STATE OF CONNECTICUT

STATE ELECTIONS ENFORCEMENT COMMISSION

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VIA FACSIMILE

January 3, 2000

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999 E. Street, N.W.
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Re: Use of the Internet for Campaign Activity

Dear Attorney Smith:

I am writing in response to your request for comments regarding the "Use of the Internet for Campaign Activity." The views that follow are my own and are not the views of the State of Connecticut, State Elections Enforcement Commission, its staff, or its Commissioners.

The questions considered are whether to continue or expand regulation of campaign activity on the Internet? Whether Internet campaign activities are analogous to campaign activities conducted in other contexts, or do they differ to such a degree as to require different rules? To what extent should existing regulations be amended or abandoned based on such regulation? Rather than address each of these related questions in turn, I approach the question of Internet regulation more generally. Determining that some regulation is likely and necessary, I then offer my interpretation to some specific instances and conclude with some suggestions that are a cautious approach to Internet regulation.

Internet Regulation Generally

While crafting rules for the Internet the FEC must avoid "...heavily burdening the common, probably necessary, communications between candidates and constituencies during an election campaign." FEC v. Christian Coalition (1999). Such regulations must be evaluated in the context of the Internet as a "nascent market" and in an environment where evidence of its impact is "anecdotal." See FCC News Release 1/28/99. The FEC should adapt existing regulations, rules, and procedents to Internet activity when possible. Moreover, the FEC should reverse existing regulations or create new specific solutions to regulating Internet activity sparingly and only when absolutely necessary. The FEC should allow Internet politics to mature and evolve an election cycle or two before more substantial action, perhaps creating a mandate to re-consider Internet regulation at a time certain in the future.

It may be helpful to examine the Federal Communications Commission (FCC) and its approach in regulating the Internet, not for direct guidance, but to conceptualize the sheer scope and newness of the Internet as a popular communications device and the results to date of a relatively "hands-off" regulatory approach. Currently, thirty million American homes are on the Internet, and competition has fueled innovation. The FCC "...has taken a de-regulatory approach, an approach that will let [a] nascent industry flourish." Remarks by FCC Chairman William E. Kennard, 7/20/99. Moreover, the FCC has taken numerous affirmative steps to ensure that the marketplace, not regulation, allowed innovation and experimentation to flourish and has had a role to play in creating a deregulatory environment in which the Internet could thrive. FCC News Release 7/19/99. It may not be possible or prudent for the FEC to adopt such an "hands-off" approach. However, where comparison of Internet activity to more traditional election activity is possible it may be prudent. Cases that do not allow for direct comparison, and otherwise demand innovative approaches, can be addressed in turn.

Finally, to date, the Commission has interpreted the Act and its regulations in a manner consistent with contemporary technological innovations where the use of the technology would not compromise the intent of the Act or regulation. Advisory Opinion 1999-9. In its application of the FECA to the Internet, the FEC must be consistent in assessing the purpose served by the regulation and the context in which the web is being used as a tool. This would assure that the FEC does not compromise the intent of the FECA. New exceptions should not be created because the Internet is novel, but rather when an equivalent comparison to existing rules or Commission interpretations cannot be drawn.

Specific Regulations

One issue is whether Internet activity should be treated as a "contribution" or "expenditure" when it relates to federal candidates and elections. Firstly, §431(8) states the term "contribution" includes "anything of value" made by a person for the purpose of influencing any election for federal office. Further, the Commission has historically interpreted the phrase "anything of value" to include "in-kind contributions" which are the provision of goods or services without charge or at less than the usual normal charge. 11 CFR 100.7(a)(1)(iii). To the extent that maintaining a web site has the associated costs of computer equipment, server charges, and electrical and telecommunications costs it can be concluded that there is determinable or estimable "value" to Internet activity. If the activity is undertaken with the purpose of supporting or opposing a candidate for elected office and therefore influencing an election, it can be determined that such activity could be considered a "contribution" by the FEC. Moreover, because a web site needs a designer, "webmaster," and expertise to maintain, update, and service such a site, it can be determined that the provision of such labor in hours spent and expertise at no cost or less than market cost would be deemed an "in-kind" service from persons providing them. Because Internet activity which seeks to influence an election represents something of value either in actual maintenance costs of the site or "in-kind" service it falls under the definition of "contribution" to a candidate for elected office and therefore should be treated as a "contribution."

Section 431(9) states that the term "expenditure" includes "any purchase, payment, loan, advance, deposit, or gift of money or anything of value, made by a person for the purpose of influencing any election for federal office. 2 U.S.C. §431(9)(A), 11 CFR 100.8(a). Further, "in-kind" contributions are also expenditures. To the extent that a person pays the actual costs for computer equipment, software, electrical and telecommunications costs to develop and maintain Internet activity in support or opposition of a federal candidate it would qualify at the least as "anything of value" and therefore as an "expenditure." If a person spends personal time and expertise to facilitate Internet activity, or if a person provides free of cost the technical hardware and telecommunications network to maintain such Internet activity, then such activity would be an "in-kind" expenditure to support an elected official or to influence elections.

The exemptions from "contributions" and "expenditures" as applied to the context of internet activity relating to federal candidates and elections should not greatly impact or cloud the analyses. Evaluating exemptions should not turn on the means or medium of expenditures and contributions, but rather should be triggered by standard source, timing, and limitation requirements. Although Internet activity to support an elected official or federal election may be novel, regulating expenditures and contributions while providing for limited exemptions for such activities is certainly not. The FEC should apply present rules, regulations, and precedent consistently to Internet developments where the regulated or exempted activity is not significantly changed because it relates to the Internet as a medium.

Candidate Web Sites

How should campaign committees treat costs associated with establishing campaign web sites? To the extent the cost of the web site satisfies the definition of "expenditure" it should be recognized as such. If the web site facilitates permissible "other receipts" such as those for legal and accounting services than it should be exempted. Consistent with its general approach, the FEC should avoid "re-inventing the wheel" at every nuance and turn of Internet regulation. In the spirit of consistency and comity it should apply consistent results through basic comparison and standard analysis. Clearly, if the process or results become tortured or complex, or if political participants can not conform their behavior based on common sense comparisons, the FEC should then adopt more novel approaches. By way of example, the following represents just such an approach with the consideration of "Candidate Web Sites" and related aspects.

Hyperlinks. If a "hyperlink" on a Candidate Web Site directs person to a fundraising mechanism or otherwise generates revenues, than it should be valued. If link generates revenues for its placement on a web site it would be equivalent to an advertising fee and it should be valued. If it is the equivalent of posting an address and telephone number then it should not be valued. If it can qualify as a solicitation then it is regulated. To the extent that a "hyperlink" on a political web site can be qualified as the "commercial use of committee assets" or the sale of unique political campaign material without a "genuinely independent market value" the commission should qualify it as a "contribution."

The Act and Commission regulations recognize that under certain circumstances, political committees may receive funds that are not contributions from the payer. An example of such funds would be "...promotional offers and rebates by vendor given to committees on the same basis as afforded to other purchasers of services." Advisory Opinion 1995-21, regarding "permissible other receipts". The FEC should distinguish its position from that of the IRS that seems to conclude that a hyperlink is "an implied endorsement." BNA, Money & Politics, Number 209. The posting of a link to another web site could merely be encouraging the exchange of information or providing the Internet user with a route to information. The user than must actively pursue such information by "clicking" on the link and subsequently exploring the second site. Currently, the FEC provides a "narrow exception" which allows acceptance of free services from corporate vendors "where certain general promotional amenities, discounts, and rebates were offered within a pre-existing business relationship." See Advisory Opinions 1991-23 and 1987-24. "Hyperlink" may fit this "narrow exception" depending on industry standards or practices, and may have to be determined with further development and usage of the Internet for FEC regulated activity.

AO 1990-26 & AO 1996-2 CompuServe. In determining regulation of Candidate Web Sites, the above Advisory Opinions may be useful, and properly adapted, would lend to the regulation of the Internet activity that is consistent with existing regulations, rules, and precedent.

AO 1990-6 should be considered when determining whether or not and how to value Candidate Web Sites. In this Advisory Opinion, the FEC determined that "...the sale or commercial use of committee assets by a principal campaign committee or other political committee to be fundraising for political purposes, resulting in contributions to the limitations and prohibitions of the act." It reached this conclusion particularly with respect to proposed sales of campaign fundraising items, or unique political campaign materials without a "genuinely independent market value." Further, the Commission considered the use of committee assets to generate income through ongoing business or commercial ventures to be fundraising." To the extent a Candidate Web Site solicits contributions in exchange for political paraphernalia or sells such paraphernalia as merchandise, AO 1990-6 should be controlling regarding the regulation of such sites.

AO 1996-2 regards the provision of free online accounts to federal candidate committees, and indicates that a reduced billboard advertising rate would represent a prohibited corporate contribution, even when advertising rate was for civic or political purposes. The FEC concluded that, because rate was not routinely offered in ordinary course of business to nonpolitical clients, it was prohibited. Moreover, even if the category of clients was varied enough to indicate that it was in the ordinary course of business, the proposed gift of online account would constitute prohibited "in-kind" contribution. §2 U.S.C. 441b(a). In relation to Candidate Web Sites, the provision of such services to a candidate committee by an individual would be an "in-kind" contribution, and if by a corporation would be prohibited. Provisions of services, including those relating to the Internet, at normal and usual charge would not entail prohibited contributions. 11 CFR 100.7(a)(1)(iii)(A); see also Advisory Opinion 1985-28.

In assuring the application of current FEC advisory opinions to Candidate Web Sites, consistency and simplicity would be most conducive to effective Internet regulation. The above Advisory Opinions serve as illustrations of how adaptation and consistency can occur when using current FEC precedent and Internet activity.

Web Sites of Publicly Funded Candidates

The issue is whether there are special considerations involving web sites established by presidential candidates receiving public funds? Although Internet activity to support an elected official may be novel, existing Commission regulations and ruling should be applied consistently where possible. This would include their application to those presidential candidates that except public funding. In some instances the unique nature of Internet communication requires the reversal of past FEC decisions, such as the recently reversed long standing policy to allow matching of credit card contributions received by presidential primary candidates via the Internet, 64 FR 32, 394 (June 17, 1999). However, the uniqueness and newness of the Internet as a medium alone, should not necessitate sweeping reforms or create problems where consistent application of precedent is possible. By way of example, solicitation costs of publicly funded presidential primary and general election candidates are currently exempted, they should continue to be so under Internet regulation or when made through a web site. Using industry standards a portion of the cost should be attributable to the solicitation costs and a portion therefore exempted to that extent.

Web Sites Created by Individuals

Regulation of Web Sites Created by Individuals may be one of the more complicated areas of regulation due to issues of free speech, freedom of association, and the mere fact that countless such Web Sites might exist. Nonetheless, to the extent possible, The FEC should continue in an effort to extend current regulations to that of Internet activity. Adaptation may be impossible in unique situations and creative and new approaches will be necessary. The following touches on specific issues that are likely to arise when addressing the FEC regulation of Web Sites Created by Individuals.

"In-kind" and "Independent" Expenditures. "In-kind" and "independent" expenditures should be applied to web sites created by individuals that contain references to candidates or political parties, just as they are applied to any other written, printed, published, or electronic media. The FEC must be cautious not to under regulate due to a fear of burdensome or complex administrative details and costs, nor should it over regulate by applying the definitions to minutia that would make oversight impossible. Presently, the FECA covers the costs incurred by individuals posting materials relating to candidates or parties. Therefore, the value of individual's "in-kind" contribution or "independent" expenditures relating to Internet activity should be determined through consistent application of the FECA and Commission precedent. In the case of "hyperlinks" to regulated candidate, political, and party committee sites, because of the sheer number and lack of cost to the creator of the "hyperlink" the FEC may best chose not to attempt to regulate such links. However, if it does chose to, it may do so by

creating mere reporting requirement if such links are discovered, or perhaps the FEC could post list of Web Sites that have such "hyperlinks," when they come to the attention of the FEC.

Coordination of Expenditures. How "coordination" should be defined in the context of campaign activity conducted on the Internet? Presently, a "coordinated expenditure" is an "expenditure made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate." §441a(a)(7)(B)(i). The FEC has elaborated that under §431(17): "cooperation," "consultation," or "at the request of" means (a) based on information about candidates plans, projects, or needs provided to the expending person by the candidates, or by the candidate's agents, with a view toward having an expenditure made..." However, recently at the District Court level "coordination" has been limited to situations where in "...the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated;" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience; or (4) volume. Substantial discussion or negotiation is such that the candidate and the spender engage as partners or joint venturers in the expressive expenditure, but the candidate and spender need not be equal partners." FEC vs. Christian Coalition (1999). "This standard limits... prohibition on expressive coordinated expenditures to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants." FEC vs. Christian Coalition (1999). The FEC should apply its current definition of "coordination" as articulated above to Internet activity, and await litigation and further rulemaking before it limits its definition of "coordination." The amorphous and burgeoning nature of the Internet and its many uses would be better addressed through the "expenditure" and "consultation" driven definition of "coordination" than that of the District Court in FEC vs. Christian Coalition which makes a showing of "coordination" difficult regardless of the medium of political activity.

Different Rules for Internet Campaign Activity

To the extent that Internet campaign activities allow no comparison and require new rules, perhaps the creation of a class of "reportable events" could be established to monitor election oriented Internet activity a FECA regulated committees. A "reportable event" would by its nature be of nominal or no cost to the user or provider, and would clearly be under limits which otherwise trigger FECA. It would nonetheless require some form of notice to the FEC or posting on the qualifying web site that such activity is taking place or being sustained. Examples that may require such reporting by either the provider or user might include "hyperlinks," "posting of web addresses," use of corporation's or labor union's computer network, sponsorship of a "chat room" and the like. It would benefit the public similar of current rules of disclosure. If not an affirmative duty to the provider, user, or benefactor, perhaps the FEC could post its own public "cyber" bulletin board of "reportable events."

The FEC should approach the Internet with enthusiasm, but also with the sense that this is an emerging technology, which may need to mature over several election cycles before its impact, can be known. Where possible the FEC should consistently apply its current regulations, rulings, and precedent. It should create new rules and reverse present ones only when necessary, and not at the cost of overburdening the FEC or participants in the political process. Finally, it must trod carefully when dealing with a nascent industry, where much of the evidence to date regarding its impact on the political process is merely anecdotal.

Sincerely yours,

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