June 3, 2005

By Electronic Mail – internet@fec.gov

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Notice 2005-10: Internet Communications

Dear Mr. Deutsch:

We appreciate the opportunity to comment on the Commission's Notice of Proposed Rulemaking 2005-10, published at 70 Fed. Reg. 16967 (Apr. 4, 2005). The NPRM seeks comment on proposed changes to its rules concerning Internet communications. As the principal authors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), we have a particular interest in ensuring that regulations adopted by the Commission accurately construe and implement that law.

BCRA made extensive amendments to the Federal Election Campaign Act of 1971 ("FECA"), as amended. Its central purpose was to end the influence of non-Federal funds (funds not subject to FECA's limits, prohibitions, and reporting requirements, commonly known as "soft money") in Federal elections. It did this by prohibiting national party committees from raising or spending soft money and prohibiting State and local party committees from spending soft money to influence Federal elections, including through the use of public communications that promote, support, attack or oppose Federal candidates. *See* 2 U.S.C. § 441i(a), (b); 2 U.S.C. § 431(20)(A)(3). These provisions were upheld in *McConnell v. FEC*, 540 U.S. 93 (2003). The Supreme Court ruled that the soft money ban furthered the legitimate congressional interest in preventing both actual corruption and the appearance of corruption in Federal campaigns.

BCRA defines a "public communication" as "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." 2 U.S.C. § 431(23). In the original soft money rulemaking shortly after the enactment of BCRA, the Commission included a *per se* exclusion for communications over the Internet from the definition of "public communication" in 11 C.F.R. § 100.26. This exclusion was among the regulations struck down by the District Court in *Shays and Meehan v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *appeal pending* No. 04-5352 (D.C. Cir.).

We are pleased that the proposed rule recognizes the need to protect against the opening of a new loophole through which soft money can flow into Federal elections by abandoning the idea of a *per se* exclusion for Internet communications. As discussed below, we believe that further fine-tuning of the rule is necessary to accurately implement Congress's intent.

We are also pleased that the proposed rule takes steps to update and modernize other provisions of the Commission's rules that might otherwise have a chilling effect on individual political expression on the Internet. We believe these changes are consistent with the goal of BCRA to address corruption and the appearance of corruption caused by unlimited contributions of soft money without inhibiting robust political debate.

All of us were candidates for reelection in 2004. We saw firsthand the way that the Internet is changing, and in many ways improving, political discourse. The opportunities that the Internet provides for average citizens to participate in political debate are the most significant change in the way that campaigns are conducted since the advent of television. The Commission must tread very carefully in this area so as not to stifle the virtually limitless potential of this exciting medium. At the same time, there is no reason to believe that monied interests will not attempt to use the Internet to influence politics and policy as they attempt to do with other modes of communication. Indeed, there is every reason to expect that they will.

Therefore, the basic principles of the federal election laws must apply to campaign activity on the Internet for which significant money is spent, just as they apply to other forms of campaign activity. The fact that the Internet allows citizens to be involved in political discourse by spending very little money or no money at all is a good thing, but it is not reason to exempt such activities when they involve the spending of significant sums of money. On the other hand, the fact that so many more citizens are now able to become involved in politics because of the Internet is good reason to draw careful distinctions in this area in order to faithfully carry out the purposes of the federal laws but not overreach in ways that do not serve those purposes.

Our comments on the specific provisions of the proposed rule follow:

Definition of "Public Communication" (11 C.F.R. § 100.126)

The definition of public communication has great significance for the proper implementation of BCRA. First, state political parties are prohibited from using soft money to pay for public communications that promote, support, attack, or oppose federal candidates. *See* 2 U.S.C. §§ 441i(b)(1); 431(20). Second, the Commission has defined "generic campaign activity" to encompass only public communications that support a political party and do not support specific Federal or non-federal candidates. *See* 11 C.F.R. § 100.25. Finally, the content prong of the Commission's coordination rule relies on the term "public communication." *See* 11 C.F.R. § 109.21(c). The *per se* exclusion for Internet communications would have allowed state parties to use soft money to attack Federal candidates or the opposing political party on their own websites or the websites

of others. It would also have permitted third parties to coordinate ads bought on the Internet with Federal political parties or candidates. These results were wholly at odds with the purposes and intent of BCRA and pre-existing federal election laws.

The proposed rule's definition of public communication goes part of the way towards rectifying the error of the *per se* exclusion by covering within that term "announcements placed for a fee on another person's or entity's Web site." Under this formulation, the purchase of banner ads or pop-up ads would be considered a public communication and therefore would be subject, in the case of state parties, to BCRA's soft money prohibition, or, in the case of third party groups, to the coordination rule. But this proposed definition still permits political committees, including state political parties, to use soft money for Internet communications as long as they don't involve the payment of money to place announcements on another person's or entity's Web site. In addition, it would still allow corporations, unions, and political committees to coordinate Internet communications on their own Web sites with Federal candidates. Neither of these results is acceptable.

In our view, the proposed rule's approach of retaining a broad exemption for Internet communications with the single exception of paid political advertising is an invitation to circumvention. Instead, the Commission should recognize that Internet communications intended to be seen by the general public (which would not include emails directed to a limited and finite number of people) are a form of "general public political advertising." The rule should provide, however, a broad exemption for communications made by individuals on their own websites or on the websites of others so long as such individuals do not pay a fee to have such messages appear. This exemption would mirror the exception to the definitions of contribution and expenditure for uncompensated individual Internet activity that the proposed rule suggests for 11 C.F.R. §§ 100.94 and 100.155.

With one exception, an exemption from the definition of public communications should not be available to corporations or unions. Political messages on corporate or union websites that are available to the general public should be considered public communications. In addition, the Internet communications of state political parties and other political committees, whether made on their own websites or the websites of others, should be considered public communications.

Not making the exemption available to corporations raises the question of whether all corporations that use the Internet should be treated equally. We recognize that bloggers are increasingly incorporating for liability purposes. They should be able to take advantage of the exemption available to individual Internet users as long as the sole purpose of their corporations is to engage in blogging. This treatment of certain corporations as individuals not subject to limitations on spending that cover corporations would be analogous to the campaign finance law's treatment of MCFL corporations. It is also consistent with the exception to the definitions of contribution and expenditure for uncompensated individual Internet activity.

In addition, no exemption should be available to political committees, including state political parties. These entities spend money to influence elections, and there is no reason to treat their expenditures for Internet communications differently from their other expenditures. One of the major problems with the *per se* exclusion in the Commission's original rule was that it would have let state party committees spend unlimited soft money on Internet communications designed to influence Federal elections. The proposed rule only addresses this problem to the extent that state parties buy advertising on the Web sites of others. But from the point of view of BCRA's soft money prohibition, whether the state party's message appears on its own site or another entity's site is immaterial. By limiting the exemption from the definition of public communication to individuals, the Commission can eliminate this problem.

This does not mean the entire cost of a state party's website will be "automatically federalized" as the proposed rule suggests. *See* 70 Fed. Reg. 16971. Under BCRA, state parties must pay for public communications that promote, support, attack, or oppose Federal candidates with hard money, not for their entire communications operation that produces such messages but may have many purposes. The incremental Federal cost of sites or communications that promote, support, attack, or oppose Federal candidates should not be hard to determine or estimate. Furthermore, state parties sometimes set up elaborate separate Web pages, often with their own URLs (*e.g.*, liesofgeorgewbush.com, or johnkerryflipflopper.com) to promote or attack Federal candidates. Even if the cost of these sites is minimal, it should be paid for with hard money. The more elaborate the site, particularly if streaming video or interactive options are involved, the more likely that significant amounts of soft money could be spent on such communications unless the proposed rule is modified.

There is no doubt that as the Internet matures and more and more voters rely on it for information about candidates and campaigns, political committees other than state parties will increasingly use it to advance their agendas and promote or attack Federal candidates. They should not be able to coordinate Internet communications with candidates without being considered to have made contributions to those candidates. Again, by limiting the exemption from the definition of public communication to individuals, the Commission will also eliminate this problem.

If the Web site on which an advertisement paid for by a state party or other political committee appears is available only to a corporation's or union's restricted class, it is still a public communication by the state party or political committee, just as an advertisement purchased in a magazine available only to the members of an organization would be. On the other hand, because corporations and unions can communicate to their restricted class on any topic without limitation, their own messages on Web sites available only to their restricted class would not be considered public communications.

Definition of "Generic Campaign Activity" (11 C.F.R. § 100.125)

The Commission's limitation of "generic campaign activity" to "public communications" was one of the more perplexing decisions it made in the initial post-BCRA soft money rulemaking. The statutory provision in question, 2 U.S.C. § 431(21) uses the term "campaign activity" not "public communication." "Public communication is defined in the very next provision of the statute as a separate term. We urge the Commission to heed the words of the statute and not leave activities that do not rise to the level of a public communication outside of the reach of the definition of generic campaign activity.

We further note that only by making sure that Internet communications by state party committees are covered by the definition of generic campaign activities (or included in the definition of public communication if the Commission maintains the current formulation), will the final rule be consistent with congressional intent. Congress wanted state party committees to use hard money (or a mixture of hard money and Levin funds) for generic campaign activities. *See* 2 U.S.C. § 441i(b). Congress made no distinction between generic campaign activities carried out online and those pursued offline.

Communications; Advertising; Disclaimers (2 U.S.C. §441d, 11 C.F.R. § 110.11)

We support the proposed rule's rationale for and approach to the disclaimer requirement in connection with Internet communications. It is sensible not to seek disclaimers on the email communications of private citizens and to limit the disclaimer requirement to situations where the list of addresses to which a communication is sent is acquired through a commercial transaction. Commercial transaction should in that instance include a swap as well as a purchase. But a limit on the number of emails that can be sent without a disclaimer should be eliminated. We also agree that Web sites of political committees should continue to have the appropriate disclaimer.

There is a good deal of debate in the blogging community over whether bloggers should voluntarily include disclaimers when they receive payments from a candidate or party. We believe that debate is important and should continue. The ethics of taking money to express opinions without disclosing those payments can certainly be questioned. But for purposes of the election laws, we agree with the proposed rule that no disclaimer should be required. Payments by campaigns are disclosed by campaigns. To require more of bloggers when others who receive payments from campaigns are not subject to similar disclosure requirements would not be fair.

Coordinated Communications (11 C.F.R. §§ 109.21, 109.37).

We agree with the proposed rule's approach of dealing in this rulemaking with Internet communications while leaving further revisions of the coordination rule for a future proceeding. We will convey our views on the coordination rule more generally at that time.

The questions asked in the proposed rule's discussion of coordination illustrate the need for a broader definition of public communication than the proposed rule offers. There is no reason to exempt from the coordination rules advertisements by corporations, unions, or political committees that require payments to outside vendors to create but that are placed on the payor's own Web site. Nor should prohibited sources such as unions and corporations be able to give free placement on their Web sites to advertisements by candidates and parties and thereby avoid being subject to the coordination rules. Exempting individual Internet communications from the coordination regulations will protect the free-wheeling political discourse that the Internet offers while not opening up obvious loopholes for significant coordinated campaign spending

We agree that the proposed rule allows individuals to republish campaign materials and link to campaign websites. The final rule should do so as well. The broad exemption for individual Internet communications not involving the payment of fees that we propose above would accomplish that worthy goal as well. We also believe that the exemption we propose would lead to better results when incorporated in the Commission's political party coordination rules. There is no reason that a state party should be able to coordinate advertising on its Web site with a Federal candidate and not have those expenditures count toward the applicable limit under 2 U.S.C. §441a(d). Yet under the proposed rule, only if the state party paid to place such an ad on a third party's website would it potentially be subject to the coordination rule.

Other Uses of the Term "Public Communication"

It is appropriate for SSF's and non-connected committees to use Federal funds to pay for communications over the Internet that refer to a political party or clearly identified Federal candidates according to the recently promulgated allocation rules in 11 C.F.R. § 106.6. In addition, it is certainly reasonable to treat as an agent of a candidate someone who is authorized to pay for Internet communications on behalf of that candidate and to prohibit agents of Federal candidates from spending non-federal money on Internet communications that promote, support, attack or oppose a Federal candidate. Indeed, once again, these corollary effects of a changed definition of public communication illustrate very well the mistake that the Commission made in adopting a *per se* exclusion for Internet communications.

Exception for News Story, Commentary, or Editorial by Media (11 C.F.R. §§ 100.73, 100.132)

This exception from the definition of "expenditure" in Federal election law, often called the media exemption, originated in FECA. The Commission has updated the media exemption over the years without additional statutory authority, and we agree that further changes are necessary. We believe the proposed rule correctly recognizes the increased use of the Internet by traditional media and also new media that takes advantages of the Internet's unique features. It is obvious that the media exemption should not be artificially limited by the types of media in existence at the time the exemption was written by Congress. The Commission is well advised to further that

exemption's First Amendment protective purposes by allowing media that use the Internet to take advantage of it.

It would clearly be incorrect to limit the exemption to entities that have off line media activities as well. As the proposed rule recognizes, with a growing segment of the public looking to the Internet for news and commentary, Web sites such as Slate, Salon, and the Drudge Report should be covered by the exemption along with more traditional news sources that now have branched out into Internet operations.

We also agree that with the proposed rule's statement that only activities that would otherwise be subject to the statutory exemption, namely news stories, commentaries, or editorials, should be covered by the exemption as it applies on the Internet. The Commission's advisory opinions flesh out how the exemption is to be applied and we believe that it is has generally been applied fairly.

Some bloggers ought to be considered part of the media for purposes of the media exemption. Others probably should not. A number of factors are relevant to that question, including whether the blogger receives payments from a campaign, solicits money for candidates, and engages in news gathering or editorializing. In the end, however, since most if not all bloggers will be covered by the exemption included in the proposed rule for individual or volunteer Internet activity, whether the media exemption applies will be irrelevant to whether the FECA applies to their activities.

Exceptions to the Definitions of "Contribution" and "Expenditure" for Individual or Voluntary Activity on the Internet (11 C.F.R. §§ 100.94, 100.155)

Although these proposed rules do not stem from the District Court's decision in the *Shays and Meehan* case, we believe that the heightened interest in this rulemaking on the part of Internet users makes this the appropriate time and place to develop a new rule that will make it clear that the Commission is not "out to get them." The proposed rule's exception to the definitions of contribution and expenditure for individual and volunteer activity on the Internet is welcome.

For the vast majority of Internet users, the costs of their participation in politics are simply the cost of computer equipment and software and the maintenance of a website or listserv. It is appropriate not to consider these expenses to be contributions or expenditures or to try to place a value on political discourse undertaken by individuals using this medium. We agree also that the rules should take account of the fact that some citizens do not own a computer and will therefore engage in political discourse using computer facilities at public libraries or universities. One situation that does not seem to be covered by the different permutations of the proposed rule is where an individual uses a computer at the home of a friend or relative. This situation can be accomplished by adding "or in the residential premises of the owner of the equipment" after the word "premises" in 11 C.F.R. §§ 100.94(a)(3) and 100.155(a)(3).

We also agree with the definitions of "computer equipment and services" and "Internet activities" for purposes of these new exceptions, particularly with the decision to set out an illustrative but not exclusive list of covered items. The Commission should be liberal in expanding these lists in order to carry out the purpose of the exceptions. It is very important that individual Internet users not feel they need to be looking over their shoulders as they engage in political debate and campaign activity for perhaps the first time in their lives.

Finally, we agree with the proposed rule's approach to the use of corporate and union computers by individuals on an occasional, isolated, or incidental basis, and support the changes in 11 C.F.R. § 114.9.

Conclusion

Our democracy is already being, and will continue to be, enhanced and strengthened by the participation through the Internet of millions of new citizens in debate on the issues and campaigns of the day. The Commission can make an important contribution to free expression and to fair and competitive elections by addressing the issues raised by this rulemaking carefully and appropriately. We believe that the campaign finance system can and should be protected from the emergence of new avenues for large expenditures of money that can lead to corruption and the appearance of corruption without undermining the important public discussions taking place on the Internet.

Thank you for your consideration.

Sincerely,

Senator John McCain
Senator Russell D. Feingold
Representative Christopher Shays
Representative Marty Meehan