I wish to testify if the Commission hears testimony on internet issues.

Comments provided by :
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Amy L. Rothstein, Esq.
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999 E Street, N.W.
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Re: Comment and Request to Testify in Response to Advance Notice of Proposed Rulemaking on "Aggregate Biennial Contribution Limits," 79 Fed. Reg. 62361 (Oct. 17, 2014), Notice 2014-12 for 11 CFR Part 110

Dear Ms. Rothstein:

The FEC's decision to exempt most political activity on the Internet from federal regulation was a deliberate and well-informed policy choice made in full consciousness of the significant and expanding use and impact of the Internet on and in political campaigns. No recent developments in Internet use or practice represent valid reasons for the Commission to revisit or revise its fundamental approach to Internet regulation.

Over the course of two decades beginning in 1995 the Commission has considered and addressed Internet activity in the course of advisory opinions, enforcement matters, multiple rulemakings, Congressional hearings, and judicial proceedings. Between 2002 and 2006 the Commission made two fundamental choices which have undergirded policy since that time:

- To exclude most internet activity from the definition of "public communication," 11 CFR 100.26, (or related terms such as advertising)
- To exclude uncompensated Internet activity by individuals from the definitions of contribution and expenditure. 11 CFR 100.94 and 11 CFR 100.155.

The Commission is free to reopen and explore prior policy decisions at any time. The Commission would be misinformed, however, if it broadly reopened decisions on Internet policy in the belief that prior Commissioners were blind to or lacked important information now available about the use and potential of the Internet to affect political campaigns. And the Commission would be misguided, in my view, to revise policy simply because Internet-based activity is hugely influential in campaigns, absent significant evidence of corruption. Such evidence is notably lacking despite more than a decade of largely "hands off" regulatory policy by the Commission regarding the Internet.

The Commission's choice largely to decline to regulate Internet political activity was deliberate and well-informed.

In Advisory Opinion 1995-9, NewtWatch PAC, the Commission held that Internet postings were a form of "general public political advertising" a defined term used frequently in the FECA and Commission regulations. *See also* AO 1995-35. In AO 1998-22, Leo Smith, the Commission concluded that an internet web site created by an individual expressly advocating the defeat of a federal candidate required a FECA-compliant disclaimer, calculation of various costs in determining the value of the expenditure, and reporting as an independent Expenditure (assuming costs exceeded $250.00) or as an in kind contribution. The Commission initially prohibited the posting of press releases and other endorsements on corporate or union web sites. *See* MUR 4686 (New York State AFL-CIO) and AO 1997-16. The Commission initially considered web links to candidate web sites to be contributions to those campaigns. *See*, e.g. MUR 4340.

By 1999, however, the Commission recognized that the approach of attempting to shoehorn Internet activity into rules designed for offline technologies and practices was misconceived. As a result the Commission issued a Notice of Inquiry on Internet use.[1] The NOI attracted over 1300 comments and specifically included questions on web sites created by campaign volunteers or otherwise coordinated with candidates and questions about use of candidate-provided materials on the Internet. The Notice was followed by a Notice of Proposed Rulemaking (October 3, 2001) and a hearing on March 20, 2002. While the commission did not adopt rules changes pursuant to that notice, the inquiry, notice, comments, and hearings did inform the Commission's choices in the McCain-Feingold rulemakings, including the decision to exclude most internet activity from the definition of general public political communication. In addition, a series of Advisory opinions in 1999 represented the beginning of a turn in the Commission's approach toward a more technology-sensitive application of election law to the Internet.[2]

In 2000, the Senate Committee on Rules held a hearing on Political Speech on the Internet,[3] including testimony from FEC Commissioners and others. As part of its 2002 BCRA Rulemakings and revisions of those rules pursuant to Shays v. FEC, the Commission issued multiple notices and conducted hearings, including a 2005 hearing on the Internet and coordinated communications.

Comments and testimony in these proceedings address, among other issues:

- Payments by campaigns to bloggers
- Political advertising on the Internet
- Cooperation between Internet activists and campaigns
- Internet fundraising

[1] http://www.fec.gov/pdf/nprm/use_of_internet/netnoi.pdf
[2] AOs 1999-03, 1999-07, 1999-09, 1999-17, 1999-22, 1999-24, 1999-25, 1999-35, 1999-36, and 1999-37.
[3] http://www.rules.senate.gov/public/index.cfm?p=CommitteeHearings&ContentRecord_id=5ec29edb-1e1a-4a27-ab71-79e18adcbd39&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=1983a2a8-4fc3-4062-a50e-7997351c154b&MonthDisplay=5&YearDisplay=2000

- The expenditure of large sums on Internet sites designed to organize voters and influence elections
- Anonymous Internet sites, postings, and material
- Internet broadcasting and video

The Commission heard testimony from Internet developers and technology entrepreneurs, and has since engaged in continuing interchanges with developers and technologists through a stream of advisory opinion requests.

The Commission in this period was not "turn[ing] a blind eye to the Internet's growing force in the political arena."[4] Rather, the Commission was highly conscious of and attentive to this growing influence and repeatedly and deliberately chose substantially to forgo regulation for valid policy reasons. The Commission did not fail to take into account the fact that the Internet was the source of a major and continually growing source of political advertising. Rather the Commission deliberately chose to limit regulation to advertising placed for a fee on another person's web site. 11 CFR 100.26.

If the Commission wishes to change these policies, it may do so, consistent with the limits of the Constitution, but it should not do so based on a false premise that the Commission was previously blind to the Internet's force, use, and influence or failed to take relevant factors and likely developments into account.

The Commission's decisions were made in full consciousness of the influence and potential for abuse of the Internet.

In my May 2000 Senate testimony, I noted:

> It is particularly important, in my view, to avoid basing a policy of regulatory leniency on the presumption that the Internet is a source of unalloyed political good. As the Reno case reminds us, the Internet hosts pornography as often as it houses public affairs; it is used by fast-buck artists as much as by high-minded public policy organizations. Hackers, thieves, and sexual predators should remind us that the Internet is not inherently "better" than other communications technologies. The Internet is a powerful tool which can be used for the good of society. I believe its potential for good will be best fostered by regulatory restraint rather than by government efforts to shape and control the medium.[5]

The Commission's 2005 Internet hearing included testimony from a blogger and web entrepreneur who had been paid by a Presidential campaign.[6] The witness addressed that circumstance in his comments and was questioned about it at the hearing.[7] Testimony included discussion of the

[4] http://eqs.fec.gov/eqsdocsMUR/14044363872.pdf

[5] http://www.fec.gov/members/former_members/mason/masonarticle3.htm#search=notice%20of%20inquiry%20internet

[6] http://sers.fec.gov/fosers/showpdf.htm?docid=36747#search=moulitsas

[7] http://sers.fec.gov/fosers/showpdf.htm?docid=774#search=moulitsas

large amounts of money spent on Internet activity and of how much of this activity was anonymous or otherwise not subject to public disclosure. Commenters and witnesses raised various concerns about potential abuses of the approach the Commission proposed and eventually adopted.

After a decade of largely deregulatory policy no abuse needing redress has emerged.

While the Commission is free to reexamine policies at any time, settled policies are normally revised when circumstances show the policies are deficient in light of changed practices or circumstances. The Commission's policy toward the Internet has revised between 1999 and 2006 as it became apparent that regulatory principles designed for other technologies did not suit the Internet. At this point Commission policy towards the Internet has been relatively settled for nearly a decade. Given that this policy leaves broad swaths of Internet activity unregulated, the lack of notable abuses, scandals, or problems is strong evidence of the wisdom of this settled policy.

Of course the Commission is not obligated to wait for a crisis before responding, but the lack definable problems with the FEC's existing Internet regulatory regime suggests that there is no brewing crisis to head off. At a minimum, those who advocate changing the settled policy need to offer something more than vague concerns about potential abuses or unspecified future innovations to justify changing policy. Indeed, the technologies and innovations that have emerged since 2006, very largely for the good of society, have to a degree been promoted by the Commission's considered "hands off" policy. Had the Commission decided to take a narrower, more prescriptive approach, many voter engagement efforts used to powerful effect might have been hindered or misshapen. An effort to regulate emerging technologies is likely to do more harm than good for the electoral process.

In particular, the fact that Internet technologies are widely and still increasingly used in campaigns and are hugely influential in campaigns is simply an insufficient as a basis to support additional regulation. "It is big and important" is simply not a sufficient (or even a rational) basis for regulation.

Inasmuch as Commissioners have requested comment on a wide range of issues in this notice, should the Commission wish to hear testimony on Internet-related issues, I request to testify on that topic.

Respectfully,

David M. Mason
Former Commissioner (1998-2008)