"Svoboda, Brian-WDC" <SVOBB@PerkinsCoie.com> on 12/03/2001 03:57:22 PM

To: internetnprm@FEC
cc:

Subject: Comments

Please open the attached document.
This document was sent to you using an HP Digital Sender.

Digital Sender Model:	HP 9100C
Digital Sender Name:	10.4.0.27
Document type:	B/W Document
Number of pages:	3
Sent by:	GRAYS <grays@perkinscoie.com>
Attachment File Format:	Adobe PDF

To view this document you need to use the Adobe Acrobat Reader.
For more information on the HP Digital Sender, Adobe Circulate,
or a free copy of the Acrobat reader please visit:

http://www.digitalsender.hp.com/reader-en

 FEC.pdf

PERKINS COIE LLP

607 FOURTEENTH STREET, N.W. · WASHINGTON, D.C. 20005-2011
TELEPHONE: 202 628-6600 · FACSIMILE: 202 434-1690

ROBERT F. BAUER
(202) 434-1602
bauer@perkinscoie.com

December 3, 2001

VIA ELECTRONIC MAIL
AND FIRST CLASS MAIL

Danny Lee McDonald
Chairman
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations

Dear Mr. Chairman:

On behalf of the Perkins Coie LLP Political Law Group, I submit these comments in response to the Notice of Proposed Rulemaking ("NPRM") published by the Federal Election Commission ("FEC" or "Commission") on October 3, 2001. These comments reflect the views of our group and not necessarily those of our clients.

As you will recall, when we commented on the Notice of Inquiry, we observed that the regulation of Internet applications raises acute First Amendment concerns. Accordingly, we suggested that the Commission adopt a presumption that the use of Internet applications is not regulated by the Act. We further suggested that, if the Commission were to consider regulations in the Internet field, it should craft those regulations on an application-by-application basis and support each with record evidence.

We finally observed that new technologies gave the Commission the opportunity to modernize several of its existing rules, such as those pertaining to "best efforts," redesignations, reattributions and the conduct of financial transactions. We noted that the absence of such changes would cause political committees to spend extra resources unnecessarily.

In light of these comments, we find the NPRM lacking in two principal respects:

First, the NPRM represents the opposite of the approach we suggested for the regulation of Internet applications. Instead of regulating discrete applications on a case-by-case basis, the NPRM identifies a narrow range of conduct to which existing regulations do not apply. The unspoken yet unavoidable conclusion is that, should the Commission adopt the NPRM, Commission regulations would restrict all other uses of Internet applications.

The result of such a policy would be to chill political uses of the Internet, not encourage them. The Commission will have warned the regulated community that "the Act's definitions of 'contribution' and 'expenditure' are broad enough to potentially encompass some types of campaign-related Internet activity conducted by individuals, corporations and labor organizations." The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. 50,358, 50,359 (2001). Yet the Commission will not have provided clear guidance as to what is permitted and what is not.

As a result, the only alternatives for a regulated individual or entity who seeks to use Internet applications for political purposes will be to remain within the narrow safe harbors created by the rule, seek relief through the advisory opinion process, or suffer the risk of Commission enforcement. Such a regime seems inconsistent with the strict limits that the First Amendment places on the regulation of campaign financing, and, specifically, the strict limits that should apply to government regulation of Internet applications.

A curious aspect of the NPRM is that it seems to acknowledge the potential, additional limits on government regulation that the Internet presents, and yet never explains how these limits might affect current Commission rules. For example, the NPRM cites our discussion of Reno v. ACLU, 521 U.S. 844 (1997), which found that factors that might otherwise permit government regulation "are not present in cyberspace." Id. at 870. Yet the NPRM never explains whether or how the scope of the Commission's current rules might be limited. Moreover, the NPRM presents virtually no record evidence of how the use of Internet applications, frequently low in cost, creates corruption or its appearance.

To the extent that the Commission seeks to affirm that certain uses of the Internet are not regulated by the Act, it is hard for the regulated community to object. However, by singling out a narrow range of Internet application uses as exempt from regulation, the Commission may create more problems than it solves. While we continue to believe that the Commission should review its regulatory policies in light of Internet applications, we must wonder whether the adoption of these proposed rules would be preferable to the status quo.

Second, the NPRM takes no measures toward integrating emerging technologies into the Commission's current compliance requirements – a step that could significantly lower the burdens for political committees.

In our view, the Commission took a positive step forward in 1999, when it developed rules that permitted Presidential candidates to match Internet credit card contributions with public funds. See Matching Credit Card and Debit Card Contributions in Presidential Campaigns, 64 Fed. Reg. 32,394 (1999). Yet as we suggested in the advisory opinion request that spurred their creation, see Advisory Opinion 1999-9, those rules were not simply a matter of convenience for the regulated community. They were necessary to ensure the future, stable operation of the regulatory framework. In the case of the Presidential matching fund program, rules that were geared almost entirely toward personal checks could not, while the use of checks declined, remain viable.

We respectfully suggest that similar issues might arise in several other contexts. If the Commission wishes to develop new Internet rules, and yet does not want to confront the difficult constitutional questions that are raised, the current rulemaking can still perform a useful function. Specifically, it can broadly review the recordkeeping and reporting obligations now placed on political committees and other regulated entities, and identify ways in which those obligations can be altered to account for new technologies.

We again appreciate the opportunity to comment on these matters.

Very truly yours,

Robert F. Bauer