising or e-mailing) of material on the Internet may be more akin to a pre-printed letter in response to a common request than to a direct mailing."

for the same calendar year."²³ After receiving written prior approval designating the calendar year during which solicitations are authorized from a member corporation, a trade association PAC must maintain a copy of the approval for three years.²⁴

In Advisory Opinion 2000-22, the Commission allowed a trade association to obtain prior approvals either by (1) "send[ing] an electronic mail message to the corporate representative requesting the corporation's approval with an attached . . . solicitation approval form" and then "send[ing] a confirmation e-mail to each corporate representative upon receipt of a form executed with [an] electronic signature"; or (2) "mak[ing] the corporate approval forms available to the corporate representatives on the secured 'members-only' portions of its Internet website" and then having "[t]he corporate representative . . . provide written approval via an electronic signature."²⁵ In these cases, the records of the electronic prior approvals were required to "be retained in a retrievable manner so as to be readily available for review by the Commission in the event of an audit or investigation."²⁶

The Commission needs to expand upon this ruling by issuing a regulation that permits a member corporation to obtain and execute a trade association PAC's prior approval form electronically, provided the trade association (1) is able to verify that the prior approval form was executed by a corporate representative, e.g., by sending a confirmation e-mail, and (2) preserves an electronic record pursuant to 11 C.F.R. § 114.8(d)(2). Under such a regulation, a trade association would not necessarily have to post its prior approval forms on a password-protected portion of its web site, nor would it have to maintain hard copies of executed prior approval forms, so long as the two conditions listed above were met.

This proposed regulation would free trade associations to develop any electronic method for obtaining and executing prior approval forms that meet the two conditions. This will avoid having to seek Commission advisory opinions to ensure that each method complies with the FECA. Thus, the proposed rule would provide clearer guidance to trade associations, while freeing the Commission from the

²³ 11 C.F.R. § 114.8(c).

²⁴ *Id.* § 114.8(d)(2).

²⁵ FEC Advisory Op. 2000-22.

²⁶ *Id.*

burdensome administrative task of analyzing varying methods for obtaining and executing prior approval forms electronically.

III. THE PROPOSED RULES SHOULD BE MODIFIED TO FURTHER DEREGULATE POLITICAL INFORMATION ON WEB SITES

The rules proposed in the NPRM regarding hyperlinks and press releases fail to fully confront the fact that the Internet is user-driven nature and involves *de minimis* costs. By restricting the manner in which corporations and labor organizations may display political information on their web sites, the proposed rules impose burdens on Internet political communications that are wholly unjustified in this context.

The proposed rules regarding hyperlinks and press releases would, if implemented, raise more questions than they would answer. For example, the hyperlinks rule would forbid a corporate or labor organization web site from anchoring a hyperlink to words or graphics that include express advocacy but would allow a hyperlink to be anchored to a URL that contains express advocacy. There is no apparent justification for treating identical language in such an unequal manner. With respect to the press release rule, a candidate endorsement that contains a hyperlink anchored in a URL containing express advocacy may be an impermissible call to action by the corporation or labor organization. If so, the rule would force the Commission to judge the legality of a hyperlink based on where it is placed on a publicly accessible web site. Rather than go down this troublesome route, the Commission should modify its proposed rules to allow for greater dissemination of political information on web sites, including use of links and posting of press releases with no conditions.

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CONCLUSION

For the above stated reasons, NABPAC urges the Commission to modify its proposed rules to (1) permit any PAC-related data (including solicitations) on a web site, (2) not require allocation of web site-related expenditures, and (3) provide for electronic prior approvals for trade association PACs.

Sincerely,



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