

SULLIVAN & MITCHELL, P.L.L.C.
ATTORNEYS AT LAW
1100 CONNECTICUT AVENUE, NORTHWEST SUITE 330
WASHINGTON, D.C. 20036

PAUL E. SULLIVAN*
CLETA DEATHERAGE MITCHELL
BOB DAHL
of Counsel

(202) 861-5900
(202) 861-6065 *facsimile*

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January 4, 2000

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COMMISSION
OFFICE OF GENERAL
COUNSEL

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

RE: Comments of Voter.com, Inc., in Response to
Federal Election Commission's Notice of Inquiry
1999-24

Dear Ms. Smith:

This firm represents Voter.com, Inc. ("Voter.com"), a corporate entity whose product(s) and service(s) include an internet political portal web site to provide electronic links for and by individual voters to / with local, state and federal candidates, political parties, public policy issue organizations, advocacy groups, and media outlets in a balanced partisanship manner and format. On behalf of Voter.com, we are pleased to submit these comments in response to the Commission's referenced Notice of Inquiry.

One of the difficult issues addressed by Voter.com since its inception has been the extent to which and in what manner the Federal Election Campaign Act of 1971, as amended (2 U.S.C. § 431 et seq) ("the Act") would be applicable, or applied, to Voter.com's activities by the Federal Election Commission ("Commission").

Voter.com is a for-profit corporation. In one sense, it is similar in most respects to a media outlet such as a television or radio station, newspaper or other publication. Voter.com, as a political portal website, provides a central clearinghouse of candidate and issue information, provided by the candidates and issue advocates themselves, who pay fees to Voter.com for dedicated space on the Voter.com web site, to say whatever it is that the organization or candidate is legally permitted to say to the general public under the Act (or similar state laws or regulations).

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By charging a fee-for-service to candidates, Voter.com, Inc. has sought to avoid any issues related to potential in-kind corporate contributions from Voter.com to candidates who, by virtue of state or federal regulation, are prohibited from receiving corporate contributions. However, issues of cost, payments and / or charges for services and products, and market valuation of such items are ever evolving. The sorting out of valuation issues cannot be known to the participants until well after the conclusion of the 2000 election cycle. Thus, it is seriously problematic for the Commission to attempt to ascertain 'value' of such items if the market itself hasn't yet done so.

Two additional questions Voter.com would pose to the Commission are 1) Is the definition of 'expenditure' for internet political activity purposes different for 'for profit' corporations and 'not for profit' corporations and 2) Does the Commission plan to apply new and unique standards for determining what constitutes an 'expenditure' for political activity on the internet?

The Commission's recent Advisory Opinion in 1999-24 to Election Zone, LLC ("Ezone"), a political portal web site similar in some respects to Voter.com, raises, rather than answers, some fundamental questions about the Commission's jurisdiction over internet activities related to federal candidates. EZone is similar to Voter.com in that both are organized as for-profit corporate entities. However, a significant difference between the two entities is the basis on which each seeks to generate revenue. That difference highlights the jurisdictional dilemma presented to the Commission in the area of regulation of internet political activities.

EZone sought and was granted the Commission's permission to offer its dedicated space to federal candidates free of charge, notwithstanding the fact that it is a corporate entity. While the Commission granted the request, it did so on grounds that suggest to the regulated community that at least one factor in the decision was the Commission's review and consideration of the *types* of paid advertising anticipated at the site. Is the conclusion to be drawn from AO 1999-24 that the Commission, in reviewing internet political activity on the internet, intends to subject web sites to review and monitoring of such things as content, the *source* of revenues supporting the site, the type(s) of advertising purchased for the site, and such other factors, rather than merely ascertaining the presence or absence of the corporate form?

Curiously, the Commission has not heretofore distinguished between for-profit and not-for-profit corporate entities for purposes of application of the Act, other than as mandated by the Supreme Court in *FEC v. Massachusetts Citizens for Life* and the Commission's regulations promulgated in response thereto at 11 C.F.R. § 114.10. The

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assumption has been that a corporate entity is bound by the regulations under the Act regardless of whether the Commission considers the corporation a 'good' (not for profit) as opposed to a 'not as good' (for profit) corporate entity.

Nonetheless, the discussion by the Commission in its two Advisory Opinions this past Fall regarding internet political activity, and the Commission's approval in particular of AO 1999-25 suggest that perhaps a key factor in the Commission's approval was the fact that the product(s) and service(s) were being offered by the League of Women Voters and the Center for Government Studies, two not-for-profit corporate entities. If the Commission intends to depart from its longstanding position that corporate entities are largely indistinguishable for purposes of the Act, that would appear to require its own rulemaking, rather than a convoluted attempt to distinguish for-profit from not-for-profit corporate entities without regard to the requirements of 11 CFR § 114.10.

This is especially true for internet companies which may be organized as for-profit entities but which have rarely, to date, actually shown a profit. Thus, the issue of 'for profit' vs. 'not for profit' becomes somewhat illusory in terms of internet entities.

Voter.com has sought to avoid such issues altogether. It has taken the position that so long as it maintains a vendor relationship with regulated entities, whether they be candidates, political parties or advocacy organizations, it is largely free to conduct its business as would any vendor serving political clients. Affirmation of such a principle may actually be something the Commission may wish to clearly state. By doing so, the Commission can simply avoid the regulatory morass which will undoubtedly ensue should the Commission embark on a novel distinction between 'for profit' and 'not for profit' corporate political activity on the internet and the implied jurisdiction assumed by the Commission over web site content of some, but not all, providers of free internet services to regulated entities.

Voter.com has attached its November 9, 1999, letter to the Commission regarding AO 1999-24 and fully incorporates that letter by reference. In that letter, Voter.com sought to identify for the Commission certain issues that it has addressed since the inception of the company. Voter.com has attempted to maintain a single important concept as the guiding principle for purposes of regulation of its activities; namely, that the Commission has historically been quite specific in regulating the permissible activities in which a corporation or labor union can engage without violating the prohibition on corporate expenditures for or contributions to a federal candidate.

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That principle has served as a sufficient guide to Voter.com and seems likely to suffice for other entities involved in political activity on the internet. Voter.com urges the Commission not to be drawn into any effort which attempts to develop a more comprehensive regulatory framework for regulating every potential type of internet political activity. We urge this for a variety of reasons, not the least of which is that the speed of change in internet commerce, technology and the types of products and services available will surely eclipse the capacity of the Commission's regulatory process.

For instance, the Commission's Notice of Inquiry invites comment regarding various issues related to 'web sites'. Since the Commission began its discussions last spring regarding application of the Act to the internet, the political portal (which can loosely be defined as a web site featuring a collection of and links to a variety of other web sites) has emerged and is in the process of becoming a significant factor in internet activity for the 2000 election cycle. Yet, that concept is not even mentioned in the Commission's Notice of Inquiry. Political portals as we now know them will continue beyond 2000 and will no doubt be enhanced by additional innovations not known or knowable to the Commission today. It is simply not possible for the Commission to predict the technology in sufficient manner to adopt regulations that are not outmoded by the time they are finally promulgated.

To proceed according to the Commission's existing regulatory paradigm would require the Commission to develop definitions and categories of web sites, define specific political activities, services or products which may or may not be offered to varying types of clients, customers, affiliates or participants, the intended and / or actual use of such services or products, the sources of revenue and advertising for web sites, not to mention the frightening prospect of the Commission's ongoing review and monitoring of content offered on the internet.

The industry standard(s) for such determinations and definitions are too fluid and are evolving too rapidly for the Commission's conventional regulatory approach.

The internet offers to voters enormous opportunities to have at their instantaneous disposal information, products and services regarding candidates, political issues and activism opportunities without filtering or bias. The Commission would be well served to allow this new venue to develop, evolve and grow without substantial intervention until such time as specific issues or problems arise or present themselves. By the same token, the Commission should be wary of substituting intermittent advisory opinions for a more comprehensive review process. An ongoing process of inviting, receiving and

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processing ideas, suggestions and comments similar to this one may be an option for the Commission's consideration.

Voter.com has elected to behave and be treated essentially as a media vendor, selling space and communication capacity to political candidates and others interested or engaged in the political process. This is one prototype that may prove successful and, as such, would be subject to the Act only as other media outlets are subject to its provisions.

Voter.com thanks the Commission for allowing it to present these comments. We stand ready to appear at any public hearing(s) called by the Commission for the purpose of hearing further comments or testimony or to answer questions regarding these comments.

Sincerely,
SULLIVAN & MITCHELL, P.L.L.C.

A handwritten signature in cursive script that reads "Cleta Mitchell".

Cleta Mitchell, Esq.
Counsel for Voter.com, Inc.

cc: Justin Dangel, President

Attachment

SULLIVAN & MITCHELL, P.L.L.C.
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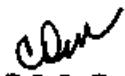
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TO: Federal Election Commission
Office of the Commission Secretary
Federal Election Commission
999 E Street NW
Washington, DC 20463

RE: COMMENTS ON DRAFT ADVISORY OPINION 1999-24

FROM: Cleta Mitchell, Esq. 
Sullivan & Mitchell P.L.L.C.
Counsel for Voter.com, Inc.

DATE: November 9, 1999

This is in response to the Draft Advisory Opinion 1999-24 to Mr. Ryan C. Arney, President and CEO, Election Zone LLC, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the operation of a web site to provide a means of communication from candidates to voters on a nonpartisan basis ("Draft"). According to the Draft, the requesting entity, 'Ezone, is a limited liability company ("LLC") organized under Colorado law in 1999, and will be taxed as a partnership, further described as "a non-partisan company, not affiliated with any political candidate, political party, political action committee or advocacy group." Ezone, according to the Draft, "seeks to expand democracy" through the Internet by operating its website, "ElectionZone.com," and that the website will serve as a channel for communication between voters and candidates. EZone will invite participation from candidates in Federal and non-Federal races.'

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Our firm serves as Counsel to a similar, for-profit Delaware corporation, Voter.com, Inc., which today launched its political portal web site. Voter.com has defined 'political portal web site' to mean a web site that directly or indirectly provides non-partisan, bi-partisan or balanced partisan content for the purpose of creating a political or voting-related portal. This shall not include sites intended to influence the outcome of an election of a candidate for public office.

However, many of the products and services offered by Voter.com to federal candidates are identical or similar to those described by EZone in its Advisory Opinion Request.

Our concern(s) about the Draft are essentially based on the fact that the Commission does not define clearly how the products and services to be offered by E Zone escape the Commission's regulations governing a corporation's providing of free goods and services to federal candidate(s).

Is the Commission concluding that a corporation may provide goods, services or products free of charge to federal candidates so long as such goods and services are provided to as many candidates as will accept them and if such services and products are offered on a broad, non-partisan basis? That generic finding does not appear in the Commission's regulations.

Is it the Commission's intent to generally supercede for internet political activities the specific activities allowed by the regulations at 11 C.F.R. § 114.4 regarding communications to the general public by a corporation or labor union regarding federal candidates? The Commission has historically been quite specific in regulating the permissible activities in which a corporation or labor union can engage without violating the prohibition on corporate expenditures / contributions to a federal candidate. This Draft seems to take a major step in another direction.

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Such a step may be welcome, but the regulated community is entitled to a more thorough statement of intent and general applicability, most probably through a rulemaking governing political portal web sites.

Our concern is that the Commission could well be in the process of creating multiple types of political portal web sites which are subject to different types of regulation depending on the type of services or products which are offered or the type of clients, customers, affiliates or participants involved in the particular political portal.

For instance, Voter.com, Inc. offers to the general public (users) the opportunity to design their own 'voter profiles' which will then match the user's views on issues with those of participating candidates, issue organizations and political parties.

The participating candidates, issue organizations and others will be those who pay for space within the portal site, providing content about themselves and their views on issues. In addition, participants will have the opportunity to post streaming video and audio of their campaign commercials, solicit contributions to their campaigns, and many other activities, products and services of their own choosing and design. All services and products will be offered to as many candidates, state and federal, as may wish to participate but participation will be offered on a paid basis in order to assure that the corporation, Voter.com, Inc., does not run afoul of the prohibitions against corporate contributions contained in 2 U.S.C. §441b.

Additionally, the Voter.com, Inc. site involves, as mentioned above, the participation of issue organizations, political parties and others who have expertise on particular issues, and who score legislative voting records and candidate responses to issue questionnaires.

This is included in an attempt to better educate citizens on the positions and voting records of public officials and candidates – beyond that which the candidates themselves may wish to tell the public and which may be at odds with the candidates' descriptions about themselves on particular issues.

According to the Draft, it would appear that the inclusion of these particular services, products and clients would or could render Voter.com, Inc.'s activities to be 'expenditures' despite the Commission's seeming to allow very similar activities to be provided at no cost to candidates by E Zone. Then again, it may be that the additional goods, services and products offered to federal candidate by a for-profit corporation (Voter.com, Inc.) would NOT be considered expenditures or in-kind contributions under the proposed Draft. But it is unclear.

That, of course, is the problem with the Draft. This piecemeal approach strikes us as inappropriate.

In light of the Commission's recent Notice of Intent to Rulemake for the purpose of receiving input and information about political activities involving the internet, the whole area of political portal websites is one of the subjects which our firm intends to pose for consideration, discussion and review by the Commission. While it is not one of areas contained within the Notice, it is pertinent to this Draft and to many entities becoming increasingly involved in internet activities related to federal campaigns.

The question is, what are the types of permissible activities in which a political portal web site may engage without running afoul of the prohibition on corporate expenditures? A number of issues arise from that basic question, which we plan to posit more fully to the Commission for discussion and possible rule-making or clarification during this inquiry period, such as:

What is the Commission's definition of a political portal web site?

Is there a difference in what can be offered by a political portal web site as opposed to a single web site or internet services vendor?

What services can be offered free of charge on a political portal web site?

What products can or can't be offered free of charge?

What is the industry standard for such determination?

What principles will be applied by the Commission in reviewing the activities of political portal web sites for purposes of defining expenditures and/or contributions via the internet?

Where and how are those principles defined?

What other participants besides federal candidates, if any, can be allowed to participate within the same political portal web site?

What specific activities of a political portal web site would be considered expenditures?

What specific activities of a political portal web site are NOT expenditures?

Who can offer such services and products?

Who can't?

What definitions exist or should exist for such products, services and activities?

What types of e-commerce activities related to federal campaigns are permissible via the internet?

Is there a difference between or among political portal web sites, internet political activities, internet vendors (providing goods and services to federal candidates via the internet) and how does the Commission intend to sort out and articulate those differences?

There are a myriad of questions regarding political portal web sites which have not been thoroughly considered by the Commission to date. We would urge the Commission to proceed very cautiously in this regard and would further suggest that the Draft may well establish precedent(s) the Commission does not intend to inadvertently establish.

In our opinion, it may make sense for the Commission to defer the Draft and other requests for Advisory Opinions related specifically to political portal web sites until the various issues and questions can be fully identified as a whole and considered in context.

Voter.com, Inc. can surely argue that its services and products, because they are offered to all candidates on a non-partisan basis, should not be considered 'expenditures' under the Act, if E Zone is granted such permission.

Our firm would be hesitant to advise any corporate entity that it could provide a full range of possible internet services and products free of charge to federal candidates. In fact, we would be similarly reluctant to so advise our non-profit corporate clients.

We are more than happy to work with the Commission to help identify the issues and concerns referenced in this letter.

It is our belief that as of this date, however, it is highly premature for the Commission to continue to parcel out narrow Advisory Opinions that may only raise more questions than are answered in the opinions.

In sum, we would urge the Commission NOT to approve the Draft of AO 1999-24 as submitted by the General Counsel's office without further review, discussion, debate and input from the regulated community.

We do appreciate the opportunity to submit these comments prior to the consideration and issuance of AO 1999-24.

Please contact us if we can be of further assistance.