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COUNSEL

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Dear Rosemary Smith,

I am submitting the following attached comments in regards to the notice of inquiry and request for comments ("the notice") published in the November 5, 1999 Federal Register (64 FR 60,360). The issues that need to be addressed by the Federal Election Commission (FEC) are very important for the future of political campaigns and election fundraising. The internet is increasingly becoming a major tool of political candidates for getting disbursing information and gaining support.

After reviewing the issues involved in the use of the internet for campaigns and how the Federal Election Campaign Act (FECA) applies to the internet, I believe that it would be useful to promulgate a new rule on the use of the internet in campaigning. The FECA was not designed to cover the internet, and I believe that it would be useful for candidates, individuals, committees and the FEC if there were separate rules governing the use of the internet in campaigns. The new rules should be designed in a way that would reflect the spirit embodied in FECA, not tailored to the specifics of FECA that were designed prior to the widespread use of the internet. In addition to this, the FEC should design any rulemaking in a way which would minimize the amount of regulation being forced upon internet users. In short, the FEC should promulgate a rule that would minimize the amount of requirements placed on web sites and individuals who use the internet.

One of the most important things to consider when deciding what to do with internet campaigning is the spirit with which FECA was written. When this act was instituted, there was absolutely no consideration of internet activities. The goal of the act was to provide some sort of fair and coherent system for elections and fundraising for these elections. Specifically, the act was aimed at the use of other communications technologies such as television and radio, which are far more centralized resources than the internet. A separate set of guidelines is necessary to determine how individuals and organizations/corporations interact with – and provide funding for – political candidates.

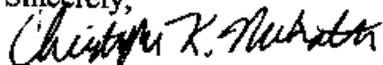
Additionally, it is extremely difficult to place a value on any internet activity supporting or opposing any candidate. For example, in several places in the notice, there are questions about how to assess the value of a hyperlink. As there is truly no definitive way to determine this value – it is different for every site, and close to zero on almost every site – any attempt to assign a value will be met with extreme resistance.

Furthermore, this same reasoning holds true for all internet costs associated with establishing and maintaining a web site.

In conclusion, it would not be wise for the FEC to attempt to regulate the use of the internet by individuals for political – or any other – purposes. Regulating the internet would set a dangerous precedent for the internet – a communications source that is so decentralized and widely available. While there may be some necessity to create rules governing candidates' web sites, the FEC should avoid enacting regulations that would affect the average individual internet user.

Thank you for the opportunity to provide these comments. If you have any questions on any of the information included in this comment, or would like to further discuss some of the issues raised, please do not hesitate to contact me. In addition to this, I would appreciate the opportunity to be involved in any further discussions and regulatory action promulgated by the FEC on the internet and political campaigning.

Sincerely,



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Attachments: 1

I – Candidate Web Sites

In the Federal Register notice, the issue was raised of how a candidate and his/her committee should treat the costs associated with the establishment of a web site. Specifically, the question was asked of whether the costs should be considered as an expenditure or as some other type of committee disbursement. This answer is very simple – it is an expenditure like any other. The costs which should be included in this are: 1) the cost for purchasing a domain name; 2) the cost for hosting the web site (either the cost of a server to host it, or the cost of hiring a company to host it); 3) the cost to hire out a company to build and maintain the site (unless volunteers are used); 4) the cost to install and maintain an internet connection, including phone lines, modems, cable modems, T-1 lines, etc.; and, 5) any other costs associated with the design and maintenance of the web site, including outside consulting services.

In addition to this, questions were raised regarding the use of hyperlinks on a candidate's web site. As there is no way to assign a value to a hyperlink, it would be foolish to attempt to regulate the use of these links on candidates' web sites. This applies to all hyperlinks, whether on a candidate's site or some other individual or corporation. It would be a dangerous precedent for the FEC to set if it were to attempt to assign a value to a hyperlink. Regardless of being able to assign a value to the link or not, regulating the use of the internet raises free speech issues that need to be considered. Any candidate should be able to place a link to any individual, organization, political committee, government or commercial site without considering any additional ramifications for this link on FEC regulations.

II – Web Sites of Publicly Funded Candidates

The issue of how to treat the web sites of publicly funded presidential candidates is an interesting one which should be included in any rulemaking by the FEC. In the notice, there are several issues raised regarding publicly funded candidates and the internet. The two most significant questions in these regards are: should contributions received over the internet be available for federal matching funds; and, should the costs of establishing and maintaining a web site (that can support internet contributions) be considered as expenditures subject to the spending limits?

The first question is much easier to answer than the second. For the first, of course contributions received over the internet should be included for matching funds. It is fundraising any way you look at it. This opinion is also expressed in the Commission's decision (64 FR 32,392 – June 17, 1999). If the FEC promulgates a rule on this issue it should retain this decision.

As for the question of how the FEC should treat the costs incurred by a candidate for establishing and maintaining a web site, the answer is a little more difficult. The real question needing to be answered is whether these costs should be considered "in connection with the solicitation of contributions." After several discussions on this topic, I have concluded that it would be in the best interests of all parties involved (candidates

and the FEC) to consider internet costs as related to the fundraising activities of candidates in all of the same circumstances as other fundraising methods. For example, a web site is much like a direct mailing. In a direct mailing, the costs are considered as related to the fundraising effort of the candidate. Candidates can use the fundraising exemption for the entire cost of these mailings, even if they may only ask for a financial contribution in one small corner of the mailing. The same should apply to all of the costs of a web site following the same rules already in place.

III – Private Individuals' Web Sites

The issue of what to do with private individuals' web sites is one of the most important and difficult issues needing to be addressed by the FEC. There are several areas to be considered when discussing regulating the use of personal web sites for campaigning/political purposes. The most important issue is that individuals' web sites cannot be regulated without infringing upon free speech rights, and any attempt to regulate or enforce regulations would be met with hostility and litigation. This would essentially apply to every internet site dealing with political candidates in any manner.

In the notice, there are issues raised about how the FECA distinguishes between activities taken in cooperation and consultation with a candidate, and those conducted independently of the candidate or his/her agents. When this is applied to the internet, the issues are not as easy to distinguish. For example, when an individual downloads a campaign button/banner to place on his or her own web site, perhaps with a link to the candidate's site, should this be considered in cooperation? It would be silly to define cooperation this way, as this gesture is comparable to an individual wearing a campaign button or placing a bumper sticker on their car. A person is not required to report an independent expenditure for the value of their car when they place a bumper sticker on it. This is not cooperation and consultation even if the candidate knows full well that the purpose of the bumper stickers are to place on your car, and the purpose of an internet button is to place on your web site.

In addition to this, individuals may reproduce speeches, policy statements or press releases from a candidate's site and place them on their own personal site. This is a more difficult issue to decipher, because it is more than a campaign button. On the other hand, even if the candidate suggests that people can use these resources on their own site, individuals generally do not call or e-mail a campaign headquarters to ask for permission to reproduce a speech or statement. This, then, would not truly be considered cooperation. On the other hand, in the notice it was mentioned that "ordinarily, the republication of campaign materials prepared by the candidate would be an in-kind contribution." However, as with all internet activities, it is impossible to assign a direct value to the portion of a web site that is the direct reproduction of candidate-generated materials. Is the FEC planning on enforcing reporting requirements on tens of thousands (and perhaps hundreds of thousands) of people who have no idea that their use of campaign buttons, speeches or other candidate-generated information – or their simple mention of supporting a candidate – needs to be reported to the FEC?

The next thing to consider is whether placing candidate information on an individual's web site should be considered an independent campaign expenditure when it is not a direct campaign contribution. Web sites and the materials contained on them, in this regard, should be considered more like an individual having a discussion than any other thing. People do not have to report to the FEC when they have a conversation with another individual about a candidate. (Although web sites are more like one-way conversations, they should still be considered individuals using their freedom of expression.) This being the case, individuals' web sites should not be considered as independent expenditures or contributions, and should be completely exempt from all FEC regulations.

In regards to the questions in the notice about hyperlinks on individuals' web sites, posting a hyperlink should never be considered as a contribution or independent expenditure unless the posting of a hyperlink on that site would normally have been paid for. In other words, if it usually costs money to post a hyperlink on a site and a candidate's site is posted there for free, then the posting should be considered as either an independent expenditure or an in-kind contribution. Any other use of a hyperlink on an individual's web site should be exempted from any reporting requirements.

The notice also requested comments on whether internet services are covered by section 431 (8)(B)(ii) of FECA which exempts "the use of real or personal property ... voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services on the individual's residential premises." In response to this, I believe that under this definition, the only things which would be covered would be: an individual hosting a candidate's web site on his/her (including candidates themselves) personal computer housed on their residential premises and an individual providing web site maintenance from his/her personal computer on their residential premises. In order to more accurately reflect the realities of internet usage, it would be wise to expand the definition of what is covered by this "residential premises" clause. The clause should be expanded to include, among other things, every internet site that an individual uses, regardless of whether it is hosted on their residential premises. 431 (8)(B)(ii) could be better suited if it read something similar to the following: "the use of real or personal property or internet services ... voluntarily provided by an individual to any candidate or any political committee of a political party in rendering voluntary personal services on the individual's residential premises, personal property or personal communications technology." The FEC should very clearly define what is included in personal property and personal communications technology, as well as exactly what internet services are.

The issue of disclaimers is very significant, in that any application of disclaimer requirements will impact an enormous amount of people - more than almost any aspect of internet campaign regulations. The reason for this is that according to section 441d of FECA, disclaimers apply to all political advertising activities "for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate." This portion of the regulation could potentially include every web site that had an opinion on any candidate, whereas other portions of the regulation

discussed here really only affect people if these amounts exceeded the \$250 reporting threshold.

Attempting to apply the traditional disclaimers to individuals' web sites would be a daunting task and would prove to be not worthwhile. It would also violate the free speech rights of individuals throughout the country – and indeed the entire world. The decision reached by the Commission in Advisory Opinion 1998-22 should be reversed in any rulemaking promulgated by the Commission. The reasons for this are discussed briefly in the notice. "Internet users generally have to take the affirmative step of directing their browsers to a web site in order to view the contents of that site. In contrast, individuals are often exposed to broadcast messages, newspaper advertisements and direct mail involuntarily." (64 FR 60,363 – November 5, 1999) To further this line of reasoning, an individual's web site should generally be considered more like a conversation between two individuals on the street as opposed to one individual reading a news paper or watching a political advertisement on television. It is precisely the reasoning used for the decision in Advisory Opinion 1998-22 that also shows the opposite should have been concluded. According to the notice, this decision concluded that "because of the internet's general availability, a web site would be considered general public political advertising" and would require a disclaimer under 441(d) of FECA. With such great availability to the internet, individuals are able to create their own personal web sites in a greater scale, enabling the medium to become less about providing a news source and more about providing a way for individuals to express their personal thoughts and feelings. Free speech issues are very important on the internet, and the attempt to regulate when people can advocate specific candidates on their personal web sites will run into extreme resistance and enforcement difficulties.

IV – Nonconnected Committees and Other Unincorporated Organizations

The notice also requested comments on how and when a hyperlink to a candidate's site should be treated as a "nonpartisan activity designed to encourage individuals to vote or to register to vote" under 431(9)(B)(ii). In response to this, the FEC should abide by the decision made in Advisory Opinion 1999-7. This decision found that when an internet site places information about candidates and links to their sites without any attempt to distinguish between candidates or their political affiliation, the links could be treated under both 431(9)(B)(ii) and 11 CFR 100.8(b)(3). The latter states that "[a]ny cost incurred for activity designed to encourage individuals to register to vote or to vote is not an expenditure if no effort is or has been made to determine the party or candidate preference of individuals before encouraging them to register to vote or to vote." In addition to this, the FEC should further this decision (possibly in a rulemaking) to also include all costs associated with the establishment, hosting and maintenance of the site.

V – Corporations and Labor Organizations

For corporations and labor organizations, the FEC should continue to enforce the same regulations on the internet that it does for other corporate and labor activities. Web

sites owned, maintained and/or operated by a corporation or labor organization should be forbidden from advocating or assisting a candidate. This is simple and would apply to nearly all web sites. What is more difficult is how to consider the "restricted class" provision of FECA. According to 2 USC 441b(b)(2)(A), FECA exempts "communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject." This includes information on political candidates. Under this "restricted class" provision, nothing on a corporation's or labor organization's web site should be exempted, unless the information is contained in a restricted section of the site accessible only by members of the restricted class. This would include information advocating or opposing any candidate and all contact information including hyperlinks. Additionally, the only e-mail communications (or other communications over the internet) that should be considered as exempt under this provision are those which are sent directly to members of the restricted class and no others. In addition, get-out-the vote and voter registration information should be allowed under the same circumstances as with any other communications method, and should not be only provided to the restricted class. When a corporation or labor organization endorses a political candidate, placing the press release on the web site or in any other type of communication should be allowed provided that it is used in a way similar to any other press release. If these are generally accessible to the public via the internet, these press releases should also be accessible to the same people.

The other issue needing to be addressed is how to consider internet services, including the costs for the creation, hosting, maintenance and support for a web site. This issue is also fairly straightforward. The FEC should incorporate the conclusions found in Advisory Opinion 1996-2 into any rulemaking. This decision found that free membership accounts provided to candidates are considered in-kind contributions when the accounts are normally paid for. This should apply to all internet services, including technological assistance, e-mail and web site hosting, web site building and maintenance, and any other costs incurred by a corporation or labor organization on behalf of one or more candidates.

VI - News Organizations

The issue of whether or not to classify information contained on the internet as an exception to the expenditure regulations is an interesting one. Under 2 U.S.C. 431(9)(B)(i) and section 100.8(b)(2), an exception is provided for "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." According to this definition, the internet is not considered as a news source that should be exempted from the expenditure regulations. What is interesting, though, is that the FEC may be able to create some type of niche here in which to place the internet. To do this, the FEC would have to explicitly find that the internet is a news source in these regards. The largest barriers to this are that the information contained on the internet is often not considered either a "news story, commentary, or editorial." There is inevitably going to be other

information and formats advocating and opposing candidates, providing links and contact information for candidates and, in many cases, a significant amount of completely unrelated information. Redefining what should and should not be considered an exemption under the news source provision will absolutely be necessary if the FEC decided this is the way to understand information on the internet – something which may be in the best interests of all involved.

VII – Conclusions

Under the current FECA regulations, there are no provisions included that were intended for application to the internet unless explicitly stated in FECA or that has been concluded in a subsequent Advisory Opinion. If campaign finance rules and regulations are going to be applied in the optimal manner in all situations, the FEC should promulgate a rulemaking to more clearly define the proper role of internet use in elections. When writing this rulemaking, the FEC needs to clearly differentiate between individuals, corporations and labor organizations, and candidates, political parties and political committees. These three categories need to be considered each in their own way and need to be approached with completely separate guidelines.

For individuals, the FEC should not regulate the use of the internet and the posting of information, hyperlinks, contact information, speeches, press releases, or any other issues related to one or more candidates. There has been no precedent set for regulating the use of the internet by individuals in nearly any capacity. Any attempt by the FEC to regulate the web sites of individuals will be a) unwelcome by the public and candidates, b) impossible to enforce with the enormous size of the internet community, c) violating the free speech rights of individuals, and, d) not in the correct meaning or intentions of the original FECA. People should be able to say whatever they want to about political candidates on the internet and also to reproduce any information as if it were any other public information.

Corporations and labor organizations need to be treated with a second set of criteria. These entities and all of the internet activities they undertake need to be considered like any other activity of the corporation or labor organization. The restrictions on the use of corporations and labor organizations for the disbursement of candidate-related or generated information should apply equally to the use of internet resources by these entities. In other words, unless it is get out the vote information or a press release, any political information distributed by these entities over the internet should be limited to the restricted class.

As for candidates, political committees and political parties, there is a little more room for maneuvering by the FEC. This portion of the issue should be the primary focus of any future rulemaking on the internet and campaign finance. Any regulations should be focused on further defining reporting requirements and what should be considered independent campaign expenditures or contributions.