Testimony of Commissioner Ellen L. Weintraub
Of the Federal Election Commission
Before the California Fair Political Practices Commission
Subcommittee on Internet Political Activity

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Thank you for inviting me to testify before the California Fair Political Practices Commission Subcommittee on Internet Political Activity. It is a particular pleasure for me to share with you the experience of the Federal Election Commission ("FEC") in conducting a rulemaking about political communication over the Internet. The day we concluded our Internet rulemaking and voted out our final rule was perhaps the most satisfying day I have had as a Commissioner. It was a fascinating topic, and we had been able to gain the insights and participation of many and varied stakeholders from across the country. For once, I believe we struck just the right balance. At the close of the meeting, two observers who had been advocating on different sides of the issue, one concerned that we not over-regulate, the other concerned that we not under-regulate, separately came up to me with remarkably similar messages. They appreciated their role in the process, they felt they had been heard, they felt government had worked, and they each felt we had done the right thing. As the person who co-wrote that rule (along with my former colleague, Michael Toner), I can tell you: For a Commissioner, it doesn't get any better than that, and I wish you equal success.

In preparation for this hearing, I reviewed the 2003 Report of the Bipartisan California Commission on Internet Political Practices. While I agree with that Commission that any attempt to study political uses of innovative technologies like the Internet is an exercise in trying to keep up with a moving target, I was struck by how much some basic premises remain the same. That Commission stated:

> Our Commission believes that the Internet and associated new technologies, if allowed to flourish, increasingly will be used in ways that improve the quality of campaigns and elections. Therefore, despite widely differing views on the wisdom of other aspects of politics and political reform, our Commission believes that the advantages of enabling Internet political activity currently do, and for the foreseeable future will, far outweigh the benefits of restricting its potential through heavy-handed regulation.[1]

That was also the view of the Federal Election Commission in 2006, and it was the view most frequently expressed by the many commenters in our rulemaking. So we begin with much common ground.

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[1] Report of the Bipartisan California Commission on Internet Political Practices, at 6 (Dec., 2003), *available at* http://www.fppc.ca.gov/InternetCom/FinalRept01-04.pdf.

As with the California Political Reform Act, the Federal Election Campaign Act ("FECA") was drafted at a time when the Internet was nothing more than a Department of Defense project connecting a few computers in California. As a result, we, like you, have been challenged to apply a statutory framework to a means of communication that was not contemplated by the law. And it would be fair to say that our view has evolved over time.

When the FEC was first presented with the question of how to apply campaign finance law to political activity on the Internet (long before I became a Commissioner), the Commission treated it like any other communication to the general public. Specifically, the Commission issued a series of early Advisory Opinions concluding that communication via the Internet should be considered a form of communication to the general public and regulated accordingly.[2] In an Advisory Opinion issued in 1998, for example, the Commission advised that a website created and maintained by an individual, because it expressly advocated the election of a Federal candidate, would be viewed as "something of value" under the FECA.[3] Accordingly, the website would be required to carry disclaimers, and any costs associated with creating and maintaining the website would be considered expenditures.[4] An Advisory Opinion issued in 1999 reaffirmed that "disclaimers are required on web sites that expressly advocate the election or defeat of a Federal candidate," while concluding that providing a link to a web site maintained by a campaign could meet the definition of "contribution" if the owner of the website would normally charge for providing such a link.[5] It took the Commission awhile to realize that this new mode of communication was not so easily shoe-horned into our old rules.

In 2002, Congress enacted the Bipartisan Campaign Finance Reform Act ("BCRA"), also known as the McCain-Feingold Act, which substantially revised FECA. Congress defined the term "public communication" in BCRA to mean "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising."[6] Because Congress did not include the Internet in this otherwise comprehensive list of media, the Commission initially determined that Congress had intended to exclude the Internet entirely from the definition of "public communication."[7] The District Court for the District of Columbia held in *Shays v. Federal Election Commission* that this interpretation of BCRA went

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[2] *See, e.g.*, Advisory Opinions 1997-16, 1996-16, 1995-35, 1995-33 and 1995-9. A searchable database of Advisory Opinions is available at http://saos.nictusa.com/saos/searchao.
[3] Advisory Opinion 1998-22 (Leo Smith) at 3.
[4] *Id.*
[5] Advisory Opinion 1999-17 (Bush Exploratory Committee).
[6] 2 U.S.C. § 431(22).
[7] Prohibited & Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,072 (July 29, 2002), *available at* http://www.fec.gov/pdf/nprm/soft_money_nprm/fr67n145p49063.pdf.

too far, and that the inclusion of the phrase "any other form of general public political advertising" in BCRA was intended to capture at least some forms of communication over the Internet.[8] Accordingly, the Court required us to devise a regulation that would include those communications on the Internet that qualify as "general public political advertising" within the definition of "public communication." To comply with the Court's ruling, we commenced a rulemaking in 2005.

Thus, we did not seek out the opportunity to launch a rulemaking on Internet politics. The responsibility was thrust upon us. And it was thrust upon us only in a limited context. First of all, the term "public communication," as we noted in our Explanation and Justification for the final rules, is a term of art that "defines the scope of covered activity for a limited number of groups who are either already subject to Commission regulation, or who are coordinating with candidates or political parties who are themselves currently subject to regulation."[9] Second, we were examining communications over the Internet only as a subset of the category of "general public political advertising." So we never intended to, and did not conduct a comprehensive review of the Federal Election Campaign Act as it applies to the Internet.

Even with that limited scope, however, the response from the public to our Notice of Proposed Rulemaking was striking. In contrast to the 6-to-12 comments our rulemakings typically inspire, we received over 800 comments, ranging from the 'usual suspects' in the Washington election law bar to bloggers and other netroot activists from all over the country. This almost unprecedented level of public engagement was extremely helpful when it was time to craft the actual rules, and we did our best to take their views into account. At the hearing, we heard testimony from Markos Moulitsas Zúniga of DailyKos and Michael Krempasky of RedState.org, among others. They don't agree on much, but they agreed on this, and we were happy to provide a forum for them to find some common ground. The message we received from them and many others was that commenters regarded the Internet as a great equalizer in political debate. Unlike traditional media, the Internet has low barriers to entry, putting common citizens on the same footing with established media and political operatives. Commenters asked

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[8] *Shays v. Federal Election Commission*, 337 F. Supp. 2d 28 (D.D.C. 2004), *affirmed*, 414 F.3d 76 (D.C. Cir. 2005), *rehearing en banc denied* (Oct. 21, 2005), *available at* http://www.fec.gov/pages/bcra/shays_meehan_mem_opinion_dc.pdf.

[9] The Internet: Definitions of "Public Communication" and "Generic Campaign Activity" and Disclaimers, 71 Fed. Reg. 18589 (April 12, 2006), *available at* http://www.fec.gov/law/cfr/ej_compilation/2006/notice_2006-8.pdf. The Explanation and Justification continues in footnote 2: "The change affects only the following regulatory provisions: the restrictions on funding of Federal election activity by political party committees and State and local candidates (2 U.S.C. 431(20)); the allocation of costs of certain communications by some political committees under 11 CFR 106.6(b); the determination that certain communications must be treated as contributions if coordinated with a Federal candidate or political party committee under 11 CFR 109.21 and 109.37; and the requirement to include disclaimer statements on certain communications pursuant to 11 CFR 110.11."

us to preserve the Internet as a relatively free and open "marketplace of ideas" and an arena for free-wheeling debate.

In the rulemaking, we attempted to address the two major concerns raised by commenters on both sides of the issue. Specifically, the campaign finance reform community worried that the previous rule left the door open for interested parties to spend large sums of money on campaign advertisements on the Internet. Bloggers, on-line media groups, and other proponents of a deregulatory approach to the Internet, on the other hand, worried that we would regulate broad swathes of online speech. We took these views into account, and drew a simple, bright line that responded to both groups. On the one hand, we determined that paid political advertisements placed on other person's websites, like advertisements in other media, should be included within the category of "general public political advertising," and subject to the associated regulations and restrictions.[10] Our approach drew upon the common understanding of the word "advertising," which includes communications for which a payment is required. The regulation also took into account information about the booming business of Internet advertising, and the industry's understanding of what forms such advertising commonly took. Comparing a "banner ad" on a newspaper's website to an ad in the offline, paper version of the newspaper, we noted that "in both cases the advertiser is paying for access to an established audience using a forum controlled by another person, rather than using a forum that he or she controls to establish his or her own audience."[11] In view of their inherently political nature, we also retained disclaimer requirements for communications disseminated by political committees. By definition, a major purpose of these committees is to influence a federal election, and political committees can fairly be charged with knowledge of the law. Under our regulations, political committee websites must include appropriate disclaimers.[12] Mass emails of more than 500 similar messages sent by political committees must also include disclaimers.[13]

By contrast, we purposely left unregulated the vast majority of communications made by individuals on the Internet, and established a series of safe harbors to further protect online speech. First, we established a safe harbor for uncompensated Internet activity conducted by individuals. In particular, we proposed exempting the value of uncompensated Internet activity by volunteers from the definitions of "contribution" and "expenditure" – confirming that such

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[10] *See* 11 CFR § 100.26, *available at* http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=11&PART=100&SECTION=26&TYPE=TEXT.
[11] 71 Fed. Reg. 18594-95.
[12] 11 CFR § 110.11(a)(1), *available at* http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=11&PART=110&SECTION=11&TYPE=TEXT.
[13] *Id*.

activity was beyond the reach of federal campaign finance law.[14] We took this step so that individual citizens who wanted to express themselves on the Internet could do so without having to worry that their blogs or websites might constitute a "contribution" or require a disclaimer. We viewed "a communication through one's own website [as] analogous to a communication made from a soapbox in a public square."[15] All of the many commenters who addressed this aspect of the rulemaking supported our proposal, which became a centerpiece of the final rule. To further safeguard individuals' online speech, we added a new safe harbor for volunteer activity undertaken at work. So long as the activity does not prevent an employee from doing their job and does not increase their employer's overhead or operating costs, individuals are free to use the computers and Internet connections already available to them to engage in political speech online.[16]

We also excluded email communications from the definition of "general public political advertising."[17] Unlike advertising, we found that there was "virtually no cost" associated with sending emails, and that "there is nothing in the record that suggests a payment is normally required" to send even a very large quantity of email.[18] To protect media entities operating online, we revised our regulations to clarify that the longstanding media exemption applies equally to news stories, commentary and editorials disseminated on the Internet. Moreover, we explained that the exemption is available not only to the online versions of established publications, such as the New York Times and CNN, but also to non-traditional entities carrying out a press function, such as bloggers.[19] Indeed, as we explained in the Explanation and Justification for the rule, a media entity need not have any offline presence whatsoever to qualify for the exemption – Slate.com and Drudgereport.com are protected to the same extent as the Washington Post.[20]

Each of these exceptions and safe harbors was intended to protect the Internet as a uniquely open and unrestricted forum for political speech. As I noted when we adopted the final rules, "with this regulation, we affirm[ed] the right of bloggers to blog, of on-line media to avail themselves of the media exemption, and of individuals to use whatever computer resources are

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[14] *See* 11 CFR §§ 100.94 and 100.155, *available at* http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr;sid=45cd85010a8846d5efee5c13399dc536;rgn=div5;view=text;node=11%3A1.0.1.1.7;idno=11;cc=ecfr.
[15] 71 Fed. Reg. 18594.
[16] *See* 11 CFR § 114.9, *available at* http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=11&PART=114&SECTION=9&TYPE=TEXT.
[17] *Id*. at 18596.
[18] 71 Fed. Reg. 18596.
[19] *Id*. at 18610.
[20] *Id*. at 18609, *see also* Advisory Opinion 2005-16 (Fired Up! LLC).

available to them to communicate about politics."[21] The final rule does not reach communications undertaken by individuals, except in the unusual circumstance where they pay to put political advertising on a third party's website. Individuals can publish webpages, send emails, provide hyperlinks, and otherwise communicate their views online without worrying that there might be campaign finance implications of their speech.

Two of our proposals ultimately did not make it into the final text of the rule. One proposal would have addressed "spam" email by requiring a disclaimer on more than 500 substantially similar unsolicited email communications, with unsolicited defined to include emails "sent to electronic mail addresses purchased from a third party."[22] We thought that the online community would support regulating such spam communications. Moreover, since only bulk emails would be included, we thought that this proposal would have no impact on individuals' speech. Somewhat to our surprise, however, commenters had a number of concerns with this proposal. One commenter noted that the proposed definition would be confusing, since "unsolicited" email is not commonly understood to be limited to email sent to addresses purchased from a third party.[23] Other commenters pointed to the low cost of email communications, even spam emails sent to a large number of recipients, in questioning the need for regulation.[24] Still others raised concerns with the implementation of our proposal, asking whether disclaimers would be permanently required for any emails sent to an address that had originally been part of a purchased list.[25] As noted above, we ultimately decided to leave even spam email unregulated, and to require disclaimers only for emails sent by political committees.

We also considered explicitly excluding all "blogs" from the definition of "public communication."[26] Commenters, including bloggers themselves, however, generally opposed crafting a regulation tied to any specific form of communication on the Internet. Commenters pointed to the rapid pace of technological change and the evolving nature of online communications in opposing this proposal.[27] Commenters also worried than an explicit reference to blogging could imply that other forms of communication on the Internet were less worthy of protection. In keeping with these concerns, the final rule we adopted did not explicitly refer to any particular software or format, but rather applies the same standard to all Internet

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[21] Statement of Commissioner Ellen L. Weintraub On Adoption of Final Rules Affecting Certain Internet Communications, March 27, 2006, *available at* http://www.fec.gov/members/weintraub/weintraub_speeches.shtml.
[22] Notice of Proposed Rulemaking, 70 Fed.Reg. 16967, 16972 (April 4, 2005), *available at* http://www.fec.gov/pdf/nprm/internet_comm/notice_2005-10.pdf.
[23] 71 Fed. Reg. 18601.
[24] *Id*.
[25] *Id*.
[26] *Id*. at 18595.
[27] *Id*. at 18596.

communications, whether websites, blogs, podcasts, tweets (which did not exist when we wrote the rule) or something entirely new.

This testimony provided an opportunity to review the FEC's experience in applying the Internet regulations to real world scenarios. The Internet rulemaking played some part in the analysis in 17 closed enforcement matters. In my view, this experience demonstrates that the approach we adopted in the Internet rulemaking has been easy to administer and appropriately protective of individual citizens' speech and expression.

Of the 17 matters, all but one were dismissed at an early stage of our enforcement process by a majority vote of the Commission. Most of these matters involved allegations that Internet activity either triggered political committee status or failed to include required disclaimers. A number of these matters involved the endorsement of federal candidates by individuals and non-party organizations on their websites. The complaints alleged that these endorsements should have been regarded as electioneering communications, independent expenditures, or coordinated communications (which are considered in-kind contributions). We dismissed each of these matters, relying on the Internet rulemaking's exclusion of "Internet communications" from the definition of "public communication." A number of other enforcement matters concerned blogging activities. Although as noted, the rule itself does not specifically exempt blogging, we have regularly relied upon the discussion about "ordinary blogging activity" in our Explanation and Justification in dismissing blogging-related matters. The sole matter that was not dismissed by a majority vote involved the use of an outside entity's email list by a Congressional campaign, which is not the type of activity that the Internet rulemaking was designed to protect, as specifically noted in the Explanation and Justification.[28]

One other area related to the Internet that we did not address in our rulemaking but occasionally arises in enforcement is cyber-fraud. The FECA includes a provision prohibiting a candidate or individual on behalf of a candidate from fraudulently misrepresenting him- or herself as working on behalf of another candidate or party or from fraudulently soliciting money on behalf of another candidate or party.[29] Sometimes, complaints alleging violations of these provisions have been based on uses of the Internet. For example, in 2004, we received a complaint about a series of websites that mimicked the Kerry/Edwards website.[30] The websites borrowed extensively from the actual Kerry-Edwards website, used the campaign slogan, and even carried a false disclaimer saying it was paid for by John Kerry. The individuals responsible used fake addresses and identities. Tenuous leads suggested individuals in India or Nigeria may

[28] *See* 71 Fed. Reg. 18599.
[29] 2 U.S.C. 441h.
[30] *See* MUR 5443 (www.johnfkerry-2004.com, et al.).

have been involved. One website was registered to an individual in Texas, who claimed her identity had been stolen. While we were unsuccessful at identifying the perpetrators, the scheme was caught early and the sites were shut down.

In 2003, Gephardt for Congress filed a complaint against Never Stop Dreaming, Inc., which had planned a fundraiser at the National Museum for Women in the Arts, purportedly on Gephardt's behalf.[31] In their communications with the museum to set up the event, the individuals responsible used email. These individuals used aliases and changed addresses repeatedly to hide their identities. Ultimately, the individuals entered into a plea agreement and were sentenced for wire fraud and fraudulent misrepresentation (separately from the FEC enforcement process).

In the last four sets of legislative recommendations the FEC has made to Congress, it has consistently urged that the fraudulent misrepresentation prohibition be extended to any person who would disrupt a campaign by such unlawful means, rather than being limited to candidates and their agents and employees. I take such cases of fraud very seriously and support this strengthening of the law. But these matters are good examples of the difficulties civil agencies face when trying to enforce laws against fraud that involve Internet use: the individuals responsible generally go to great lengths to hide their identity; our jurisdiction is limited, whereas the Internet is global; and other government agencies, such as the Department of Justice, may be better situated to attack this problem. Criminal law enforcement agencies have more resources, more experience in detecting and prosecuting cyber-fraud, and have all the tools and penalties of the criminal law available to them.

Finally, of course, the Internet has been a key tool for enhancing the disclosure of campaign finance activity and has enabled a degree of transparency never imagined by the drafters of the FECA. At the FEC, enhancing disclosure has been a hallmark of our approach to the Internet. On our website, www.fec.gov, we provide campaign finance information through a series of easy to use interactive maps. These maps, which are the first thing most visitors to www.fec.gov will encounter, break down campaign spending by cycle, by race, and by jurisdiction. Our website also includes electronic and scanned copies of individual campaign finance reports, as well as a searchable database of our advisory opinions and closed enforcement matters, and the complete record of our rulemakings, including the one we are discussing here today – all available to the public free of charge. In addition, the website includes a virtual library of campaign finance-related materials, including relevant statutes and

[31] *See* MUR 5384 (Never Stop Dreaming, Inc.).

regulations and our plain-English campaign finance guides for parties, candidates, corporations and labor organizations.

The Internet has been a boon to those who practice politics as well as to those who administer and enforce campaign finance laws. Thank you once again for inviting me to testify at this important hearing. I welcome your questions.