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January 4, 2000

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Federal Election Commission  
999 E St., NW  
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FEDERAL ELECTION  
COMMISSION  
OFFICE OF GENERAL  
COUNSEL

JAN 4 3 42 PM '00

Dear Ms. Smith:

We are writing in response to the Commission's notice of inquiry and request for comments on the use of the Internet for campaign activity. We write as attorneys who represent numerous nonprofit advocacy organizations, many of which are actively involved in federal elections. While our experience advising these clients about federal election law informs our perspective, these comments are not submitted on behalf of any client.

**SCOPE OF COMMENTS**

We commend the Commission for moving quickly to provide guidance on the use of the Internet. In particular, we are pleased that the Commission seeks to adopt a comprehensive approach, rather than issuing guidance piecemeal as requests for advisory opinions arise. The Internet has revolutionized communications in only a few short years, and it is entirely appropriate to consider it sui generis, rather than attempting to fit Internet activity into pre-existing rules that were designed to address other types of communications.

While recognizing the need to provide expeditious guidance on activity that is already taking place, we encourage the Commission to consider any rules it may adopt as a preliminary attempt to determine the proper application of FECA to the Internet. The uses and scope of this medium are rapidly evolving, and any attempt to pin down the proper treatment of Internet campaign activity is almost certain to be challenged in the very near future by as yet unforeseen developments.

In the time available, we have not been able to conduct the comprehensive review of all Commission regulations suggested in the notice of inquiry. Rather, we have identified a few areas where it would be especially useful to have clarification of applicable rules, or where existing precedent should be reconsidered.<sup>1</sup>

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<sup>1</sup> We are disappointed at the short time given to respond to this far-sweeping inquiry. Especially with the winter holidays falling at the very end of the notice period, the timing is not

# HARMON, CURRAN, SPIELBERG & EISENBERG, LLP

Rosemary C. Smith, Acting Assistant General Counsel  
January 4, 2000  
Page 2

## LEGITIMATE FEC CONCERNS IN REGULATING INTERNET ACTIVITY

In crafting rules that apply the restrictions of FECA to the Internet, the Commission should consider carefully the legitimate governmental interest that permits it to regulate political speech at all. Primarily, the justification for allowing the government to limit this form of speech, otherwise protected by the First Amendment, is the need to prevent corruption or the appearance of corruption in the political process. In fact, the Commission's regulatory authority does not extend to speech per se, but only to the extent it represents an expenditure of funds. The Supreme Court has said that money (campaign contributions) can be a form of speech; it does not follow that speech on behalf of a candidate is necessarily a form of monetary contribution that can or should be regulated.

Far from representing a loophole through which campaign communications can escape FEC regulation, the Internet has the potential to be a tremendous force to reduce the impact of money on political campaigns. When every citizen can make her view heard and engage freely in public debate, traditional campaign spending on paid media communications becomes far less significant in determining the outcome of elections. As more and more individual citizens and citizen groups gain Internet access, with the ability to disseminate advocacy communications broadly to the public at minimal incremental cost, the ability of accumulated wealth to have a disproportionate voice in the political debate will diminish. Therefore, the Commission should proceed cautiously in making any rules that would tend to restrict speech in this most democratic forum. The rules of FECA should not be applied indiscriminately to any Internet activity.

The question, then, is when does an Internet communication involve costs that should be treated as a political contribution or expenditure? For our nonprofit organization clients, one of the most difficult questions has been how to measure the costs of communications on a web site or using e-mail. They are uncertain what costs need to be captured and paid for with PAC funds if they use this technology to publicize endorsements or for other political communications. Existing Commission rulings could be read to suggest that this calculation should sweep broadly, so that all costs associated with setting up internet access are included. We respectfully urge the Commission to not take such an approach.

## GENERAL COSTS RELATED TO INTERNET ACCESS

In a few short years, having a web site or at least e-mail capabilities has become practically essential for businesses, nonprofits, and many individuals. No office, it seems, is complete without a telephone, fax machine, and e-mail access. The costs of setting up these communications capabilities are not undertaken in order to make a single communication, but as a threshold for participating in public life. Typically, a web site and e-mail system are used for

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calculated to provide the Commission with the widest possible scope of comments to inform its decision-making.

**HARMON, CURRAN, SPIELBERG & EISENBERG, LLP**

Rosemary C. Smith, Acting Assistant General Counsel

January 4, 2000

Page 3

an extremely broad variety of communications related to an organization's mission. It makes little sense to treat Internet costs (ISP charges, phone lines or other high-speed connection costs, equipment purchase or lease, web design fees) differently from the costs of other communications systems in general use. Just as a corporation's SSF may use the phone system of its connected organization without paying for a portion of the phone systems general operating costs (such as equipment or maintenance fees), an SSF should be permitted to use corporate facilities to make e-mail or web communications without having to pay for such use. Similarly, a nonconnected PAC should be permitted to treat Internet access charges as operating expenses, rather than having to attribute these general costs with particular communications. Of course, in both cases identifiable marginal costs, such as staff time associated with a particular communication, could be charged to the PAC.

In the absence of such a rule, organizations seeking in good faith to comply with the law may have to measure the expenses of online services and allocate a portion to specific communications. This likely would involve an extremely complex calculation to decide "how much" of a web site is attributable to specific portion of its content. For instance, would the calculation have to account for daily updates in content so that it accurately captured the amount of the site devoted to a particular communication on any given day? Would each FEC report then have to reflect the mathematical result of accounting for the web site content for each day of the reporting period? In the face of such complexity, the Commission would have to create rules for making this measurement of web content or e-mail use. However, forcing the regulated community and the Commission to go through this exercise would serve little purpose in the context of a medium where cost does not necessarily effect the effectiveness and/or breadth of distribution of a communication.

## LINKS

Links are part of what gives the web its unique character. Many sites are valuable and attract visitors primarily because they serve as a source of links to other sites' contents. Many links are provided without charge because the linking site believes that the linked site would be of interested to its visitors.

Some existing Commission rulings have suggested that a link to a web site is a thing of value, so that a link to a candidate's web site should be treated as an in-kind contribution to that candidate. While it is true that some links on the Internet are placed according to an agreement in return for payment, the existence of such arrangements should not dictate the Commission's approach toward regulating links. Treating all links as in-kind contributions to the linked site only because some links can also serve as paid advertisements would undermine the effectiveness of the web as a means of communication.

We suggest an alternate approach in which links are presumed not to be a contribution absent facts that indicate the contrary. Thus, individuals would be free to link to the sites of political candidates as part of a discussion of their views. If a site routinely charges for similar links, that

**HARMON, CURRAN, SPIELBERG & EISENBERG, LLP**

Rosemary C. Smith, Acting Assistant General Counsel  
January 4, 2000  
Page 4

would be a factor tending to rebut the presumption that a link to a political campaign provided without charge should not be treated as a contribution.<sup>2</sup> Such an approach would allow an issue organization to point its visitors to the web sites of candidates who have taken a position on its issue without making an illegal corporate contribution.

This approach is consistent with other provisions of the Act and regulations. The Commission does not routinely regulate things with substantial communicative content merely because they have an intangible value. For instance, although a candidate debate or voter guide may have "value" to a campaign, that value is secondary to their value to the public and the organization that seeks to engage in political debate.

#### POSTING ROUTINE COMMUNICATIONS TO A WEB SITE

Many nonprofits routinely print membership newsletters that are subsequently posted to a web site; few of them expect to generate substantial traffic through that portion of the site. However, it is a convenient way of giving the public information about the organization and its activities. Having the material available on line is also a service to the organization's members.

Existing Commission rulings, however, do not permit a nonprofit membership organization to post on its publicly accessible web site any issue of its newsletter announcing its candidate endorsements unless it has an SSF that can pay for such posting. This puts a substantial burden on the ability of nonprofit organizations to use their web sites to communicate, both with members and with the public, about their activities. An organization that routinely posts a membership newsletter on a web site has two choices. The organization may undertake significant expense and inconvenience to create a password-protected, members-only section of the site, and post the newsletters with endorsements there, or it may screen its newsletters for prohibited communications before posting them.

This situation places a burden on these organizations, without significantly furthering the goals of FECA. In reality, the danger of corporate funds exercising improper influence on the political process would not be noticeably increased if a nonprofit's communications to its members could be routinely posted to the web without these additional expenses. So long as the posting is routine, with the endorsements treated no differently from any other content, organizations

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<sup>2</sup> One can imagine other circumstances that would rebut this presumption. In most cases, a link to a candidate's web site would be just one small feature on a complex web site. Were a corporation to expend substantial resources to design and promote a site that did nothing but direct visitors to a favored candidate, the link (and the site as a whole) might properly be treated as an in-kind contribution. However, this would be a very unusual case. Regulations should be narrowly tailored to protect the government's interest and not restrict the political speech of all web sites in an attempt to forestall the extreme case. A rebuttable presumption meets this standard.

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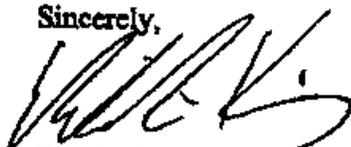
Page 5

should not be required to invest staff time to screen and modify these communications before they are made available on the web.

Similarly, the Commission has ruled that an organization may not post a news release announcing endorsements to a publicly accessible web site. This position should be reconsidered. The regulations allow an organization to communicate its endorsements through its ordinary channels of communicating such news announcements. If an organization routinely posts press releases to a section of its web site, the regulatory exception allowing organization's to send news releases announcing endorsements to the organizations ordinary press contacts should be extended to allow news releases containing endorsement announcements to be posted on an organization's web site.

We thank you for the opportunity to provide these thoughts at this time.

Sincerely,

  
Elizabeth Kingsley

  
Nicole McLaughlin