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Before the Committee on House Administration
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Chairman Ney, Ranking Member Millender-McDonald, and members of the Committee, thank you for inviting me to testify on the proper reach of any regulation of campaign activity on the Internet.

I hope to make a few basic points: (1) The Commission's 2002 regulations mistakenly adopted a 'total carve out' for Internet communications that exempts from core statutory provisions even paid campaign advertising; (2) There are ways for the Commission to rectify the situation by regulating only Internet activity that raises the concerns underlying the core statutory provisions while leaving the vast majority of Internet activity, including blogging, uninhibited; and (3) Congress should await the Commission's effort and should not compound the current problem with enactment of the same 'total carve out' approach.

The Commission's Mistake

As you know, the Federal Election Commission is in the midst of a rulemaking proceeding concerning the proper reach of regulation regarding political activity on the Internet. Earlier this year, the Commission published a notice of proposed rulemaking laying out several options, and this summer the Commission held two days of hearings. We hope to be able to adopt final rules by the end of the year.

The situation is somewhat complicated by the fact that the regulations adopted by the Commission in 2002 created a very broad exemption from several statutory restrictions for Internet activity—similar to the exemption adopted by this Committee when considering the Pence/Wynn Bill—and the Commission has been in litigation over this broad exemption since October of 2002. A federal district court held these regulations, along with several others, contrary to the statute or otherwise invalid, and though the FEC did not appeal regarding the Internet exemption, it has appealed regarding other regulations.[1] In theory, if the full U. S. Court of Appeals for the District of Columbia rules that the plaintiffs challenging the Commission's regulations had no standing to bring the suit in the first place, some commissioners might urge that the

[1] The U.S. District Court for the District of Columbia concluded that the Commission's broad Internet exemption would "severely undermine [the Federal Election Campaign Act's] purposes," and would permit "rampant circumvention of the campaign finance laws and foster corruption or the appearance of corruption." *Shays v. FEC*, 337 F. Supp. 2d 28, 70 (D.D.C. 2004), *aff'd*, 414 F.3d 76 (D.C. Cir. 2005), *petition for rehearing en banc filed* (Aug. 29, 2005). Though the district court held some 15 regulations invalid, it nonetheless indicated that pending resolution of the litigation and adoption of needed revisions by the FEC, the challenged regulations remain in effect. *Shays v. FEC*, 340 F. Supp. 2d 39, 54 (D.D.C. 2004).

Commission simply drop its Internet rulemaking proceeding and leave the current regulations—with their 'total carve out' for Internet communications—on the books.

Speaking on my own behalf, I would oppose that approach for several reasons. Procedurally, any ruling that the plaintiffs did not have standing no doubt will be appealed to the Supreme Court and, as a result, there is the prospect of looming uncertainty for many more months. Even if plaintiffs ultimately lose on standing grounds, there is the probability that another suit based on a new standing argument would be initiated, meaning years more litigation. The Commission should proceed to repair through regulation those most obvious defects it created in 2002, and should do so in time to give guidance to those participating in the 2006 elections.

On the merits, the broad exemption the Commission adopted leaves serious gaps in the statutory system put in place by Congress to require 'hard money' funding of state or local party communications supporting particular federal candidates, to limit or prevent certain contributions on behalf of federal candidates and committees, and to require disclaimers on political advertising. Experience teaches that political professionals will exploit any perceived loopholes. For example, the national party 'soft money' loophole started as a minor blip in the 1980s, and exploded to a half-billion dollar binge by the 2000 election cycle.[2] Internet advertising and e-mails sent to millions are themselves showing signs of growing, in terms of usage and cost. Thus, carefully crafted regulation is in order.

Acting in haste after passage of the Bipartisan Campaign Reform Act (BCRA), the Commission made several mistakes. First, when dealing with the new 'hard money' restrictions placed on state and local party funding of "public communications" that promote, support, attack, or oppose a federal candidate,[3] the Commission indiscriminately crafted language that excluded "communications over the Internet."[4] *This arguably leaves state and local parties free to fund hard-hitting, candidate-specific attack ads placed for a fee on popular Internet websites—no matter the cost—as some sort of allocable expense that can be paid for in large part with 'soft money.'* [5] Second,

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[2] As the Supreme Court has observed, "of the two major parties' total spending, soft money accounted for 5% ($21.6 million) in 1984, 11% ($45 million) in 1988, 16% ($80 million) in 1992, 30% ($272 million) in 1996, and 42% ($498 million) in 2000." *McConnell v. FEC*, 40 U.S. 93, 124 (2003).

[3] 2 U.S.C. 431(20)(A)(iii), 441i(b)(1). This involves but one of the types of activity BCRA labeled as "Federal election activity" (FEA). It is the only Federal Election Campaign Act provision that actually uses the "public communication" term of art. It is critical to note that the statute includes in the term "public communication," not just the specific examples of "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," but also "*any other form of general public political advertising*" (emphasis added).

[4] 11 CFR 100.26. The Commission took this post-BCRA approach even though it had long held Internet websites and widespread e-mail to be a type of "general public political advertising" under the analogous disclaimer language at 2 U.S.C. 441d. *See* Advisory Opinions 1999-37 and 1995-9, available at www.fec.gov.

[5] In another area, dealing with "generic campaign activity" that state and local parties cannot pay for with 'soft money,' the Commission narrowed the statute's reach by confining the definition to "public

when later crafting new regulations specifying when 'coordinating' a paid communication with a candidate or committee makes the communication an in-kind contribution or party coordinated expenditure, the Commission unnecessarily adopted a 'content' requirement which, in turn, adopts the Commission's own restrictive "public communication" definition that excludes all "communications over the Internet."[6] *This leaves corporations, unions, foreign governments, and wealthy individuals free to fund, without regard to the statutory limits and prohibitions, Internet communications of any sort in full coordination with federal candidates and committees.* Imagine a huge corporation or union being able to fully fund the Internet ad campaign or million person e-mail operations of a cooperating presidential or congressional campaign or party committee![7] The third mistake of the Commission came when drafting the post-BCRA regulations dealing with disclaimers. Though the statute requires notice identifying the payor and indicating whether there is candidate authorization on "any . . . type of general public political advertising," the Commission again adopted its restrictive "public communication" definition and thereby excluded "communications over the Internet" (aside from two situations separately covered: websites of "political committees" and e-mail sent unsolicited to over 500 recipients*).*[8] *The result is that candidates, party*

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communications." *Compare* 2 U.S.C. 431(21) *with* 11 CFR 100.25. This means the restrictions intended for "generic campaign activity" will not reach Internet communication of any sort, no matter what its cost.

[6] The statute defines a "contribution" as "*any* gift. . . [or] loan. . . of money or *anything of value* made by any person for the purpose of influencing any election for Federal office" (emphasis added). 2 U.S.C. 431(8)(A)(i). It further states that "expenditures [defined at 2 U.S.C. 431(9)(A)(i) as "*any* purchase, payment, . . . loan, . . . or gift of money or anything of value made by any person for the purpose of influencing any election for Federal office"] made by any person . . . in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, *shall* be considered to be a contribution to such candidate" (emphasis added). 2 U.S.C. 441a(a)(7)(B)(i).

Notwithstanding that the statute contains no 'content' standard—and certainly no "public communication" limitation—the Commission's "coordinated communication" regulation adopted a 'content' requirement at 11 CFR 109.21(a)(2) and narrowed its reach to: "(1) A communication that is an electioneering communication under 11 CFR 100.29 [radio or TV]; (2) A *public communication* that disseminates, distributes, or republishes, in whole or in part, campaign materials prepared by a candidate, the candidate's authorized committee, or an agent of any of the foregoing. . . ; (3) A *public communication* that expressly advocates the election or defeat of a clearly identified candidate for Federal office; (4) A communication that is a *public communication*, as defined in 11 CFR 100.26, and about which each of the following statements . . . are true: (i) The communication refers to a clearly identified candidate for Federal office; (ii) the public communication is publicly distributed or otherwise publicly disseminated 120 days or fewer before a general, special, or runoff election, or 120 days or fewer before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate; and (iii) The public communication is directed to voters in the jurisdiction of the clearly identified candidate or to voters in a jurisdiction in which one or more candidates of the political party appear on the ballot" (emphasis added).

[7] Some may argue that other Commission regulations would trump the exemptions carved from the "coordinated communications" rule. While it is true that other regulations regulate "in kind contributions" of "goods or services," 11 CFR 100.52(d), and corporate or union "contributions" and "communications to those outside the restricted class that expressly advocate," 11 CFR 114.2(b)(1), (2)(ii), the "coordinated communication" regulation cannot be read as a nullity where there is a communication involved and there is 'coordination.'

[8] The statute, at 2 U.S.C. 441d, requires paid for/authorization notice on communications "through any broadcasting station, newspaper, magazine, outdoor advertising facility, mailing, or any other type of general public political advertising." At 11 CFR 110.11(a) the Commission specified: "This section applies only to public communications, defined for this section to include the communications at 11 CFR

committees, and other persons who pay for Internet campaign ads on popular websites do not have to follow the statutory disclaimer rules.

In sum, as a result of the poor decisions made by the Commission in the rulemaking process, party committees will be using 'soft money' to pay for Internet ads bashing candidates; corporations, unions, foreign nationals, and wealthy individuals will be paying for Internet related expenses of requesting candidates and parties; and the public won't have a clue who is paying for virtually all Internet advertising they will see.

This is not an inconsequential or hypothetical concern. The 2004 elections clearly illustrated that the Internet has arrived as an important medium for influencing federal elections. In 2004, candidates used the Internet to solicit contributions online, provide content to download and distribute, recruit volunteers, and send videos and e-mail messages to supporters.[9] Not surprisingly, the presidential campaigns of George Bush and John Kerry made extensive use of the Internet:

> Both have transformed their web sites into virtual campaign offices that offer an array of tools. After feeding online supporters a steady diet of hard-hitting Web videos--designed to stir their partisan juices--the campaigns are now urging them to use those tools to help spin the media, contact voters and get out the vote."[10]

Given the number of e-mail addresses held by the campaigns, it is likely these were widespread communications. According to press reports, the Bush campaign had a list of approximately 6 million of its supporters' e-mail addresses; the Kerry campaign 2.5 million.[11] A blanket Internet exemption would allow all of these candidate Internet activities to be underwritten, without regard to amount or source, by outside groups.

Moreover, evidence shows that the money spent on these Internet activities to influence elections is significant. Even though most citizens' use of the Internet involves little expense, there are groups that are raising and spending large sums on Internet communications and other Internet-related expenses. A search of the FEC database shows about $25 million on Schedule B disbursement schedules described with terms like "web," "Internet," and "e-mail." That figure does not even include Senate filings that are not electronic, state party disbursements that appear on other disbursement schedules, or other Internet-related expenditures described by less descriptive terms such as "communication expenses." Moreover, a number of the payments were very large. In 2004, for example, one of the national party committees made payments of $260,000 for e-mail acquisition, payments of $200,000 and $179,000 for e-mail services, and payments of $170,000 and $147,000 for web advertising. Likewise, a review of 527 group filings with the Internal Revenue Service showed large Internet disbursements. For example, Progress for America Voter Fund spent over $450,000 on e-mail

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100.26 plus unsolicited electronic mail of more than 500 substantially similar communications and Internet websites of political committees available to the general public. . . ."

[9] *See* "E-Mail Credited with Pivotal Role in 2004 Election," *New Jersey Record* (November 7, 2004).

[10] "Bush, Kerry Make Last Minute Pleas for Help by E-Mail," *Washington Post* (Oct. 19, 2004).

[11] *Id*.

disbursements during the 2004 election cycle, over $158,000 for website services and over $213,000 for Internet banner advertisements. Swift Boat Veterans showed a total of over $320,000 in similar categories. The November Fund showed a total of over $512,000 in these categories.[12]

The invalidated regulations of the Commission essentially would ignore this significant financial activity and the potential for 'soft money' and other otherwise restricted sources being used to pay for it. Thus, I will vigorously oppose any effort to simply stick with the current regulations. The Commission can do better, and we should be encouraged to do so.

The Commission's Effort to Correct Its Mistake

The Commission has heeded the basic message of the district court that overturned the 'total carve out' approach in the Commission's regulations:

> Congress intended all other forms of "general public political advertising" to be covered by the term "public communication." What constitutes "general public political advertising" in the world of the Internet is a matter for the FEC to determine. [337 F. Supp. 2d at 70]

The focus of Internet regulation should be those Internet campaign ads placed on websites that normally charge a commercial fee for such placement. That is precisely what the Commission attempted in its Notice of Proposed Rulemaking published on April 4, 2005. The proposed definition of "public communication" was revised as follows:

> *Public communication* means 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. The term *general public political advertising* shall not include communications over the Internet, except for announcements placed for a fee on another person's or entity's Web site. [70 Fed. Reg. 16977]

As crafted and applied to the state and local party funding rules, the coordinated communication rules, and the disclaimer rules, the proposed language would repair the most obvious flaw in the Commission's earlier regulations. For ads "placed for a fee:"

- state and local parties would have to follow the funding restrictions intended for "public communications" and "generic campaign activity,"
- all persons who coordinate such ads with a candidate or party would have to treat them as contributions or coordinated expenditures,

[12] Documentation for these figures was submitted as part of the Commission's Internet rulemaking record. "Supplemental Materials for the Internet Communications Rulemaking," Office of General Counsel Memorandum (July 13, 2005).

- and disclaimers saying who paid for them and whether they were authorized by a candidate would have to be included (unless otherwise impractical).[13]

Importantly, under the Commission's proposed rules, no other Internet communication would be regulated as a "public communication." Thus, state and local parties would not have to apply the new BCRA 'soft money' prohibition to material placed on their own websites or to e-mail activity. Likewise, persons coordinating with candidates or parties regarding material placed on such persons' own websites would not have to worry about triggering the "coordinated communication" rules.

With regard to disclaimers for persons other than political committees, the Commission's proposed rules would not require a disclaimer under any circumstances if the communication did not include express advocacy or solicitation of federal contributions. For anyone, other than for paid ads placed on someone else's website, the proposal would only require a disclaimer on e-mail sent to more than 500 recipients if the sender paid for a mailing list to accomplish the mailing.[14] Thus, for material placed on one's own website, and for e-mail that is sent to 500 or fewer persons or to a list developed without having to purchase the names, there is no disclaimer requirement.

Taken as a whole, the Commission's proposed regulations already described move toward a reasonable balance. They get at the heart of the problem noted by the court in *Shays v. FEC*, and at the same time leave wide latitude for individuals, bloggers, and others to undertake Internet political activity. In my view, the regulations also need to address situations where a person produces an Internet campaign ad and then places the ad on a popular website that ordinarily charges a fee for placement but the fee is waived. It would be as if a newspaper waived its normal advertising fee. Also, there might be a need to address situations where someone pays a vendor a significant amount for a polished, hard-hitting campaign ad placed on that person's own website for viewing, copying, and distributing. Finally, there might be good reason to assure that a person could not simply get around the in-kind contribution rules by paying for the website or e-mail expenses of a candidate or party. But these are refinements that can be the subject of deliberations by the full Commission in the coming days.

To further assure the vast array of individuals who use the Internet for political speech that the Commission intends to leave individuals free to operate outside the relatively few constraints noted above, the Notice of Proposed Rulemaking suggested several revisions to other regulations. For example, because the current exemption in the statute for use of one's personal property, such as a computer and Internet service, is

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[13] The Commission's regulations have long recognized exceptions for communications where placement of the disclaimer would be inconvenient or impracticable. 11 CFR 110.11(f). *See also* Advisory Opinion 2002-9, available at www.fec.gov, where the Commission concluded that a disclaimer was not required on text messages sent via wireless telephones.

[14] **§ 110.11 Communications; advertising; disclaimers** would cover "unsolicited" e-mail, and the latter would be defined as "those e-mail that are sent to electronic mail addresses purchased from a third party." 70 Fed. Reg. 16978. The Commission settled on the number 500 because Congress has used this line when defining the reach of "mass mailing" and "telephone bank." *See* 2 U.S.C. 431(23), (24).

ambiguously worded to cover "volunteer" activity,[15] the Commission proposed making it clear that this exemption would extend not only to activity coordinated with a candidate or party, but also to activity undertaken independently.[16] The Commission also proposed clarifying that this exemption would extend to use of computer equipment and services available at a public facility like a library, public school, community center or Internet café. *Id*. This set of modifications is critical because the Commission heretofore has had to regulate independent Internet activity that crosses over into 'express advocacy' as "independent expenditure" activity that must be paid for only with 'hard money' and that must be reported even by individuals if it crosses a $250 threshold.[17]

In addition, the Commission proposed clarifying its rules allowing an employee's or member's use of facilities of a corporation or labor organization as long as it doesn't impede the person's or organization's normal amount of work (11 CFR 114.9(a) and (b)). The proposal would apply specifically to use of "computers, software, and other Internet equipment and services."[18]

Further, the Commission's proposed regulation included language implementing the so-called 'media exemption' (2 U.S.C. 431(9)(B)(i)) to make clear that Internet activity can qualify. Specifically, the Commission proposed revising 11 CFR 100.132 to state:

> Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication, *whether the news story, commentary, or editorial appears in print or over the Internet*, is not an expenditure unless the facility is owned or controlled by a political party, political committee, or candidate. . . . [70 Fed. Reg.16978; emphasis added]

Overall, the Commission's proposed regulations offer a great deal of additional assurance to individuals, bloggers, and others that the great majority of citizen activity using the Internet will fall outside any Federal Election Commission interest. As it stands, the proposal package would only regulate as a "public communication" Internet ads placed on another's website for a fee and, additionally for disclaimers, e-mail sent to more than 500 recipients where the list has been purchased.

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[15] 2 U.S.C. 431(8)(B)(ii) exempts from the definition of "contribution" 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 or in [a] church or community room for candidate-related or political party-related activities. . . ." The Commission has extended this same exemption concept to the definition of "expenditure." *See* 11 CFR 100.135, 100.136.

[16] Proposed § 100.155, 70 Fed. Reg. 16978.

[17] *See* Advisory Opinions 1998-22 and 1999-37, available at www.fec.gov.

[18] 70 Fed. Reg. 16978, 16979. Some have mistakenly assumed that the 'safe harbor' the Commission created in this area, a *per se* allowance for use of facilities not exceeding one hour per week or four hours per month, is a hard rule. In fact, the 'normal work/normal activities' test is the overall rule, and this frees organizations to allow significant use during non-work hours.

The Commission received nearly 800 comments on the proposal and the various issues raised. The Commission held two days of hearings on June 28 and 29. Twenty-one witnesses testified. The commissioners are now pouring over the voluminous record in the proceeding and working toward a potential final rule. I strongly urge the Congress to let the Commission attempt to work out this complicated matter using its expertise and understanding of the various statutory and regulatory provisions involved.

While the Internet is unique, and the Internet community is very interested in minimal restrictions being imposed, the Commission must be mindful of the underlying statutory scheme Congress has in place. While it may be appropriate to interpret some statutory terms, such as "public communication" or "general public political advertising," in a way that only reaches some Internet activity, there are other terms, such as contribution" or "expenditure," that do not so readily bend to such distinctions. The Commission has to be careful about applying the state and local party FEA funding restrictions and the in-kind contribution concepts to communications using, say, facsimile technology, but not Internet technology. The Commission has to think hard about whether it should apply such rules to traditional mailings or phone banks to more than 500 people, but not to Internet e-mail. The Commission has to ascertain whether there is a justifiable legal distinction for disclaimer purposes between someone photocopying and distributing thousands of flyers at virtually no cost, and someone downloading and distributing the same number of flyers over the Internet. These are the kinds of distinctions and decisions that Congress rightly has delegated to the Commission through its authority to "prescribe rules . . . to carry out the provisions of" and "formulate policy with respect to" the provisions of FECA. 2 U.S.C. 437c(b)(1), 438(a)(8).

Congress should not approve the language adopted when considering the Pence/Wynn Bill

In June this Committee adopted a short amendment to the Pence/Wynn bill (Sec. 14 of H.R. 1316). It follows the same approach the FEC took two years ago, and it will lead to the same problems I have noted above. I strongly urge the Committee not to pursue this course.

There are better ways to craft rules in this area, and the Federal Election Commission should first be given a chance to draw lines that will uphold the core provisions of the Act while leaving free the types of Internet political activity that engage millions of citizens.

The amendment adopted by this Committee (and adopted also on the Senate side in S. 1053) simply exempts "communications over the Internet" from the definition of "public communication." On the one hand, this might not exempt all the Committee expected, because the term "public communication" actually is used in FECA only once, to describe one type of "Federal election activity" that a state or local party committee must pay for with 'hard money' only. 2 U.S.C. 431(20)(A)(iii). It is only through the Federal Election Commission's creativity that the "public communication" concept has

drifted into regulations that define "generic campaign activity" by state and local parties (11 CFR 100.25), that define "coordinated communications" (11 CFR 109.21(a), (c)), and that define the scope of disclaimer requirements (11 CFR 110.11(a)). Thus, if the Commission were to revise its regulations, it is conceivable the amendment would have very limited application. To be effective, any statutory change would have to address the various statutory provisions that touch on how Internet activity might be regulated: the definitions of "contribution," "expenditure," and "Federal election activity" (in all its variations); the separate definition of "contribution or expenditure" applicable to corporations and labor organizations; the exemptions covering personal property used for 'volunteer' activity and 'media' activity; and the disclaimer rules. *See* 2 U.S.C. 431(8), 431(9), 431(20), 441b(b)(2), 431(8)(B)(ii), 431(9)(B)(i), and 441d, respectively. Unless a comprehensive approach is taken, Congress might create a situation where only Internet activity tied to the "public communication" definition is unregulated, but other Internet activity, such as "independent expenditure" activity, continues to be regulated. These problems can best be avoided by letting the Commission deal with these issues in the rulemaking context.

More importantly, if the Commission were to retain use of the "public communication" construct in all its current locations, the broad exemption of all Internet communication now in the Pence/Wynn bill would forever thereafter require that even hard-edged candidate-specific attack ads placed for a fee on popular Internet sites escape the party 'soft money' restrictions and the in-kind contribution restrictions at the core of the statute, as well as the disclaimer rules. While the amount of paid Internet advertising may be only in the tens of millions of dollars now, it is certain to grow as a means of providing candidate support. A statutory exemption that doesn't make a critical distinction for commercial ads could lead potential 'friends' to offer to pay for a candidate's entire Internet related advertising effort while avoiding the contribution limits and prohibitions that have been on the books for decades. The Supreme Court in *Buckley v. Valeo* upheld the contribution limits at issue and warned that the limits would become meaningless if they could be evaded "by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." 424 U.S. 1, 46 (1976). A more careful approach is needed to avoid this problem. The Commission can achieve a well-crafted regulatory approach along the lines needed.

Conclusion

The Internet is a wonderful tool for political activity. Its accessibility and generally low cost are invigorating the body politic. By the same token, its increased usage by candidates and parties and the increased resources being put into this technology for campaign advertising suggest a need to be cautious about attempts to 'exempt' all Internet activity from federal campaign finance laws.

A few years ago, the Federal Election Commission adopted a 'total carve out' for Internet activity that has only brought litigation and confusion. A federal court roundly criticized the Commission for its approach, and the Commission now has a chance to better calibrate a focused set of regulations. The approach thus far taken by the

Commission suggests a balanced, reasonable outcome—one that will apply longstanding campaign funding restrictions to paid Internet advertising, but will leave virtually every other Internet activity by individuals, bloggers, and others completely unfettered. Disclaimers would be required on paid Internet ads, unless impracticable, and on express advocacy e-mail sent to more than 500 recipients, but only if the list used was purchased.

Congress should await the outcome of the Commission's regulation proceeding. Passage of the amendment adopted by this Committee in June would only recreate many of the problems brought on by the Commission's earlier attempt in this area.

I thank the Chairman, Ranking Member, and members of this Committee for the opportunity to testify. The Commission stands ready to assist the Committee further in any way it would find helpful.