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May 15, 2000

Lawrence Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
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*Timely Comments
On AOR 2000-09*

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
MAY 15 12 02 PM '00

Re: *The Voter.com Request for Advisory Opinion*
(Advisory Opinion Request 2000-9)

Dear Mr. Noble:

Grassroots.com respectfully submits these comments in response to the Voter.com Request for Advisory Opinion ("AOR"), filed May 5, 2000 with the Federal Election Commission.

Grassroots was founded in September 1999. It is a non-partisan media and technologies company that is creating the Internet's premier political action destination—a website containing rich media and everyday communication-collaboration tools. Grassroots is constantly seeking to reconnect all Americans with their political system in an open, non-partisan online community. As part of that effort, Grassroots recently acquired the Democracy Network ("DNet")—an online project created by the League of Women Voters Education Fund (the "League") and the Center for Governmental Studies ("CGS"). The DNet and Grassroots websites offer free information and public service to all candidates and voters.

Introduction

Grassroots is deeply committed to the Internet's ability to engage citizens in democracy and therefore urges the Commission not to retreat from its Opinions that have promoted the Internet's vast potential to provide all voters with access to nonpartisan voter information. More importantly, Grassroots, despite being a for-profit enterprise, is deeply committed to the mission of providing this type of information free of charge through DNet. Charging candidates, of course, could be a significant deterrent to ensuring that all candidates, particularly candidates with limited resources, have the opportunity to be included in these type of nonpartisan voter-information settings.

DNet allows all federal, state and local candidates in races covered, on a nonpartisan basis and at no cost, to post their own unedited information on its site—including contact information, positions on issues, rebuttals to other candidates, biographical information, and endorsements. Thus, it does not charge for its content, but rather derives revenues from its advertising, and the sale of tools and services to candidates, citizens, and organizations of all sizes through the Grassroots website.

Voter.com, by contrast, has chosen a business model that derives its revenues from selling “dedicated space on its website for preset, standardized prices at a commercially reasonable rate to federal, state and local candidates and issue organizations.” AOR at 1. Voter.com’s business model, making individuals and organizations pay for links,¹ would be disastrous if imposed on the rest of the Internet political community. The use of links is central to the power of the Internet. The provision of links to other information content providers (including the political parties and candidates themselves, and extending out throughout the World Wide Web to all other sources linked to those sites) is the most efficient and effective way for its users to obtain accurate and complete information available on races and candidates. It also enables users to view candidate websites and make a personal decision to interact directly with a candidate’s campaign—a result which, if offered equally to all candidates on a nonpartisan basis, is a public good which should be exempt from the Act’s definition of “expenditure,” pursuant to the Commission’s reasoning in Advisory Opinion 1999-25.

There is another difficulty with Voter.com’s business model for the rest of the Internet political community. Political participants prior to the Internet were largely parties, candidates, and well-organized groups of persons, all at least passingly familiar with the federal election laws and FEC reporting obligations. Internet political participants, by contrast, tend to include large numbers of individuals, private non-profit entities, governmental agencies, and small newsletter publishers who are completely unaware that federal election law may reach their activity. For all of these reasons, Grassroots urges the FEC to recognize the importance of leaving nonpartisan activity on the Internet unburdened by federal election law requirements, to the greatest extent possible.

Summary

Section I seeks to put Voter.com’s AOR in its proper context (A) as an attempt to move for reconsideration of Advisory Opinions issued to other entities (reconsideration can only be

¹ In its AOR (at 7), Voter.com states:

To avoid any potential concerns that such links would constitute a ‘thing of value’ for purposes of the Act which could be interpreted to constitute illegal in-kind corporate contributions to federal candidates by virtues of their participation in the site, Voter.com determined that it should not provide the dedicated space (*hence, the links*) free of charge to federal candidates. (Emphasis added.)

sought by the original requestor, within 30 days); (B) as a request for an FEC Opinion concerning the activities of others (FEC rules require that an Advisory Opinion Request concern one's own activity); and (C) as an improper attempt to use the power of the federal government to force other Internet entities to adopt Voter.com's own unique business model of charging candidates to reprint their statements, rather than the model adopted by virtually all other Internet entities of providing such information as a public service on a nonpartisan basis.

Section II explains that Advisory Opinion 1999-24 ("Election Zone"), Advisory Opinion 1999-25 ("DNet"), and other recent Advisory Opinions were correctly decided and sufficiently clear to answer Voter.com's inquiries without further advice.

I.

THE REQUEST SHOULD BE DISMISSED AS NOT MEETING COMMISSION REQUIREMENTS FOR AN ADVISORY OPINION

A. Voter.Com's AOR Is More Properly Viewed As A Request For Reconsideration And As Such Is Not Permitted By Commission Rules

Voter.Com's comments in this AOR are not novel, but rather appear to be a reargument of its unsuccessful comments dated November 9, 1999 to the Commission staff's Draft Advisory Opinion 1999-24 ("EZone") (copy attached). The fact that Voter.com understands fully the holdings of the Commission's previous Opinions is proven on the Commission's own public record by Comments submitted by Voter.com in the Notice of Inquiry 1999-24, where Voter.com's attorney stated that "EZone sought and was granted the Commission's permission to offer its dedicated space to federal candidates free of charge, notwithstanding the fact that it is a corporate entity." Comments at page 2.²

Clearly, Voter.com does not agree with the Commission's legal reasoning and conclusions in Advisory Opinions 1999-24 and 1999-25. Under the Commission's regulations, however, it may not ask the Commission to reconsider these Opinions. 11 C.F.R. § 112.6 (stating that only the requestor of the opinion *within 30 days* of receipt of the opinion, or a Commissioner who voted with the majority that originally approved the opinion, may request reconsideration). Accordingly, Voter.com does not have standing to request reconsideration of those Opinions, although that is plainly what its request does, poorly disguised as an inquiry into its own conduct. In fact, what the AOR asks is whether Voter.com is correct in interpreting the

² They also are extraordinarily similar to a complaint against Grassroots.com and DNet, which was publicly released when filed by the National Legal and Policy Center ("NLPC"). The complainant has stated to the press that DNet's republication of candidate statements, and its linkage to candidates, both done on a nonpartisan basis approved by the Commission in Advisory Opinions 1999-24 and 1999-25, are illegal corporate contributions of "something of value" to federal candidates. It would of course be improper for Voter.com to seek to interfere in an enforcement matter by making a collateral filing through the Advisory Opinion process, and the Commission should not allow such activity.

federal election laws to prohibit activity explicitly approved by the Commission in those Advisory Opinions: a request for reconsideration by any name.

B. Voter.Com Is Not Requesting An Advisory Opinion Concerning Its Own Activities, But Rather Those Of Other Entities

The DNet Opinion was issued on October 29, 1999 and the EZone Opinion was issued on November 15, 1999. Voter.com has proceeded with its business activities for the subsequent seven months, before suddenly seeking “confirmation” that the provision of certain nonpartisan Internet activities without charge (such as is done by its for-profit business competitors, and by numerous not for profit web sites, but NOT by Voter.com) is impermissible. Thus, this AOR patently does not relate to Voter.com’s own activities, but rather is an attempt to have the Commission regulate others. This is not a permissible use of the Advisory Opinion process.

Voter.com could fairly have asked whether it meets the Commission’s standard for non-partisan activity, relied on in Advisory Opinion 1999-25. It has apparently adopted a “bi-partisan” rather than a “non-partisan” approach to content provision. Its AOR speaks only of the two major parties, and it does not commit to providing content from all candidates who meet objective standards adopted in advance, as the Commission has required for nonpartisan sites. However, guidance on this issue is not sought in the AOR. Nor does Voter.com state that it actually seeks to provide content from candidates, and links, without charge, although that is the ostensible subject of the AOR. If Voter.com is satisfied that its current activities (charging candidates for links and disseminating their views) comply with FEC rulings, and if it does not intend to provide these services free to candidates, then it has no basis for asking for an Advisory Opinion.

C. The Voter.Com Advisory Opinion Request Is A Bald Attempt To Use The Power Of The Federal Government To Force Others To Adopt A Questionable Business Model

It is also possible to view the Voter.com AOR merely as an attempt to use a government agency as a weapon to force all other entities in the Internet political community to adopt Voter.com’s approach to content provision. The standard for the Internet political community, whether non profit or for profit, has been and continues to be to provide as much quality content as possible so as to attract the greatest number of visitors. As Patrick Cahill, Voter.com’s Manager of Corporate Development, notes in an attachment to the Request, those sites with the greatest number of visitors (“eyeballs” in the Internet world) become the most successful. Thus, Internet sites, just like newspapers and broadcast news programs, seek to place the most interesting and diverse free content on their pages or programs, in the hopes of attracting readers or viewers. The existence of those readers or viewers, in the case of a for-profit entity, enable the publication or station to charge for advertising.

This is the model that has been adopted by the vast majority of programmers in the Internet political community: maximum content, to attract visitors to the site. The fact that Voter.com has adopted a different model—charging persons to place content on its site, with the

resulting potential for severely limiting content—should be perfectly acceptable as a matter of federal election laws (provided the terms of business do not favor one candidate or party over others). However, the FEC should not allow its Advisory Opinion process to be manipulated to impose this content model on the rest of the Internet. There may or may not be room for both models in the business marketplace, but there certainly is room for both as a matter of election law.

II.

THE FEC'S RECENT ADVISORY OPINIONS ARE CORRECTLY DECIDED

The continued experimentation, innovation, and growth of the Internet as a tool to enhance democratic participation depends in large measure on individuals and entities being able to provide political and candidate information on a nonpartisan basis without fear of having such coverage being deemed an illegal campaign contribution or expenditure. Accordingly, Grassroots opposes Voter.com's efforts to reverse or revisit the Commission's Advisory Opinions that have confirmed the Internet's potential to dramatically improve America's political knowledge and involvement. Specifically, regarding nonpartisan communication over the Internet, over the past year the Commission has consistently allowed significant maximum freedom for all individuals and entities to participate in political and democratic activities via the Internet.

Advisory Opinion 1999-7 was the Commission's first statement concerning nonpartisan presentation of candidates over the Internet. The Secretary of State of Minnesota asked whether her Office's official web page may include links to candidates' web pages. The Commission concluded that providing links in a nonpartisan manner to all ballot qualified candidates running for office in Minnesota is not an impermissible contribution of "something of value" by the State to the federal candidates. The Commission noted that the Secretary of State's website encourages participation in the political process on a neutral basis and is therefore nonpartisan activity "designed to encourage individuals to vote or to register to vote."

In Advisory Opinion 1999-25, DNet requested confirmation from the FEC that its provision of candidate-related information on a nonpartisan basis through its Internet web site was permissible. DNet also sought confirmation that it could link to candidate and party web sites, provide voting and voter registration information, enable substantive discussions and online debates in which candidates directly participate, and provide biographical and other information provided by candidates. The FEC confirmed that DNet's activities are permissible, but declined to use a mixture of the available exemptions from the regulations (such as the voter guide, press, or candidate debate exemptions) as recommended by the staff draft of the Advisory Opinion. Instead, the Commission decided, based on the statute itself (rather than the regulations), that the entire web site as designed by DNet was not an "expenditure in connection with a federal election" (and therefore not covered by the federal election laws) because it was "nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. § 431(9)(B)(ii).

Although DNet was a not for profit entity, the DNet Opinion was not expressly limited to nonprofit organizations. The Commission's next Advisory Opinion on the subject, 1999-24 (EZone), confirmed that the "nonpartisan" exemption applicable to DNet's activity would apply equally to the same activity by a for profit corporation. It was this result that Voter.com opposed at the time in Comments filed with the Commission.

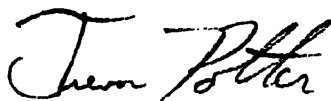
Advisory Opinion 1999-17 provided more guidance regarding political activity over the Internet based on a request from the George W. Bush for President campaign. Pertinent to Voter.com's AOR, the Commission found that whether providing a link to a campaign would constitute a contribution or not turned on whether "*the owner of the web page providing the link would normally charge for the providing of such a link.*" (Emphasis added.) Thus, only if a website normally charged for the provision of similar links—but in a particular instance chose to charge less than the normal amount (or nothing at all)—would the provision of a link be treated as a campaign contribution. The Commission had to reach the question of whether a link had "value" in the Bush AOR because the link was not being provided to all candidates on a nonpartisan basis, as in DNet and EZone.

These Advisory Opinions clearly state the Commission's interpretation of the "nonpartisan" provision of the statute (2 U.S.C. § 431(9)(B)(ii)), which exempts nonpartisan, candidate related, information-rich Internet activity from campaign finance regulation. More importantly, these Opinions (and public statements by individual Commissioners) show that the FEC is seeking not to inhibit the communicative power of the Internet, but rather to "unleash its promise," a position which is entirely in keeping with general federal policy towards the Internet.

Conclusion

Voter.com's AOR raises the specter of a return to the confusing and overly regulatory environment which existed prior to Advisory Opinions 1999-7, 1999-24, and 1999-25. It should be self-evident that public access to political speech would be threatened if nonpartisan Internet sites were forced to obtain payment from candidates, political parties, and issue organizations before providing their links and reprinting their speech.

Sincerely yours,



Trevor Potter
Kirk L. Jowers
Counsel to Grassroots.com

Attachment

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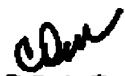
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TO: Federal Election Commission
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RE: COMMENTS ON DRAFT ADVISORY OPINION 1999-24

FROM: Cleta Mitchell, Esq. 
Sullivan & Mitchell P.L.L.C.
Counsel for Voter.com, Inc.

DATE: November 9, 1999

This is in response to the Draft Advisory Opinion 1999-24 to Mr. Ryan C. Arney, President and CEO, Election Zone LLC, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the operation of a web site to provide a means of communication from candidates to voters on a nonpartisan basis ("Draft"). According to the Draft, the requesting entity, "Ezone, is a limited liability company ("LLC") organized under Colorado law in 1999, and will be taxed as a partnership, further described as "a non-partisan company, not affiliated with any political candidate, political party, political action committee or advocacy group." Ezone, according to the Draft, "seeks to expand democracy" through the Internet by operating its website, "ElectionZone.com," and that the website will serve as a channel for communication between voters and candidates. EZone will invite participation from candidates in Federal and non-Federal races.'

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Our firm serves as Counsel to a similar, for-profit Delaware corporation, Voter.com, Inc., which today launched its political portal web site. Voter.com has provides non-partisan, bi-partisan or balanced partisan content for the purpose of creating a political or voting-related portal. This shall not include sites intended to influence the outcome of an election of a candidate for public office.

However, many of the products and services offered by Voter.com to federal candidates are identical or similar to those described by EZone in its Advisory Opinion Request.

Our concern(s) about the Draft are essentially based on the fact that the Commission does not define clearly how the products and services to be offered by E Zone escape the Commission's regulations governing a corporation's providing of free goods and services to federal candidate(s).

Is the Commission concluding that a corporation may provide goods, services or products free of charge to federal candidates so long as such goods and services are provided to as many candidates as will accept them and if such services and products are offered on a broad, non-partisan basis? That generic finding does not appear in the Commission's regulations.

Is it the Commission's intent to generally supercede for internet political activities the specific activities allowed by the regulations at 11 C.F.R. § 114.4 regarding communications to the general public by a corporation or labor union regarding federal candidates? The Commission has historically been quite specific in regulating the permissible activities in which a corporation or labor union can engage without violating the prohibition on corporate expenditures / contributions to a federal candidate. This Draft seems to take a major step in another direction.

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Such a step may be welcome, but the regulated community is entitled to a more thorough statement of intent and general applicability ~~most notably~~ through a rulemaking governing political portal web sites.

Our concern is that the Commission could well be in the process of creating multiple types of political portal web sites which are subject to different types of regulation depending on the type of services or products which are offered or the type of clients, customers, affiliates or participants involved in the particular political portal.

For instance, Voter.com, Inc. offers to the general public (users) the opportunity to design their own 'voter profiles' which will then match the user's views on issues with those of participating candidates, issue organizations and political parties.

The participating candidates, issue organizations and others will be those who pay for space within the portal site, providing content about themselves and their views on issues. In addition, participants will have the opportunity to post streaming video and audio of their campaign commercials, solicit contributions to their campaigns, and many other activities, products and services of their own choosing and design. All services and products will be offered to as many candidates, state and federal, as may wish to participate but participation will be offered on a paid basis in order to assure that the corporation, Voter.com, Inc., does not run afoul of the prohibitions against corporate contributions contained in 2 U.S.C. §441b.

Additionally, the Voter.com, Inc. site involves, as mentioned above, the participation of issue organizations, political parties and others who have expertise on particular issues, and who score legislative voting records and candidate responses to issue questionnaires.

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This is included in an attempt to better educate citizens on the positions and voting records of public officials and candidates – beyond that which the candidates themselves may wish to tell the public and which may be at odds with the candidates' descriptions about themselves on particular issues.

According to the Draft, it would appear that the inclusion of these particular services, products and clients would or could render Voter.com, Inc.'s activities to be 'expenditures' despite the Commission's seeming to allow very similar activities to be provided at no cost to candidates by E Zone. Then again, it may be that the additional goods, services and products offered to federal candidate by a for-profit corporation (Voter.com, Inc.) would NOT be considered expenditures or in-kind contributions under the proposed Draft. But it is unclear.

That, of course, is the problem with the Draft. This piecemeal approach strikes us as inappropriate.

In light of the Commission's recent Notice of Intent to Rulemake for the purpose of receiving input and information about political activities involving the internet, the whole area of political portal websites is one of the subjects which our firm intends to pose for consideration, discussion and review by the Commission. While it is not one of areas contained within the Notice, it is pertinent to this Draft and to many entities becoming increasingly involved in internet activities related to federal campaigns.

The question is, what are the types of permissible activities in which a political portal web site may engage without running afoul of the prohibition on corporate expenditures? A number of issues arise from that basic question, which we plan to posit more fully to the Commission for discussion and possible rule-making or clarification during this inquiry period, such as:

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What is the Commission's definition of a political portal web site?

**Is there a difference in what can be offered by a political portal web site as opposed to a single web site or internet services vendor?
.....**

What products can or can't be offered free of charge?

What is the industry standard for such determination?

What principles will be applied by the Commission in reviewing the activities of political portal web sites for purposes of defining expenditures and/or contributions via the internet?

Where and how are those principles defined?

What other participants besides federal candidates, if any, can be allowed to participate within the same political portal web site?

What specific activities of a political portal web site would be considered expenditures?

What specific activities of a political portal web site are NOT expenditures?

Who can offer such services and products?

Who can't?

What definitions exist or should exist for such products, services and activities?

What types of e-commerce activities related to federal campaigns are permissible via the internet?

Is there a difference between or among political portal web sites, internet political activities, internet vendors (providing goods and services to federal candidates via the internet) and how does the Commission intend to sort out and articulate those differences?

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There are a myriad of questions regarding political portal web sites which have not been thoroughly considered by the Commission to date. We would urge the Commission to proceed very cautiously in this regard and would further ~~intend to inadvertently establish.~~ intend to inadvertently establish.

In our opinion, it may make sense for the Commission to defer the Draft and other requests for Advisory Opinions related specifically to political portal web sites until the various issues and questions can be fully identified as a whole and considered in context.

Voter.com, Inc. can surely argue that its services and products, because they are offered to all candidates on a non-partisan basis, should not be considered 'expenditures' under the Act, if E Zone is granted such permission.

Our firm would be hesitant to advise any corporate entity that it could provide a full range of possible internet services and products free of charge to federal candidates. In fact, we would be similarly reluctant to so advise our non-profit corporate clients.

We are more than happy to work with the Commission to help identify the issues and concerns referenced in this letter.

It is our belief that as of this date, however, it is highly premature for the Commission to continue to parcel out narrow Advisory Opinions that may only raise more questions than are answered in the opinions.

In sum, we would urge the Commission NOT to approve the Draft of AO 1999-24 as submitted by the General Counsel's office without further review, discussion, debate and input from the regulated community.

We do appreciate the opportunity to submit these comments prior to the consideration and issuance of AO 1999-24.

Please contact us if we can be of further assistance.