CENTER FOR INDIVIDUAL FREEDOM

113 S. Columbus Street, Suite 310 • Alexandria, VA 22314 • (703) 535-5836 • (703) 535-5838 (fax) • www.cfif.org

June 3, 2005

VIA ELECTRONIC MAIL
& HAND DELIVERY:
Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Comments and Request to Testify Concerning Notice of Proposed Rulemaking on Internet Communications (Notice 2005-10)

Dear Mr. Deutsch:

The Center for Individual Freedom hereby submits these comments in response to the Notice of Proposed Rulemaking on Internet Communications issued by the Federal Election Commission and published beginning at 70 Fed. Reg. 16967 (Apr. 4, 2005). In addition, I respectfully request an opportunity to testify at the public hearings scheduled for June 28-29, 2005, on this matter. My contact information is as follows:

Reid Alan Cox
General Counsel
Center for Individual Freedom
113 S. Columbus Street, Suite 310
Alexandria, VA 22314
(703) 535-5836

I. ABOUT THE CENTER FOR INDIVIDUAL FREEDOM

Founded in 1998, the Center for Individual Freedom (the "Center") is a non-partisan, non-stock, non-profit corporation organized and existing under the laws of the Commonwealth of Virginia, and is tax exempt under Section 501(c)(4) of the Internal Revenue Code. The Center's mission is to protect and defend individual rights and freedoms guaranteed by the Constitution of the United States, including the freedoms of speech and of the press, the freedom of association, and privacy rights, as well as the fundamental right of all Americans to participate freely and fully in the political process.

Of particular concern to the Center in this rulemaking proceeding is the need to vigilantly safeguard the online speech and association rights of all individuals. Indeed, the Center's interest here stems not only from its principled commitment to protect and defend the First Amendment rights of any individual to publish or receive information, news, and commentary on the Internet, but also from the Center's practical experience as

an online publisher, itself. As a vocal proponent of individual freedom, open government, and public accountability, the Center engages in direct-to-the-public advocacy by disseminating issue-oriented news, information, and commentary through a variety of media, including its own website, <http://www.cfif.org>, which is updated weekly and visited by millions of readers each year, and its own e-mail lists, which have tens of thousands of subscribers. The Center's advocacy is, therefore, dependent upon an ability to speak and associate with other citizens online so that the Center is able to expand public knowledge, encourage public discourse, and influence public opinion on issues of public importance.

II. OVERVIEW

While the Center understands the necessity of revisiting the rules on "Internet Communications" as a result of the decision in *Shays v. Federal Election Commission*, 337 F. Supp. 2d 28 (D.D.C. 2004), the Center is concerned that the Federal Election Commission (the "Commission") has not been careful enough to "strike" the proper "balance between provisions of the [Federal Election Campaign] Act," as amended by the Bipartisan Campaign Reform Act ("BCRA"), and the "significant" constitutional and "public policy considerations that encourage the Internet as a forum for free or low-cost speech and open information exchange." 70 Fed. Reg. at 16969. Indeed, by merely entering this area, no matter how lightly it treads, the Commission sweeps within its regulatory reach millions of Americans who use the Internet to discuss and disseminate their thoughts and opinions about issues of the utmost public importance. Such a result is particularly troubling since these individuals and groups are using the Internet to exercise constitutionally protected speech and association rights that are at the core of the First Amendment, as the U.S. Supreme Court has consistently recognized. *See Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)) ("the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office"); *accord Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 386 (2000); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976).

Quite simply, the threat posed by the Commission's proposed rules is staggering. After all, even if the Commission "intend[s] to ensure [only] that political committees properly finance and disclose their Internet communications, without impeding individual citizens [and groups] from using the Internet to speak freely regarding candidates and elections," 70 Fed. Reg. at 16967, all individuals and groups that wish to comply with federal election law will still have to navigate hundreds of pages in the Code of Federal Regulations, *see* 11 C.F.R. § 100.1 *et seq.* — not to mention numerous more pages in the United States Code, *see* 2 U.S. § 431 *et seq.* — just to ensure that they have not inadvertently run afoul of regulations that were never intended to apply to them. This concern is all the more serious since the Internet is a uniquely powerful yet democratic medium that permits anyone and everyone with Internet access to speak and associate directly with anyone and everyone else with Internet access. In other words, the

constitutional promises of free speech and association are most readily and universally available to Americans via the Internet, where they can set up their virtual soapboxes on any corner of the information superhighway to discuss the most pressing public issues with their fellow citizens. Surely, this virtual public forum should not be chilled by regulation.

Moreover, given the rapid rate of technological innovation and software development, it is abundantly clear that neither the Congress through its legislative power nor the Commission through its regulatory power can keep up with the ever-changing ways Americans communicate on the Internet. In fact, the history of these proposed regulations proves this point convincingly. As of April 4, 2005, a primary concern articulated by the Commission in connection with this Notice of Proposed Rulemaking ("NPRM") was whether and to what extent federal election law should regulate weblogs (or "blogs") and their publishers, known as webloggers (or "bloggers"). But when Congress enacted BCRA only three years earlier in March 2002, or even when this Commission promulgated its original regulations concerning Internet communications four months later in July 2002, blogs and bloggers were nowhere in the legislative mind of Congress or the regulatory considerations of the Commission. That is due to the fact that blogging only emerged as a widely adopted mass communications medium in the three-year period between the enactment of BCRA and this NPRM. Such a rapid change in the way people communicate is the rule rather than the exception when it comes to the Internet, and it is a fundamental reason why the Commission must be exceptionally careful in crafting regulations that are not only proper today but also will not cause unintended consequences tomorrow.

III. SECTIONS 100.73 & 100.132: NEWS STORY, COMMENTARY, OR EDITORIAL BY THE MEDIA

None of the proposed rules better typifies the Center's constitutional and policy concerns than the proposed revisions to the so-called "media exemption" found in 11 C.F.R. §§ 110.73 and 100.132. Specifically, despite the NPRM's assurances that "the Commission is proposing to amend sections 100.73 and 100.132 . . . to indicate that any media activities that otherwise would be entitled to the statutory exemption are likewise exempt when they are transmitted over the Internet," 70 Fed. Reg. at 16974, the explanation makes it abundantly clear that the exemption would only "extend" to protect "media entities" rather than all individuals and entities that publish on the Internet, 70 Fed. Reg. at 16975. The Commission is, in essence, picking winners and losers when it comes to political speech. In other words, if an individual or group is deemed an exempt "media entity" by the Commission through its "case-by-case" process, 70 Fed. Reg. at 16975, then its speech is fully protected. But, if the Commission concludes an individual or group — for whatever reason — does not constitute a "media entity," then its speech is wholly subject to the entirety of the complex amalgamation of federal election law and its resulting maze of regulation. Not only does the First Amendment reject such tacit licensing of speech and of the press by the government, *see First National Bank v.*

Bellotti, 435 U.S. 765, 801-02 (Burger, C.J., concurring), but policy considerations weigh against such a narrow exemption since the very advantage of the Internet is that a publisher does not have to possess substantial means to disseminate his or her message to the public at-large. Indeed, the apparent limitation of the proposed "media exemption" to only the mainstream or institutional press dramatically undermines and threatens the unique publishing advantage provided by the Internet because it deprives those without substantial means of the only medium through which they can publish their political thoughts in a cost-effective way.

Thus, the NPRM's questions about whether the exemption should "be limited only to the activities of media entities that also have off-line media operations" and "whether bloggers . . . are entitled to the statutory exemption" miss the mark. If the First Amendment protects the speaker who takes to a soapbox in the town square or the pamphleteer who distributes leaflets at a major intersection, then the exemption codified in Sections 100.73 and 100.132 should be broad enough to shield the blogger who publishes his campaign common sense and the advocacy group that e-mails its political commentary, just as it does the national broadcast networks, cable news channels, talk radio, daily newspapers, weekly newsmagazines, and "Salon.com, Slate.com, and Drudgereport.com." 70 Fed. Reg. at 16975.

Quite simply, the Commission has taken exactly the wrong approach in defining the "media exemption" by asking "Who should be exempt?", when both the Constitution and important policy considerations suggest the question actually should be "Who should not be exempt?" When considered in this way, it is obvious that the only difference between the speech published by mainstream "media entities," which is exempt pursuant to the Commission's rules, and the speech of any other independent publisher, which is not, is whether the carrier of the message is approved by the Commission. And, for the Commission to discriminate against speakers on such an arbitrary basis raises serious concerns. As a result, the Commission should alter the proposed rules to ensure it is clear that the exemptions for "any cost incurred in covering or carrying a news story, commentary, or editorial" apply to any independent entity that publishes constitutionally protected material regardless of the medium used and irrespective of whether the entity is a member of the mainstream (institutional) "media" or not.

IV. SECTION 110.11: COMMUNICATIONS; ADVERTISING; DISCLAIMERS

The Center also objects to the Commission's proposed extension of disclaimers through 11 C.F.R. § 110.11(a) to paid Internet advertisements and unsolicited e-mail, as well as the Commission's proposed definition of "unsolicited e-mail." Indeed, such disclaimers would either be ineffective or unnecessary or both, while the proposed definition of "unsolicited e-mail" raises more questions than it answers.

As to the extension of disclaimers to paid Internet advertisements (most likely being posted on World Wide Web sites), such disclaimers would be totally ineffective and impractical. Banner advertisements posted on high traffic World Wide Web sites are the most common form of paid Internet advertising. These banner ads are quite small and convey only a small amount of information to the reader. As a result, requiring a disclaimer would be ineffective and impractical because the limited size of the banner ad would necessitate that the disclaimer either be miniscule and unnoticeable or be located on a subsequent linking page that the reader might never see. Indeed, in dealing with other small objects, 11 C.F.R. § 110.11(f) exempts "[b]umper stickers, pins, buttons, and similar small items" from the disclaimer requirements because disclaimers on such items "cannot be conveniently printed." If, on the other hand, the Commission were to insist that the disclaimers be as large as the rest of the text appearing in Internet banner ads, then those advertisements would lose their usefulness altogether since the disclaimer would crowd-out the message intended to be conveyed. In either case, the disclaimer would serve no useful purpose. With regard to "unsolicited e-mail," the requirement of a disclaimer is wholly unnecessary since the sender of the e-mail is generally apparent.

More importantly, however, is the NPRM's confusing attempt to define "unsolicited e-mail." According to the proposed rule, "[u]nsolicited e-mail shall be defined as those e-mail[s] that are sent to electronic mail addresses purchased from a third party." 70 Fed. Reg. at 16978. This definition raises numerous follow-up questions. For instance, is the e-mail unsolicited if the e-mail address was purchased/rented at some time in the past but now the sender and recipient have developed an ongoing relationship of electronic communications? Does the recipient have to explicitly opt-in, or can the recipient simply not opt-out of a subscription? (This question is particularly interesting since Congress approved of an opt-out method for dealing with "spam" in the so-called CAN-SPAM Act of 2003, 15 U.S.C. § 7701 *et seq.*) And, is the e-mail unsolicited if a sender, instead of purchasing/renting e-mail addresses to contact, arranges for another person to send out the content to his or her own subscription e-mail list? None of these questions are answered by the proposed rule. In short, the question really turns on what sort of permission from the recipient is necessary to send him or her e-mail. In the analogous context of U.S. postal mail, there is no requirement that content of the mail is dependent upon whether the sender has explicit permission to send the recipient something, the same should be true for e-mail. In other words, whether the Commission requires disclaimers on e-mail — even if the content expressly advocates the election or defeat of a candidate or solicits a contribution — should have nothing to do with the explicit permission or subscription of the recipient. In the end, the answer that should be adopted by the Commission is the same one that applies to all Americans' postal mailboxes: if they don't want a particular message, they can throw the message away by deleting the e-mail.

The countless questions and boundless confusion conjured by the NPRM's definition of "unsolicited e-mail" and the impractical and unnecessary disclaimer requirements are but two examples of similar problems of vagueness and obliqueness

throughout the NPRM. As a result, if these rules are adopted in their present form, the millions of citizens now expressing their political views by publishing them on the Internet will face the certainty of a constantly shifting and impossible to understand maze of regulations with which they must comply. The inevitable consequence of this vagueness will be a steady broadening of the Commission's interference with Internet speech as its regulatory reach expands through advisory opinions and future rulemakings. Meanwhile, many of those countless citizens who now enjoy the unfettered speech online will silence themselves rather than try to understand the complexities of federal election law in order to avoid the certain inconveniences and potential penalties that could result from violations made purely by mistake. Rather than embracing vagueness and uncertainty, the Center urges the Commission to narrow the focus of these rules and craft very specific, easy to understand guidelines that are carefully targeted at candidate and political committees.

V. SECTION 114.9: USE OF CORPORATE OR LABOR ORGANIZATION FACILITIES AND MEANS OF TRANSPORTATION

While the Center welcomes the Commission's apparent willingness to exempt an individual's independent or volunteer political activity on the Internet from being subject to the Federal Election Campaign Act, as amended by BCRA, *see* Proposed 11 C.F.R. §§ 100.94 & 100.155, 70 Fed. Reg. 10677-78, the Center is concerned that the safe harbor for this activity is exceptionally narrow when the individual uses corporate or labor organization computer equipment. Specifically, the Commission's proposal in Section 114.9 states that "stockholders and employees of [a] corporation" and the "officials, members, and employees of a labor organization" may only "make occasional, isolated, or incidental use of the facilities" of the corporation or labor organization. 70 Fed. Reg. at 16978-79. That rule goes on to define a safe harbor for "occasional isolated or incidental use" as "not exceed[ing] one hour per week or four hours per month." 11 C.F.R. §§ 114.9(a)(1)(ii) & (b)(1)(ii).

It almost goes without saying that publishing one's thoughts about the current political issue of the day will often take multiple hours to produce even a single short comment. It requires time to familiarize one's self with the subject, think about its implication, write down one's thoughts, and, finally edit and publish those ideas for the rest of the world to see on the Internet. Thus, just to take the world of blogging as an example, the safe harbor provided for users of corporate and labor organization computers, even if on their own time, is obviously insufficient to permit any regular or periodic publishing. In other words, while the Commission has proposed an exemption for an uncompensated volunteer Internet activity, that exemption is illusory for anyone who intends to engage in that activity at their place of business if it is a corporation or labor organization. This is especially hard to understand since those employers already have their own bottom line incentives to make sure their employees are working, rather than volunteering for someone else, while on the job. Moreover, this is yet another example of the Commission discouraging or restricting political speech and association

for no good reason. The Center suggests that the Commission dramatically increase the amount of time allowed under the corporate and labor organization safe harbor to address this concern.

VI. CONCLUSION

In general, the Center's fundamental warning about and objection to the proposed rules is that they threaten the unique ability of the Internet to provide a virtual public forum for Americans to exercise their core First Amendment rights in the political and electoral process. While the Commission is to be applauded for attempting to limit the reach of these proposed regulations so that Americans can enjoy the full breadth of their free speech and association rights, the rules as they stand now still raise more questions than they answer and would chill substantial amounts of political discussion and debate that should be encouraged rather than regulated. For this reason, the Center's primary and continuing recommendation with respect to any regulation of "Internet Communications" is that the Commission exercise extraordinary restraint and exacting care, ensuring always to err on the side of more speech and less regulation. To do otherwise puts our most important constitutional freedoms and democratic values at risk.

I thank the Commission for the opportunity to submit these comments, and I would welcome the opportunity to discuss these issues at the public hearings on June 28-29, 2005.

Respectfully submitted,

Reid Alan Cox
General Counsel
Center for Individual Freedom
113 S. Columbus Street
Suite 310
Alexandria, VA 22314
(703) 535-5836