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Comments in support of REG 2015-04 Rulemaking Petition: "Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (*Citizens United*)"

SUBMITTED ELECTRONICALLY [sers.fec.gov]

Dear Ms. Rothstein:

On behalf of Common Cause's 400,000 members and supporters, I appreciate the opportunity to submit these comments to the Federal Election Commission ("the Commission") in response to the rulemaking petition "Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (*Citizens United*)," 80 Fed. Reg. 45116 (July 29, 2015). Common Cause is dedicated to upholding the core values of American democracy. We work to create open, honest, and accountable government that serves the public interest; promote equal rights, opportunity, and representation for all; and empower all people to make their voices heard in the political process. This includes reducing the undue influence of money in politics and ensuring that all spending is transparent.

We support the objectives of the rulemaking petition and join in urging the Commission to make badly needed changes to, among other things, improve disclosure, prevent circumvention of

contribution limits, and provide common-sense rules concerning coordination between candidates, their campaign committees and other entities.

The Supreme Court's decision in *Citizens United* ripped a massive hole in the fabric of crucial federal campaign finance laws, which were enacted in response to scandal to prevent corruption, enable Americans to see who is trying to influence their votes and hold elected officials accountable to the public interest.

Unfortunately, the Commission has done little within its lawful authority to mitigate the damage or keep pace with the new landscape. In the 2014 federal elections, political spending from undisclosed sources reached a new record for midterm elections of over $173 million.[1] During the 2012 presidential election, outside spending from secret sources topped $308 million.[2] Contribution limits have become virtually meaningless, as candidates freely solicit (with a wink and a nod) enormous gifts for "independent" outfits created and run by their associates and family to bankroll their election.

The Commission should move forward with the requests in the rulemaking petition. Of course, the FEC cannot reverse or contravene Supreme Court decisions. Still, there are limited but important steps that the Commission can and must take, consistent with controlling statutes, to curb corruption and its appearance and shine a light on the money that influences voters' choices. In most instances, those steps are in direct line with the assumptions and pronouncements that the Court made when it decided these cases in the first place.

Disclosure

Part of the Commission's core mission is to use its lawful authority to make campaign spending transparent. Outside of its street-level windows in Washington, D.C., the Commission displays three large posters trumpeting its commitment to disclosure. The poster in the middle says that

[1] Center for Responsive Politics, Outside Spending by Disclosure, Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees, https://www.opensecrets.org/outsidespending/disclosure.php (last accessed October 26, 2015).
[2] *Id.*

employees inside are "*informing the public* of the funds raised and spent in federal elections." Another poster quotes *Buckley v. Valeo*: "In a republic where the people are sovereign, *the ability of the citizenry to make informed choices* among candidates for office is essential." The third poster quotes Justice Louis Brandeis in 1913, before he joined the Supreme Court: "*Sunlight is said to be the best of disinfectants*; electric light the best policeman" (emphasis added).

Unfortunately, the FEC's posters are not representative of its work to date post-*Citizens United*. The Commission has *not* informed the public about all of the money raised and spent in federal elections; its inaction and failure to enforce campaign finance laws has *reduced* the ability of the citizenry to make informed choices at the ballot box; and it has *failed* to update its regulations to keep pace with the Court's decisions and keep the sunlight shining on political actors funneling hundreds of millions of dollars through secretive organizations to influence our elections.[3]

Common Cause urges the Commission to revise its disclosure rules pertaining to electioneering communications and independent expenditures and bring them into alignment with the Federal Election Campaign Act (FECA) and the Bipartisan Campaign Reform Act (BCRA).

The law requires "every person" that makes disbursements for electioneering communications exceeding $10,000 in a calendar year to disclose donors who contribute, in the aggregate, $1,000 or more per election cycle. *See* 52 U.S.C. § 30104(f). "Every person" (other than a political committee) that makes an independent expenditure in excess of $250 during a calendar year is required to disclose donors whose aggregate contributions exceed $200 in a calendar year. 52 U.S.C. §§ 30104(c)(1); (c)(2)(C); (b)(3)(A).

Under the current rules, the FEC requires disclosure only of contributors who donate "*for the purpose* of furthering electioneering communications," 11 C.F.R. § 104.20(c)(9) (emphasis added), or "*for the purpose* of furthering the reported independent expenditure," 11 C.F.R. §

[3] Ann M. Ravel, Vice-Chair of Federal Election Commission, *How Not to Enforce Campaign Laws*, N.Y. TIMES, Apr. 2, 2014, *available at* http://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html?_r=0.

109.10(e)(1)(vi) (emphasis added). The "for the purpose" language in the Commission's rules limits the scope of disclosure contemplated by Congress in the statute. The latter is silent concerning a "purpose" intent for electioneering communications. When it comes to independent expenditures, the statute is also silent in one place, while in another makes a broader reference to "the purpose of furthering *an* independent expenditure." *Compare* 52 U.S.C. §§ 30104(b)(3)(A) *with* (c)(2)(C) (emphasis added). We think the intent of Congress in the statute is clear – it favored more transparency, not less.

As Judge Jackson wrote in *Van Hollen v. FEC* concerning the illegality of the current electioneering communications rules, the Commission's regulations are "inconsistent with statutory language and purpose" and create an "easily exploited loophole that allows the true sponsors of advertisements to hide behind dubious and misleading names."[4] Before *Van Hollen*, donors could evade disclosure by disclaiming that their contributions were earmarked "for the purpose" of a specific electioneering communication.

Transparency in political spending is important for at least three reasons. First, disclosure protects voters' right to know who is trying to influence their decision on Election Day. Voters are able to evaluate the merits of an appeal for their vote if they know who is speaking to them. Second, disclosure curbs corruption and its appearance, including the specter of undue influence over public policy. Third, disclosure is critical to the enforcement of our campaign finance laws.

Disclosure is also consistent with the Supreme Court's jurisprudence that justified some of its most recent campaign finance cases. In a portion of *Citizens United* that had the support of eight members of the Court, Justice Kennedy wrote that "disclosure … enables the electorate to make informed decisions and give proper weight to different speakers and messages."[5] The same eight justices agreed that disclosure allows "[s]hareholders [to] determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests."[6] Importantly, the

[4] *Van Hollen v. FEC*, 2014 U.S. Dist. LEXIS 164833, *5, *6 (D.D.C. Nov. 25, 2014).
[5] *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).
[6] *Id.* at 370.

Court held that disclosure furthers First Amendment interests because it "permits citizens and shareholders to react to the speech of corporate entities in a proper way."[7]
Moreover, in *McCutcheon v. FEC*, the Chief Justice wrote that "[t]oday, given the Internet, disclosure offers much more robust protections against corruption. … Because massive quantities of information can be accessed at the click of a mouse, disclosure is effective to a degree not possible at the time *Buckley*, or even *McConnell*, was decided."[8]

Unfortunately, reality belies any pronouncement about the availability of campaign disclosure "at the click of a mouse." Even if the FEC's disclosure systems were more accessible and user-friendly for average citizens, the loopholes in the Commission's regulations in no way render disclosure as effective as it should be – or as robust as the Court assumed. There is no adequate disclosure system in place to fully shine a light on the hundreds of millions of dollars pouring into our elections in the form of independent expenditures and electioneering communications, including from sham nonprofits hiding behind inadequate FEC rules.

While Common Cause believes that the core holdings in *McCutcheon* and *Citizens United* are egregiously misguided, the Commission should bring its regulations more fully into alignment with the decisions' reliance on assumptions about the existence and value of disclosure, as well as controlling provisions of law that remain on the books.

Foreign National Spending

FECA prohibits foreign nationals from "directly or indirectly" making "an expenditure, independent expenditure, or disbursement for an electioneering communication."[9]

With an increasingly interconnected global marketplace, it is important that the Commission clarify the rules concerning spending by the American subsidiaries of foreign corporations and put affirmative checks in place to curb foreign influence in our democratic self-government.

[7] *Id.*
[8] *McCutcheon v. FEC*, 134 S.Ct. 1434, 1460 (2014).
[9] 52 U.S.C. § 30121.

As discussed more fully above, the Supreme Court's decision in *Citizens United* – coupled with FEC inaction – has allowed front groups to serve as conduits for hundreds of millions of secret dollars in our elections.

Corporations do not act alone in a vacuum – as Justice Stevens wrote in his dissent to *Citizens United*, "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their 'personhood' often serves as a useful legal fiction. But they are not themselves members of 'We the People' by whom and for whom our Constitution was established."[10]

Corporations are controlled by others – including, at times, foreign owners (corporations and/or human beings). Among other things, the Commission should revisit its rules concerning foreign spending in elections and place affirmative requirements on spenders to certify that no foreign funds constitute any portion of an entity's political expenditures. This is particularly important in the wake of so much secret money in our elections.

Corporate and Labor Coercion Rules

The petition also requests that the Commission review and clarify its rules against coercion of corporate employees or labor organization members to support the entities' independent political spending. As the fundraising arms race continues to skyrocket at a record pace, the Commission should ensure that the proper rules are in place to protect employees and labor organization against job loss, monetary and financial retaliation, or other means of undue conduct for failure to support an employer's or labor organization's independent political spending.

Coordination and Independence

Lastly, Common Cause strongly urges the Commission to strengthen its coordination rules, as the petition also requests. Coordination between candidates and "independent" entities violates

[10] *Citizens United*, 558 U.S. at 466 (Stevens, J., dissenting).

source and contribution limits and otherwise vitiates the independence assumed by the Supreme Court in *Citizens United* and *Buckley v. Valeo*.

Nearly every 2016 presidential candidate enjoys the support of a Super PAC backing his or her – and only his or her – campaign.[11] The "hand-in-glove relationship between" these single-candidate Super PACs and many of these campaign committees is an affront to any notion of independence.[12]

The *New York Times* recently described the absurdity of the current loophole-ridden rules. Consider "CARLY for America," the Super PAC backing former Hewlett-Packard CEO Carly Fiorina's presidential campaign (itself organized as "Carly for President"). According to the *Times*, "her campaign committee, Carly for President, selects the events she will attend, and the Super PAC does the rest."[13] Moreover, "at nearly every event" during a recent trip through the early primary state of South Carolina:

> Mrs. Fiorina was framed by two standing banners emblazoned with the "CARLY for America" logo. In much smaller type that was not legible more than a few feet away, the banners said 'Paid for by CARLY for America.'
>
> Nowhere did the signs explain that "Carly," in capital letters, was an acronym for 'Conservative, Authentic, Responsive Leadership for You' – itself an evasion of an F.E.C. regulation that prohibits super PACs from using a candidate's name in their own.
>
> As a result, Mrs. Fiorina's campaign materials are barely distinguishable from the super PAC's – right down to their logos, each of which features a star at the center of the capital A in 'Carly.'
> …

[11] Center for Responsive Politics, 2016 Outside Spending by Single-Candidate Super PACs, https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=C (last visited Oct. 24, 2015).
[12] Nick Corasaniti, "Carly Fiorina's 'Super PAC' Aids Her Campaign, in Plain Sight," N.Y. TIMES (Sept. 30, 2015). *See also* Matea Gold, "Why Super PACs Have Moved From Sideshow to Center Stage for Presidential Hopefuls," WASH. POST (Mar. 12, 2015).
[13] *Corasaniti*, *supra* note 12.

> So far, at least, the super PAC, not Carly for President, has also been the main source for messages urging volunteers to spread the word about Mrs. Fiorina on social media or to build crowds for events when she comes to town.[14]

The practice also threatens to engulf Senate and House races. Left unchecked, the current loophole-ridden coordination rules will swallow-up our entire campaign finance system, rendering contribution and source limits meaningless.

The Commission should adopt new regulations that curb how candidate-specific independent expenditure-only committees ("Super PACs") and other entities can operate as little more than phantom arms of candidates' principal campaign committees, except for the ability to raise unlimited money from any source. The factors the Commission should use to determine independence include, but are not limited to:

- Sharing vendors;
- Whether the Super PAC is established at the request or suggestion of a candidate;
- Candidate-fundraising on behalf of the Super PAC;
- Spending patterns in support of single candidate campaigns; and
- Whether the Super PAC is staffed by close associates and family members of the candidate.

Conclusion

The 2016 elections will mark the fourth federal election cycle since *Citizens United* and the fourth federal election cycle with little substantive action from the Commission to address the new reality of political spending (much of it secret) and its influence in our democracy.

Americans of all political stripes are appalled by the new normal of political spending. According to recent comprehensive polling by CBS News and the *New York Times*, 84% of our

[14] *Id.*

fellow citizens think that money has "too much" influence in political campaigns today; 75% believe that independent groups should be required to disclose their contributors; and 85% believe that we must make "fundamental changes" or "completely rebuild" our system for funding political campaigns.[15]

We urge the Commission to make every effort to move beyond its gridlock on these above basic matters and, consistent with its mission, statutory law, and Supreme Court precedent, modernize and update its rules as requested in the petition.

Respectfully submitted,

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Common Cause

[15] CBS News & *New York Times*, "Americans' Views on Money in Politics," June 2, 2015, *available at* http://www.nytimes.com/interactive/2015/06/02/us/politics/money-in-politics-poll.html.