



Comments of OMB Watch on Proposed Rules  
Governing Internet Communications

*"the most participatory form of mass speech yet developed"*<sup>1</sup>

OMB Watch is the operating name of Focus Watch, Inc., a nonprofit corporation organized and operating under section 501(3) of the Internal Revenue Code. OMB Watch's goal is to promote government accountability and citizen participation in public issues and decision-making. In the course of its work, OMB Watch has become increasingly convinced of the importance of the Internet to achieving these objectives. The advent of the Internet has altered for the better the relationship between the people and their government. The Internet is empowering ordinary citizens, providing them with tools to hold government accountable.

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<sup>1</sup> *ACLU v. Reno*, 521 U.S. 844, 863 (1997).

OMB Watch has a narrow and a more general interest in this rulemaking. Its narrow interest is to try to prevent any regulation that might impede its own use of the Internet in furthering its mission. Its overriding interest, however, is to promote the Internet as vehicle for civic participation. Last year's election saw a marked increase in civic engagement fostered by the Internet. Nonpartisan nonprofits showed renewed interest and energy for educating and mobilizing voters.<sup>2</sup> This development should be applauded and nurtured. It should not be an excuse for greater government intervention. The obvious benefits that the public derived from a largely unregulated Internet should not be lost to the speculative harms that might be offered to justify new regulation.

It has become clear that many of the underlying premises of campaign finance regulation do not hold on the Internet. OMB Watch's own use of the Internet demonstrates well the inadequacy of these assumptions as a justification for regulation. A core justification for regulation is the widely accepted link between money and influence in politics. As OMB Watch has learned, influence over the Internet is more a product of persuasiveness and allegiance than it is of money. Open access forecloses dominance by the well situated or by the wealthy. Measured only by its budget, OMB Watch is a small, seemingly inconsequential organization. The Internet immeasurably increases its ability to compete in the marketplace of policy ideas. The fact that the Internet is largely unregulated reduces compliance costs and allows ordinary citizens to organize and participate in the political debate on essentially the same footing as well funded special interest groups. That has been OMB Watch's experience.

Although OMB Watch does not intervene in elections, it believes that access and parity on the Internet were evident in last year's elections. Individuals and groups were able

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<sup>2</sup> One website operated by OMB Watch, *NPAAction.org*, provided tools to assist nonprofits with voter education and get-out-the-vote efforts. OMB Watch saw heavy traffic on this site.

to take advantage of open access and low entry costs to participate in campaigns across the country. Vast amount of information related to the election was exchanged over the Internet. Meetings were organized. Contributions were collected. Issues and candidates were debated. Virtual political communities were created. Political competition over the Internet was fierce but success was more a product of the power of one's argument than the size of one's wallet. Given OMB Watch's commitment to fostering civic participation, it welcomed this development as the Commission should.

Ordinary people participate in politics over the Internet with little expectation that what they are doing may be subject to government regulation<sup>3</sup>. OMB Watch strongly encourages the Commission not to upset this expectation by imposing regulation on communications over the Internet. The Commission should avoid imposing even seemingly innocuous regulation on the Internet communication. For example, the Commission in this rulemaking proposes requiring disclaimers on unsolicited e-mail. To enforce the proposed rule the Commission will regularly need to determine whether the e-mails sent were substantially similar, were to addresses purchased from a third party and exceeded 500 pieces. The definition of unsolicited is so narrow that it can be easily circumvented. At the same time, any investigation prompted by a complaint will necessarily be intrusive and chilling. The proposed regulation accomplishes little but inserts government regulation into a medium where the freedom of expression is being most fully realized.

Campaign finance regulation also assumes that there is a widely accepted understanding of who qualifies as a member of the fourth estate and enjoys the broad exemption from regulation granted to the press. As the Commission suggests in this

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<sup>3</sup> The one exception to this general expectation is fundraising, which the Commission should continue to regulate regardless of the medium it occurs because of the potential for fraud and violation of core provisions of the Federal Election Campaign Act.

rulemaking, that assumption is open to question when applied to the Internet. OMB Watch, for example, operates a website over which it exercises editorial control, publishes news and commentary. It has never sought the shelter of the press exemption but if did, it is not clear why it would not qualify. The same question could be asked with respect to portals such as AOL or for that matter to search engines such as Google. The standards that the Commission might apply to determine what entities qualify as press entities on the Internet are unclear. OMB Watch cannot imagine the contours of a satisfactory test.

The issue that has got the most attention is regulation of blogs<sup>4</sup>. The Commission seeks comment in this rulemaking on whether bloggers should be entitled to the press exemption. Specifically the Commission asks whether the exemption should be limited to press entities that finance operations with subscriptions or advertising revenue. There is no satisfactory answer to either question. Some traditional press outlets, for example, the *Christian Science Monitor* and the *Washington Times* are not self-supporting and require regular financial support from their owners. It would be ironic to tie the press exemption to receipt of payments from sources like advertisers and corporate subscribers that are otherwise prohibited from contributing in federal elections.

The business models for blogs are almost as varied as the number of blogs. It is unclear how basing regulation on a blogger's business model would advance any legitimate government objective. Would the *Election Law* blog maintained by Professor Hasen, which reports daily on election law developments, not be entitled to the press exemption because Professor Hasen's business model, if it exists at all, is different from that of the *New York Times*? Again one must wonder what the legal justification would be for extending less

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<sup>4</sup> For the record, at its various Websites, OMB Watch maintains and moderates blogs on issues of concern to it.

protection to someone who publishes as a public service without compensation than to, say, the *Drudge Report* or *Salon*.

It is futile to attempt to shoehorn blogs or more generally the Internet into the existing press exemption. Certainly the basis for an exemption cannot be the particular software, such as blogging software, used to publish. To stretch the existing press exemption shoe to fit the big foot of Internet publishing will render the press exemption meaningless. The Commission should forego such an effort and instead treat the Internet as the unique medium that it is. It should craft an exemption that frees anyone who wants to publish over the Internet from Commission regulation. Any attempt to categorize bloggers based on a business model or an existing classification in Commission regulation will prove unsatisfactory. Whether a blogger is a foreign national or a government contractor should be of no regulatory interest. Later in these comments a better approach than using an overstretched press exemption is offered for Commission consideration.

Another assumption of existing campaign finance regulation that does not hold over the Internet is that the source, the publisher and the audience are easily distinguished. Existing regulation limits the ability of any person to republish a candidate's campaign materials. It is unclear, however, what would constitute a republication over the Internet. If OMB Watch were to publish or link to a policy paper published on a candidate's website, is that a republication for the purpose of the regulation? If OMB Watch provides an electronic forum on its website to allow the public to debate policy issues, is OMB Watch responsible if some of the participants advocate for the election or defeat of a clearly identified candidate? If OMB Watch posts video of a candidate debate or a candidate's responses to policy questions, is OMB Watch transgressing any Commission regulation? The answer to all these questions should be no. Again the unique architecture of the Internet and the freedom that is embodied there argue against regulation.

This rulemaking was initiated in response to the decision in *Shays v. Federal Election Commission*. The district court found that the Commission had not adequately explained why communications over the Internet should not be considered a form of general public political advertising. The reason is that most communication over the Internet does not fall neatly into the category of advertising. For example, the Commission asks whether a candidate's payments to a blogger should preclude the blogger from qualifying for the press exemption. The underlying assumption appears to be that if the blogger does not qualify for the press exemption that postings on his or her blog would be advertising that would need to carry a disclaimer. This strikes us as wrongheaded. The freewheeling exchanges that characterize most blogs do not resemble advertising as it commonly understood. In the traditional press, the line between advertising and news and commentary is well demarcated. Over the Internet the line is either blurred or does not exist. Treating blogging as advertising creates more regulatory conundrums than it solves.

The same would hold true if the Commission included Internet communication generally under the definition of public communication. The Commission would be attempting to regulate activity beyond its capacity to enforce with standards that in practice will turn out to be arbitrary and of no discernible public benefit.

To encourage rather than discourage political use of the Internet, the Commission should exempt the costs of establishing, operating and maintaining a website and the cost of e-mailing from the definition of contribution and expenditure. Taking this approach has many benefits. It would allow people full use of the Internet to engage in politics without fear that their activity would trigger any registration or reporting obligation. This exemption would reflect the open access and low entry costs that characterize Internet speech. Essentially by valuing a person or group's own Internet activity at zero frees the Commission from having to making distinctions between Internet users. At the same time, it would leave

unaffected payments made for banner or other forms of Internet advertising on other people's websites. It would rescue the Commission from having to wrestle with the extremely difficult issues that arise when the government attempts to bring order to the open marketplace of ideas that is the Internet.

The Supreme Court in *ACLU v. Reno* accorded speech over the Internet the highest level of protection. The Court did so because it recognized that the Internet held the promise of freeing individuals from historic, economic and social restraints on civic participation. This insight by the Court should provide direction to the Commission in this rulemaking. This rulemaking challenges the Commission to abandon its customary role of regulating campaign activity and to assume the role of promoting participation. The Commission could interpret the law to impose greater restraints on Internet political activity. The wiser choice is for the Commission to step back and to allow the Internet to flourish as a public square where all are invited and all can be heard.