



January 15, 2015

Via Electronic Submission System

Federal Election Commission
Attn: Amy L. Rothstein, Assistant General Counsel
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Washington, D.C. 20463

RE: Advance Notice of Proposed Rulemaking [REG 2014-01]

On October 9, 2014, the Commission issued an Advance Notice of Proposed Rulemaking in Response to *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014). 79 Fed. Reg. 62361. The ANPRM “requests comments on whether to begin a rulemaking to revise other regulations in light of certain language from the Supreme Court’s recent decision in *McCutcheon v. FEC*.” ANPRM at 1. Specifically, the FEC asked for comments from the regulated community concerning the Commission’s “earmarking regulations...affiliation factors...joint fundraising committee regulations...and disclosure regulations.” Furthermore, “[t]he Commission also seeks comment on whether it should make any other regulatory changes in light of the decision.” *Id.*

McCutcheon v. FEC and the Commission’s Statutory Responsibilities

From the text of the ANPRM, the Commission relies heavily upon Chief Justice Roberts’s indication that “multiple avenues [are] available to *Congress* that would serve the Government’s interest in preventing circumvention while avoiding ‘unnecessary abridgment’ of First Amendment rights.” *McCutcheon*, 134 S. Ct. at 1458 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (emphasis supplied); ANPRM at 3 (citing same).

In its review of the Bipartisan Campaign Reform Act’s (“BCRA”) aggregate contribution limit, the *McCutcheon* Court was obligated to conduct a heightened scrutiny analysis in order to determine whether the limit was a “means closely drawn to avoid unnecessary abridgement of associational freedoms.” *McCutcheon*, 134 S. Ct. at 1444 (citing *Buckley*, 424 U.S. at 25).

Merely because the Chief Justice suggested, as part of that analysis, a number of measures that might be more carefully constructed than a blunt aggregate limit does not mean those measures would necessarily survive the

required “closely drawn” analysis in the federal courts. *See Citizens United v. FEC*, 558 U.S. 310, 332 (2010) (noting that the Court’s decision in *McConnell v. FEC* was “facilitated by the extensive record, which was over 100,000 pages long”) (internal quotation marks and citation omitted). “In the First Amendment context, fit matters,” and a fit may only properly be determined by conducting the necessary review against the provided record. *McCutcheon*, 134 S. Ct. at 1456. As the *McCutcheon* Court itself stated, “[w]e do not mean to opine on the validity of any particular proposal.” *Id.* at 1459.

Nor, for that matter, does the Chief Justice’s repeated suggestions that *Congress* could plausibly take up additional anti-circumvention measures necessarily mean that the *FEC* may legislate in Congress’s stead. *McCutcheon*, 134 S. Ct. at 1458 (“Importantly, there are multiple avenues available to Congress that would serve the Government’s anticircumvention interest”); *id.* (“If Congress agrees, it might...”); *id.* at 1458-1459 (“[I]f Congress believes...it could require”); *id.* at 1459 (“Congress has adopted transfer restrictions, and the Court upheld them, in the context of state party spending”); *id.* (“Congress might also consider...”); *id.* (“The point is that there are numerous alternative approaches available to Congress...”)¹.

Any actions that the Commission takes must be consistent with its legislative charge to “make, amend, and repeal such rules, as are necessary to carry out the provisions of this Act.” 52 U.S.C. § 30107(a)(8) (2014). Accordingly, any promulgated rules and regulations must contain the “reasoned analysis” necessitated by the Administration Procedure Act, and must then survive review under *Chevron v. Natural Resources Defense Council*, 467 U.S. 847 (1984). *Shays v. FEC*, 337 F. Supp. 2d 28, 53 (D.D.C. 2004); *Shays v. FEC*, 414 F.3d 76, 105 (D.C. Cir. 2005) (“proceeding with our *Chevron*/APA inquiry”).

The Commission must not “rel[y] on factors which Congress has not intended it to consider...fail[] to consider an important aspect of the problem, [or] offer[] an explanation for its decision that runs counter to the evidence before the agency.” *Shays v. FEC*, 337 F. Supp. 2d 28, 52-53 (D.D.C. 2004). Indeed, “[t]he degree of deference a court should pay an agency’s construction is...affected by ‘the thoroughness, validity, and consistency of an agency’s reasoning.’” *Shays*, 337 F.

¹ Indeed, in only *one* circumstance did the Court suggest that the Commission might have authority to adopt stricter anti-circumvention measures. That was in the context of PACs. *McCutcheon*, 134 S. Ct. at 1460 (“The FEC might strengthen those rules further by, for example, defining how many candidates a PAC must support in order to ensure that ‘a substantial portion’ of a donor’s contribution is not rerouted to a certain candidate”). Again, of course, the Supreme Court was not issuing an advisory opinion suggesting that the FEC *could* permissibly do this. But the decision to explicitly mention the FEC in only one circumstance, and Congress in others, is telling.

Supp. 2d at 53 (quoting *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981)).

This Commission must not take its rulemaking power for granted, nor may it consider the passage of BCRA a simple transfer of Congress’s Article I powers to the Commission. *Common Cause v. FEC*, 692 F. Supp. 1391, 1396 (D.D.C. 1987) (“Where the agency interprets its statute in a way that flatly contradicts Congress’s express purpose, the court may – indeed must – intervene and correct the agency”).

We urge the Commission to tread carefully in this area, mindful of its charge to not simply act “commensurate with Congress’ regulatory aims,” but also to “allow the maximum of [F]irst [A]mendment freedom of expression in political campaigns.” *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988).

According, the Center for Competitive Politics submits comments on the specific proposals mentioned by the ANPRM.

A. Earmarking

i. Amendment to 11 C.F.R. § 110.1(h)

The Chief Justice stated that the Commission could strengthen existing earmarking regulations “by, for example, defining how many candidates a PAC must support in order to ensure that ‘a substantial’ portion’ of a donor’s contribution is not rerouted to a certain candidate.” *McCutcheon*, 134 S. Ct. at 1459 (citing 11 C.F.R. § 110.1(h)). This is the only statement from the Court suggesting the Commission’s unilateral power to act.

Accordingly, the Commission has asked whether “the Commission should make such a change to 11 CFR 110.1(h), for example, by establishing a minimum number of candidates a PAC must support or by establishing a maximum percentage of a PAC’s funds that can go to a single candidate?” 79 Fed. Reg. 62362. The Commission has also questioned whether adopting such a measure might “unnecessarily limit the ability of PACs to associate with candidates,” particularly given the Supreme Court’s determination that the right to association with a political candidate is a “basic constitutional freedom” which “lies at the foundation of a free society.” 79 Fed. Reg. 626363; *Buckley*, 424 U.S. at 25.

Before considering the contents of any proposed rule change, however, the Commission should first consider whether existing rules are sufficient. Under current regulations, a “person may contribute to a candidate...and also to a political committee which has supported, or anticipates supporting, the same candidate in the same election, as long as...[t]he 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.” 11 C.F.R. § 110.1(h).

In other words, the Commission’s rules already prohibit earmarking, and, even before *McCutcheon*, donors were theoretically able to use contributions to PACs to skirt the limit on contributions to individual candidates. Yet nothing suggests that there have been significant evasions of the current rule or that its enforcement has been a problem for the Commission. The Commission has successfully prosecuted cases under 110.1(h), both in federal court, see e.g. *FEC v. Nat’l Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992), and in obtaining settlements at the Commission level, see e.g. MURs 4568 (*Triad Management Services Inc.*), 4633 (*Riley for Congress*), 4634 (*Sam Brownback for Congress*), 4736 (*Rick Hill for Congress*), and 5274 (*Missouri State Democratic Committee*).

During the course of the *McCutcheon* case, counsel for the United States and *amici curiae* floated numerous hypotheticals suggesting that absent an aggregate cap on contributions, informal earmarking that skirted the existing legal prohibitions might occur. These theories are highly unlikely to occur in reality. Brad Smith, “Former FEC Commissioner: Decision Restores First Amendment,” *TIME.COM* (April 2, 2014)²; Zac Morgan, “*McCutcheon’s* Wild Hypotheticals”, *CENTER FOR COMPETITIVE POLITICS* (Dec. 11, 2013)³ The *McCutcheon* majority itself found such theories “implausible” and “unlikely.” 134 S. Ct. at 1453, 1453-54. The Court noted that the district court erred by engaging in such “speculation.” *Id.* at 1455. It considered such scenarios “divorced from reality,” and it clearly stated that the government may not by statute “further the impermissible objective of simply limiting the amount of money in political campaigns” by claiming “circumvention,” given the “improbability of circumvention.” *Id.* at 1456.

In short, while the Court suggested that certain regulatory steps short of an aggregate ban on contributions might be a less restrictive way for the government to accomplish its objectives, it made clear that such means must address an actual, and not a hypothetical, problem. Moreover, it expressed clear doubts that large scale circumvention of existing laws and regulations is likely.

Thus, any new rules would require some support beyond the mere fear that terrible things might occur – things which, we note, do not appear to have occurred in the most recent, post *McCutcheon*, election cycle.

² Available at: <http://time.com/47313/former-fec-commissioner-decision-restores-first-amendment/>

³ Available at: <http://www.campaignfreedom.org/2013/12/11/mccutcheons-wild-hypotheticals/>

As a preliminary matter, it is unsurprising that individuals who hold certain ideological views are likely to give to candidates and organizations that hold similar political beliefs. It would be expected that a donor who ardently supports abortion rights might give to EMILY's List, a PAC that exclusively contributes to pro-choice female candidates for office. Some overlap between candidate and group support is inevitable, as 11 CFR § 110.1(h) recognizes by limiting earmarking to situations where a “substantial portion” of a contributor’s PAC donation is re-routed back to the donor’s candidate of choice.

Obviously, a significant concern with the FEC merely plucking a number or percentage out of thin air would be the likelihood that the Commission’s rule could be challenged under *Chevron* Step Two as an “arbitrary” use of the Commission’s power. What is the “proper” number of candidates a PAC must support before it no longer poses a credible threat of circumvention? Two? Three? Five? Fifteen? Faced with such a question, it is worth noting that the *McCutcheon* court suggested that being “one of ten equal donors to a PAC that gives the highest contribution to Smith” would likely not raise significant circumvention concerns. *McCutcheon*, 134 S. Ct. at 1454.

Moreover, setting a cap or percentage could be problematic for smaller PACs, which may represent unpopular causes championed by only a handful of candidates. It could stifle groups which have an interest in a federal issue with particular local salience, such as a group dedicated to preserving a wetlands or constructing a new stretch of highway, from associating with their local candidates for federal office.

Furthermore, PACs do not exclusively spend money on federal campaigns. An organization which dedicates 35 percent of its \$10,000 budget to an educational mission and 65 percent of its efforts to electing candidates to federal office must register and report with the Commission. Creating additional administrative hurdles—such as requiring the PAC to split its \$6,500 among nine different candidates for office, or else abstain from associating with candidates at all—poses significant First Amendment concerns.

Of course, the “substantial portion” requirement is not the only provision of 11 C.F.R. § 110.1(h). The contributor must also have actual “knowledge” that a substantial quantity of her initial donation will go to a particular candidate.

The United States Court of Appeals for the District of Columbia Circuit applied 11 CFR § 110.1(h) in *FEC v. Nat’l Republican Senatorial Comm.*, 966 F.2d 1471 (D.C. Cir. 1992) (“*NRSC*”). That case concerned mass mailings that “listed four states with close Senate races, and informed the recipient that if the Republican candidate in those races did not receive a certain amount of money in a certain amount of time, the vital races would be lost.” *NRSC*, 966 F.2d at 1473. The *NRSC*’s mailer “concluded by suggesting a contribution amount...and by stating that any

contribution made would be divided equally among the candidates in the four states listed.” *NRSC* at 1473. In this case, the donor plainly had knowledge that 25% of his contribution would go to specific candidates—indeed, the donor had to fill out a donation card which declared that he was “enclosing the most generous contribution I can [give] to be split equally among [the candidates].” *Id.* at 1473. The D.C. Circuit ruled that donations the NRSC received via this mailer were earmarked, and counted toward an individual’s contribution limit to the candidates involved.

This is to say, the regulation is already sufficiently clear, and has been successfully applied by the federal judiciary. While the Commission might promulgate a regulation defining a “substantial portion” of a donor’s contribution—the phrase “substantial” seems to imply a large percentage, and the Supreme Court has suggested it must be above 10%—the knowledge requirement sufficiently limits opportunities for circumvention. After all, if a donor *does not know* what a PAC will do with her money once it is turned over, how could she possibly be seeking to circumvent the base limits?

This dovetails with the Commission’s second question regarding earmarking: whether the knowledge requirement should be lessened to capture vague, “implicit” arrangements.

ii. Changing the “knowledge” requirement

The FEC has requested comment on whether “the Commission [ought] to revisit the manner in which it enforces its earmarking regulations to encompass...implicit agreements.” 79 Fed. Reg. 62362. The Commission’s question is grounded in the Chief Justice’s assertion that 11 C.F.R. § 110.6(b)(1) acts to prevent a donor from “even *imply[ing]* that he would like his money recontributed to [a candidate].” *Id.* (quoting *McCutcheon*, 134 S. Ct. at 1453) (emphasis in original). Presently, “the Commission has determined that funds are to be considered earmarked only when there is clear documented evidence of acts by donors that resulted in their funds being used as contributions.” 79 Fed. Reg. 62362.

This standard is consistent with the FEC considering “implicit” agreements as part of its earmarking analysis, but only where there is adequate, demonstrable evidence that a true agreement existed. It would be odd if the Commission ignored a donor’s written plea that a contribution “be used to help defeat Senator Smith, to whom I have already maxed out my contributions,” especially if the request were then followed by an immediate and sufficiently-large PAC donation to Senator Smith. *See Conciliation Agreement, In re Riley*, Matters Under Review 4568, 4633, 4634, 4736, FEDERAL ELECTION COMMISSION, (Dec. 19, 2001). “[I]f an FEC official cannot” square those facts with voting to find Reason to Believe, then that official likely “has not a heart[,] but a head of stone.” *McCutcheon*, 134 S. Ct. at 1456. The

FEC could also reasonably investigate potentially less overt chicanery, such as the use of intentionally-encoded messages to arrange a pass-through.

Going further, and permitting investigations into less-obvious efforts at collusion, risks having the Commission criminalize not action but thought. Plainly, “nothing in the Federal Election Campaign Act [or its BCRA amendments]...requires individuals to make their political contributions in ignorance—citizens have a right to seek out information on candidates and groups they may wish to support.” Statement of Reasons of Commissioner Bradley A. Smith, In the Matter of Carolyn Malenick, *et. al*, FEDERAL ELECTION COMMISSION (March 1, 2003). As discussed *supra*, it is unsurprising that ideologically-minded individuals will give to PACs which support the same candidates the donor would prefer. Merely because a donor gives money to a PAC in the hopes that contribution will incidentally benefit a candidate of their choice is hardly surprising, and certainly not sanctionable. For good reason, the FEC’s regulations on earmarking require that the contributor maintain direction or control of a contribution, even after the monies involved have left his grasp.

Efforts to minutely regulate winks and nudges—without any overt communication between PAC and donor—will inevitably pose opportunities for gamesmanship. Complaints by ideologically driven opponents of parties or PACs will likely increase. After all, there is no punishment for bringing unprovable allegations to the Commission. *See AFL-CIO v. FEC*, 333 F.3d 168, 174 (D.C. Cir. 2003) (one goal of FECA’s 1976 amendments was to “help[]...prevent political opponents from bringing baseless charges against each other for purposes of generating negative publicity”). This will only further drain the limited resources of the Commission through needless investigations and potential follow-on litigation by disappointed complainants. *See, e.g. Public Citizen v. FEC*, Case No. 14-148 (D.D.C. 2014).

Furthermore, it is unclear how the Commission could draft language regulating such activities without running aground “the shoals of vagueness.” *Buckley*, 424 U.S. at 78. If a donor may be charged with circumvention, even if her contribution is made without any obvious intent to conspire with the PAC, it will chill donations to ideologically-affiliated—that is, all—PACs. Under such circumstances, no “person of ordinary intelligence” could discern whether any given contribution is legal or not. *Id.* at 77. Such concerns are particularly troubling given our country’s longstanding recognition that when “First Amendment rights are involved” laws must have “an even greater degree of specificity” than usual. *Id.* (citation and quotation marks omitted).

B. Affiliation Factors

Here again we begin by noting that the Commission ought not, and constitutionally likely cannot, act without first developing a serious record proving a concrete problem. That record must rely on something other than sweeping claims, hypotheticals, or theories advanced by advocates of more regulation, or even Commissioners themselves, to the effect that broad regulatory measures are necessary to prevent “circumvention.”

Broadly speaking, the current factors for determining affiliation are adequate, and have provoked no significant cry for change. The Commission should not be in the business of fixing regulations that are not broken. If it does, it creates new uncertainties surrounding the contours of those new requirements. Presently, the Commission relies on no fewer than ten factors “to determine whether committees are affiliated.” 11 C.F.R. 100.5(g)(4)(i).

Just a few months ago, in Advisory Opinion 2014-11, the Commission properly and appropriately declared that Health Care Service Corporation’s separate segregated fund was “no longer affiliated with the SSF of Blue Cross and Blue Shield Association.” AO 2014-11 at 1. The FEC made this determination solely based on a “letter and attachments received on August 11, 2014, supplemental information...submitted on September 17, 2014...and public disclosure reports filed with the Commission.” *Id.* The advisory opinion was handed down October 2, 2014.

The Commission quickly determined that the committees were not *per se* affiliated, and thus reviewed all ten “circumstantial factors” provide by 11 C.F.R. 100.5(g)(4)(i). *Id.* 4-7. Ultimately, relying on a prior, analogous advisory opinion, the FEC determined that Health Care Service Corporation’s “ongoing relationship with and obligations to [Blue Cross]...[is] outweighed by the absence of facts that support a finding of affiliation under any of the other factors listed in the regulations.” *Id.* at 11.

In short, the present rules appear workable and it is difficult to imagine an evidentiary record that could support the need to further expand or revise the affiliation factors.

C. Joint Fundraising Committees

The Commission has asked for comments concerning whether, “[i]n light of the *McCutcheon* decision” and relevant statutory authority, “can or should the Commission revise its joint fundraising rules? If so, how?” 79 Fed. Reg. 62363.

Joint fundraising committees are creatures of statute. The Act specifically states that “candidates may designate a political committee established solely for

the purpose of joint fundraising by such candidates as an authorized committee.” 52 U.S.C. § 30102(e)(3)(A)(ii). The Commission has already promulgated significant regulations of joint fundraising committees. 11 C.F.R. § 102.17(c) (requiring, *inter alia*, that a “joint fundraising notice shall be included with every solicitation for contributions” listing a variety of factors, including the allocation formulate and “informing contributors that...they may designate their contributions for a particular participant or participants,” keep a “separate depository account,” and other recordkeeping requirements).

Joint fundraising committees in fact offer many advantages. Although they may require extensive bargaining between candidates and require some legal complexity to establish, once established they reduce the cost and time necessary for fundraising. Simply put, they are an efficient way for candidates and parties to raise funds. Further, they connect parties and candidates in ways that may be beneficial both to informing voters and strengthening party structures, which many political scientists see as normative goods. Peter J. Wallison & Joel M. Gora, *Better Parties, Better Government*, at 131 (AEI Press 2009) (Any contribution is likely to be lost in the huge sums that the parties will be able to raise from many different constituencies. In addition, the party, unlike the individual candidate, has an interest in winning nationally, and to do so must assemble a broad coalition of interests. Tilting toward any particular special interest will impair this balancing process.).

It would be improper for the Commission to attempt to simply raise the cost of political fundraising as an indirect means of trying to reduce the amount of political speech.

Here again, there is simply no actual evidence that greater regulation, which would impose new First Amendment burdens, is necessary, beyond the self-serving hypotheticals of those who in fact have long records favoring “the impermissible objective of simply limiting the amount of money in political campaigns.” 134 S. Ct. at 1456.

In *McCutcheon*, the government argued that joint fundraising committees could potentially serve as a means of illegal circumvention.⁴ The Chief Justice

⁴ Although the government’s position at oral argument largely rested on the corruption potential of a single person, such as the Senate majority leader, receiving a large check for a joint fundraising committee. The Court properly dismissed this concern, given that the majority leader is not permitted to receive the full proceeds of such a hypothetical check. *McCutcheon*, 134 S. Ct. at 1441 (“Any regulation must target [the]...direct exchange of an official act for money” or the “appearance” of such corruption).

suggested a few potential avenues that might be taken to limit this risk as regards joint fundraising committees, should they be shown to pose a risk of circumvention.⁵

One of these options—“limiting the size of joint fundraising committees”—is plainly not available to the Commission. *McCutcheon*, 134 S. Ct. at 1459. The Act does not grant the FEC the ability to draw a line around the number of candidates who may participate in a joint fundraising venture; it simply grants candidates the ability to associate together and create them. 52 U.S.C. § 30102(e)(3)(A)(ii). Indeed, it is worth again noting that the Chief Justice specifically noted that such a limit might be enacted “if *Congress* believes that circumvention is especially likely to occur through creation of a joint fundraising committee.” *Id.* at 1458-1459 (emphasis supplied).

The Chief Justice also noted that Congress might “require that funds received [by candidates] through creation of a joint fundraising committee...be [only] spent by their recipients”—that is, limiting a candidate committee’s statutory right to contribute to other committees. *Id.* at 1459. The Chief Justice correctly noted that similar transfer restrictions have been upheld before. *Id.* But this would be a reform left to Congress, as the Chief Justice plainly stated. *Id.* at 1458 (“if Congress believes...”). Indeed, it is impermissible for the Commission to respond to the striking down of one portion of the Act by re-writing another portion—at least absent an extensive evidentiary record. *Van Hollen v. FEC*, 2014 U.S. Dist. LEXIS 164833 (D.D.C. 2014).

D. Disclosure

In light of the Chief Justice’s observation that the Internet has made disclosure “more robust” than it was during the early FECA era because “[r]eports and databases are available on the FEC’s Web site almost immediately after they filed,” the Commission has sought public comments on disclosure. *McCutcheon*, 134 S. Ct. at 1460.⁶ Specifically, the FEC asks “[g]iven these developments in modern

⁵ Once again, CCP notes the need for the Commission to actually construct a record demonstrating that joint fundraising committees may pose such a significant threat which may “erode[] to a disastrous extent’...‘confidence in the system of representative Government.” *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297 (1982) (quoting *Buckley*, 424 U.S. at 27).

⁶ Certain commissioners have been particularly vocal on this point. Statement of Reasons of Vice Chair Ann M. Ravel and Commissioner Ellen L. Weintraub, *In the Matter of American Future Fund*, FEDERAL ELECTION COMMISSION at 1 (Dec. 18, 2014) (“Americans are dismayed by the fact that dark money is pouring into their elections...We will continue to fight for better disclosure and more accountability in our political process. In the meantime, we hope that members of the public who care about democracy will help us hold *the FEC* accountable for failing to take action on

technology, which regulatory changes or other steps should the Commission take to further improve its collection and presentation of campaign finance data?”

First of all, CCP notes that the Commission has little authority to alter disclosure rules beyond the specifications of FECA and BCRA. *See Van Hollen v. FEC*, 2014 U.S. Dist. LEXIS 164833 (D.D.C. 2014). It is not the Commission’s place to impose new rules on speakers that do not distribute electioneering communications or whose major purpose is not political activity.

However, some minor changes concerning the presentation of existing contributor data would be useful. One of the downsides of the worldwide availability of “massive quantities of information...at the click of a mouse” is the risk of overloading interested parties with *too much* information. In fact, one study has demonstrated that after accounting for information that is voluntarily disclosed by a campaign, mandated disclosure provides little additional useful information to voters.⁷

For example, when searching for an individual contributor, the FEC’s search function allows a user to specify a specific amount range. While CCP obviously does not have access to the back-end of the FEC’s web site, we would conjecture that those fields are most often used to specify large amounts. Most Americans simply have no interest in who gave \$200 or \$300 to a multi-million dollar U.S. Senate campaign.

Oddly enough, the FEC’s site does not provide for a similar option for those users seeking to pull reports by PACs and candidates. Instead, somebody seeking,

dark money”), Ann Ravel, “How Not to Enforce Campaign Laws”, THE N.Y. TIMES (April 2, 2014), *available at*: <http://www.nytimes.com/2014/04/03/opinion/how-not-to-enforce-campaign-laws.html>;

⁷ Omri Ben-Shahar and Carl E. Schneider, “The Failure of Mandated Disclosure,” *University of Pennsylvania Law Review*, Vol. 159:647. Retrieved on October 16, 2013. Available at: <http://www.campaignfreedom.org/wp-content/uploads/2012/11/Ben-Shahar-2011-Failure.pdf> (2011). In other controlled experiments, access to disclosure information about sources of financial support for a ballot measure provided “virtually no marginal benefit” to voter knowledge, and voters showed less interest in campaign finance information than news reports, editorials, and the content of campaign ads. “Information at the Margin: Campaign Finance Disclosure Laws, Ballot Issues, and Voter Knowledge,” *Election Law Journal*, Vol. 12:2. Retrieved on October 16, 2013. *Available at*: <http://www.campaignfreedom.org/wp-content/uploads/2013/07/Information-at-the-Margin-Campaign-Finance-Disclosure-Laws-Ballot-Issues-and-Voter-Knowledge.pdf> (2013).

say, the October report for Restore Our Future's 2012 general election campaign has to pull the entire form and review it directly. The FEC ought to allow users the ability to search only for donors giving within specified ranges to candidates or committees. If nothing else, this may have the salutary effect of educating interested citizens regarding the existing limits on contribution to candidates, parties, and PACs.

Finally, the Commission must take special care that its actions are narrowly tailored to a concrete problem. In doing so, we would urge the Commission to bear in mind that disclosure obligations are among the most difficult and vexing for small organizations and true grassroots efforts relying heavily on volunteers. As complex as campaign finance law has become, it is relatively easy for such organizations to understand, for example, that they may not take foreign contributions into a Super PAC. What is often the more difficult part of compliance is the disclosure reports. Jeffrey Milyo, "Campaign Finance Red Tape: Strangling Free Speech & Political Debate", Institute for Justice (October 2007) (no participants in a study of 255 individuals were able to correctly filling out and filing campaign disclosure reports "based on a simple scenario typical of grassroots political activity" for California, Colorado, or Missouri).

The Supreme Court has long recognized that compulsory disclosure raises substantial constitutional concerns. *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 544 ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. And it is equally clear that the guarantee encompasses protection of privacy of association in [certain] organizations..."). The core disclosure rules currently in place for independent expenditures have, in many cases, been explicitly upheld by the Court in cases going back to *Buckley*, but only after being substantially narrowed by *Buckley*. 424 U.S. 1 at 78-80. Labeling a regulation "disclosure" does not free a policy from constitutional analysis or alleviate the concrete First Amendment burdens it may impose.

E. Other Steps

At a minimum, the FEC should, before embarking on new rulemakings to add to the hundreds of pages of existing regulations, conduct a thorough review of its regulations and eliminate rules or regulations that are outdated or obsolete. While the Commission's recent decision to implement *Citizens United* and *McCutcheon* is certainly laudable, it is a shame that it took this Commission nearly five years to simply remove unquestionably unconstitutional regulations concerning corporate political activity. In the future, the Commission should quickly and efficiently implement Supreme Court rulings to ensure that the regulated community is properly apprised of the effects of such decisions.

The Commission should also review the limitations on corporate and labor union separate segregated fund solicitations. Fundraising appeals are speech fully-protected by the First Amendment, and restrictions such as 11 C.F.R. § 114.6, which limits separate segregated funds to making “a total of two written solicitations for contributions” to employees who are not “stockholders, executive or administrative personnel, and their families” may be excessive. That regulation was written before the widespread use of e-mail, and should be revised.

Finally, the Commission should take this opportunity to “affirm[] that Internet activities by individuals and groups of individuals face almost no regulatory burdens under the Federal Election Campaign Act.” *Internet Communications*, 71 Fed. Reg. 18,589, 18590 (Apr. 12, 2006). As the Commission has previously found after a full notice and comment period, Internet communications involve “minimal barriers to entry, including [] low cost and widespread accessibility,” and are “distinct from other media in a manner that warrants a restrained regulatory approach.” *Id.* at 18,589. They were in no way implicated by the *McCutcheon* ruling, and ought not to be burdened by additional regulation. “The need to safeguard Constitutionally protected political speech allows no other approach.” *Id.* at 18,590.

As the Supreme Court noted just a few Terms ago, campaign finance laws ought to be interpreted so as to provide for more speech and less censorship. *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 474 (2007). This should be the guiding principle for all future actions taken by the Commission.

* * *

The Center appreciates the opportunity to comment upon the Commission’s ANPRM. In addition to these written comments, CCP requests an opportunity to have a representative testify before the Commission, in person, at its February 11, 2015 public hearing.

Respectfully submitted,



Bradley A. Smith
Chairman