



FEDERAL ELECTION COMMISSION  
 WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 )  
 Citizens for Responsibility and )  
 Ethics in Washington; and ) MUR 6795  
 )  
 Melanie Sloan )

**CONCURRING STATEMENT OF REASONS OF  
 COMMISSIONERS LEE E. GOODMAN AND CAROLINE C. HUNTER**

In this case, the Commission voted unanimously to dismiss a complaint that Citizens for Responsibility and Ethics in Washington (“CREW”), a 501(c)(3) nonprofit corporation, violated the law by failing to report independent expenditures and failing to register and report as a political committee. While we concur in the result, we write separately to highlight two issues of broader significance. First, we are concerned that the Commission has further undermined the protection afforded by the 2006 Internet freedom rule by declining (by a vote of three to three) to exempt from regulation CREW’s free political posts on its own website. Second, the Commission’s substantive and procedural scope of review in this case, and that of the Commission’s Office of General Counsel (“OGC”), was properly limited, illustrating a standard that must apply to all other organizations facing political committee determinations.

**I. Background**

The Complaint charged that CREW failed to report independent expenditures and is a political committee whose major purpose is attacking the character and fitness for office of candidates in the throes of their elections. As evidence of CREW’s predominant electoral purpose, the Complaint asserted that beginning on September 15, 2010, CREW launched a “public relations campaign” opposing the election of Senate candidate Christine O’Donnell.<sup>1</sup> The Complaint alleged that CREW’s campaign opposing O’Donnell was part of a new project targeting at least fourteen federal candidates whom CREW identified as “crooked.”<sup>2</sup>

<sup>1</sup> MUR 6795 (CREW), Complaint at 4.

<sup>2</sup> *Id.* at 9 & Ex. I. While the Complaint focuses solely on CREW’s expenditure of resources in connection with the O’Donnell communications, the information it provides indicates that CREW expended resources to make similar communications about at least thirteen other candidates in the 2010 election. *Id.* at Exs. B, D, E, I. For example, CREW represented on its website that “[s]ince 2005, CREW has highlighted the most egregious violators of the public trust in our annual *Most Corrupt Members of Congress* report. Now, CREW has begun a list of

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Concurring Statement of Reasons in MUR 6795 (CREW)

According to the Complaint, CREW violated the Act by failing to report several communications to the Commission as independent expenditures.<sup>3</sup> These communications are summarized in turn:

- Four press releases CREW posted to its own website that challenged the character and fitness for office of Christine O'Donnell and other federal candidates;<sup>4</sup>
- Four television appearances by CREW's executive director Melanie Sloan (two on *Anderson Cooper 360°*, one on *The Ed Show*, and one on *The Situation Room with Wolf Blitzer*) during which Sloan again challenged O'Donnell's character and fitness for office;<sup>5</sup>
- A news article appearing in the *The News Journal* discussing complaints CREW filed with the Commission and the U.S. Attorney's Office against O'Donnell;<sup>6</sup>
- An article appearing on Ricochet.com containing clips of Sloan's quotes from other sources in which Sloan asserted that O'Donnell was "clearly a criminal" and that while "Democrats don't agree on much . . . , [they] should agree on one point: thieves belong in jail not the United States Senate."<sup>7</sup>

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*Crooked Candidates* to shine the spotlight on some of the lousy politicians vying for federal office in 2010." *Id.* at Ex. I.

<sup>3</sup> *Id.* at 5.

<sup>4</sup> MUR 6795 (CREW), Complaint at Exs. B, D, E, I. The September 15, 2010 press release (Exhibit B) stated, in pertinent part:

11 of the most rotten candidates in America have survived primary season, and will be moving on to the general election. Today, [CREW] released an updated list of *Most Crooked Candidates* adding Delaware Republican Christine O'Donnell. The latest edition to the national wall of shame has been called everything from "a fraud" by her former campaign manager, to a "perennial candidate who can't get elected dog catcher" by the state Republican Party chair. . . . "The American People deserve better," concluded Ms. Sloan. "We shouldn't have crooks, liars or frauds on the ballot and we shouldn't have to worry that the Most Corrupt Candidates will someday grow up to become the Most Corrupt Members of Congress."

*Id.*, Ex. B. The September 20, 2010 press release (Exhibit E) referred to O'Donnell as a "criminal" and a "crook," accused her of several crimes, and concluded that "thieves belong in jail not in the United States Senate." *Id.*, Ex. E.

<sup>5</sup> *Id.* at Exs. C-1 to C-8.

<sup>6</sup> *Id.* at Ex. F.

<sup>7</sup> *Id.* at Ex. G.

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- An op-ed authored by Sloan that appeared in *The News Journal* in which Sloan declared that the position of U.S. Senator “demands integrity and honesty” but that “Ms. O’Donnell has demonstrated neither;”<sup>8</sup>
- A mass email soliciting donations to CREW that referred to O’Donnell as a “crook” and concluded that “[t]he last thing the country needs is for one of today’s Crooked Candidates to grow up and become one of tomorrow’s Most Corrupt Members of Congress;”<sup>9</sup>
- A petition drive in which CREW collected over 3,000 signatures calling for a criminal investigation into O’Donnell’s financial activities;<sup>10</sup> and
- CREW’s 2010 Annual Report, which contains information relating to the complaints CREW filed against O’Donnell.<sup>11</sup>

The Complaint further alleged that CREW received contributions earmarked for political purposes and that CREW was required to report them pursuant to the disclosure rules governing political committees.<sup>12</sup> It also alleged that CREW “both received and directly spent more than \$5,000 on this campaign against Christine O’Donnell, under FEC regulations, including in Melanie Sloan’s time and salary with C.R.E.W., including its petition drive.”<sup>13</sup> CREW allegedly paid Sloan \$230,000 per year in 2010. Therefore, according to the Complaint, if Sloan spent at least 43.5 hours on CREW’s public relations campaign opposing O’Donnell’s election, the value of her time on the campaign exceeded \$5,000.<sup>14</sup>

<sup>8</sup> *Id.* at Ex. H.

<sup>9</sup> *Id.* at Ex. J. The solicitation continued: “Looking for ways to help CREW build a better Washington? . . . And, if possible, please donate so that we continue the work of building a better Washington.” *Id.* at Ex. J. The Complaint also alleges that CREW “engaged in substantially identical or similar communications by the use of regular mail (‘direct mail’) and through other means,” but it has not provided any such documents to the Commission. *Id.* at 15.

<sup>10</sup> *Id.* at 10-11 & Ex. K.

<sup>11</sup> *Id.* at Ex. K.

<sup>12</sup> *Id.* at 14-15.

<sup>13</sup> *Id.* at 12. The Complaint alleged CREW exceeded \$5,000 in resource expenditures even if one excluded Sloan’s news appearances and coverage.

<sup>14</sup> *Id.*; see also 2010 CREW IRS Form 990 at 7 (disclosing Sloan’s reportable compensation as \$228,949).

## II. The Commission's Failure to Apply the Internet Exemption Here Will Further Chill Online Political Speech

As a threshold basis for evaluating CREW's conduct, Commissioner Goodman proposed an alternative Factual and Legal Analysis in which the Commission would have analyzed CREW's right to post materials online under the Commission's 2006 Internet freedom rule without incurring the burdens of federal regulation.<sup>15</sup> The Internet freedom rule is a "broad exemption" from regulation.<sup>16</sup> Whenever an individual or a group engages in uncompensated "Internet activities," meaning "[s]ending or forwarding electronic messages . . . [or] any other form of communication distributed over the Internet," for the purpose of influencing a Federal election, neither their services nor their use of equipment or services to communicate over the Internet constitute "expenditures" under the Act, unless the communications are placed for a fee on another person or group's website.<sup>17</sup> The exemption thus "make[s] clear, appropriately so, that individuals [and groups] engaging in unfettered political discourse over the Internet using their own computer facilities . . . [are] not . . . subject to regulation under the campaign finance laws."<sup>18</sup>

The proposed Factual and Legal Analysis observed that CREW is a group whose uncompensated Internet activities fall squarely within the protection of the Commission's Internet freedom rule.<sup>19</sup> The press releases that the organization posted to its website and the mass email that it distributed clearly are "communication[s] distributed over the Internet" that constitute "Internet activities" under the regulation.<sup>20</sup> There has been no allegation that CREW was compensated by a third-party to post the press releases concerning Christine O'Donnell to its

<sup>15</sup> See Attachment A, Draft Factual & Legal Analysis (proposed by Commissioner Lee E. Goodman).

<sup>16</sup> *Internet Communications*, 71 Fed. Reg. 18,589, 18,603 (Apr. 12, 2006) (internal quotation marks omitted); see also *Internet Communications and Activity*, FEC Brochure at 1 (May 2006), available at <http://www.fec.gov/pages/brochures/internetcomm.pdf> ("An uncompensated individual or group of individuals may engage in Internet activities for the purpose of influencing a federal election without restriction. *The activity would not trigger any registration or reporting requirements with the FEC.*" (citing 11 C.F.R. § 100.155) (emphasis added)).

<sup>17</sup> See 11 C.F.R. § 100.155. Moreover, 11 C.F.R. § 100.94 exempts uncompensated Internet activity from the Act's definition of "contribution."

<sup>18</sup> *Supra* note 16.

<sup>19</sup> See, e.g., MUR-6729 (Checks & Balances for Economic Growth), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen (agreeing with the recommendation of the Commission's Office of General Counsel that the Internet exemption applied to an organization's politically themed videos posted for free on YouTube.com).

<sup>20</sup> 11 C.F.R. § 100.155(b). According to OGC, only three communications, exhibits B, J, and E, contained express advocacy and thus could be independent expenditures. See MUR 6795 (CREW), First General Counsel's Report at 5-6; MUR 6795 (CREW). The Commission ultimately concluded that "three of CREW's communications at issue in the Complaint might be considered to have expressly advocated the election or defeat of a clearly identified federal candidate, while the "remaining communications at issue in the Complaint may not contain express advocacy or were not available to the Commission." MUR 6795 (CREW), Factual & Legal Analysis at 4 n.21.

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website or to distribute the mass email soliciting donations to CREW. Likewise there was no allegation that CREW paid a fee to any third party to advertise its messages about O'Donnell. Accordingly, the proposed Factual and Legal Analysis concluded that CREW's communications were exempt from regulation. The organization was not obligated to report its associated costs as "independent expenditures" and did not cross the \$1,000 expenditure threshold for becoming a political committee because those costs are expressly excluded from the statutory definition of "expenditure."<sup>21</sup> In short, CREW's email and website activities presented a clear-cut application of the 2006 Internet freedom rule.

When the proposal was made to recognize CREW's rights under the Internet exemption, however, it was defeated by a vote of three to three.<sup>22</sup> This case thus represents the second time in recent months that the Commission has failed to muster four votes to exempt free political postings on the Internet under the 2006 Internet freedom rule,<sup>23</sup> creating a cloud of uncertainty over all who use the Internet to share their political views.<sup>24</sup>

The 2006 Internet freedom rule has served the American people well for nearly a decade and has fostered a robust national forum for political discussion. If Commissioners disagree with the 2006 Internet freedom rule, they should state so publicly and explain that position. But the Commission's enforcement process should not be used as a mechanism to disassemble freedoms the Commission unanimously guaranteed to the public in 2006.<sup>25</sup>

### III. The FEC Must Consistently Apply the Same Standards When Determining Whether an Organization Qualifies as a Political Committee

We agree with and voted for the result in this matter and write separately to emphasize our agreement with important aspects of the Commission's substantive analysis of CREW's major activity and procedural treatment of the Complaint and Response. Substantively, after declining (by a vote of three to three) to exempt CREW's Internet communications the Commission addressed whether CREW had spent over \$1,000 on expenditures to elect or defeat clearly identified federal candidates. The Commission assumed *arguendo* that CREW's communication about Christine O'Donnell included express advocacy and found no reason to

<sup>21</sup> For there to be an "independent expenditure" there must be an "expenditure" as defined by the Act and Commission regulations. See 52 U.S.C. § 30101(17) (formerly 2 U.S.C. § 431(17)) ("The term 'independent expenditure' means an expenditure by a person . . ." (emphasis added)).

<sup>22</sup> See MUR 6795 (CREW), Certification dated December 9, 2014 (Commissioners Goodman, Petersen and Hunter voting Yes; Commissioners Ravel, Weintraub and Walther voting No).

<sup>23</sup> See MUR 6729 (Checks and Balances for Economic Growth), Statement of Vice Chair Ann Ravel; see also MUR 6729 (Checks and Balances for Economic Growth), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen.

<sup>24</sup> See MUR 6795 (CREW), Factual & Legal Analysis at 4-5 (leaving the question of whether CREW's activities could be regulated open but dismissing the case due to "prosecutorial discretion," which suggests some Commissioners believe the Commission has jurisdiction to regulate website and email communications).

<sup>25</sup> See, e.g., MUR 6729 (Checks and Balances for Economic Growth), Statement of Vice Chair Ann Ravel.

Concurring Statement of Reasons in MUR 6795 (CREW)

believe that CREW spent over \$1,000 in conducting its “Most Crooked Candidates” campaign.<sup>26</sup> The Commission reached this conclusion even though the Complaint apprised the Commission of significant administrative and overhead costs associated with CREW’s “Most Crooked Candidates” campaign and CREW’s own statements in publicly available court filings evinced a clear political and electoral purpose.

The Complaint apprised the Commission of significant internal costs accrued by CREW in the production of its communications. Specifically, the Complaint alleged that:

- CREW devoted a significant amount of money in calendar year 2010 to conduct its “Most Crooked Candidates” campaign;
- CREW’s “Most Crooked Candidates” campaign targeted Christine O’Donnell and at least thirteen other candidates in similar terms;<sup>27</sup> and
- CREW’s “Most Crooked Candidates” campaign required significant organizational expenditures for administrative, salary, production, or overhead costs.<sup>28</sup>

So informed, the Commission concluded “it does not appear that the costs of posting press releases on CREW’s website and sending a mass email would have triggered the \$250 independent expenditure reporting threshold or the Act’s \$1,000 threshold for political committee status” and went on to state “there is *no available information* for the Commission to assess *any* additional costs associated with these communications.”<sup>29</sup> Thus, it is clear that the Commission did not count CREW’s spending on administrative, salary, production, or overhead costs in connection with the 2010 “Most Crooked Candidates” campaign toward the \$1,000 threshold for political committee status.

In addition, CREW has stated publicly a clear political and electoral purpose. Specifically, CREW represented the following in publicly available federal court filings:<sup>30</sup>

- It “targets government officials who sacrifice the common good to special interests through high-impact legal actions,”<sup>31</sup>

<sup>26</sup> MUR 6795 (CREW), Factual & Legal Analysis at 4.

<sup>27</sup> MUR 6795 (CREW), Complaint at Ex. I.

<sup>28</sup> *Id.* at 16.

<sup>29</sup> MUR 6795 (CREW), Factual & Legal Analysis at 5 (citations omitted) (emphasis added).

<sup>30</sup> In December 2014, we voted in favor of a Commission Enforcement Manual that would have permitted the Commission to consider publicly available federal court filings found on government websites. See Agenda Document 14-60-A: Revised Enforcement Manual; Certification dated Dec. 11, 2014 (showing Chairman Goodman and Commissioners Hunter and Petersen voted to approve Agenda Document 14-60-A: Revised Enforcement Manual).

<sup>31</sup> MUR 6795 (CREW), Complaint at Ex. A (CREW website).

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- “A core part of this work is examining and exposing the special interests that have influenced our elections and elected officials, and using that information to educate voters regarding the integrity of public officials, candidates for public office, the electoral process and our system of government;”<sup>32</sup>
- Toward this end, CREW “monitors the activities of those who run for federal office as well as those groups financially supporting candidates for office or advocating for or against their election;”<sup>33</sup>
- And CREW “regularly reviews campaign finance reports groups, candidates, and political parties file with the FEC that disclose their expenditures and, in some cases, their contributors. Using the information in those reports CREW, through its website, press releases, reports, and other methods of distribution, publicizes the role of these individuals and entities in the electoral process and the extent to which they have violated federal campaign finance laws.”<sup>34</sup>

Since CREW did not cross the \$1,000 threshold for political committee status, the Commission appropriately did not seek to investigate the extent of CREW’s electoral activities or its communications regarding the fourteen candidates targeted in the 2010 “Most Crooked Candidates” campaign. Ultimately, the Commission did not believe it had sufficient information to find reason to believe that a violation of the Act occurred. CREW’s statements did not convince the Commission to inquire further into CREW’s expenditures on such activities, its funds raised in connection with those activities, or its underlying major purpose.

This is a change from how some Commissioners have approached political committee status in the past. In the past, some Commissioners have expressed dissatisfaction with any political committee analysis that failed to place nearly all of an organization’s speech and activities under a microscope, writing how the political committee analysis must be “fact-intensive”<sup>35</sup> and consider an organization’s “full range of campaign activities,” including any “public communications mentioning federal candidates.”<sup>36</sup> Consistent with this view, these Commissioners supported investigations into any spending on “other materials discussing various candidates” and “overhead or administrative expenses.”<sup>37</sup> Their bounded approach in this matter is a welcome new precedent in contrast to past practices.

<sup>32</sup> Complaint for Declaratory Judgment and Injunctive Relief ¶ 6, *CREW v. FEC*, No. 1:14-cv-01419-CRC (D.D.C. Aug. 20, 2014).

<sup>33</sup> *Id.* at ¶ 7.

<sup>34</sup> *Id.*

<sup>35</sup> See MUR 6396 (Crossroads Grassroots Policy Strategies), Statement of Reasons of Vice Chair Ann M. Ravel and Commissioners Steven T. Walther and Ellen L. Weintraub at 3.

<sup>36</sup> See MUR 6538 (Americans for Job Security) & MUR 6589 (American Action Network), Statement of Reasons of Vice Chair Ann M. Ravel and Commissioners Steven T. Walther and Ellen L. Weintraub at 3.

<sup>37</sup> See MUR 6402 (American Future Fund), Statement of Reasons of Vice Chair Ann M. Ravel and Commissioner Ellen L. Weintraub at 3. Some of my colleagues have maintained that activities which merely

## Concurring Statement of Reasons in MUR 6795 (CREW)

The Commission's restrained procedural treatment of this matter also observed appropriate limits.<sup>38</sup> Upon receiving the Complaint in this case, the Commission's OGC did not seek evidence of additional electoral activity by combing through the archives of CREW's website or draw inferences based on unsourced accusations or characterizations in press accounts. Nor was CREW called upon to supplement its Response about its communications with respect to other candidates identified in its "Most Crooked Candidates" campaign or similar campaigns. Rather, in preparing its recommendation, OGC looked solely at the information in the Complaint and the Response.<sup>39</sup> Likewise, the Factual & Legal Analysis ultimately approved by the Commission discussed only the materials found in the Complaint and Response.

The Commission's restraint in this case is a proper break from how other matters addressing political committee status have been approached within the agency.<sup>40</sup> We trust this matter represents a lasting evolution in the Commission's approach to political committee analysis. The Commission and OGC established important substantive standards and restrained procedures in reviewing this challenge to CREW's political committee status. The same standards and procedures must be applied in all cases.

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"criticize[] . . . a clearly identified federal candidate," *id.* at 4, or that attack a candidate's character should count toward a major purpose finding. See Ned Barnett, *FEC Veteran Laments Dark Money in Elections*, RALEIGH NEWS & OBSERVER (Oct. 18, 2014), at <http://www.newsobserver.com/2014/10/18/4242134/fec-veteran-laments-dark-money.html> ("Issue groups make a mockery of their name by supporting personal attacks. When challenged, Weintraub says, the groups say the candidate's character is an issue. 'That's not an issue,' Weintraub says. 'There are issues out there, but these ads are not about issues. They are about candidates.'").

<sup>38</sup> See generally Request for Comment on the Enforcement Process (2013), Comments of Perkins Coie LLP, Political Law Group at 3-6 (regarding the proper scope of pre-RTB review), available at <http://www.fec.gov/law/policy/enforcement/2013/perkinscoie.pdf>.

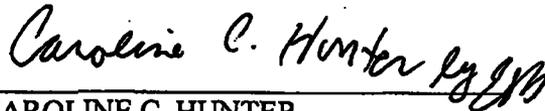
<sup>39</sup> The Commission and OGC also limited itself to the Complainant's characterization of its allegations and did not name additional respondents beyond those mentioned in the caption of the Complaint, even though the Complaint listed thousands of dollars in reported expenses it characterized as potential personal use violations by two additional federal candidates. MUR 6795 (CREW), Complaint at 11-12 (reciting a list of expenses by then-Senator Joseph Biden and Senate candidate Mike Castle that the Complaint characterizes as a "slush fund" and "exactly the same type of expenses" as those it claims CREW characterized as personal use violations.).

<sup>40</sup> In several recent political committee cases involving groups such as Crossroads Grassroots Policy Strategies and American Future Fund, OGC gathered extensive facts about the organizations before the Commission considered or found reason to believe a violation had occurred pursuant to 52 U.S.C. § 30109(a)(2). See, e.g., MUR 6396 (Crossroads Grassroots Policy Strategies) (OGC conducted an unauthorized investigation by combing through press accounts prior to a finding of reason to believe); MUR 6402 (American Future Fund) (same). This practice has also been common in other matters outside of the political committee context. See, e.g., MUR 6540 (Rick Santorum for President).

Concurring Statement of Reasons in MUR 6795 (CREW)

  
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LEE E. GOODMAN  
Commissioner

Jan. 29, 2015  
Date

  
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CAROLINE C. HUNTER  
Commissioner

Jan. 29, 2015  
Date

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

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4  
5 **(as proposed by Commissioner Goodman)**

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7 RESPONDENTS: Citizens for Responsibility and Ethics in Washington MUR: 6795

8  
9 Melanie Sloan

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11 **I. INTRODUCTION**

12 This matter was generated by a complaint filed by Jonathon Moseley. *See* 2  
13 U.S.C. § 437(g)(a)(1). The complaint alleges that Citizens for Responsibility and Ethics in  
14 Washington (“CREW”) violated the Federal Election Campaign Act of 1971, as amended (the  
15 “Act”), by failing to report independent expenditures to the Commission, and by failing to  
16 comply with certain reporting requirements of political committees. The Commission finds no  
17 reason to believe any violation of the Act occurred. Each of CREW’s communications at issue  
18 in the Complaint that might have contained any express advocacy are exempted from regulation  
19 by the Commission’s regulatory “Internet exemption,” and, in any event, the costs associated  
20 with those communications did not reach the statutory thresholds requiring that they be reported  
21 or that CREW register as a political committee.

22 **II. FACTUAL AND LEGAL ANALYSIS**

23 **A. Facts**

24 ~~CREW is a 501(c)(3) nonprofit corporation “dedicated to promoting ethics and~~  
25 ~~accountability in government and public life.”<sup>1</sup> CREW represents that it “targets government~~  
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1 Resp. at 8.  
2 Compl. Ex. A (CREW website).

1 CREW has stated in federal court pleadings in actions against the Commission that “[a] core part  
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6 office as well as those groups financially supporting candidates for office or advocating for or  
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8 political parties file with the FEC that disclose their expenditures and, in some cases, their  
9 contributors. Using the information in those reports CREW, through its website, press releases,  
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11 the electoral process and the extent to which they have violated federal campaign finance laws.”<sup>5</sup>

12 The Complaint in this matter alleges that beginning on September 15, 2010, CREW  
13 launched a “public relations campaign” opposing the election of Senate candidate Christine  
14 O’Donnell.<sup>6</sup> The Complaint alleges that CREW’s campaign opposing O’Donnell was part of a  
15 new project targeting approximately fourteen federal candidates whom CREW identified as  
16 “crooked.”<sup>7</sup>

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<sup>3</sup> Complaint for Declaratory Judgment and Injunctive Relief ¶ 6, *CREW v. FEC*, No. 1:14-cv-01419-CRC  
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<sup>4</sup> *Id.* at ¶ 7.

<sup>5</sup> *Id.*

<sup>6</sup> Compl. at 4.

<sup>7</sup> *Id.* at 9 & Ex. I. The Complaint provides information indicating that CREW devoted resources to make similar communications about other candidates. *Id.*, Exs. B, D, E, I. For example, CREW represented on its website that “[s]ince 2005, CREW has highlighted the most egregious violators of the public trust in our annual *Most Corrupt Members of Congress* report. Now, CREW has begun a list of *Crooked Candidates* to shine the

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spotlight on some of the lousy politicians vying for federal office in 2010." *Id.*, Ex. I. The Complaint focuses solely on CREW's expenditure of resources in connection with the O'Donnell communications.

<sup>8</sup> *Id.* at 5. In arguing that CREW was required to report its activities as independent expenditures, the Complaint cites both 11 C.F.R. § 104.4 (covering independent expenditures by political committees) and 11 C.F.R. § 109.10 (covering independent expenditures by persons who are not political committees).

<sup>9</sup> Compl., Exs. B, D, E, I. The September 15, 2010 press release (Exhibit B) stated, in pertinent part:

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<sup>10</sup> *Id.*, Exs. C-1 to C-8 (submissions also available at <http://curesocialism.blogspot.com/2014/02/crew-complaint.html>).

<sup>11</sup> *Id.*, Ex. F.

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<sup>13</sup> *Id.*, Ex. H.

<sup>14</sup> *Id.*, Ex. J. The solicitation continued: “Looking for ways to help CREW build a better Washington? . . . And, if possible, please donate so that we continue the work of building a better Washington.” *Id.*, Ex. J. The Complaint also alleges that CREW “engaged in substantially identical or similar communications by the use of regular mail (‘direct mail’) and through other means,” but it has not provided any such documents to the Commission. *Id.* at 15.

<sup>15</sup> *Id.* at 10-11 & Ex. K.

<sup>16</sup> *Id.*, Ex. K.

<sup>17</sup> *Id.* at 14-15.

<sup>18</sup> *Id.* at 12. The Complaint alleges CREW exceeded \$5,000 in resource expenditures even if one excludes Sloan’s news appearances and coverage.

1 least 43.5 hours on CREW's public relations campaign opposing O'Donnell's election, the value  
2 of her time on the campaign exceeded \$5,000.<sup>19</sup>

3 In its Response, CREW states that none of the communications identified in the  
4 Complaint qualified as express advocacy under 11 C.F.R. § 100.22(b), and thus they were not  
5 independent expenditures.<sup>20</sup> According to CREW, "[e]ven if the payment of Ms. Sloan's salary  
6 could be construed as an expenditure in connection with a federal election, [the] complaint  
7 would still fail because none of the public statements Ms. Sloan made regarding the September  
8 20th complaints meets the definition of an independent expenditure under FECA or FEC  
9 regulations."<sup>21</sup> CREW further contends that the statements made by Sloan during her television  
10 appearances, in her op-ed, and to newspaper reporters are covered by the press exemption.<sup>22</sup>  
11 Lastly, CREW states that it is not a political committee.<sup>23</sup>

12 **B. Analysis**

13 The Act places certain reporting and disclaimer requirements on persons who make  
14 independent expenditures.<sup>24</sup> An "independent expenditure" is an expenditure by a person  
15 expressly advocating the election or defeat of a clearly identified federal candidate that is not  
16 coordinated with a candidate, a candidate's authorized committee, or their agents, or a political

19 *Id.*; see also 2010 CREW IRS Form 990 at 7 (disclosing Sloan's reportable compensation as \$228,949).

20 *Resp.* at 4-6.

21 *Id.* at 4.

22 *Id.* at 6-7.

23 *Id.* at 8.

24 2 U.S.C. §§ 434(c), 434(g), 441d; 11 C.F.R. §§ 109.10, 110.11.

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1 party committee or its agents.<sup>25</sup> Under the Commission's regulations,<sup>26</sup> only three of CREW's  
2 communications at issue in the Complaint might be considered to have expressly advocated the  
3 election or defeat of a clearly identified federal candidate: (1) its September 15 press release  
4 (Exhibit B); (2) its September 22 mass email (Exhibit J);<sup>27</sup> and (3) its September 20 press release  
5 (Exhibit E).<sup>28</sup> Yet, even assuming, *arguendo*, that any of these three communications could be  
6 considered to have contained express advocacy, the Commission finds no reason to believe a  
7 violation occurred. *First*, as a threshold matter, the communications, all of which CREW  
8 distributed itself for free over the Internet, are exempt from regulation under the Commission's  
9 exemption for uncompensated "Internet activities." *Second*, regardless of the applicability of the  
10 Internet exemption, the expenses associated with CREW's communications did not reach the  
11 statutory thresholds for either independent-expenditure or political-committee reporting.

12 **1. CREW's emails and press releases are exempt from FEC regulation under**  
13 **the Internet exemption.**

14  
15 A threshold basis for not finding reason to believe CREW violated the Act's reporting  
16 requirements and for dismissing this matter is that the press releases CREW posted to its website  
17 and CREW's mass email fall squarely within the Commission's regulatory "Internet exemption."

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<sup>25</sup> 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

<sup>26</sup> See 11 C.F.R. § 100.22 (defining "expressly advocating"). Certain Commissioners have questioned the continuing validity of the definition of express advocacy provided in 11 C.F.R. § 100.22(b). See MUR 6346 (Cornerstone Action), Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen at 9-14 (citing *Maine Right to Life Comm. v. FEC*, 98 F.3d 1, 1 (1st Cir. 1996)).

<sup>27</sup> CREW contends that the September 22 mass email (Exhibit J) contained no express advocacy but was, instead, merely "a request to sign a petition asking the U.S. Attorney for Delaware to conduct a criminal investigation of Ms. O'Donnell and a request for contributions for CREW." Resp. at 6.

<sup>28</sup> The remaining communications at issue in the Complaint either clearly do not contain express advocacy, were not provided to the Commission preventing any assessment of express advocacy, or were not made or paid for by CREW. The Complaint did not include a copy of the alleged petition, alleged direct mail solicitations, or press releases or other communications targeting thirteen other candidates CREW identified as "CREW's Crooked Candidates 2010."

1           The Internet exemption is a “broad exemption” from regulation.<sup>29</sup> Whenever an  
2 individual or a group engages in uncompensated “Internet activities,” meaning “[s]ending or  
3 forwarding electronic messages . . . [or] any other form of communication distributed over the  
4 Internet,” for the purpose of influencing a Federal election, neither their services nor their use of  
5 equipment or services to communicate over the Internet constitute “expenditures” under the Act,  
6 unless the communications are placed for a fee on another person or group’s website.<sup>30</sup> The  
7 exemption thus “make[s] clear, appropriately so, that individuals [and groups] engaging in  
8 unfettered political discourse over the Internet using their own computer facilities . . . [are] not  
9 . . . subject to regulation under the campaign finance laws.”<sup>31</sup>

10           CREW is a group whose uncompensated Internet activities are protected by the Internet  
11 exemption.<sup>32</sup> The press releases that the organization posted to its website and the mass email  
12 that it distributed clearly are “communication[s] distributed over the Internet” that constitute

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<sup>29</sup> *Internet Communications*, 71 Fed. Reg. 18,589, 18,603 (Apr. 12, 2006) (internal quotation marks omitted); see also *Internet Communications and Activity*, FEC Brochure at 1 (May 2006), available at <http://www.fec.gov/pages/brochures/internetcomm.pdf> (“An uncompensated individual or group of individuals may engage in Internet activities for the purpose of influencing a federal election without restriction. *The activity would not trigger any registration or reporting requirements with the FEC.*” (citing 11 C.F.R. § 100.155) (emphasis added)).

<sup>30</sup> See 11 C.F.R. § 100.155. Moreover, 11 C.F.R. § 100.94 exempts uncompensated Internet activity from the Act’s definition of “contribution.”

<sup>31</sup> *Internet Communications*, 71 Fed. Reg. 18,589, 18,603 (Apr. 12, 2006) (internal quotation marks omitted); see also *Internet Communications and Activity*, FEC Brochure at 1 (May 2006), available at <http://www.fec.gov/pages/brochures/internetcomm.pdf> (“An uncompensated individual or group of individuals may engage in Internet activities for the purpose of influencing a federal election without restriction. *The activity would not trigger any registration or reporting requirements with the FEC.*” (citing 11 C.F.R. § 100.155) (emphasis added)).

<sup>32</sup> See, e.g., MUR 6729 (Checks & Balances for Economic Growth), Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen (agreeing with the recommendation of the Commission’s Office of General Counsel that the Internet exemption applied to an organization’s politically themed videos posted for free on YouTube.com).

1 "Internet activities" under the regulation.<sup>33</sup> There is no allegation or suggestion that CREW was  
2 compensated by a third-party to post the press releases concerning Christine O'Donnell to its  
3 website or to distribute the mass email soliciting donations to CREW. There is also no allegation  
4 that CREW paid a fee to any third party to advertise its messages about O'Donnell.  
5 Accordingly, CREW's communications are exempt from regulation. The organization was not  
6 obligated to report its associated costs as "independent expenditures" because those costs are  
7 expressly excluded from the statutory definition of "expenditure."<sup>34</sup>

8 **2. Furthermore, the expenses associated with CREW's Internet**  
9 **communications did not reach the statutory thresholds for either**  
10 **independent-expenditure or political-committee reporting.**

11  
12 Furthermore, and in any event, there is no reason to believe CREW violated the Act  
13 because the expenses associated with its press releases and mass email did not reach the statutory  
14 thresholds for reporting. Indeed, not every communication containing express advocacy must be  
15 reported to the Commission. The Act requires persons who are not political committees to report  
16 independent expenditures only when they aggregate in excess of \$250 with respect to a given  
17 election in a calendar year.<sup>35</sup> The costs associated with posting the two press releases on  
18 CREW's website and sending the mass email did not reach the \$250 reporting threshold.<sup>36</sup> As

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<sup>33</sup> 11 C.F.R. § 100.155(b).

<sup>34</sup> For there to be an "independent expenditure" there must be an "expenditure" as defined by the Act and Commission regulations. See 52 U.S.C. § 30101(17) (formerly 2 U.S.C. § 431(17)) ("The term 'independent expenditure' means an expenditure by a person . . ." (emphasis added)).

<sup>35</sup> 11 C.F.R. § 109.10(b).

<sup>36</sup> See, e.g., Factual & Legal Analysis at 6, MUR 6173 (PRI Inc.) (costs of express advocacy newsletter distributed by e-mail and website deemed *de minimis*); Statement of Reasons of Comm'rs Thomas, Toner, Mason, McDonald & Weintraub, MUR 5491 (Jerry Falwell Ministries, Inc.) (costs of express advocacy newsletter distributed by e-mail and website deemed *de minimis*); see also MUR 6247 (www.examiner.com) (alleged in-kind contributions by host website to paid blogger who regularly posted about his candidacy deemed *de minimis*).

1 the Commission noted in its Explanation and Justification relating to Internet Communications,  
2 “there is virtually no cost associated with sending e-mail communications, even thousands of e-  
3 mails to thousands of recipients . . . .”<sup>37</sup> Furthermore, the Commission does not count CREW’s  
4 expenditure of staff time or salaries or administrative resources devoted to the research, writing,  
5 production, online posting, or emailing the communications. Such costs are not sufficiently  
6 distinct or measurable to attribute to the electoral communication cost.

7 Similarly, because the cost of the press releases and mass email did not surpass the \$250  
8 independent expenditure threshold, the costs associated with these communications are even  
9 further removed from crossing the Act’s \$1,000 threshold for political committee status.<sup>38</sup>

10 Without reaching the statutory threshold for being a political committee, the Complaint’s  
11 allegations that CREW was subject to certain reporting requirements as a political committee  
12 should likewise be dismissed because there is no reason to believe CREW is a political  
13 committee. *See* 11 C.F.R. § 104.3(j) (reporting earmarked contributions); *id.* § 104.4  
14 (independent expenditures by political committees); *id.* § 102.8 (receipt of contributions).

15 Because the expenses associated with the email and press releases did not reach either  
16 statutory threshold, there is no reason to believe CREW violated any reporting requirements or  
17 was a political committee.

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<sup>37</sup> 71 Fed. Reg. 18,594, 18,596 (Apr. 12, 2006) (explaining why email is not a form of “general public political advertising”).

<sup>38</sup> *See* 2 U.S.C. § 431(4); 11 C.F.R. § 100.5.