

1 **ADVISORY OPINION 1999-25**

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3 **Trevor Potter**  
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5 **1776 K Street, N.W.**  
6 **Washington, D.C. 20006**

**DRAFT**

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8 **Dear Mr. Potter:**

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10 **This responds to your letter dated September 1, 1999, on behalf of Democracy**  
11 **Network (“DNet”), as supplemented by your letters dated September 14, October 20,**  
12 **and October 26, requesting an advisory opinion concerning the application of the**  
13 **Federal Election Campaign Act of 1971, as amended (“the Act”), and Commission**  
14 **regulations to the operation of a website that provides information with respect to Federal**  
15 **candidates.**

16 **DNet is an online project of the League of Women Voters Education Fund (“the**  
17 **League”) and the Center for Governmental Studies (“CGS”), “designed to improve the**  
18 **quality and quantity of voter information and to create a more educated and involved**  
19 **electorate.” The League is an independent incorporated entity, tax exempt under 26**  
20 **U.S.C. §501(c)(3), that encourages active and informed participation of citizens in**  
21 **government. It acts in coordination with the League of Women Voters of the United**  
22 **States which is a leading non-partisan voter information and participation organization.**  
23 **CGS, formed in 1983, is a 501(c)(3) incorporated entity which uses communications**  
24 **technologies to provide information about government and elections on a non-partisan**  
25 **basis. You state that it has a history of creating innovative public interest projects**  
26 **including the nation’s largest non-profit television channel, the “California Channel,”**  
27 **focusing on State government.**

28 **You summarize the proposed activities of DNet’s website during the current**  
29 **election cycle, stating that they would entail the provision of Federal candidate-related**  
30 **information on a non-partisan basis, including voting and voter registration information,**  
31 **substantive discussions and online debates in which candidates directly participate,**  
32 **biographical and other information about the candidates, and electronic links to websites**  
33 **of candidates or their committees. You state that the League and CGS seek confirmation**

1 that DNet's proposed activities are exempt from the definition of "contribution" or  
2 "expenditure."<sup>1</sup> The Commission's response requires an overview of DNet's  
3 background and objectives, as well as a somewhat detailed description of the  
4 proposed activities.

#### 5 *DNet's Background*

6 DNet was launched during the 1996 presidential elections and since then has  
7 provided voter information on hundreds of elections, including Federal and non-Federal  
8 campaigns and ballot measure elections. It has received its funding from a number of  
9 prominent foundations and charitable institutions. You describe its goals as: (1)  
10 increasing voter understanding of public policy problems; (2) fostering greater civic  
11 participation and interaction between voters and candidates; (3) providing day-to-day  
12 information concerning local, State, and Federal government; and (4) creating new online  
13 communities. You state that DNet gained considerable attention during the month  
14 preceding the 1998 general elections when it covered all 50 states "with nine full feature  
15 debate sites and 41 basic voter information sites," including candidate links and coverage  
16 of ballot referenda. You characterize DNet as "part of a larger effort on the Web to create  
17 non-profit, non-partisan, interactive tools for local, state, and national political  
18 participation," noting that America Online is cross-linking to DNet in cities where Digital  
19 City is operational, and that DNet will be included in AOL's coverage of the 2000  
20 election.

#### 21 *Proposed Activities*

22 A number of the interactive features entail participation by candidates. All ballot  
23 qualified candidates running in elections covered by DNet are invited to participate.<sup>2</sup>

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<sup>1</sup> You have analyzed your proposal under specific exceptions to the definition of "contribution" and "expenditure" found in the Act and Commission regulations and recommend the application of one or more of these exceptions. These include the exceptions for (1) nonpartisan activity to encourage voting or registering to vote, (2) staging of candidate debates by nonprofit organizations or news media entities, (3) news stories, commentary, or editorials distributed by news media entities, (4) preparation and distribution of voter guides consisting of candidates issue positions, and (5) candidate appearances on the premises of non-profit educational institutions.

<sup>2</sup> You state that this criterion may prove impractical in a general election for president where candidates may qualify for the ballot only in some States. In that event, DNet will use other objective criteria. At a minimum, it will include all candidates who are on the ballot in enough States to win a majority in the Electoral College.

1 After the filing deadline has passed, DNet obtains lists of all the properly registered  
2 candidates from the appropriate election officials. DNet then contacts all those  
3 candidates and provides them with an ID and password so they can prepare their online  
4 biographies and submit their contacts and endorsers' statements. They may then begin  
5 submitting policy positions and replying to questions and statements from other  
6 candidates and the public. To assist in initiating the process, DNet will suggest a few  
7 issue areas to the candidates.

8 The major feature of DNet is "a database of textual, audio, and visual statements,  
9 which candidates can directly and remotely update, and which voters can access  
10 according to their interests." Using her ID and password, a candidate can enter the  
11 website and write on any issue she chooses, or respond to questions from other candidates  
12 or from members of the public. The League will moderate the questions from the public  
13 in the manner of a radio talk show host, screening them in a non-public portion of the  
14 website to ensure that they are understandable and not redundant or obscene before  
15 posting the questions on the website for responses by the candidates. A candidate's  
16 position on an issue is automatically entered in a "Candidate Grid," which indicates that  
17 she has stated a position with a red check mark and states "no comment" opposite the  
18 opponents' names. The position is then e-mailed to the opponents who are thereby  
19 encouraged to submit statements, which are entered in the Grid.<sup>3</sup> A candidate may  
20 continually edit or update her position statement, as well as comment on the positions of  
21 the other candidates.<sup>4</sup> To see a candidate's position on an issue and responses to viewers'  
22 questions, the viewer clicks on the check mark on the Grid.<sup>5</sup> In addition to the posting of  
23 the issue positions and responses on the Grid, candidate rebuttals to other candidates on  
24 each issue will appear in a separate "digital debate" section. All individual statements  
25 (e.g., position statements, replies, rebuttals) will be limited to 1,000 words each; DNet

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<sup>3</sup> For security purposes, the statement is returned to the submitting candidate to confirm the entry.

<sup>4</sup> DNet will contact candidates "on a periodic, but more or less frequent, basis" to inform them of positions entered by other candidates and to remind them to respond to the positions, as well as other comments and questions entered at the site.

<sup>5</sup> You state that viewers will be asked to vote as to which issues are most important to them. Viewers and candidates can then see the issues on the Grid ranked in accordance with the results of the vote tally. You

1 will cut off a statement after 1,000 words and screen for such aspects as obscenity,  
2 but will not substantively edit a statement. Viewers will also be able to compare any  
3 two candidates side by side on the same screen on a particular issue; the screen will  
4 display their photographs, their self-edited position statements, and their additional  
5 comments (i.e., the rebuttals) on the issue. You assert that this entire process has the  
6 effect of "creating thousands of simultaneous online debates in hundreds of races," and  
7 that this process encourages candidates to address a greater range of issues and in greater  
8 depth than they typically do on television or paid advertising.

9 In addition, as indicated above, each candidate provides her biography,  
10 information on how to contact the campaign, and individual and organizational  
11 endorsements, including head and shoulder shots of persons making statements in a video  
12 form. DNet also provides a national "issue of the day" feature on its home page which  
13 refers viewers to an issue exchange between candidates within the site.

14 DNet also provides an e-mail form and the candidates' addresses for viewers to  
15 communicate directly with campaigns. In addition, campaigns may post hyperlinks to  
16 their websites on DNet.<sup>6</sup> Links are also provided to sites with reports of official  
17 campaign contribution data for candidates (such as governmental websites and  
18 websites that summarize information filed with governmental entities) and ballot  
19 measures. DNet also furnishes official ballot and local voting information (including  
20 registration deadlines, absentee balloting information, and links to polling place  
21 information). Finally, DNet will provide links to editorials, news (including links to  
22 various news services), and updated listings of debates and political events. You state  
23 that, to the extent that DNet links to any editorial endorsements of candidates, it will  
24 "make every effort, on a nonpartisan basis," to list a representative assemblage of  
25 local newspapers that have made endorsements in the relevant race, or, in the case

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also note that the name of whichever candidate was the most recent to edit or update a position statement on any issue would move to the top of the Grid.

<sup>6</sup> A viewer may fill out the form on-line and then click to have it sent to the candidate's committee. DNet will forward the viewer's form to the campaign committee. DNet, however, has no control over the content or result of the contact. Other than the provision of this vehicle and the hyperlinks to campaign websites, DNet has no involvement or role in viewer's direct communications with, contributions to, or volunteering for campaigns.

1 of national candidates, to list a representative assemblage of large papers across the  
2 nation.<sup>7</sup>

3 *Legal Analysis*

4       **The sponsors of DNet are incorporated entities.** The Act prohibits a  
5 corporation from making any “contribution or expenditure” in connection with a Federal  
6 election. 2 U.S.C. §441b(a); 11 CFR 114.2(b). The term “contribution or expenditure” is  
7 defined to include “any direct or indirect payment, distribution, loan, advance, deposit, or  
8 gift of money, or any services, or anything of value . . . to any candidate, political party or  
9 committee, organization, or any other person” in connection with any Federal election.  
10 11 CFR 114.1(a)(1); see also 2 U.S.C. §441b(b)(2). The phrase “anything of value”  
11 includes goods or services provided without charge or at less than the usual and normal  
12 charge. 11 CFR 100.7(a)(1)(iii)(A) and 100.8(a)(1)(iv)(A). In past advisory opinions,  
13 the Commission has concluded that the costs associated with creating and maintaining a  
14 website could be considered an expenditure (or in-kind contribution), depending upon the  
15 content of the site and whether exceptions are applicable. See Advisory Opinions 1999-  
16 7, 1998-22, and 1997-16.

17       **The application of the Act to the proposed activity depends upon the nature**  
18 **of DNet and its sponsors, and the described functions of the website. The Act**  
19 **provides that the term “expenditure” does not apply to “nonpartisan activity**  
20 **designed to encourage individuals to vote or to register to vote.” 2 U.S.C.**  
21 **§431(9)(B)(ii). Thus, even if the statements of the candidates and their endorsers or**  
22 **the contents of the candidate websites to which DNet has hyperlinks would be in**  
23 **connection with a Federal election, the DNet website may be permissible under this**  
24 **exception.**

25       **DNet is a project of two corporations that have qualified as tax exempt**  
26 **organizations under 26 U.S.C. §501(c)(3). As such, they may not participate or**  
27 **intervene in any political campaign on behalf of or in opposition to any candidate.**

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<sup>7</sup> You also enclose a copy of “DNetizen,” an online news magazine that is accessible from the website and is published by DNet. It provides news and commentary on Internet-related matters, such as electronic voting proposals, online disclosure of campaign finance information, the public’s perception of “Spam,” and the effectiveness of e-mail petitions.

1 **Moreover, the League and CGS were created and operate for the purposes of**  
2 **providing information about elections, the electoral process, and government on a**  
3 **nonpartisan basis. As indicated, DNet was established for the purposes of**  
4 **increasing voter understanding of public policy issues and government, and**  
5 **increasing civic participation and voter interaction with candidates on a**  
6 **nonpartisan basis. The website is a new type of multifaceted vehicle that exhibits a**  
7 **broad range of features and capabilities, owing in large part to the technology**  
8 **involved, and which provides comprehensive, continuous coverage of Federal**  
9 **elections and of Federal candidates on a large scale.**

10 **In addition to DNet's composition and the purposes of the website, there are**  
11 **several aspects of DNet's activity that should be examined to determine whether it**  
12 **comes within the nonpartisan exception to the definition of expenditure. These**  
13 **aspects are: the standards for inviting candidates and degree of participation by**  
14 **each candidate; the audience targeted; the selection of materials that come from**  
15 **sources other than the campaigns, such as media entities; the degree of coordination**  
16 **between DNet and the campaigns; and the communications of DNet itself.**

17 **The standards proposed by DNet as to which candidates will be invited to**  
18 **post statements, responses, hyperlinks to their campaign websites, and other**  
19 **information provide for the invitation of each ballot-qualified candidate in an**  
20 **election other than a presidential general election. This is the same standard**  
21 **approved in Advisory Opinion 1999-7 when the State of Minnesota proposed an**  
22 **informational website that would provide campaign mailing addresses, phone**  
23 **numbers, and hyperlinks to candidate websites. Your limitation with respect to**  
24 **presidential candidates in the general election conforms to standards set out in**  
25 **another context where Commission regulations seek to ensure that corporate**  
26 **contributions or expenditures would not result. See the voter guide regulations at**  
27 **11 CFR 114.4(c)(5)(ii). Similarly, the space allocations and the positioning of**  
28 **candidates on the Grid are based upon objective criteria.**

1           **DNet's website will be available for viewing and interaction by the general**  
2 **public.<sup>8</sup> No effort will be made to determine the political party or candidate**  
3 **preference of the viewers. See 11 CFR 100.8(b)(3). As such, the website will not be**  
4 **targeted toward encouraging participation or voting by a selected group of persons**  
5 **of a particular party or other group.**

6           **You have referred to information from, and links on the website to, neutral**  
7 **sources such as official ballot and local voting information, reports of official**  
8 **campaign contribution data, and local, State, and national news services. There will**  
9 **also be links, however, to editorial endorsements. You have stated that DNet will**  
10 **make every effort on a nonpartisan basis to link to a representative sample of**  
11 **newspapers that have made endorsements in a relevant race, and the Commission**  
12 **assumes that there will be no attempt to skew a selection so as to emphasize support**  
13 **of a candidate or a party. If this occurs, the editorials may be construed as express**  
14 **advocacy by DNet and not merely the republication of news media editorials. This**  
15 **caution, however, does not mean that DNet would engage in express advocacy**  
16 **merely because links to editorials show a preponderance of support of one candidate**  
17 **over others. The Commission understands that a representative sample may, in**  
18 **some cases, show a preponderance of support for one candidate.**

19           **DNet will communicate with the candidates (or their campaigns) in order to**  
20 **invite their participation, to inform them of the positions of other candidates and**  
21 **questions and comments, to remind them to respond, to edit for length of statements**  
22 **(cutting a statement after 1,000 words) or obscenity, and to provide technological**  
23 **advice as to the use of the website, such as how candidates may remotely update**  
24 **their statements. DNet's communications with the candidates, however, will not**  
25 **pertain to the substance of the statements or information posted by the candidates**  
26 **(e.g., issue positions). In engaging in the above communications, which are**  
27 **necessary for the effective operation of the website, DNet will not be discussing the**  
28 **candidate's plans, projects, or needs. With respect to the information provided by**

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<sup>8</sup> Because of the general availability of access to the Internet, the Commission has concluded that communication via a website would be considered a form of communication to the general public. See

1 the candidates, DNet will merely serve a passive function to provide complete  
2 information about elections and will communicate with candidates to fulfill that  
3 function. In view of these circumstances, DNet's communication with a campaign  
4 would not constitute acting in cooperation or with the prior consent of, or  
5 consultation with, or at the request or suggestion of, a candidate, her committee, or  
6 her agent. See 2 U.S.C. §§431(17) and 441a(a)(7)(B)(i); 11 CFR 100.16, 109.1(a) and  
7 (b)(4)(i)(A). As such, DNet's efforts to provide candidates with an opportunity to  
8 participate in the website would not constitute an in-kind contribution by DNet to  
9 those candidates.

10 Finally, the information presented indicates that DNet itself will not score or  
11 rate the candidates or make any statements expressly advocating the election or  
12 defeat of any clearly identified candidate, or of the candidates of any political party.  
13 As indicated and subject to the discussion above, DNet will function in such a way  
14 that none of the statements made by candidates or persons supporting the  
15 candidates can be imputed to DNet.

16 Based on the foregoing discussion of the nature of DNet, its sponsoring  
17 organizations, and the website itself, the Commission concludes that DNet's  
18 proposed activity is exempt from the definition of "expenditure" at 2 U.S.C.  
19 §431(9)(B)(ii), and is therefore permissible under the Act. As indicated above, the  
20 Commission observes that the DNet website is very comprehensive in its efforts to  
21 present information to voters. In order to satisfy the requirements of the Act,  
22 however, a website need not be identical to the DNet site, either as to the kinds of  
23 information presented or as to the technology used on the website. In addition, the  
24 Commission notes that it has examined a number of factors in reaching its  
25 conclusion. Although all of these factors are relevant, different facts with respect to  
26 a particular factor may or may not lead to a conclusion that a website's activities are  
27 permissible.

