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January 15, 2015

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Federal Election Commission  
999 E Street NW  
Washington, DC 20463

SUBMITTED ELECTRONICALLY [sers.fec.gov]

Re: REG 2014-01: Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues  
(*McCutcheon*)

Dear Ms. Rothstein:

On behalf of Common Cause's 400,000 members and supporters, we appreciate the opportunity to submit these comments to the Federal Election Commission ("the Commission") in response to its Advanced Notice of Proposed Rulemaking ("ANPRM"), 79 Fed. Reg. 62361 (Oct. 17, 2014). Common Cause is a national nonpartisan advocacy organization founded in 1970 by John Gardner as a vehicle for ordinary citizens to make their voices heard in the political process. Common Cause works to reduce the undue influence of money in our politics, which includes advocating for full transparency and disclosure of spending in federal campaigns.

Common Cause President Miles Rapoport and Policy Counsel Stephen Spaulding request an opportunity to testify at the public hearing on February 11, 2015.

We are pleased that the Commission has taken the initiative to solicit input on what it can do to better enforce our campaign finance laws and is considering action with this ANPRM to make badly needed changes to improve disclosure, prevent circumvention of contribution limits, and provide common-sense rules around coordination between candidates, their campaign committees and other entities.

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

To date the FEC has just stood by and watched it unravel, doing little within its lawful authority to mitigate the damage. Not since the Watergate scandal have we seen candidates dance so dangerously close with billionaires and special interests spending millions to back their campaigns, or so much secrecy about who is dancing with whom. In the 2014 federal elections, political spending from undisclosed sources reached a new record for midterm elections of over \$173 million.<sup>1</sup> During the 2012 presidential election, outside spending from secret sources topped \$308 million.<sup>2</sup> 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 friends, associates and family to bankroll their election. The American public sees what is happening, but the FEC has looked the other way.

Of course, the FEC cannot reverse or contravene Supreme Court decisions. Nonetheless, 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. Failure to enforce laws duly enacted by Congress and unchanged by the Court is a dereliction of duty.

### *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 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)

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<sup>1</sup> 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 January 11, 2015).

<sup>2</sup> *Id.*

With all due respect, the FEC’s posters are not representative of the FEC’s work to date in the post-*Citizens United* landscape. 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.<sup>3</sup>

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. § 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.

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<sup>3</sup> 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](http://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html?_r=0).

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.”<sup>4</sup> 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.”<sup>5</sup> 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.”<sup>6</sup> Importantly, the 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.”<sup>7</sup> 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.”<sup>8</sup>

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

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<sup>4</sup> *Van Hollen v. FEC*, 2014 U.S. Dist. LEXIS 164833, \*5, \*6 (D.D.C. Nov. 25, 2014).

<sup>5</sup> *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

<sup>6</sup> *Id.* at 370.

<sup>7</sup> *Id.*

<sup>8</sup> *McCutcheon v. FEC*, 134 S.Ct. 1434, 1460 (2014).

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.

### **Earmarking and Affiliation**

The ANPRM also asks if the Commission should change any of its earmarking and affiliation rules in light of the *McCutcheon* decision. The Commission should amend and enforce its earmarking rules to clarify that a contribution to an independent expenditure-only committee supporting one candidate counts as a contribution to that candidate.

Unfortunately, even before *McCutcheon*, the rise of candidate-specific independent expenditure-only committees (“candidate-specific Super PACs”) made a mockery of contribution limits. They continue to do so. The *Washington Post* called candidate-specific Super PACs “the must-have accessory for House candidates in 2014.”<sup>9</sup> Candidate-specific Super PACs, often set-up by family members or close associates of candidates, tap into the same pool of donors as a candidate’s principal campaign committee.

Increasingly, the distinction between a candidate-specific Super PAC and a principal campaign committee is one without a difference. Unlike a candidate’s principal campaign committee, though, a candidate-specific Super PAC can accept unlimited amounts of money from individual human beings, corporations, unions and other entities. During the 2012 presidential election, former Speaker of the House Newt Gingrich made a frank assessment of why his campaign failed. Although he said that running for President is “not a rich man’s game,” he continued that “[i]t’s certainly a game which requires you to have access to a lot of money.

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<sup>9</sup> Matea Gold & Tom Hamburger, *Must-Have Accessory for House Candidates in 2014: The Personalized Super PAC*, WASH. POST, July 18, 2014, available at [http://www.washingtonpost.com/politics/one-candidate-super-pac-now-a-must-have-to-count-especially-in-lesser-house-races/2014/07/17/aaa2fcd6-0dcd-11e4-8c9a-923ecc0c7d23\\_story.html](http://www.washingtonpost.com/politics/one-candidate-super-pac-now-a-must-have-to-count-especially-in-lesser-house-races/2014/07/17/aaa2fcd6-0dcd-11e4-8c9a-923ecc0c7d23_story.html).

We couldn't have matched Romney's Super PAC, but in the end, he had I think sixteen billionaires and we had one, and it made it tough."<sup>10</sup> Those 16 billionaires funded Romney's Super PAC, not his campaign, yet Speaker Gingrich made no distinction – and neither do the American people. It's called common sense.

In the most recent 2014 congressional midterms, at least 104 candidate-specific Super PACs collectively raised over \$68 million.<sup>11</sup> Irrespective of whether a contribution went to the candidate's committee or the candidate's Super PAC, candidates know to whom they owe a debt of gratitude.

The Commission's rules allow donors to give both to a candidate's authorized committee and to committees that have supported or anticipate supporting the same candidate. *See* 11 C.F.R. § 110.1(h). Importantly, though, the rule includes a major qualification – “as long as (1) [t]he political committee is not ... *a single candidate committee* [and] (2) the contributor does not give with the knowledge that a substantial portion will be contributed to, or expended on behalf of, that candidate for the same election.” *See id.*

This rule already seems to prohibit contributions to a Super PAC supporting a single candidate if a donor has already given the maximum to the candidate's principal campaign committee. Yet the Commission has not enforced the rule in this matter for the three most recent federal election cycles after *Citizens United*. We recommend that the Commission enforce this rule to hold those accountable who circumvent contribution limits in this way.

More action on behalf of the Commission is necessary to address Super PACs that support a more limited number of candidates greater than one – those, too, could be used to circumvent contribution limits. The Commission should clarify what constitutes a “substantial portion” of a contribution that could be expended on behalf of a candidate per 11 C.F.R. § 110.1(h) to count as a contribution to the candidate. Common Cause believes “substantial portion” is far less than 50%, but more than 10%. The Commission should clarify this provision of the rule.

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<sup>10</sup> Jonathan Karl et al., *Newt Gingrich's Advice for Mitt Romney: Sharpen Your Animal Instincts*, ABC NEWS/YAHOO! NEWS, June 19, 2012, <http://news.yahoo.com/blogs/power-players/newt-gingrich-advice-mitt-romney-sharpen-animal-instincts-105728293.html> (last accessed January 12, 2015).

<sup>11</sup> Center for Responsive Politics, 2014 Outside Spending, by Single-Candidate Super PAC, *available at* <http://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=C> (last accessed Jan. 11, 2015).

The Commission should also amend its affiliation rules to include, as circumstantial factors in determining affiliation, whether former associates, employees or family members of a candidate operate or form a political committee in question. Specifically, the ANPR asks for comment on 11 CFR §§ 100.5(g)(4) and 110.3(a)(3), which lists various circumstantial factors in the analysis of whether political committees are affiliated. Several high-profile Super PACs in recent years were established by family members and close associates of a candidate, including former employees. In the most recent 2014 election, for example, at least three Super PACs were funded almost entirely by close family members of candidates, including parents.<sup>12</sup> In 2012, presidential campaigns and single-candidate Super PACs supporting their respective campaigns shared the same consultants.<sup>13</sup> These sorts of relationships should be taken into account when deciding whether a Super PAC is affiliated with a specific candidate.

### **Joint Fundraising Committees**

Post-*McCutcheon*, under the current FEC rules, candidates may solicit multimillion dollar checks on behalf of joint fundraising committees.<sup>14</sup> However, the Court left open the possibility that the Commission could amend its rules to limit the size and scope of these committees, as the ANPRM explains. Doing so will lessen opportunities for corruption and its appearance.

The Commission should consider prohibiting candidates from forming joint fundraising committees with parties. Specifically, FECA authorizes *candidates* to form joint fundraising committees – but says nothing about whether they may include party committees. *See* 52 U.S.C. 30102(e)(3)(A). The regulation which allows these committees to form with party committees is inconsistent with FECA.

This is all the more important because late last year, Congress greatly expanded the number of accounts that political party committees may use to solicit funds. Whereas previously an individual could give \$259,200 to national party committees per election cycle, now an

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<sup>12</sup> Fredreka Schouten and Christopher Schnaars, *Some Candidates' Super PACs are a Family Affair*, USA TODAY, July 18, 2014, available at <http://www.usatoday.com/story/news/nation/2014/07/18/relatives-fund-candidate-super-pacs-rothblatt/12824361/>.

<sup>13</sup> Mike McIntire and Michael Luo, *Fine Line Between 'Super PACs' and Campaigns*, N.Y. Times, Feb. 25, 2012, available at <http://www.nytimes.com/2012/02/26/us/politics/loose-border-of-super-pac-and-romney-campaign.html?pagewanted=all>.

<sup>14</sup> *McCutcheon*, 134 S. Ct. at 1465 (Breyer, J., dissenting).

individual can give as much as \$1,555,200. *See* Consolidated and Further Continuing Appropriations Act, 2015 (H.R. 83) (113<sup>th</sup> Cong.). This massive increase is an open invitation to corruption, particularly after *McCutcheon*'s evisceration of aggregate limits.

It is imperative that the Commission revise its rules to limit the size and scope of joint fundraising committees, starting by aligning the regulation with the statute. To the extent candidates continue to form joint fundraising committees, they should be independent and exclusive of political parties. Otherwise, the Commission's rules will continue to allow candidates to solicit millions of more dollars from deep pocketed donors, weakening confidence in a democracy that should be responsive to constituents instead of contributors.

### **Coordination**

Lastly, Common Cause strongly urges the Commission to strengthen its coordination rules. They are easily exploited in ways that do an end-run around contribution limits and otherwise vitiate the independence assumed by the Supreme Court in *Citizens United*. For example, the Commission should adopt new regulations that will curb the creation of candidate-specific Super PACs that operate as little more than phantom arms of candidates' principal campaign committees, except for the ability to raise unlimited money from any source.

Respectfully submitted,

*/s/ Miles Rapoport*

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*/s/ Stephen Spaulding*

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