INSTITUTE FOR
FREE SPEECH

July 7, 2023

Federal Election Commission
1050 First Street, N.E.
Washington, DC 20463

Re: REG 2022-05: Conduit Reporting Threshold

Dear Commissioners:

The Institute for Free Speech ("IFS") respectfully asks the Federal Election Commission ("Commission" or "FEC") to consider these late-submitted comments on the above-referenced rulemaking petition filed by WinRed (the "Petition").

IFS supports the WinRed Petition, which asks the FEC to amend its rules requiring political committees acting as conduits to report small-dollar donors irrespective of the $200 threshold for itemizing contributions set forth in the Federal Election Campaign Act of 1971, as amended (the "FECA" or "Act"). Contrary to the December 22, 2022 comments of the Campaign Legal Center (the "CLC Comments"), the Act does not "expressly preclude[]" the Commission from amending its conduit reporting rule in the manner suggested by the Petition.[1] Instead, it is the FEC's current rule that clashes not only with the statutory text and scheme, but also with the donor disclosure jurisprudence.

A) The Act

1. The Act does not require conduits to report all donors under the $200 itemization threshold.

The Act does not require political committees acting as conduits to indiscriminately report *each and every* donor of earmarked contributions in disregard of the $200 itemization threshold specified elsewhere in the statute. Ironically, the CLC Comments, when parsed, illustrate this very point.

The Act broadly states, "The intermediary or conduit [of] an earmarked contribution shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient."[2]

[1] CLC Comments at 1.

[2] 52 U.S.C. § 30116(a)(8).

Purporting to rely on the "*Chevron* framework," CLC contends this "reporting requirement is categorical. It mandates the reporting — to the Commission and to the recipient — of the 'original source' of *every* earmarked contribution made on behalf of a candidate through a conduit."[3] However, CLC can only reach this conclusion by sleight of hand, first selectively quoting from *Chevron*, and then further selectively applying the cherrypicked *Chevron* language to the Act's text.

According to CLC, *Chevron* "asks if Congress 'has directly spoken to the precise question at issue*'* through the enabling statute."[4] CLC then elides the "precise question" phrase to claim that, here, "Congress, through FECA, 'has directly spoken' on the conduit reporting requirement as it applies to contributions made 'on behalf of candidates.'"[5]

Not so fast. While Congress may have "directly spoken" to the *general issue* of reporting conduit contributions, the particular FECA provision in question does not, on its face and by itself, address the "*precise question*" of *how* conduits "shall report the original source and the intended recipient of such contribution."[6]

This ambiguity becomes more apparent in light of the full *Chevron* framework, which does not support CLC's position (and which CLC, unsurprisingly, does not recite):

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. *If the intent of Congress is clear*, that is the end of the matter; for the court, as well as the agency, must give effect to *the unambiguously expressed* intent of Congress If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, *if the statute is silent or ambiguous with respect to the specific issue*, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[7]

Here, the FECA provision in question is not at all "clear" or "unambiguous." At best, it is silent on whether conduits must report *all* donors of earmarked contributions, regardless of how little they give, or only those contributing in excess of $200, as provided in the statute's general disclosure provisions. The conduit reporting provision merely says conduits must "report the

---

[3] CLC Comments at 2-3 (emphasis in the original).

[4] *Id.* at 2 (quoting *Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005)).

[5] *Id.*

[6] 52 U.S.C. § 30116(a)(8).

[7] *Chevron*, *U.S.A.*, *Inc. v. Nat'l Res. Def. Council*, *Inc.*, 467 U.S. 837-42 (1984) (emphasis added).

original source" of earmarked contributions in some general sense. Critically, the provision does not specify *what* information must be reported about the original source. Presumably, this must be read in combination with the whole of the statutory scheme.

The provision's broad and general treatment of reporting conduit contributions contrasts sharply with the exacting specificity found elsewhere in the FECA for public reporting of contributions. Specifically:

(i) committees' reports are required to include:

> the identification of each [] person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value *in excess of $200* within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal office), or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution;[8]

and

(ii) "identification" is specifically defined as:

> (A) in the case of any individual, the name, the mailing address, and the occupation of such individual, as well as the name of his or her employer; and
>
> (B) in the case of any other person, the full name and address of such person.[9]

Nothing suggests that Congress intended for the reporting of earmarked contributions through a conduit to obliterate the general statutory provisions on reporting contributions. In light of the "ambiguity in the statute or [] space in the enacted law" that exists regarding *how* committees acting as conduits are to "report the original source" of conduit contributions under 52 U.S.C. § 30116(a)(8), the Commission has discretion in how it chooses to "fill [in the] gap" by rulemaking.[10]

[8] 52 U.S.C. § 30104(b)(3)(A) (emphasis added).

[9] *Id.* § 30101(13).

[10] *U.S. v. Mead*, 533 U.S. 218, 229 (2001).

The Commission can and should recognize that there are two separate and distinct interests embodied in the Act's requirement for conduits to report earmarked contributions to the intended recipient, on the one hand, and to the Commission and the public on the other hand. *First*, there is a compliance interest: The recipient must abide by the contribution limit and itemization requirements. The recipient thus needs the full name and address of the contributor to aggregate contributions that are made directly to the recipient with those provided through the conduit and to make best efforts to obtain contributors' information when required. *Second*, there is an informational interest: Elsewhere in the FECA, Congress has spoken to the informational interest in donor disclosure only above the $200 threshold.

The FEC has a second-order compliance interest in the conduit reports insofar as the filings may help the agency determine whether recipients of earmarked contributions are properly accounting for and reporting them. However, the current reporting regime does not appear to advance this interest. We searched audit reports[11] and Matters Under Review (MUR) on the topic of earmarked contributions. We found only 11 MURs and 20 audit reports with findings of liability involving this issue, with just eight MURs involving reporting of earmarked contributions. There hasn't been a relevant audit report since 2006. While there is no clear pattern, one common violation is a recipient's failure to properly report conduit contributions in memo entries on Schedule A. We found no MURs opened involving earmarked contributions of $200 or less.

Given that a relatively common issue appears to be recipients not properly reporting earmarked contributions made through conduits (or not following the FEC's prescribed format for reporting such contributions), compliance concerns may be better satisfied by a new requirement that: (i) the conduit report the total amount of unitemized contributions that it passes along to each recipient on reports filed with the Commission; and (ii) the recipient report to the Commission the total amount of unitemized contributions that it receives from each conduit. If an investigation is necessary, the Commission could demand to see further details of unitemized earmarked contributions. Recipients' failures to report conduit contributions would be easily spotted with such a reporting requirement.

2. <u>The FEC's existing rule is contrary to the statutory scheme</u>.

Not only does the statute not bind the Commission to stick to its current approach of requiring conduit committees to itemize every earmarked contribution regardless of amount, but the current rule is actually contrary to the statutory scheme. If Congress has spoken to the specific question at issue, it is against, not in support of, the current FEC rule.

[11] We used the audit report filters of Findings and Issue Categories – Disclosure and the subcategory of Earmarked Contributions. We searched the FEC's legacy enforcement query system for "conciliation agreements" and "civil penalties, disgorgements, other payments and letters of compliance" for the keywords "earmarked contributions."

First, under the canon of statutory construction that the "specific governs the general,"[12] the FEC's existing conduit reporting rule fails to incorporate the Act's $200 contribution itemization threshold. To wit, while FECA's conduit reporting provision broadly and *generally* requires conduits to "report the original source" of earmarked contributions, elsewhere, the FECA *specifically* requires committees only to itemize information about donors who exceed the $200 threshold.[13] Therefore, the FECA's specific $200 contribution itemization threshold should also "govern[]" the general contributor reporting requirement under the conduit reporting provision.

Second, nowhere does the statute lend any support to the type of bifurcated donor disclosure scheme set forth in the Commission's rule, under which: (i) conduit PACs must report donors' names and addresses for earmarked contributions of any amount; and (ii) occupation and employer information ("OCC/NOE" in FEC-speak) must be additionally reported for each earmarked contribution of more than $200.[14] As explained above, the Act takes an all-or-nothing approach when it comes to itemization of contributions: Either *no* donor information is reported if a donor has given no more than $200 during the relevant timeframe, or *all* of a donor's information (name, address, and OCC/NOE) is reported upon triggering the $200 threshold.[15] The Act simply does not contemplate bifurcating the level of detail that is reported for donors based on a "zero-dollar" threshold (for name and address) and a $200 threshold (for OCC/NOE), as existing 11 C.F.R. § 110.6(c)(1) does.[16]

In short, the FEC's existing conduit contribution reporting rule is unsupported by the statute.

B) Donor Disclosure Jurisprudence

Campaign finance reporting requirements are subject to "exacting scrutiny," which requires "a substantial relation between the disclosure requirement and a sufficiently important governmental interest."[17] The standard requires a disclosure rule to be "narrowly tailored to the

---

[12] *Radlax Gateway Hotel*, *LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (internal brackets, quotation marks, and citation omitted); *see also Fourco Glass Co. v. Transmirra Products Corp*., 353 U.S. 222, 228 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.") (internal quotation marks and citations omitted).

[13] *Compare* 52 U.S.C. § 30116(a)(8) *with id.* §§ 30104(b)(3)(A), 30101(13).

[14] 11 C.F.R. § 110.6(c)(1)(iv)(A).

[15] 52 U.S.C. §§ 30104(b)(3)(A), 30101(13).

[16] In the *recordkeeping* context, the Act requires committees to collect a donor's name and address for every contribution exceeding $50, and to additionally collect OCC/NOE information for every donor whose contributions exceed $200. *Id.* § 30102(c)(2), (3). However, even there, the Act does not permit bifurcation based on the "zero-dollar" and $200 thresholds contained in 11 C.F.R. § 110.6(c)(1)(iv)(A).

[17] *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021) (quoting *Doe v. Reed*, 561 U.S. 186, 196 (2010)).

government's asserted interest."[18] The Act does not require "maximal disclosure" for every contributor, but rather also considers "the conflicting privacy interests that hang in the balance."[19]

In *Buckley v. Valeo*, the Supreme Court upheld the Act's contribution itemization threshold with misgivings, characterizing it as "indeed low."[20] The Court recognized that "[c]ontributors of relatively small amounts are likely to be especially sensitive to recording or disclosure of their political preferences," and that the requirement to publicly report donors "may well discourage participation by some citizens in the political process."[21] Nonetheless, the Court ultimately decided that Congress drew a permissible line with the threshold.[22] It is clear from *Buckley* that the Court would not have upheld a requirement for committees to report *all* donors, regardless of how little they give.

The Commission's existing conduit contribution reporting rule fails "exacting scrutiny" by requiring donors of even $1 to be publicly reported, in disregard of the Act's $200 itemization threshold for contributions. As *Buckley* recognized, the statute's itemization threshold serves the important function of protecting the privacy interests of small-dollar donors and not "discourag[ing] [their] participation [] in the political process." It strains credulity to believe that public knowledge of a $1 earmarked contribution made by John Doe through ActBlue or WinRed to Jane Roe's campaign for Congress "serves informational functions" or furthers "the prevention of corruption and the enforcement of the contribution limitations"—the governmental interests that *Buckley* recognized as justifying the FECA's reporting requirements.[23] Even the existing $200 contribution itemization threshold sweeps in far too many small-dollar donors, as supporters of more disclosure requirements have acknowledged.[24]

---

[18] *Ams. for Prosperity Found.*, 141 S. Ct. at 2383.

[19] *Van Hollen v. FEC*, 811 F.3d 486, 494 (D.C. Cir. 2016).

[20] *Buckley*, 424 U.S. at 83. The *Buckley* Court addressed the original itemization threshold, which was $100. Subsequent amendments to the Act raised the threshold to the current $200 level. However, the $100 threshold the *Buckley* Court addressed in 1976 would be $547 today, so the current $200 threshold is actually *much lower* than even the threshold at issue in *Buckley. See* U.S. Bureau of Labor Statistics, CPI Inflation Calculator, *at* https://www.bls.gov/data/inflation_calculator.htm; *see also* FEC, Legislative History of the FECA Amendments of 1979 at 155 ("the $100 threshold was originally established in 1971. Since that time the increases in the Consumer Price Index indicate that a $200 threshold would be effectively the same as the original threshold.").

[21] *Buckley*, 424 U.S. at 83.

[22] *Id.*

[23] *See id.*

[24] *See*, *e.g.*, Robert F. Bauer and Samuel Issacharoff, *Keep Shining the Light on 'Dark Money'*, POLITICO MAGAZINE, April 12, 2015, at https://www.politico.com/magazine/story/2015/04/keep-shining-the-light-on-dark-money-116901/ ("As a starting point in any reform initiative, the small donor should get a pass. The present federal threshold for donor reporting could be raised from $200 to $2,700, the current contribution limit. No one is 'buying' a candidate for public office for that figure, and the privacy interests of donors at that level or below should be protected."); Richard L. Hasen, *Show Me the Donors*, SLATE, Oct. 14, 2010, *at* https://slate.com/news-and-politics/2010/10/what-s-the-point-of-disclosing-campaign-donations-let-s-review.html ("[T]he Internet does have

Nor did the Commission explain how the conduit contribution reporting rule properly: (a) serves any of the judicially recognized interests in donor disclosure; and (b) implements the statute, especially in light of the Act's $200 contribution itemization threshold, when it first proposed and adopted the rule in 1976, or when it amended the rule in 1989 (but retained the same substantive approach).[25] In fact, the Commission did not provide any explanation whatsoever for the rule's substance either time. Incidentally, the agency's failure to explain the existing rule, by itself, puts the rule on shaky ground.[26]

The CLC Comments attempt to justify the Commission's rule on the grounds that "researchers and academics rely on conduit PAC reports to understand political donor behavior and educate the public about trends in politics," and provide numerous examples to that effect.[27] However, none of the rationales CLC offers has been recognized under the "exacting scrutiny" framework as serving a "sufficiently important governmental interest" to justify the infringement on donor privacy,[28] nor does CLC cite any judicial authority to support its claim.

Lastly, as explained above, the FEC does not appear to use reported information on conduit contributions of $200 or less for many, if any, enforcement matters. As Chief Justice John G. Roberts, Jr. wrote in the *Americans for Prosperity Foundation* opinion:

> California casts a dragnet for sensitive donor information from tens of thousands of charities each year, even though that information will become relevant in only a small number of cases involving filed complaints. California does not rely on [donor information] to initiate investigations, and in all events, there are multiple alternative mechanisms through which the Attorney General can obtain [donor]

---

the potential to make individual small contributors skittish about political activity. So we should raise the threshold for disclosure, requiring it for larger contributors and spenders and leaving out the small timers.").

[25] *See* FEC, Notice 1976-38, 41 Fed. Reg. 35932, 35950 (Aug. 25, 1976); FEC, Explanation and Justification for Final Rule on Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions, 51 Fed. Reg. 34098, 34107 (Aug. 17, 1989); *see also* FEC, Notice 1976-27, 41 Fed. Reg. 21572, 21586-87 (May 26, 1976); FEC, Notice of Proposed Rulemaking, Contribution and Expenditure Limitations and Prohibitions, 51 Fed. Reg. 27183, 27188-89 (Jul. 30, 1986).

[26] *See*, *e.g.*, *CREW v. FEC*, 316 F.Supp.3d 349, 378-79 (D.D.C. 2018) ("The FEC provided a single sentence explanation for new regulation § 109.2, stating that: 'This section has been amended to incorporate the changes set forth at 2 U.S.C. [§] 434(c)(1) and (2) regarding reporting requirements for persons, other than a political committee, who make independent expenditures.' . . . Otherwise, the administrative record provides no explanation for the divergence between the statutory purpose clause and initial proposed regulation . . . nor any indication that the FEC focused any attention on the discrepancy between the statutory text and the proposed regulation."), *aff'd*, 971 F.3d 340 (D.C. Cir. 2020).

[27] CLC Comments at 4-5.

[28] *See Buckley*, 424 U.S. at 66-68.

information after initiating an investigation . . . Certainly, this is not a regime whose scope is in proportion to the interest served.[29]

The same is true with the FEC's current rule.

C) Conclusion

When Congress amended the FECA in 1974 to require conduits of earmarked contributions to report such contributions, members of Congress were concerned about "secretive earmarking and laundering" of large contributions.[30] There is no evidence that Congress was concerned about reporting donors of every earmarked contribution of $1 or $5, nor does the statutory text require such reporting.

Over the years, both Congress and the Commission have been concerned about reducing the reporting burden on committees by raising the itemization threshold and eliminating excessive reporting. The legislative history of the 1979 FECA amendments is replete with references to "simplify[ing] the Act and reduc[ing] the recordkeeping and reporting requirements on candidates and committees," and Congress enacted numerous amendments to that effect.[31]

The FEC's rule requiring conduit committees to indiscriminately list on public reports every donor of an earmarked contribution, no matter how small, was contrary to the statutory text and scheme when the rule was enacted in 1976. The rule has become even more anomalous and anachronistic as the FECA, campaign finance jurisprudence, technology, and political fundraising practices have evolved over time.

For the reasons discussed above, the Commission should grant WinRed's Petition and initiate a rulemaking on the conduit reporting rule.

Sincerely,

Bradley A. Smith
Chairman

Eric Wang
Senior Fellow

---

[29] *Ams. for Prosperity Found.*, 141 S. Ct. at 2387 (internal citations and quotation marks omitted).

[30] H.R. Rep. No. 93-1239, Supp. Views of Rep. Bill Frenzel at 157, *reprinted in* FEC, Legislative History of the FECA Amendments of 1974 at 791; *see also* 120 Cong. Rec. S4710 (daily ed. Mar. 28, 1974) (statement of Sen. Cook), *reprinted in* FEC, Legislative History of the FECA Amendments of 1974 at 260) (discussing a hypothetical earmarked contribution of $3,000).

[31] FEC, Legislative History of the FECA Amendments of 1979 at 152; *see also*, *e.g.*, *id.* at 20-21, 32-33, 451. Even groups like Common Cause "strongly support[ed]" the FEC's "recommendations to reduce the number of reports to be filed" and to "simplify reporting requirements." *Id.* at 46.