

FAIR POLITICAL PRACTICES COMMISSION

Internet Political Activity and the Political Reform Act

Subcommittee on Internet Political Activity

08/11/2010



REPORT FROM SUBCOMMITTEE ON INTERNET POLITICAL ACTIVITY

EXECUTIVE SUMMARY

In October 2009 the Fair Political Practices Commission created a Subcommittee on Internet Political Activity and named Commissioners Elizabeth Garrett and Timothy A Hodson as its members. The charge of the Subcommittee was to build upon the work of the Bipartisan California Commission on Internet Political Practices, in particular, on the Bipartisan Commission's December 2003 Report. The Subcommittee was not to replicate the Bipartisan Commission's work but rather to gather information and solicit input regarding the current role of electronic communication in California political campaigns. This information would be used to determine whether technological developments require changes in the Political Reform Act (PRA) and Commission regulations intended to protect the right of Californians to be fully informed of the sources of campaign contributions, expenditures, and political advertising.

The Subcommittee held two hearings that included more than a dozen campaign consultants, Internet experts, public interest advocates, representatives of the Federal Election Commission (FEC) and others. Based on this testimony and extensive research conducted by the Commission staff, the Subcommittee formulated four basic principles to guide further regulatory action and statutory change:

- Full and truthful disclosure of campaign activity, including Internet activity, by candidates and political committees, is required to ensure the integrity of democratic institutions and the electoral process.
- If regulations require disclosure with respect to paid political communications that are printed or broadcast, then similar paid communications that are disseminated over the Internet should be accompanied by similar disclosures.
- The Commission should avoid regulating volunteer, grassroots political activity and ensure to the extent possible that the Internet remains a flourishing source of robust and vibrant political discourse among citizens.
- The Commission should broadly interpret the words of the Political Reform Act to allow regulation consistent with these principles and the objectives of the PRA. Legislative change should be written to allow flexibility in future regulatory responses to the use of technology that is evolving rapidly and in unanticipated ways.

These principles, in turn, informed the development of specific recommendations for regulatory and statutory changes set forth in Section IV of this report. The Subcommittee's recommendations are also based on the successful work of the Federal Election Commission in this area. The Subcommittee's recommendations include:

1. Paid advertising on the Internet should be subject to the same disclosure requirements applied to advertising that is printed or broadcast. In addition to legislative changes to the

Political Reform Act necessary to achieve this objective, the following regulatory changes should be pursued by the Commission:

- To ensure that a committee sending a mass campaign email is appropriately identified as a committee sending a mass mailing, the Commission should interpret Section 84305 to require such identification and make clarifying changes to Regulation 18435 as soon as possible.
 - Regulations applying to paid advertisements should be extended, to the greatest extent possible, to paid advertisements on the Internet. To this end, the Commission should revisit its earlier determination in Regulation 18450.1 that the advertisement disclosure provisions of the PRA do not apply to any “web-based or Internet-based communication.”
2. Uncompensated political activity should be exempted from regulation to the extent possible, and the Commission should adopt a clear regulatory exemption applying to individuals acting without the consent or knowledge of a political committee, and who do not trigger the \$1,000 expenditure threshold.
 - The Commission should clarify that an individual’s sending or forwarding emails, linking to a web site, or establishing and maintaining a website does not result in a contribution or expenditure under the PRA. Moreover, these activities are of only nominal value, and the value of the equipment used in such activities is not considered in determining the amount of political expenditures. This safe harbor should also clarify that an individual’s uncompensated online political activity (that does also not include political expenditures of \$1,000 or more) undertaken on a work computer will not trigger regulation.
 - Uncompensated bloggers should not be regulated at this time but considered to be engaged in activity falling under this exemption. If bloggers or others are communicating through electronic means and receiving compensation from campaigns and political committees, their activity will be revealed through expenditure reports filed by those entities. We acknowledge that witnesses testified that it is good practice for bloggers and others who are compensated by campaigns to reveal that information on their websites, and we applaud that practice. If in the future the right of Californians to full and truthful campaign disclosure is significantly compromised by undisclosed compensated bloggers, the Commission should revisit this decision and consider an appropriate regulatory or legislative response.
 3. The Commission staff should produce information in formats easy for citizens to use and understand (*e.g.*, FAQ sheets) so that people will understand that uncompensated political activity does not generally trigger regulation, and they will continue to participate actively in the public realm.
 4. The PRA’s media exemption should be interpreted to include online media sources, whether or not they also participate in print or broadcast media.

5. The Commission should support the interoperability of online campaign reporting systems at the state and local levels.
6. As stated by the 2003 Bipartisan Commission report, regulatory activity should not inhibit online voter education efforts.
7. Agencies such as the Commission and the Secretary of State should continue to make information available in a timely way on their websites and provide that information in formats that are easily accessible by Californians.
8. Agencies and the Legislature should encourage, and perhaps require, electronic filing of all campaign information required to be disclosed to allow easier and timely access.

REPORT FROM SUBCOMMITTEE ON INTERNET POLITICAL ACTIVITY

I. Charge to the Subcommittee

The Fair Political Practices Commission created a Subcommittee on Internet Political Activity to continue and update the important work done by the Bipartisan California Commission on Internet Political Practices. That Bipartisan Commission conducted a study called for by Assembly Bill No. 2720 (Chpt 975, Stats of 2000 [Olberg]) and issued its report in December 2003.

Working with the 2003 recommendations in mind and the current charge from the Fair Political Practices Commission, the Subcommittee on Internet Political Activity gathered information about the present state of online campaigning and the myriad ways campaigns currently use the Internet. While the scope, pervasiveness, sophistication, and influence of the Internet has evolved since the Bipartisan Commission produced its report, the validity and importance of the basic purposes of the Political Reform Act (PRA) and the right of Californians to be fully informed of the sources of campaign contributions, expenditures, and political advertising have remained unchanged. Indeed, as the world becomes more complex and the quantity of information more voluminous, the principles that inspired the PRA are even more crucial to a well-functioning democracy.

Traditional campaign media like slate mailers, direct mail flyers, and certain advertisements – all of which are currently required by the PRA to include disclosure of their source and financing – are increasingly replaced or accompanied by email, tweets, websites and YouTube videos. The Fair Political Practices Commission has the responsibility to evaluate and, if necessary and consistent with its statutory authority, adopt appropriate responses to new political realities. The Commission does not have authority to regulate the content of political communications, nor does it have authority to regulate the actions of individuals or groups, including those using the Internet for political purposes, so long as those individuals or groups do not raise or expend sufficient funds to trigger reporting obligations under the Political Reform Act.

Because the Internet is inexpensive and accessible, it has become an important means of communicating and a significant source of political information. Recognizing this, the Bipartisan Commission recommended that the Fair Political Practices Commission provide ground rules to encourage communication while using appropriate disclosure rules to provide the people of California the information they need to make informed political decisions. To continue the work of the Bipartisan Commission, the Subcommittee was charged with the following:

- Describe current federal laws and regulations regarding disclosure of sources and financing of Internet political activity as well as similar actions in other states;
- Solicit information and advice from scholars, legal experts, political activists and practitioners regarding political activity on the Internet, the need, if any, for state action to ensure full disclosure of the sources and financing of paid Internet political communications, and, if state action is necessary and desirable, the nature and shape of such action;
- Solicit information and advice from scholars, legal experts, political activists and practitioners regarding how well the Commission and other state agencies are making use of the Internet to enhance the public accessibility of campaign finance, lobbyist and other information;

- Assess the authority of the Commission and other state agencies to take action in this area;
- Evaluate current Commission regulations, advice letters, etc. pertaining to Internet political activity; and
- Assess the current status of the Bipartisan California Commission on Internet Political Activity's recommendations for regulatory and statutory, including any actions taken in response to those recommendations.

To that end, Commissioners Garrett and Hodson, the members of the Subcommittee, conducted two public hearings during which participants presented testimony regarding the current state of the law, practical uses for electronic media, and suggestions for the Commission in regulating in this arena. The two hearings, one in the Commission offices in Sacramento and the other at the USC Gould School of Law in Los Angeles, afforded the Subcommittee the opportunity to hear from scholars, bloggers, and campaign experts regarding the need for regulation and the appropriate form of any regulatory response. Commissioner Lynn Montgomery attended both hearings.

The Subcommittee received valuable testimony from the following individuals: Jennie Bowser, *National Conference of State Legislatures*; Campaign Consultants Steve Maviglio, *Forza Communications*, Bryan Merica, *ID Media*, and Julia Rosen, *The Courage Campaign*; Kim Alexander, *California Voter Foundation*; Derek Cressman, *Common Cause*; Tiffany Mok, *ACLU*; Tracy Westen, *Center for Governmental Studies*; Jon Fleischman, *The Flashreport*; public officials Ellen Weintraub, *Federal Election Commissioner*, and Tony Miller, *Chief, Political Reform Division, California Secretary of State*; and Professors Jeffrey Cole, *USC Center for the Digital Future*, Geoffrey Cowan, *USC Annenberg School for Communication and Journalism*, Richard Hasen, *Loyola Law School*, and Barbara O'Connor, *California State University, Sacramento*.

II. Brief Description of Hearings¹

Through the Internet Subcommittee hearings, the Commission examined the growing use of the Internet and new media in political campaigns. The panelists offered insight into the ways in which professionals and others interact with various media and offered suggestions regarding areas that could benefit from Commission guidance as well as those that are, in the panelists' perspective, better left unregulated at this time.

A. Sacramento Hearing

At the Sacramento hearing, the subcommittee received testimony from online editors, bloggers, and academics. Each offered a perspective of the role of the Internet and other electronic media in campaigns. California is not the first state to see a trend toward campaigning through electronic media, although it is among those leading the charge to determine the best way to provide the public with information while not impeding the momentum that new methods of

¹ To the extent that the Subcommittee received written testimony from the hearing participants, links to that testimony can be found here: <http://www.fppc.ca.gov/subcommittee/index.php?view=agenda-20100317> (March 17, Sacramento Hearing) and here: <http://www.fppc.ca.gov/subcommittee/index.php?view=agenda-20100324> (March 24, Los Angeles Hearing).

communication provide for increased discussion and analysis of politics and elections among a wide array of participants.

Jennie Bowser of the National Conference of State Legislatures reported that, of the states that are investigating this area, several have adopted the federal standards for regulating, which she characterized as using a “light-touch” approach, *i.e.*, regulating paid political advertising placed on the Internet by registered political committees, but leaving Internet political communication by uncompensated individuals unregulated. A handful of states are actively engaged in reviewing their applicable laws – whether on their own initiative or in response to lawsuits. Wisconsin, for example, is currently drafting guidelines for electronic communications, while Florida, which requires disclaimers on all ads, is enacting laws in response to litigation challenging disclosure on Google ads, which are limited with respect to the number of characters and size.²

The Subcommittee also heard from a panel of campaign consultants, bloggers, and editors regarding their thoughts on the future of “new media” and appropriate regulation under the PRA. The panelists explained that we are witnessing the inception of electronic media as a major means of political communication. Fast-paced developments in this arena, which promise to empower ordinary voters and expand the scope of political discourse, could be hindered by too much regulation too soon. Allowing the newer media to follow their current trajectory as campaigns and citizens innovate and experiment will encourage a more organic evolution of online campaigning.

All the panelists expressed particular concern about the appropriate regulation of communication on social media sites like Twitter and Facebook. These forums for discussion are not only relatively new to political networking and campaigning, but are changing faster than even savvy Internet-users can keep up with. To regulate these outlets as they are today might create loopholes tomorrow as the platforms and technologies change. Additionally, this new media differs from a traditional campaign communications in several ways. Notably, many key aspects of a traditional political communication are controlled by the campaign; however, unrelated third parties can change the content or structure of an original web-based or other electronic communication, often with no coordination or notice to the candidate or campaign committee. For example, if a campaign were to create a section on Facebook to meet disclosure objectives, Facebook administrators could unilaterally make changes to the site that affect how the disclosure is displayed or viewed. The page itself might be eliminated, depending on the changes Facebook adopts. In addition, the campaign often does not control the length of the messages allowed on the online medium. Nor does it control the manner in which users interface with the message. In a similar vein, the Internet poses a unique opportunity for anyone to easily, cheaply, and quickly disseminate information. A video that portrays and promotes a candidate might be seen by thousands of people before the candidate knows of its existence.

For print advertisements, the PRA requires in most circumstances that certain disclosures be printed on the front of the advertisement or on the envelope if it is a mailed piece. In contrast, under current statutory language and Commission interpretation, campaign webpages, mass emails, and Internet advertisements in most situations are not subject to the same rules. Most panelists agreed that paid campaign advertisements, whether on a website or search-based (such as a Google

² Florida very recently passed a law (that should be signed by the Governor during the summer of 2010) called the “Technology in Elections Act” that exempts certain messages from disclosure on their face, if the messages meet certain standards. Florida law requires that certain communications (those that are limited in space but are paid political advertisements) include the brief message “pd. pol. ad.” or include a link to a website with more information. See <http://laws.flrules.org/2010/167> for text of law.

ad), should include appropriate disclosure, and the expenditures for such political communication should be reported. There is no one best way to disclose information, but options include “roll-over” disclosure, links to the candidate’s FPPC number or website, or on-ad disclosure.

One challenge in considering disclosure for the variety of electronic media is space. Some of the best available options for online advertising allow a party to buy ad-space that has the potential to appear in front of significant numbers of people, but the ads are often subject to strict character limits. Similarly, social media (such as Twitter) and text messages (via cellular phone) have character limits making traditional methods of disclosure impractical. Some panelists recommended that online advertisements should link users to a website that contains full disclosure, rather than require lists of major donors, identification numbers, or other identifiers on the advertisement itself. That link would provide all the required disclosures, but those disclosures would not be visible directly on an advertisement and therefore not use precious characters. Many panelists counseled that regulation should be flexible to accommodate changes in the nature of online communication and developments in technology that could facilitate effective disclosure.

In addition to questions concerning whether these new methods of communication lend themselves to traditional approaches for disclosure, panelists and Subcommittee members expressed concerns about the \$1,000 committee-qualification threshold. Several cautioned that a threshold at this level might create a trap for those who might not consider that their activities would fall under the ambit of the PRA. For example, a group of college students could spend more than \$1,000 producing a YouTube video supporting a particular candidate (even if the cost of the equipment was not included in the calculation) and never suspect their activity would trigger coverage under the PRA. This concern is relevant not just to Internet communications, but to all political activities undertaken by people who are not typical political actors. The grassroots nature of online communication, however, broadens the potential “trap for the unwary.”

B. Los Angeles Hearing

The overall tenor of the hearing held at the University of Southern California Gould School of Law was that the Subcommittee should tread lightly on rapidly changing technologies.

Commissioner Ellen Weintraub of the Federal Election Commission reported on the FEC’s rulemaking process completed in 2006. The FEC aimed to appropriately address then-unregulated spending in online campaigning without over-regulating broad swaths of online political speech by bloggers and online media sources, among others. As it moved through the process, the FEC found that taking a moderate approach to regulating Internet communications would best facilitate open discourse and encourage robust political speech. Additionally, the FEC had no interest in regulating unpaid bloggers who express their personal opinions and are not working for a campaign.

The FEC’s examination of political communication over the Internet culminated in its adoption of new Internet regulations effective May 12, 2006.³ The FEC Internet communications rules strike a delicate balance, permitting unfettered political speech on the Internet and email by individuals, but requiring appropriate disclaimers on messages paid for and sent by political campaigns. The federal rulemaking was a thoughtful, bipartisan approach to regulating political activity on the Internet which was praised by all interested parties, including campaign

³ *Internet Communications*, Federal Election Commission notice regarding final rules, 71 Federal Register 18589 (5/12/2006) (codified at 11 CFR Parts 100, 110, and 114), *available at*: http://www.fec.gov/law/cfr/ej_compilation/2006/notice_2006-8.pdf (last visited July 1, 2010).

representatives, communications and technology representatives, election lawyers, and public interest groups. The several years experience with implementation has been viewed as positive.

Tony Miller, then-Chief of the Political Reform Division at the California Secretary of State's office, warned against setting traps for the unwary but also stressed that voters deserve accurate, accessible information. Campaigns and candidates should be accountable for the information they disseminate by posting links to their websites or their identification numbers. Increased disclosure on advertisements and emails, no matter how many people receive an email, is necessary to ensure accountability. He also supported a uniform, centralized system for online filing that is easy to use for both campaigns and the public.

Most agreed that it is difficult to regulate a moving target. Innovation is not predictable and could be stifled by moving too quickly and regulating too strictly. The Internet has changed the way that people digest information: people demand accurate information quickly and they want to be able to discover, with the click of a mouse and tap of a finger on an iPad, if a person is disseminating false information. Reports within 24 hours, disclosure or links to disclosure, and avenues to determine who is behind a message (and whether that person is being paid) were among the top priorities identified.

Most panelists agreed that the worst-case scenario would be to chill speech that was previously unfettered. Jon Fleischman of the FlashReport⁴ stated that "requiring someone to give even one character of their 140 character 'Tweets' is a burden on speech."⁵ In a comment letter, Tech America expressed the same concern, saying that to require disclosure on small spaces (Google ads, Tweets, etc.) would be unconstitutional as a prior restraint on speech and content-based regulation. That position is not the mainstream view, however, nor is it seen as the best understanding of the jurisprudence, as Professor Richard Hasen, one of the nation's leading election law scholars, explained in his testimony. The majority of panelists encouraged a balanced approach that provides disclosure but does not interfere unnecessarily with the platform used to communicate.

Suggestions by panelists to address some of the concerns raised at the hearings included increasing the expenditure thresholds that trigger the PRA's provisions regulating a "committee"; encouraging self-regulation among participants; not allowing any apparent limitation of a particular platform to discourage appropriate and careful regulation; avoiding regulating "Internet hobbyists"; and encouraging a campaign finance disclosure system that is interoperable across jurisdictions. To do this, the panelists recommended that the Commission focus on the role that money plays in campaigns and providing voters information about the influence of money. Moreover, clear goals should be articulated to guide regulatory action now and in the future and to encourage appropriate

⁴ See <http://www.flashreport.com>.

⁵ This concern, however, may overstate the case. People who post on Twitter regularly offer shortened hyperlinks to direct a reader to a full story or source. Examples include this recent post from the Sacramento Bee's "Capitol Alert": [CapitolAlert](http://bit.ly/b36cc2) Karen Bass clears path to Congress with primary win <http://bit.ly/b36cc2>. Additionally, Jerry Brown's user name on Twitter includes his committee name ("Jerry Brown 2010") and clicking on that committee name brings one to his Twitter home page. His homepage lists his name, location, web address, and brief biographical information. Many "Tweeters" are able to produce their messages in less than the 140 characters allowed by creating a journalistic headline and providing a link for more information. While the full disclosures of top donors, etc., would not be practical, there are reasonable ways to provide recipients of Tweets with relevant disclosure.

legislative change to update the PRA to better accomplish its purposes and ensure integrity of the electoral process.

III. Principles to Guide Policy Making in the Context of Electronic Political Communication

The Subcommittee believes it is important to lay out broad principles that should guide the legislative and regulatory responses to the increasing use of the Internet and new technology by candidates and political campaigns. The pace of change in this arena of political communication is so rapid that any regulatory response will be a “work in progress”: it will require sensible implementation and enforcement, and new guidance will be required in the future. Principles can guide not only current regulatory responses, but also the appropriate responses in the future.

In summary, these principles are:

- A. Full and truthful disclosure of campaign activity, including Internet activity, by candidates and political committees is required to ensure the integrity of democratic institutions and the electoral process.
- B. If the PRA and regulations require disclosure on paid political communications that are printed or broadcast, then similar paid communications that are disseminated over the Internet should be accompanied by similar disclosures.
- C. The Commission should avoid regulating nonprofessional, grassroots political activity and ensure to the extent possible that the Internet remains a flourishing source of robust and vibrant political discourse among citizens.
- D. The Commission should broadly interpret the words of the Political Reform Act to allow regulation consistent with these principles and the objectives of the PRA. Legislative change should be written to allow flexibility in future regulatory responses to the use of technology that is evolving rapidly and in unanticipated ways.

Each of these is more fully explained below.

- A. Full and truthful disclosure of campaign activity, including Internet activity, by candidates and political committees is required to ensure the integrity of democratic institutions and the electoral process.

Just as with all campaign regulation, the state interests to be vindicated by regulation of Internet and other digital political communications are three-fold: to combat corruption and the appearance of corruption; to provide voters information about candidates and ballot measure campaigns and the sources of their funding; and to enforce contribution and other limits applicable to campaigns.

Those interests do not change when the method of communication changes, although the means of vindicating those interests should be tailored to the way in which communication occurs. The PRA regulates the communication of political campaigns by virtue of their participation in the political sphere and the PRA determines the confines of that sphere by looking at the amounts that an individual or group spends. The PRA regulates such communications in two ways:

- Qualification as a Committee. Section 82013 provides, in pertinent part, that a person becomes a committee subject to the PRA’s reporting requirements, when the person

makes independent expenditures totaling \$1,000 or more in a calendar year, or when a person receives contributions from others of \$1,000 or more for political purposes in a calendar year. An independent expenditure is a payment for an activity or communication that expressly advocates the election or defeat of a candidate or passage or defeat of a measure, and that is independent of the candidate or measure committee. (Section 82031.) Thus, if a person or group of persons spends \$1,000 or more and produces a communication that expressly advocates, the person (or group) and the communication are subject to regulation under the PRA.

- Required Disclosures on Communications. The PRA's *sender identification rules* require that a political committee sending a mass mailing put its committee name and address on the campaign mailer. (Section 84305.) Federal Communications Commission rules require political committees' ads, including candidates' ads that are broadcast on television or cable, to state who paid for the ad. The PRA's *advertisement disclosure provisions* require an advertisement for or against a ballot measure, or a broadcast or mass mailing ad paid for by an independent expenditure, to name the committee paying for the ad, state the economic or other special interest of the committee, and state the committee's top two \$50,000 donors.⁶ (Sections 84501-84510.) For independent expenditures, the PRA also requires that an advertisement supporting or opposing a candidate state that it was *not authorized by a candidate*.⁷ (Section 84506.5) Campaign robocalls are required by the PRA's *telephone identification rules* to announce who paid for or authorized the call. (Section 84310.)

The policies that justify the campaign disclosure described above apply just as well to campaign activity that occurs on the Internet. When a committee or candidate engages in campaigning, the public should know that the communication is being paid for *regardless* of the form that communication takes. In the current networked world, political communication by a regulated committee or candidate that occurs over the Internet is the functional equivalent of a broadcast ad, and an email is the functional equivalent of a mailer. The PRA regulates the communications based on the amount of money the group or individual spends. Once the \$1,000 threshold is met, the committee informs the public of its activities. In an age where information can be quickly and easily consumed by way of electronic media, the need to inform the public by effective disclosure in this context is even greater.

The PRA does *not* focus on the method of communication (*e.g.*, a print advertisement or an "electronic" advertisement on a website). Rather, the PRA focuses on the fact that a committee or candidate is paying for the communication. Further, the more fluid the boundaries among various forms of communication, the more the public expects to be informed in similar ways on different forums. Just as one is trained to scan the lines at the end of a television ad to find out who its major

⁶ The advertisement disclosure rules are additional, detailed disclosures that apply to ballot measure advertisements and independent expenditures, two situations in which it is especially difficult to determine who is speaking.

⁷ Legislation currently pending in the Senate, AB 1322 introduced by Assembly Member Huffman, would amend Section 84506.5 and require the following disclaimer for independent expenditures on candidates: "Notice of Independent Expenditure: This communication is neither approved nor authorized by any candidate or candidate-controlled committee. It is paid for by [committee name], a committee making independent expenditures. The donors to this committee are listed at [website address]."

donors are, one can also scan through Internet advertisements to determine whether a message is “Paid for” and by whom.

Most importantly, information must be available to voters so that they know which candidates and campaigns are behind paid political communication on the Internet and so they can hold political actors responsible. This is one of the most important policies implemented by the PRA: to provide information and ensure an informed public. It is no less important in the context of electronic communication than it is in the realm of broadcast or printed political advertisements.

B. If regulations require disclosure on paid political communications that are printed or broadcast, then similar paid communications that are disseminated over the Internet should be accompanied by similar disclosures.

Voters should not be misled or uninformed by candidates and campaigns about the source of information that campaigns distribute, whether in print, broadcast, or electronic media. Yet the different treatment accorded to new media has created significant and problematic gaps in the coverage of the PRA’s disclosure provisions. For example, at the hearings, panelists commented on negative “hit-piece” emails that were sent out to a large number of recipients, apparently by a political committee, but that contained no identification of the sender.

The method of disseminating paid political communication should not result in material differences in the information disclosed about the source of that communication. Federal election law and some states require a standard disclaimer stating the name of the political committee paying for or authorizing the material on all “public communications” sent by a campaign. In those jurisdictions, disclosure can be appropriately expanded by regulation to include new means of communication through regulatory action.

In contrast, the Political Reform Act’s disclaimer rules are dispersed and may be less comprehensive in coverage. The PRA’s disclaimer rules are found in the sender identification provisions for mailers (Section 84305), the advertisement disclosure rules for ballot measure ads and broadcast or mass-mailing ads paid for by independent expenditures (Sections 84501-84510), and telephone identification rules for campaign robocalls (Section 84310). For independent expenditures, the PRA also requires that an advertisement supporting or opposing a candidate state that it was not authorized by a candidate (Section 84506.5). Additionally, several sections of the PRA are not written with broad language that facilitates regulatory updating. For example, statutory provisions limit regulations on mailings based on how many “pieces” are sent, describe where on a “postcard” disclaimers should be printed, and describe that advertisements are subject to particular disclosure size and type rules when they are found in “a newspaper, magazine, or other print media.” (*See* 82041.5, 84305.5, and 84508.)

Because the PRA’s disclaimer rules are not comprehensive and somewhat rigidly formulated in ways that may not always allow application to new forms of political communication, it may be more difficult to extend them to new media than it may be in other states. Nevertheless, democratic accountability and electoral integrity require that paid advertisements on any medium be accompanied by disclosure. Thus, the Commission should interpret the PRA to allow regulation consistent with these principles and should strongly encourage legislative change to provide flexibility with respect to provisions that cannot be interpreted to apply to Internet and other electronic paid political communication. Such legislative change should be adopted as quickly as possible – and written as flexibly as possible – so that regulation can be promulgated rapidly and updated to account for changes in the future.

Regulation must also take account of the characteristics of each kind of communication, in particular, the character and size limitations of certain Internet ads or forms of communication. The disclosure required must not impede meaningful political communication within the confines of distinctive methods of electronic communication. In some cases, that will mean providing links or other mechanisms that allow interested citizens the ability to learn the source of information rather than disclosure on the face of the ad or the communication.

Regulations and statutes should be drafted in general terms that allow for compliance that changes as technology changes; that do not depend on particular structures of the Internet and social media that currently exist but will evolve over time; and that realistically account for limitations such as the number of characters or size of the ad while still ensuring that voters have access to information about political activity financed by candidates and campaigns. Regulations should set out clear objectives for disclosure applying to new methods of communication without being overly prescriptive based on current facets of the technology that will change quickly and often without the involvement of the communicators.

C. The Commission should avoid regulating volunteer, grassroots political activity and ensure to the extent possible that the Internet remains a flourishing source of robust and vibrant political discourse among citizens.

Californians should be free to engage in political debate and discussion without being ensnared by traps for the unwary that trigger regulation by the Commission. If activity on the Internet or through electronic means does not trigger existing requirements for coverage, people should continue to be free to express themselves and support campaigns for candidates and ballot measures, without worrying that they might be subject to disclosure requirements. There are clear rules regarding activity and expenditures that bring people and groups under the purview of the PRA; for example, only when independent political expenditures reach the \$1,000 level does the activity fall under the PRA. It is important, however, to assess the clear rules for coverage, particularly the level of the thresholds, to ensure that they are set at appropriate amounts to exempt most grassroots activity and so they adjust to accommodate for changes in the cost of living without further legislative action.

Because new technology is so widely used by people without knowledge of the structure of the PRA or sophisticated understanding of technical rules surrounding elections, regulations should be as clear as possible. Enforcement standards must be clearly articulated, and safe harbors should be expressly designed to protect speech by citizens. The Commission should provide material such as FAQ sheets to make clear that speech that is not communication paid for by or coordinated with candidates or campaigns generally is not subject to regulation.

D. The Commission should broadly interpret the words of the Political Reform Act to allow regulation consistent with these principles and the objectives of the PRA. Legislative change should be written to allow flexibility in future regulatory responses to the use of technology that is evolving rapidly and in unanticipated ways.

Some provisions of the PRA use language that was commonly and easily understood, and perhaps not ambiguous, at the time it was written. As technology has advanced, however, words like “mail” have developed multiple meanings. For example, “mail” could refer to a piece of paper or object that is sent through the United States Postal Service, or it could be a message relayed electronically as email. Because the PRA is a remedial statute designed to protect the integrity of the democratic process and ensure that voters have relevant information about the paid political

messages they receive, the Commission should reconsider past interpretations of statutory language that can reasonably accommodate new interpretations based on current political realities and that are consistent with the purposes of the PRA.

To continue with the example of “mail,” prior interpretations of statutory language referring to “mail” that limit the word to traditional mail should be replaced with interpretations that encompass email, and similar forms of electronic communication that are the functional equivalent of mail in the 1970s. The result of exempting electronic mail from regulations is that any campaign can send a misleading “hit” piece by email to hundreds of people without ever disclosing the source. The reader would not know if a concerned citizen or a rival campaign provided the information.⁸ This is only one example of statutory interpretation that should change as the reality of politics is transformed by technological change.

In addition, we acknowledge that regulation of a “moving target” is difficult, posing the risk of obsolescence as technology changes, allowing circumvention because of imperfect foresight, or threatening to stifle innovation that will enhance discourse. Therefore regulations in this area should be reviewed periodically to ensure that they offer sufficient guidance for compliance and enforcement, while also providing flexibility for changing technology.

Where the language of the PRA does not allow for regulation consistent with these principles, even with broad interpretation, the Commission should recommend that the Legislature amend the PRA to provide regulatory flexibility to respond to evolving methods of campaigning.

IV. Recommendations

Guided by the general principles articulated above and with the success of the FEC’s approach in mind, the Subcommittee recommends the following regulatory and statutory changes:

A. Paid advertising on the Internet should be subject to the same disclosure requirements applied to advertising that is printed or broadcast.

Federal rules require a website set up by a FEC-registered political committee to be accompanied by disclosure stating who paid for or authorized the communication. In California, standard disclaimer rules for campaign mailers or certain broadcast advertisements require a sentence giving the name of the political committee that sent or paid for the message. Just as in the federal context and like state rules for print or certain broadcast communications, state candidate and campaign websites should be accompanied by disclosure of the source of the communication; mass emails sent by candidates or campaigns should include such disclosure; the functional equivalent of slate mail activity taking place online, through email, websites or other electronic means, should contain the required slate mail disclosures.

Some paid advertising does not allow adequate room for disclaimers required by current law (*e.g.*, some forms of electronic advertisements, twitter communication, etc.). In those cases, candidates and committees must provide information in ways that are practicable given the limitations of the medium (*e.g.*, on the website that is accessed when one clicks on an ad; on pages providing information about the source of tweets; on appropriate places in social networking sites;

⁸ For example, as staff presented at the Sacramento hearing, emails attacking an Attorney General candidate were completely anonymous and appeared to be sent from “Nancy Drew” and “The Hardy Boys.” Without disclosure, the recipients had no way of determining the true source.

through information that pops up when the mouse is rolled over word or phrase). The Maryland Board of Elections recently passed new electronic media rules to provide just such flexibility. The Maryland regulations provide that if electronic media advertisements are too small (*e.g.*, a micro bar, a button ad, a paid text advertisement that is 200 characters or less in length, or a small paid graphic or picture link) to contain an “authority line,” the ads will comply with the required disclosure of the political committee authorizing the message if the ad allows the viewer to click on the electronic media advertisement and the user is taken to a landing or home page that prominently displays the authority line information.⁹

The need to accommodate communication in limited spaces and with limited text must be balanced against the right of the public to be informed. Regulations should set forth principles to guide disclosure; offer safe harbors; and allow flexibility appropriate for this evolving method of communication. We recommend that Commission staff draft regulations to achieve this level of disclosure on paid electronic political communication and identify any legislative change to the PRA required to fully achieve this objective. Language that the Commission has previously adopted addressing electronic media can be found in Regulation 18540 discussing voluntary expenditure ceilings. This language is already inclusive and serves as a good example for other regulations.

Specifically, with regard to regulatory change, we recommend:

- To ensure that a committee sending a mass campaign email is appropriately identified as a committee sending a mass mailing, the Commission should interpret Section 84305 to require such identification, and make clarifying changes to Regulation 18435 as soon as possible.
- Regulations applying to paid advertisements on ballot measures and independent expenditures should be extended, where possible, to paid advertisements on the Internet. To this end, the Commission should revisit its earlier determination in Regulation 18450.1 that the advertisement disclosure provisions of the PRA do not apply to any “web-based or Internet-based communication.”¹⁰
- The Commission should amend recordkeeping Regulation 18401(a)(9) to require that when a political committee sends mass emails, information such as IP addresses, the email address of the sender, and the recipient email lists are included within the list of records that a committee must keep.
- A person linking to a candidate’s website does not, by itself, constitute coordination with the campaign under the independent expenditure statute, Section 82031. Thus, Regulation 18225.7(d) should be amended to add that an “expenditure is not made at the behest of a candidate or committee merely when” a person creates a link to a candidate or committee’s website.

⁹ For text of the Maryland regulations, *see* Chapter 7, Maryland Code of Regulations, Section 33.13.07 (2010), available at: http://www.elections.state.md.us/campaign_finance/documents/Authority_Line_social_media_07212010.pdf (last visited, July 27, 2010).

¹⁰ This would also have the effect of rescinding several advice letters saying the Commission does not regulate email or Internet.

- The following regulatory changes should be adopted to clarify and expand their reach. In some of these cases, legislative change in the underlying statutory language to broaden the reach of the PRA would also be helpful and would underscore the Commission’s authority to adapt regulation to account for modern realities of political communication.
 - Regulation 18215 regarding contributions (update language to be more inclusive of new media);
 - Regulation 18225 regarding expenditures (broaden limitation of “print or broadcast”);
 - Regulation 18420 addressing reporting contributions of state or local agencies (broaden limiting language of “broadcast” and other references to advertising by “television, radio, or newspaper campaigns” to include electronic advertisements);
 - Regulations 18450.4 and 18450.5 regarding ad disclosure (delete limitations to broadcast, video, and print); and
 - Regulation 18531.7 discussing payments for communication to members (language is fairly broad, but could explicitly include electronic mail, etc.).

Specifically, with regard to legislative changes, we recommend:

- Disclaimers be standardized and clarified. Adopt legislation enacting a new disclaimer rule requiring all public communications issued by a political campaign or committee to state basic information such as a committee’s name, website address, if any, FPPC #, and that the communication was paid for by the committee. Permit a shortened version of the disclaimer on certain Internet or text message communications, or alternative means of compliance that allow voters to easily access the information through links or other mechanisms. For independent expenditures, the new disclaimer rule could require messages to state that they were not authorized by *or coordinated with* a candidate.
- Expand advertising disclosure statutes to include all advertisements, whether in print, broadcast, or other electronic form. (*See* Section 84501-84510.) These Sections, if read broadly, include online advertisements that are paid for by independent expenditure or that support or oppose a ballot measure, but the statutory language could be expanded to delete limiting disjunctive phrases such as “if printed or broadcast.” The language should be corrected through legislative change to include electronic communication and a “catch-all” provision that allows regulatory flexibility as technology develops.
- The PRA be updated to include disclosure on electronic forums with limited space. An online advertisement that is limited in space cannot practicably place the disclosures required in Sections 84503, 84504, and 84506; a change to allow a shortened disclosure, such as a web address or similar techniques, would facilitate compliance.

- Adopt legislative changes as applied to online social networking sites (and other electronic messages with limited character lengths) including:
 - When a political committee or candidate (that has already qualified as such under the PRA) establishes a social media account and engages in communications that support or oppose a candidate or ballot measure, the committee or candidate must disclose on the “bio page,” account landing site or similar means that the communications have been paid for by a committee or candidate. Such language should be generally and flexibly drafted to allow the Commission to update and adjust regulation as technology advances.
 - If a campaign is using the media account for campaign updates, policy commentary, or to support or oppose a candidate or committee, the “user name” or similar identifier must adequately identify the name of the candidate or committee.
 - Posts made by the committee must contain a link to an external website that will state, in detail, the funders of that committee and more information about the committee itself, or adopt another mechanism allowed by technology that achieves the same objective. General language should allow the Commission to adapt this mandate as technology changes and to provide for compliance in different ways that still vindicate the disclosure objectives of the PRA.
- Areas in the PRA that could be updated so that all types of applicable communications are included:
 - Advertising Disclosure (Sections 84502, 84506, 84507, 84508, 84511)
 - Contribution limits (Sections 85310, 85312)
 - Mass Mailing (82041.5, 84305)
 - Slate Mailing (Section 84305.5)

B. Regulation should not apply directly to political blogs, but the activity of paid bloggers should be disclosed through expenditure reports required under current regulations.

Like the FEC regulation, we recommend that bloggers not be required by the PRA to disclose in their blogs that they are paid by a political campaign. We note that many testified that this is the appropriate practice by bloggers, and we acknowledge that many do provide such information to readers. Further regulation is not necessary at this time because payments by candidates and campaigns to bloggers or others communicating on the Internet will be revealed by expenditure reports filed by campaigns.

However, we recommend that the Commission consider requiring that expenditure reports contain more detail of payments for activity on the Internet, including payments to bloggers, so that these payments can be more easily discerned.¹¹ The brief description on the expenditure report

¹¹ Section 84211(k) requires expenditure reports to include a “brief description of the consideration for which each expenditure was made” for each person to whom an expenditure over \$100 was made. The

would include the name of the recipient of payment for electronic communication, the purpose of the payment, and the name of website or other similar address where the communication (blog, tweet, Facebook page, etc.) appears.

We do not recommend requiring disclosure in blogs at this time because of our concern about stifling this robust and growing source of political discourse. We considered an alternative that would require bloggers compensated by a campaign committee to disclose on their blogs that they have material connections to a campaign. This was based, in part, on a recent Federal Trade Commission guideline requiring bloggers endorsing products to disclose their financial connections to the manufacturers of the product. Requiring disclosure of paid bloggers would also be analogous to Section 84511 of the PRA mandating disclosure of paid spokespersons in ballot measure ads. We recommend instead that the Commission continue to monitor the development of activity on weblogs and assess whether disclosure through expenditure reports is sufficient to ensure voters know when a blogger is part of a political campaign and when she is acting as an interested citizen expressing her political views. If the Commission determines that the failure to require more disclosure of compensated political bloggers has undermined the right of the public to be informed about the course of political communication, the issue of appropriate regulation should be revisited.

C. Uncompensated political activity should be exempted from regulation to the greatest extent possible.

Because the Commission wishes to foster open communication and involvement in political processes, the value of uncompensated Internet political activity by individuals should not be included in the definitions of “contribution” or “expenditure.”¹² As the FEC observed in its final rules, “[A] communication through one’s own website is analogous to a communication made from a soapbox in a public square.”¹³ In addition, when an uncompensated individual links to a political website or communication, this activity is not sufficient to create coordination with a campaign or to trigger regulation under the PRA and should be considered to be of nominal value.

Specifically, with respect to regulatory change:

- As the law currently reads, the “\$1,000 committee threshold” is the statutory attempt to exempt grassroots political activity by ordinary citizens. Here, that threshold should be applied to protect the typical uncompensated blogger or grassroots organizer using electronic communications who simply wants to express herself and engage her fellow Californians in discourse. This threshold should be applied so that it operates to allow robust, unregulated political activity on the Internet and elsewhere.
- The Commission should adopt, through regulation, a clear exemption that applies to individuals who act without the consent or knowledge of a political committee and

new regulation would expand on the “brief description” to include compensation for blogging or other Internet updates.

¹² The PRA recognizes this, provided that an individual’s volunteer personal services do not constitute a contribution. (Section 82015(g); Regulation 18215(c)(2).)

¹³ *Internet Communications*, Federal Election Commission notice regarding final rules, 71 Federal Register 18589, at 18594 (*see supra* at fn 3).

who do not trigger the \$1,000 expenditure threshold. This will clarify that an individual's sending or forwarding emails, linking to a website, or establishing and maintaining a website does not result in a contribution or expenditure under the PRA. Sending emails about political campaigns, when done by individuals who are uncompensated, should not trigger regulation and should be considered of nominal value. Similarly, when an uncompensated individual creates a link to a campaign website, that activity should not trigger regulation and should be considered of nominal value. Finally, the value of computers and other equipment owned by the producer of such speech should not be considered in determining the amount of political expenditures made with respect to a communication.

- This safe harbor should clarify that an individual's uncompensated online political activity undertaken on a work computer will not trigger regulation. This rule would, of course, be subject to an employer's rules on personal use of computers, and statutes prohibiting government employees' use of public funds for political purposes.
- The Commission staff should also produce information in formats easy for citizens to use and comprehend, for example FAQ sheets, so that people will understand that uncompensated political activity does not generally trigger regulation and will continue to participate robustly in the public realm. The effect of the \$1,000 committee threshold should be clearly explained and well publicized.

Although the value of uncompensated political activity aimed at Internet communication should not be considered in computing "contributions" or "expenditures," and the value of computers and other equipment owned by the producer of such speech should not be considered, there will be circumstances in which an individual may spend more than \$1,000 in out-of-pocket expenses (*e.g.*, payments to vendors, payments for talent, studio rental time, etc.) to produce a political communication disseminated over the Internet (*e.g.*, YouTube videos). These expenditures will cause the individual to make sufficient expenditures to be considered a political committee under the PRA. Although we do not think that such expenditures for an Internet communication should be treated differently from those for a communication disseminated in print or via broadcast, we do note that the thresholds that trigger regulation generally may be too low for statewide races. We therefore recommend that the Commission assess current thresholds for committee qualification in Section 82013 and recommend to the Legislature new amounts that would be indexed for inflation.

D. The PRA's media exemption should be interpreted to include online media sources, whether or not they also participate in print or broadcast media.

Through regulatory revision, the Commission should include online media in the exemptions from the definitions of "contribution" and "expenditure" for payments made by a newspaper, magazine or television station on a news story, commentary or editorial. (Regulations 18215(c)(8) and 18225(b)(4).) Importantly, however, blogging should not automatically be considered to trigger the media exemption unless the blog meets the standards for being considered part of the media. It is not necessary to expand the media exemption to include uncompensated bloggers who are unaffiliated with campaigns because they are protected by the exemption recommended above for volunteer uncompensated political communication.

V. Related Internet Technology Issues.

A. We support interoperability of online campaign reporting systems at the state and local levels.

Tony Miller of the Secretary of State's office, the 2003 Bipartisan Commission report, and several witnesses at the Internet Subcommittee hearings, as well as at various hearings of the full Commission, have recommended a collaborative system of reporting. State and local filers should use a "standard filing format," a uniform or standard technical format that committees or candidates can use to file campaign finance statements electronically. If state and local filers all use a standard filing format, and all submit electronic filings with the Secretary of State, campaign finance data can be integrated and displayed in a way that allows the public to use the information easily. The Legislature should provide appropriate funding to the Secretary of State to permit upgrades to or a rebuilding of the existing state electronic disclosure system (Cal-Access); moreover, the system should be designed so it integrates local campaign filings. All steps – regulatory and legislative – necessary to achieve an integrated, easy-to-use online system of campaign finance disclosure for all political activity in the state should be taken immediately.

We thus recommend adoption of legislation that would create uniform online electronic filing system for campaign finance information of state and local candidates and committees in California. In addition, the legislation should mandate the creation of a searchable, accessible integrated webpage for the public to access information about the sources of funding for California candidates and ballot measures. The legislation should vest authority to create and oversee this system with the Secretary of State and should provide sufficient funding.

B. We agree with the recommendation in the 2003 Bipartisan Commission report that regulatory activity should not inhibit online voter education efforts.

The Commission has issued numerous advice letters making clear that online candidate information sites do not count as a "contribution" to a candidate because they are public forums open to various candidates, under Regulation 18215(c)(10). It is now time to clarify that principle through regulation, even though no evidence was presented that such activity is being chilled. As more Californians vote at home, the information they receive from the Internet – from government sources, nonprofit groups and other sources of voter information – can provide valuable cues and information at the time they cast their ballot, as well as serve as sources of information before they go to the polls.

C. Agencies such as the Commission and the Secretary of State should continue to make information available on their websites in formats that are easily accessible by Californians.

D. Agencies and the Legislature should encourage, and perhaps require, electronic filing of all campaign information required to be disclosed to allow easier and timely access.

The amount of campaign finance information being electronically disclosed is steadily growing. State electronic filing started in 1997 with the Online Disclosure Act. (*See* Sections 84600-84612.) The threshold for state committees required to file electronically started at \$100,000 of activity, decreased to \$50,000, and most recently, decreased to \$25,000 in the Huber bill, effective January 2011 (*See* Assembly Bill 1181 (2010), amending Section 84605.) In addition, a growing number of cities and counties are posting campaign finance information online. The Commission and all other relevant entities should take steps to facilitate and hasten the path toward comprehensive online filing.