

January 23, 2015

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Federal Election Commission
Office of General Counsel
999 E Street, NW
Washington, DC 20463

Re: Petition for Rulemaking

Dear Sir or Madam:

On October 7, 2014, we wrote the Commission concerning recent rulemakings intended “to conform FEC rules to recent Supreme Court decisions.” At that time, we noted our belief that “additional opportunities” exist “for the FEC to undertake similar actions... that would contribute significantly to the clarification of, and successful compliance with, the law.” Through this petition submitted pursuant to Part 200 of the Commission’s regulations, we suggest two reforms that present such opportunities.

First, the Commission should turn its attention to the Administrative Fines Program, and in particular to the expansion of that program signed into law last year. A rulemaking should be undertaken to formally implement that directive.

Second, the FEC should undertake a revision of several of its principal forms and their instructions. These comprise both the minimum and near-universal level of contact between those (except non-committee contributors) regulated by the Federal Election Campaign Act (“the Act”) and the Commission. Consequently, they provide the most obvious and effective means of providing clear and unambiguous guidance about much of the conduct regulated by the Act. However, in many cases the forms, and their instructions, are outdated and misleading, and all of them would benefit from greater clarity and relevance to the activities that they are supposed to disclose.

The failure to properly and timely file these reports exposes committees to Commission investigations and potential penalties. Moreover, the Act enables political or ideological opponents to file complaints that the Commission must process. As lawyers in the field, we have noted that poorly-resourced or unsophisticated filers are often led astray by the current forms, and that even sophisticated filers must guess about how to translate their conduct to the forms’ categories and design quirks. The consequences include not only unnecessary legal exposure for filers struggling to comply with the Act’s reporting requirements, but also inaccurate Commission data as apples and oranges are often reported as each other.

These problems can be substantially alleviated with a few targeted revisions addressing significant changes in the law over the past several years and inadequacies in the forms and their instructions that we and our clients have encountered over time. This would require relatively little of the Commission’s time, ought to be uncontroversial, and would materially improve the ease of filing and the quality of reports. The Commission should also embark on a more extended enquiry into its reporting forms to assure that they reflect accurately and clearly the

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relevant legal requirements, and to facilitate filer comprehension, accuracy, and consistency in reporting.

For those reasons, and to initiate that process, we respectfully submit this Petition for Rulemaking.¹

A. The Commission should implement the 2014 federal legislation expanding the scope of the Administrative Fines Program.

Last January, Congress extended the Administrative Fines Program (“AFP”) until the close of 2018.² As part of that extension, Congress placed additional categories of minor reporting violations under the AFP.³ The Commission thereafter stated that it would conduct a rulemaking “to address that expansion,”⁴ but it has not yet done so. In particular, the Commission has not implemented a system for addressing “the following categories of reporting violations” through the AFP:

- Independent expenditure reports filed by individuals and other entities using FEC Form 5 (2 U.S.C. §434(c));
- Certain federal election activity reports filed by state and local parties using FEC Form 3X (2 U.S.C. §434(e));
- Electioneering communications reports filed by individuals and other entities using FEC Form 9 (2 U.S.C. §434(f));
- 24- and 48-Hour reports of independent expenditures filed by political committees (using Schedule E of FEC Form 3X), and individuals, corporations, unions and other entities (using FEC Form 5) (2 U.S.C. §434(g));
- Bundling reports filed by campaigns, party committees and leadership PACs using FEC Form 3L (2 U.S.C. §434(i)); and
- Convention reports filed by convention and host committees in regard to national party conventions (2 U.S.C. §437).”⁵

We propose that, with the authority Congress provided last year, the Commission conduct a rulemaking that would extend the AFP to these categories of violations, using an approach that considers the criteria found at 11 C.F.R. § 111.43 – election sensitivity, level of activity, the number of days late, and the number of previous violations -- and similar factors but eschews a strict formulaic penalty.

¹ We note that some of these proposals, especially those concerning changes to the Commission’s forms and their instructions, may be accomplished without formal rulemaking. For instance, the Commission recently updated its Schedule E without notice and comment. In such cases, we believe it would be in the public interest for the Commission to immediately turn its attention to similar housekeeping matters.

² See FEC, Final Rule, “Extension of Administrative Fines Program,” 79 Fed. Reg. 3302 (January 21, 2014).

³ *Id.*

⁴ *Id.*

⁵ <http://www.fec.gov/pages/fecrecord/2014/february/adminfinesextension.shtml>.

B. The Commission should revise several of its principal forms and their instructions.

1. The Commission's forms should not require sophisticated accounting techniques or require filers to internalize the risk of necessary estimations.

Satisfactory completion of the current forms requires both sophisticated legal knowledge and accounting acumen. For example, the process for reporting in-kind contributions on Form 3X requires comfort with double-entry bookkeeping. In the Commission's words: "[i]n order to avoid inflating/deflating the cash on hand amount, the amount of an in-kind contribution from an individual should be disclosed as a receipt on Line 11(a)(i) of the Detailed Summary Page (Contributions from Individuals/Persons) and a disbursement on Line 21(b) of the Detailed Summary Page (Other Federal Operating Expenditures)."⁶ This method of recordkeeping is unnecessarily complex and confusing. Instead, we propose that the Commission add a single, streamlined page to Form 3X for reporting all in-kind contributions, and dispense with the requirement that in-kind transactions be, counterintuitively, reported as expenditures.

The Commission's 24- and 48-hour reports present another potential source of confusion. This is because not all expenditures are fully known at the time these reports are filed. Consider online expenditures where a committee is charged based upon the number of "clicks" its ad receives. In such cases, the scope of the expenditure cannot be known with precision within 24-48 hours. Nonetheless, because the duty to file these reports is triggered when activity worth a certain amount (\$10,000 and \$1,000, respectively) is undertaken, and not when the money is actually spent (an accrual concept whose application here we support), the committee may find itself forced to file a report despite possessing insufficient information. While this state of affairs is preferable to one in which a committee may avoid its statutory responsibility to file reports by simply delaying invoicing or payment, it is far from ideal. Accordingly, we propose that the Commission acknowledge that some guesswork will be involved in these and similar circumstances, and clarify that committees need only engage in best efforts to reasonably ascertain the value of expenditures subject to 24- and 48-hour reports.

2. The Commission's forms should reflect the existence of independent-expenditure only committees.

Independent expenditure only committees ("IE PACs") —sometimes colloquially called "Super PACs" (though most accurately described as non-contributing committees) —have been explicitly lawful since 2010, following the decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), which in turn relied upon *Citizens United v. FEC*, 558 U.S. 310 (2010). The Commission has recognized the impact of that and later decisions, noting that "[w]hen financing communications in connection with federal elections, it is important to understand that the rules differ significantly depending on whether the communication is coordinated with a candidate or

⁶ Federal Election Commission, *Political Action Committees*, (<http://www.fec.gov/rad/pacs/FederalElectionCommission-RAD-PACs.shtml>).

party committee or is produced and distributed independently.”⁷ Nevertheless, the Commission has not updated its forms to explicitly recognize the existence of independent-expenditure-only committees. Instead, it offers only a distinct cover letter that the Commission requests, but does not require, IE PACs to submit.

To take one example of this neglect, all political committees must complete Form 1, the Statement of Organization. That form’s first page includes a series of checkboxes for filers to declare the form a committee takes. But Form 1 does not provide a box for IE PACs. The absence of this option is confusing. Moreover, because the Commission’s instructions for completing Form 1⁸ have not been updated since February 2009,⁹ they provide no guidance at all for IE PACs, of which there are now, by the Commission’s count, nearly 1,000.¹⁰

As noted above, these committees may, but need not, submit a cover letter along with Form 1 that states their distinct nature.¹¹ But filers would not learn of this option by consulting the Commission’s instructions; instead, under the website heading “Nonconnected PAC Registration Toolkit,” the Commission provides a “[t]emplate for letter independent expenditure committees may file with their FEC Form 1, pending forthcoming FEC rules.”¹² But no form for IE PACs have issued, and no rulemaking has been proposed, despite the Commission’s recent rule revisions addressing other consequences of *Citizens United v. FEC*. This haphazard and informal system should be revised.

Accordingly, we propose that the Commission add a box on Form 1, item 5, allowing IE PACs to disclose their status, and do away with the cover letter system currently in place. We also propose that the Commission update its instructions for Form 1 to reflect the existence of (and new, streamlined reporting process for) IE PACs.

3. The Commission’s forms should reflect the existence of *Carey* funds.

Like IE PACs, non-contribution accounts of “hybrid” committees are not addressed by the Commission’s forms. Often called “*Carey* accounts” after the federal court decision recognizing their legality,¹³ these accounts allow a nonconnected political committee to solicit and accept unlimited contributions to one bank account designated for independent expenditures, while maintaining a second, separate bank account designated for source-and-amount-limited contributions to candidates and their authorized political committees. The Commission’s forms have not been updated to reflect the existence and lawfulness of these accounts.

⁷ Federal Election Commission, *Coordinated Communications and Independent Expenditures*, <http://www.fec.gov/pages/brochures/indexp.shtml>.

⁸ <http://www.fec.gov/pdf/forms/fecfrm1i.pdf>

⁹ *Id.* (see, e.g., p. 1 “revised 02/09”).

¹⁰ http://www.fec.gov/press/press2011/ieoc_alpha.shtml

¹¹ http://www.fec.gov/pdf/forms/ie_only_letter.pdf

¹² <http://www.fec.gov/info/toolkit.shtml>. See also, e.g., <http://www.fec.gov/info/forms.shtml>, noting that the letter is to be filed “pending forthcoming Commission rulemakings.”

¹³ *Carey v. FEC*, 791 F. Supp. 2d 121 (D.D.C. 2011). See also FEC Statement on *Carey v. FEC*, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account, October 5, 2011, <http://www.fec.gov/press/press2011/20111006postcarey.shtml>.

Form 1 does not provide a checkbox registration option for committees intending to use *Carey* accounts. Instead, like IE PACs, such committees may submit a cover letter¹⁴ along with their Statement of Organization. Also like IE PACs, *Carey* funds are not recognized or discussed in the FEC's instructions for completing Form 1. Finally—and, again, similarly—the cover letter option is not found in the Commission's instructions, but rather by reviewing the FEC's list of forms. The letter is described as a “[l]etter committees with non-contribution accounts may use in conjunction with Form 1, pending forthcoming Commission rulemakings.”¹⁵ Again, no such rulemaking has been noticed.

Similarly, Form 3X should be modified so that it is conducive to reporting *Carey* funds. The Commission has acknowledged that “there is not, at present, a clear way to distinguish on Line 11(a) between contributions deposited into the committee's separate accounts [on Form 3X].”¹⁶ It then prescribes how these funds should be indicated on the existing form.¹⁷ Plainly, rather than cause additional confusion for filers and the public, Form 3X should be updated to reflect how *Carey* accounts operate. This would be especially helpful for small, unsophisticated or unrepresented committees seeking to navigate this form.

Consequently, we propose that the Commission add a box on Form 1, item 5, permitting filers to state their intention to fund a *Carey* account, and do away with the cover letter system currently in place. And we suggest that the Commission update its instructions for Form 1 to reflect the existence of (and new, streamlined reporting process for) *Carey* accounts. Finally, we propose that the Commission add instructions and a second schedule to Form 3X for filers to report contributions to and expenditures from the separate, second account. This approach would be simpler for filers, and provide a clearer picture of a committee's activities to both the Commission and the public.

4. The Commission's forms should recognize that corporations and labor organizations may make contributions to IE PACs.

It has been nearly five years since *Citizens United v. FEC*, *SpeechNow.org v. FEC*, and the Commission's ensuing actions made clear that corporations and labor organizations could lawfully make contributions to IE PACs. Nevertheless, Form 3X lacks space for reporting these contributions.¹⁸ For example, Schedule A for itemized receipts contemplates all contributors in terms of “first, middle, last” name, “employer,” and “occupation.” These classifications plainly

¹⁴ http://www.fec.gov/pdf/forms/noncontribution_letter.pdf.

¹⁵ <http://www.fec.gov/info/forms.shtml>.

¹⁶ <http://www.fec.gov/press/press2011/20111006postcarey.shtml>.

¹⁷ See <http://www.fec.gov/press/press2011/20111006postcarey.shtml> (indicating that, because the form has not been updated to reflect changes in the law, “committees should report contributions deposited into the Non-Contribution Account on Line 17 of Form 3X titled ‘Other Federal Receipts.’ When itemizing on Schedule A, electronic filers should identify those receipts by entering ‘Non-Contribution Account’ as memo text or in the description field. (Paper filers should simply write ‘Non-Contribution Account’ below the amount).”)

¹⁸ See, e.g., Form 3X, p. 3, ln. 11.

do not apply to entities other than natural persons. Schedule A should clearly state that such entities may make contributions, and phrase its informational requests accordingly.¹⁹

The confusion on this point is apparent from the face of Form 3X, and is exacerbated by incorrect guidance in the Commission's brochure entitled "Coordinated Communications and Independent Expenditures." This brochure professes to have been updated in April 2014, but, bafflingly, ignores *Citizens United*. The section of the brochure entitled "Who May Make Independent Expenditures" advises filers that: "[p]ersons prohibited from making contributions or expenditures in connection with federal elections (such as corporations, labor organizations and individuals or businesses with federal government contracts) are similarly prohibited from making independent expenditures. However, there is one exception to this rule. Certain [n]onprofit [c]orporations [m]ay [m]ake [i]ndependent [e]xpenditures. In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, the Supreme Court outlined a limited exception to the general prohibition on corporate expenditures. The Court said that MCFL, a nonprofit corporation, could make independent expenditures because it had certain essential features."²⁰

But this guidance is, of course, wrong, as is now reflected in the Commission's recently-revised regulations. Surely, even if the regulation-revision process has lagged, the Commission's public guidance, and the materials on which the general public most relies, ought to avoid dated pronouncements that, undeniably, reflect a superseded and inapplicable legal regime.

We propose that the Commission reword the relevant portions of Form 3X to clearly permit reporting of corporate and labor contributions where they are lawful. We also propose that the Commission update its guidance to reflect the current state of the law in this area.

5. The Commission should confine Form 3X to nonconnected committees and separate segregated funds, create a separate reporting form for political party committees, and thoroughly redesign Form 3X.

Form 3X should be confined to nonconnected committees and separate segregated funds because of their significant differences from the political party committees that are also covered by that form. In addition to that change and our previous recommendations, Form 3X merits a thorough examination and redesign for purposes of compliance with current law, clarity and thoroughness, and its instructions merit the same. The Commission should undertake a fresh review of Form 3X, invite public comment and review state campaign finance reporting forms for ideas about how to make the form and its instructions accessible, complete and current.

¹⁹ This change also would accommodate the longtime fact that certain entities – partnerships, some limited liability companies, Native-American tribal entities, and unincorporated associations – are “persons” that may contribute to regular committees and are subject to the same contribution limits as are individuals. See 52 U.S.C. §§ 30101(11), 30116(a)(1), 30118(a); FEC AO 1978-51 (Friends of Eldon Rudd).

²⁰ <http://www.fec.gov/pages/brochures/indexp.shtml>.

Even if the political-party-specific material were removed from Form 3X, and the form's current overall format were retained, we suggest, for example, the following revisions:

1. Revise the form and instructions to reflect regulatory, judicial and administrative legal developments since their various segments were last revised (we note that they now reflect the Act's recent recodification under Title 52, which is a good start).
2. Add Schedule A lines for:
 - a. Refunds from nonfederal sources that are not offsets to operating expenditures (such as contributions and donations);
 - b. Refunds in connection with federal independent expenditures;
 - c. Miscellaneous receipts (distinct from or replacing the misleadingly titled Line 17, "Other Federal Receipts (Dividends, Interest, etc.)").
3. Subdivide Line 21(b) so it separates true federal operating expenses, such as rent, travel and the like, from direct political-activity expenses—such as GOTV—that are not contributions or independent expenditures (to be carefully and clearly explained in the instructions).
4. Similarly, subdivide and clarify Line 29 for administrative and direct political spending for nonfederal purposes (to be carefully and clearly explained in the instructions).
5. Add Schedule B lines for:
 - a. Voided checks that were previously reported as Schedule B disbursements, and either make clear that these are all negative entries or structure the summary pages so this line is a deduction from the Schedule B total;
 - b. Communications by a separate segregated fund to the membership of the connected organization.
6. Eliminate the "Category Type" Codes; they are redundant to the Schedule B lines and "purpose" explanations, and some of them are also confusing and overlapping. Moreover, the Commission does not appear to enforce compliance with them.
7. For nonfederal contributions and donations made, redesign the disbursement fields to list only what is relevant to the Act. For example, do not invite references to federal offices and types of elections there.
8. Improve Schedule E reporting of independent expenditures. Clarify what categories of expenses should be reported as independent expenditures and what related expenses may be reported as operating expenses (and so are not subject to 24-hour and 48-hour reporting). Clarify the obligation to include on 24-hour and 48-hour reports estimates of expenses that cannot be known with precision within their reporting deadlines, such as for some in-kind, grassroots, and social media expenses. Clarify whether and when there is an obligation to amend a 24-hour or 48-hour report.

9. Rather than require or recommend myriad kinds of memo entries interspersed throughout Form 3X, particularly for items that are not included in report totals (such as for the receipt of certain legal and accounting services), establish a separate schedule with appropriate lines to report and as appropriate quantify such matters.
10. More generally, dispense with requiring or recommending most memo entries interspersed throughout Form 3X and instead establish a separate schedule for their submission with links or references to the specific reporting entry (if any) that is explained.

Conclusion

The undersigned practitioners reflect divergent political views and clienteles, but strongly urge the Commission to take these important steps. These measures would enable regulated committees to comply with the Act's reporting and disclosure requirements, could be adopted on a fully bipartisan basis, and would advance the goals of statutory compliance, enforcement, and sound legal administration. To those ends, we hope that the Commission will act quickly to address the topics raised in this Petition.

We appreciate the Commission's consideration.

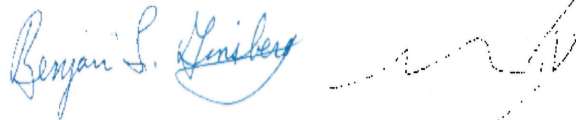
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