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VIA ELECTRONIC MAIL
AND FIRST CLASS MAIL

Scott Thomas
Chairman
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Use of the Internet for Campaign Activity

Dear Mr. Chairman:

On behalf of the Perkins Coie LLP Political Law Group, I submit these comments in response to the Notice of Inquiry published by the Federal Election Commission ("FEC" or "Commission") on November 5, 1999. These comments reflect the views of our group and not necessarily those of our clients.

The Federal Election Campaign Act ("the Act") and Commission regulations do not speak directly to the use of Internet applications in connection with Federal elections. The Commission's decision to consider its regulatory policy in this area is timely and appropriate. We would suggest adoption of a presumption that the use of Internet applications is not regulated by the Act, and that to the extent new rules are necessary, they must be narrowly tailored and supported by record evidence to withstand constitutional scrutiny.

Together, the landmark Supreme Court cases of Buckley v. Valeo, 424 U.S. 1 (1976), and Reno v. ACLU, 521 U.S. 844 (1997), indicate significant limits on the capacity of the Commission to regulate political activity conducted on the Internet. It has long been axiomatic that Commission regulations "operate in an area of the most fundamental First Amendment activities." Buckley v. Valeo, 424 U.S. 1, 14 (1976). Accordingly, as the Supreme Court said, "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly

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tailored to serve an overriding state interest." McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345 (1995).

Regulation of Internet activity presents still more exacting challenges for the Commission in fashioning a regulatory position within constitutional parameters. Striking down Congressional legislation that sought to limit the distribution of "obscene or indecent" material over the Internet, the Reno Court found that factors permitting government regulation in other contexts "are not present in cyberspace." 521 U.S. at 868. The Court relied in part on the fact that the Internet "provides relatively unlimited, low-cost capacity for communication of all kinds." Id. at 870. The Court held that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." Id.

Of course, the only governmental interest sufficient to justify restrictions on political speech is the prevention of actual or apparent corruption of elected officials. FEC v. National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985). Actual evidence is required, and the government cannot meet its burden merely by asserting a "hypothetical possibility" of corruption. Id. at 498. Accord United States v. National Treas. Employees Union, 513 U.S. 454, 475-76 (1995).

Many Internet applications inherently pose a diminished risk of corruption. The Supreme Court in Reno noted the leveling effect of the Internet on political discourse when it wrote: "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, mail exploders and newsgroups, that same individual can become a pamphleteer." 521 U.S. at 870.

Moreover, the diversity among Internet applications makes it impossible to support blanket regulation of the Internet under a strict scrutiny standard. For purposes of regulation, the Internet cannot be viewed as a whole, but rather as the aggregate of a number of diverse applications that serve different purposes and have different effects. See Timothy Wu, Application-Centered Internet Analysis, 85 Va. L. Rev. 1163 (1999). Applications such as a web browser, electronic mail, the Usenet, streaming video-on-demand and hyperlinking "vary quite dramatically from a functional perspective". Id. at 1167. Commercial applications such as the sale and purchase of banner advertising, cross-linking agreements and "spam" can indeed

involve the receipt and disbursement of large sums of money. However, applications such as web publishing, mail discussion lists, Usenet boards and chat rooms require virtually no disbursements of funds. See id. at 1199-1201. It is hard to see how these sorts of applications lend themselves to risks of political corruption, which prompted the initial passage of the Act and allowed the Buckley Court to uphold several of its provisions.

As a "threshold question" to its Notice of Inquiry, the Commission asked "whether campaign activity conducted on the Internet should be subject to the Act and the Commission's regulations at all." Use of the Internet for Campaign Activity, 64 Fed. Reg. 60,360, 60,361 (1999). So far, the advisory opinions issued so far on proposed Internet applications reflect a view that Internet applications are already subject to the Act, with the only questions being precisely how they are regulated and whether some are exempt under a particular statute. See, e.g., Advisory Opinion 1995-9 and Advisory Opinion 1998-22 (holding that a Web page constitutes "general public political advertising").

This approach seemingly presumes that the use of Internet applications is governed by the Act without any evidence of corruption with regard to those applications. Yet as discussed above, with some Internet applications, it is questionable whether the necessary actual or apparent corruption can ever be established.

A failure in this proceeding to fully account for this principle can lead to results such as Advisory Opinion 1999-17. In the opinion, the Commission first adhered to its holding in Advisory Opinion 1998-22, assuming that the meager costs associated with developing a web site expressly advocating the election or defeat of a candidate represent disbursements to be allocated either as in-kind contributions or independent expenditures. However, the Commission held that while these disbursements may be subject to regulation in other contexts, they were exempt volunteer activities under 11 C.F.R. § 100.7.

The result here is sound, but the reasoning leading to the result is not. For the decisive consideration should be constitutional--that regulation in these circumstances could not meet the Buckley and Reno standards. Instead, the Commission relies on a well-intentioned and well argued, but to the mind of some, opportunistic, reading of

its own rules. Other opinions have also suffered for this lack of a constitutional framework for decision. The Commission's finding that a web site constitutes "public political advertising," first set forth in Advisory Opinion 1995-9 and repeated in subsequent opinions, is flatly at odds with the observation of the Supreme Court in Reno v. ACLU. "The Internet is not as invasive as radio or television . . . [C]ommunications over the Internet do not invade an individual's home or appear on one's computer screen unbidden. Users seldom encounter content by accident." 521 U.S. at 869.

With no specific regulations in place, the Commission should state clearly that it presumes that the use of Internet applications is not regulated by the Act. This would restore constitutional soundness to the Commission's approach, ensure that the Commission remains within its authority under the Act, and give needed certainty to the regulated community. Most of all, it would be consistent with the presumption in favor of free speech that is embodied not only by Buckley, but by Reno as well: "The record demonstrates that the growth of the Internet has been and continues to be phenomenal. As a matter of constitutional tradition, in the absence of evidence to the contrary, we presume that government regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it." 521 U.S. at 885.

Should the Commission draft new rules limiting Internet applications, it should do so narrowly and carefully. As discussed above, the Internet is not a single, large, homogeneous entity, but rather the aggregate of a series of different applications - electronic mail, web pages, Usenet discussion groups, instant messenger platforms, and others. The number and diversity of these applications will only increase in time. The Commission should confront each individually, in each instance supporting any proposed new regulations with record evidence of corruption. For example, the Commission may conclude that the uncompensated provision of web banner advertising normally sold under commercial terms may create a risk of corruption that warrants regulation. It might reach the same conclusion with respect to cross-linking in a commercial context. However, these circumstances may be distinguished from the mere posting of a web page, even if by a corporation or labor union.

Finally, on a related front, we suggest that the Commission modify its regulations to provide campaigns with maximum flexibility to use now-prevailing

technologies to satisfy their compliance obligations under the Act. By imposing antiquated standards for recordkeeping and reporting, the Commission runs the risk of requiring those who engage in political activities to spend extra resources unnecessarily on compliance burdens, when those resources could be as easily dedicated to influencing voters. For example, it should:

- broadly permit the use of electronic mail to satisfy "best efforts" obligations;

- permit the use of electronic mail, supported by digital signature technology, to satisfy the requirements for written redesignations and reattributions, and for supporting documentation to establish the eligibility of a contribution for Presidential public matching funds;

- expand provisions for making disbursements, conducting other financial transactions and storing financial data online; and

- revise its regulations to reflect the impending demise of the paper check, providing for the increased use of credit and debit cards as it did in Advisory Opinion 1999-9.

We appreciate the opportunity to comment on these matters.

Very truly yours,

Robert F. Bauer

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