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January 7, 2000

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

RE: Federal Election Commission Notice of Inquiry 1999-24: Use of the Internet for Campaign Activity

Dear Ms. Smith:

Common Cause and Democracy 21 jointly submit these comments in response to the Notice of Inquiry and Request for Comments published in the Federal Register on November 5, 1999 (64 Fed. Reg. 60360).

Common Cause is a nonpartisan, nonprofit organization that works for open, accountable government and the right of all citizens to be involved in shaping our nation's public policies. Common Cause has more than 200,000 members nationwide, with active members in every state.

Democracy 21 is a non-profit, non-partisan public policy organization that supports campaign finance laws to prevent the undue influence of money in politics, to promote competitive elections and to protect the integrity of the electoral and governmental decision making process. Democracy 21 has researched, written and publicly commented about the relationship between money, power and influence in the American political process.

Background

Key democratic values are facilitated by the "never-ending world-wide conversation" made possible by the Internet. American Civil Liberties Union v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996). Among other things, the Internet:

- empowers individual activity by making every individual a potential publisher;
- eases access to information, dramatically reducing the costs of finding out about issues and candidates;
- allows users to post comments to web sites at minimal cost (facilitating a wider, more robust debate on issues);
- allows users to participate more easily in political activities; and
- reduces pressure on fundraising, by providing an effective, low-cost alternative forum for discussion and coordination of campaign activities.

Although the Internet is a powerful engine for democracy, the core values of the Federal Election Campaign Act retain their importance and relevance in this new context. The challenge facing the Commission is to translate these values into clear and enforceable rules and (where necessary) to recommend changes in the Act to produce a sound election law system that appropriately takes account of a new world of individually-driven, decentralized, global communications. Part of this challenge is to maintain sufficient flexibility in the Act so that future technical developments do not continuously force a re-writing of the rules. The most difficult questions posed by the Commission in its Notice of Inquiry deal with whether and how to apply the Act and its regulations to the posting of campaign-related material (as opposed to the making of contributions and expenditures by the actual transfer of funds).[1] Thoughtfully addressing this set of issues will take time, and will require study of how changing uses of the Internet actually affect political discourse. But some key principles can and should now be adopted to provide guidance for all concerned in the short term.

The approach suggested below to regulating individual online activity that is not coordinated with a candidate will require, we recognize, legislative action by Congress to alter existing statutory disclosure requirements. We urge the Commission to recommend such legislative changes in order to strike a better balance between the goals of the Act and the opportunities for individual political expression that are now possible through the Internet.

Core Values of the Act

A central premise of the Act is that it is necessary to protect the electoral process from both corruption and the appearance of corruption. As the Supreme Court said in Buckley v. Valeo, "To the extent large contributions are given to secure political quid pro quo from current and potential officeholders, the integrity of our system of representative democracy is undermined."[2] The Buckley Court also spoke of the danger of the appearance of corruption: "Of almost equal concern as the danger of actual quid pro quo arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse

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[1] Obviously, that the Internet is used to solicit or make contributions cannot reasonably be thought to change the rules applicable to such transfers of funds. Accordingly, we will focus these comments on questions relating to the conditions under which the posting of comments on the Internet by individual and corporate actors (and the expenses incurred in connection with such postings) should be regulated.

[2] Buckley v. Valeo, 424 U.S. 1, 26-27 (1976).

apparent in a regime of large individual financial contributions."[3] The fundamental aspiration of the Act is that individual American voters are entitled to perceive (a) that any election in which they participate is fair and open, and (b) that any representative chosen through the electoral process will not be beholden to large monied interests.

For this reason, the Act limits the amount of contributions from individuals and groups, limits that directly serve the goal of deterring corruption and the appearance of corruption.

Expenditures that are coordinated with a candidate raise the same concerns as contributions and thus are treated by the Act as contributions. On the other hand, spending for electoral advocacy by an individual that is not coordinated with a candidate is speech that enjoys a stronger form of First Amendment protection and is not limited by the Act. The Act does require that such spending, if over a modest threshold amount, be publicly disclosed and accompanied by public identification of the spender. These disclosure requirements, the Buckley Court held, were necessary to protect the integrity of the campaign process.[4]

Corporations and labor unions have historically been treated differently by the campaign finance laws from individuals and other groups. Since the beginning of the last century, corporate contributions, and later, corporate expenditures, to influence federal elections have been banned. This ban was extended to labor unions in the 1940's. The reason that such bans on corporate and union political giving and spending, including independent spending, have been upheld is the Supreme Court's recognition that the large aggregations of wealth that can be amassed by such groups might have a distorting effect on the political process and undermine the integrity of our elections. The unique state-conferred corporate structure (which facilitates the amassing of large treasuries) warrants the Act's limit on independent expenditures. Austin v. Michigan Chamber of Commerce, 493 U.S. 652, 659 (1990), quoting FEC v. National Conservative Political Action Committee, 470 U.S. 480, 500-01 (1985) ("[T]he compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form.")

Common Cause and Democracy 21 believe that protection of the core values of the Act in the context of the Internet is compatible with the creation of clear rules. These rules can and should minimize regulatory burdens and give adequate warning of wrongful action, while facilitating rapid growth of the Internet. These rules should flow from the core values outlined above, and should also take into account the characteristics of the Internet that differ from those of the off-line world.

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[3] Id. at 27.

[4] As the Court noted in Buckley, "disclosure provides the electorate with information as to where political campaign money came from and how it is spent by the candidate;" deters actual corruption and the appearance of corruption by exposing large contributions and expenditures; and provides information necessary for detection of violations of the Act. Buckley v. Valeo, 424 U.S. at 66-68.

A Framework for Implementation of the Act's Core Values on the Internet

A. The express advocacy speech of individual Internet users, made independently of a candidate, should be unregulated by the Act as long as the expenditures involved do not exceed a substantial monetary threshold; if they do, such expenditures should only be subject to existing disclosure and disclaimer requirements.

The campaign finance laws place no limits on the amount of money an individual can spend on election advocacy activities as long as they are independent of a candidate. This is true whether that advocacy occurs via traditional media or via the Internet. The only regulatory requirements at issue in such independent spending by individuals is the obligation to disclose the money spent in such activities, and to include a disclaimer as to who is responsible for the speech.

We urge that these disclosure requirements be relaxed in the context of individual independent online electoral activity. Individuals who establish web sites and engage in online postings promoting particular candidates – and who do so independently of the candidate - should be permitted to conduct these activities free of any burden from campaign finance rules[5] as long as substantial individual expenditures to advocate a candidate are not involved. The Commission's task is to balance the need for disclosure with the need to provide clear leeway for individual actions so as to avoid (i) imposing unnecessary burdens or (ii) abandoning the Act's important goals.

Common Cause and Democracy 21 suggest that if an individual in establishing a web site (or posting online) spends more than a substantial threshold amount (e.g., more than $25,000) for the purpose of advocating the election or defeat of a particular candidate, then, even if the individual acts independently of any campaign, the individual's site should include a disclaimer and his/her expenditure should be disclosed. But independent activities by individuals on the Internet that do not meet this expenditure threshold should not be regulated.

In other words, individual Internet communications that advocate election of a candidate should be unregulated if they are uncoordinated with a campaign and do not rise to a level of substantial spending by the individual. Only substantial advocacy expenditures by individuals should trigger disclosure and disclaimer requirements.

This suggestion assumes that the Commission will continue to regulate advocacy activities on the Internet by an individual that are coordinated with a campaign.[6] Coordinated

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[5] Of course, as noted above, such speech should be distinguished from dollar contributions.

[6] The Commission is in the midst of a rulemaking devoted to defining "coordination." Federal Election Commission Supplemental Notice of Proposed Rulemaking 1999-27: General Public Political Communications Coordinated With Candidates, 64 Fed. Reg. 68951, December 9, 1999. Common Cause and Democracy 21 intend to participate in the Commission's rulemaking. Accordingly, these comments will not address this definitional issue.

expenditures are considered in-kind contributions under the Act subject to the various limits and prohibitions set forth in the Act.[7]

To date, the Commission has taken the position that individual, uncoordinated communication via a web site should always include a disclaimer (containing the web site owner's full name and a statement as to whether the communication is authorized by any candidate).[8] Common Cause and Democracy 21 urge the Commission to seek changes -- either regulatory or statutory -- so that such disclaimers are not required. Taken to its logical extreme, the Commission's current ruling with respect to individual web sites created independently of a campaign threatens to mire the Commission in endless searches for individual web sites that have some express advocacy component. Applying regulations to individual, inexpensive actions on the Internet could thus prove counterproductive.

On the other hand, requiring individuals to disclose their expenditures if they have spent more than $25,000 on an individual, uncoordinated web site advocating a particular candidate, or on other online activity, would implement the purposes of the Act, while providing substantial leeway for most individual advocacy speech on the Internet.

Accordingly, where individuals have spoken on the Internet without coordination with a candidate or campaign, their statements should not be regulated (e.g., by requiring disclosure) unless their cost of publication exceeds a substantial monetary threshold.[9]

B. Corporate, labor union, foreign national and government contractor contributions and expenditures should continue to be regulated.

Actions by corporations and labor unions (whether on the Internet or in any other context) should continue to be more strictly regulated. These entities should not be allowed to use this new medium to achieve the directed, concentrated candidate advocacy prohibited in the off-line world.

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[7] We suggest, however, that the mere establishment of links by individuals (the equivalent of stating an address online), even where coordinated by a campaign, should not necessarily be regulated. Similarly, mere copying and posting of pre-existing campaign materials by individuals, even if coordinated, should not necessarily be regulated. Linking and copying, whether coordinated with a campaign or not, are fundamental to individuals' daily life on the Internet and do not inherently pose risks to the core values of the Act.

[8] Federal Election Commission, *Advisory Opinion Number 1998-22* (Washington D.C.: GPO 1998) http://herndon3.sdrdc.com/ao/ao/980022.html (last accessed 12/17/99).

[9] We believe this is the optimal set of rules that should apply to individual advocacy activities on the Internet. Some such rules might be adopted by the Commission directly or established by means of its prosecutorial discretion. (There may be authority allowing the Commission to forbear where strict enforcement of its rules would undermine the purposes of the Act.) Others require amendment of the Act. In general, we urge the Commission to establish this proposed structure either by means of its own regulatory actions or (where appropriate) by affirmative recommendation of needed legislative changes.

First, corporate/labor union candidate advocacy and expenditures should continue to be prohibited on the Internet as they are in the off-line world.[10] There is no reason why the advocacy expenditure of corporate or labor funds is less corrupting if it takes place in connection with the Internet as opposed to print or traditional media. The vice is the use of corporate or labor funds to finance advocacy to the public of the election or defeat of a particular candidate.

On the other hand, corporations and labor unions should retain the right to speak and advocate to their own employees and membership. The advent of the Internet should not change these fundamental relationships. Indeed, the Internet likely facilitates such internal communications. Generally, such corporate and labor union speech will not become available to the public at large. On the other hand, for the same reason that the current regulations now allow the dissemination of some advocacy information by corporations through normal press channels,[11] there should be room for internal advocacy that would in the normal course of events also be archived on an external web site.

Second, fundraising for a candidate undertaken by a corporation, labor union, government contractor, or foreign national should (like direct contributions) be prohibited in the context of the Internet. Likewise, present rules regulating campaigns' solicitation of cash contributions (and the making of cash contributions) need not be changed.

The existing Act and regulations create some latitude for incidental use of corporate facilities by employees in connection with elections, where no incremental expense is incurred and the employee is not prevented from doing his or her job. Similar principles can be applied to avoid overly burdensome regulatory strictures in the context of an employee's use of corporate computer resources.

Overall, the Commission should remain mindful that expenditures by corporations and labor unions (other than for nonpartisan or traditionally exempt purposes) create the same threats to the Act's core values even if the resulting speech is online. The proliferation of low-cost opportunities for speech does not, in the end, reduce either the effectiveness or corrupting potential of corporate or labor union expenditures designed to influence elections.

C. Conclusion

Translating the core values of the Act to fit this new medium (and successor technologies) will not be an easy task. We recommend that the Commission act with caution and allow time for experimentation. Only after the actual effects created by use of the Internet have been clearly identified will the Commission be able to analyze open questions in light of the Act's core values.

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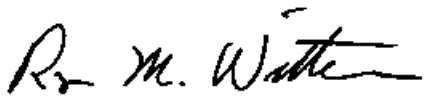
[10] As the Commission has recognized, these prohibitions should not apply to nonpartisan activities. Federal Election Commission, *Advisory Opinion Number 1999-25* (October 29, 1999).

[11] 11 C.F.R. Sec. 114.4(c)(6)(1999).

Common Cause and Democracy 21 urge the Commission to view its task as translating the core values of the Act into this new medium rather than literally applying each existing rule in the form of burdensome or unenforceable Internet mandates. The Commission should guard against having its resources diverted from protecting against the core vices the Act was intended to address. We have set forth in these comments key distinctions the Commission should attempt to establish, either by means of exercising its regulatory and enforcement discretion or by recommending necessary statutory changes.

Respectfully submitted,



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