215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

January 15, 2015

Federal Election Commission
Attn: Amy L. Rothstein
Assistant General Counsel
999 E Street, N.W.
Washington, D.C. 20463

Testimony of Public Citizen on Rulemaking and the *McCutcheon* Decision: Aggregate Biennial Contribution Limits (Notice 2014-12)

> *"Importantly, there are multiple alternatives available…. Such alternatives to the aggregate limits properly refocus the inquiry on the delinquent actor: the recipient of a contribution within the base limits, who then routes the money in a manner that undermines those limits."*
> --Chief Justice Roberts, McCutcheon v. FEC (2012)[1]

A sharply divided U.S. Supreme Court once again struck down regulations on money in politics on April 2, 2014, when five justices ruled that the long-standing "aggregate contribution limits" of the Federal Election Campaign Act of 1971 (FECA) are now unconstitutional on First Amendment grounds. *McCutcheon v. Federal Election Commission*, 572 U.S. __ (2014).

Prior to the *McCutcheon* decision, an individual could contribute up to a total of $123,200 per election cycle to all federal candidates and committees combined, with sub-limits of $48,600 to all candidates and $74,600 to all political committees and parties. This meant that a wealthy donor could give a maximum individual contribution to nine candidates and seven political committees.

Aggregate contribution limits were originally established in the 1974 amendments to Federal Election Campaign Act (FECA) in response to the Watergate scandals that involved allegations of laundered campaign funds, illegal corporate contributions, "bought" ambassadorships by wealthy individuals and secret campaign cash. More specifically, the aggregate contribution limits were offered as a means to avoid circumvention of the individual contribution limits. A wealthy contributor could sidestep the individual contribution limit to a candidate by making multiple contributions to other political committees that would then be spent supporting the same candidate. The aggregate contribution limits were upheld by the Supreme Court in the 1976 *Buckley v. Valeo* decision.[2]

---

[1] Chief Justice Roberts, Opinion, McCutcheon v. Federal Election Commission, 572 U.S. __ (2014), at 33-34.
[2] Buckley v. Valeo, 424 U.S. 1 (1976) at 38.

In 2014, the Roberts Court overruled this holding, reversing some 40 years of established campaign finance law. The *McCutcheon* decision expands the rights only of a handful of millionaires and billionaires capable of making campaign contributions in excess of $123,200. At the same time, the decision removes the bulwark of FECA's language to prevent circumvention of the individual contribution limits. Even the court majority recognized this, and encouraged policymakers to take appropriate steps to preserve the integrity of the contribution limits.

Appropriate remedial actions can and should be taken by the Federal Election Commission within the agency's boundaries for rulemaking. Public Citizen strongly recommends that the FEC take at least three regulatory actions to address the new campaign finance environment in the wake of the *McCutcheon* decision:

- Re-establish the comprehensive system of transparency of money in politics that existed prior to 2007, including full donor disclosure, that is prescribed by law and that the courts have concluded is so valuable to our democratic process.
- Strengthen the coordination and earmarking rules to prevent circumvention of the base contribution limits through such entities as the "super-connected" super PACs.
- Heed the advice of Chief Justice Roberts and limit the size of joint fundraising committees.

1. Donor Disclosure in Campaign Spending

There is no question about the constitutionality of mandating transparency of money in politics; the Court has repeatedly upheld campaign-finance disclosure laws, most recently and notably in *Citizens United* itself. The current era of "dark money" that has cast a pall over our elections does not come from the Court, nor does it come from the law. The current era of dark money in federal elections is traceable almost wholly to decisions, and lack thereof, by the Federal Election Commission.

Perhaps reflecting the Justices' lack of experience in real-world campaigns, the Roberts Court in *Citizens United* naively assumed that in the Internet age there is full disclosure of money in politics, reaffirmed the public's right to know, and even partly justified lifting campaign finance regulations on the grounds of transparency.

In *Citizens United*, Justice Kennedy wrote for the majority:

> *"With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can 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."*[3]

In *McCutcheon*, Justice Roberts reiterated the Court's confidence in disclosure:

> *"With modern technology, disclosure now offers a particularly effective means of arming the voting public with information... Today, given the Internet, disclosure offers much more robust protections against corruption... Reports and databases are available on the FEC's Web site almost immediately after they are filed, supplemented by private entities such as OpenSecrets.org and FollowTheMoney.org. 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."*[4]

But Kennedy and Roberts are gravely mistaken about the real world of campaign finance disclosure. Transparency of money in politics today is sorely lacking. And while some parts of the so-necessary disclosure regime can be enacted by other agencies—the SEC on corporate spending transparency for example—the bulk of the solution to this lack of disclosure lies at the steps of the FEC.

At the federal level, the initial fading of campaign finance disclosure began from an errant rulemaking by the Federal Election Commission. In response to the 2007 *Wisconsin Right to Life* decision, the FEC revised the disclosure rule by exempting groups that made electioneering communications from disclosing contributors' identities except in special cases in which donors specifically earmarked money for that purpose.[5] A similar earmarking requirement for disclosure has also been applied to independent expenditures.

Because few donors are apt to attach such specific instructions to their contributions, the effect has been to gut the disclosure requirement enshrined in BCRA – despite the fact that the federal statute calls for full donor disclosure.

According to an analysis by Public Citizen,[6] among groups broadcasting electioneering communications in federal elections, nearly 100 percent disclosed their funders in the 2004 and 2006 election cycles (the first two election cycles after BCRA created this category of campaign ads). In the 2008 elections, the first after *Wisconsin Right to Life* and the revised FEC rule on disclosure, the share of groups disclosing their funders plummeted to less than 50 percent. In 2010, barely a third of electioneering communications groups disclosed their funders.

---

[3] Citizens United, 588 U.S. at 370.
[4] McCutcheon, 572 U.S. _ at 24.
[5] 11 C.F.R. §104.20(c)(9).
[6] Taylor Lincoln and Craig Holman, 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process (2011), available at: http://www.citizen.org/documents/Citizens-United-20110113.pdf

Among groups making independent expenditures (expenditures expressly intended to influence elections) in federal elections, disclosure of donors fell from 90 percent in 2004 and 97 percent in 2006 to only 70 percent in 2010. Combining the loss of donor disclosure behind electioneering communications with the loss of donor disclosure behind independent expenditures, the sources of only about half the funds spent by outside groups in the 2010 federal elections were disclosed to the public. [*See* Appendix A, "Disclosure Eclipse (2010)]

There was a modest up-tick in donor disclosure in the 2012 elections, due almost entirely to the new prevalence of so-called "super PACs," which are registered political committees subject to federal disclosure laws. According to the Center for Responsive Politics, 24 percent of outside spending groups provided no donor disclosure, another 24 percent provided partial disclosure, and only about 52 percent of outside spending groups provided full disclosure of their funding sources.[7] But the total amount of "dark money" in the 2012 elections – at least $310 million – exceeded the amount of undisclosed money in any previous election.[8] According to the Center for Responsive Politics, estimates of dark money in the 2014 midterm elections are about $173 million, the highest of any previous midterm.

Dark money will continue to plague our elections, and continue to be a source of frustration and cynicism among the electorate, until such time as the FEC comports with the law and court rulings and re-establish regulations mandating full donor disclosure of money in elections.

2. Super PACs and the Coordination/Earmarking Rules

Of the alarming trends in the devolution of the nation's campaign finance system, the lack of transparency concerns the public most. But the emergence of super PACs – so-called independent expenditure committees that may receive unlimited funds from corporations, unions and wealthy individuals – run a close second.

Unlike dark money, super PACs did not come about due to the lack of needed FEC regulation. Instead, they owe their existence to several court rulings, including *SpeechNow.org v. FEC* (2010)[9], *Emily's List v. FEC* (2009)[10] as well as *Citizens United*. Based on the assumption that super PACs only make independent expenditures, rather than campaign contributions directly to candidates, the anti-corruption rationale for limiting donations to super PACs no longer holds. As a result, super PACs may receive unlimited donations from corporations, unions and individuals and spend that money independently of candidate campaigns. For the most part, donations and expenditures by super PACs are subject to disclosure.

---

[7] Center for Responsive Politics, analysis of disclosure of donors by outside spending groups in the 2012 federal elections, available at: http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=O&type=A&chrt=D

[8] Center for Responsive Politics, at: https://www.opensecrets.org/outsidespending/disclosure.php

[9] SpeechNow.org v. Federal Election Commission, 599 F.3d 674 (2010).

[10] Emily's List v. Federal Election Commission, 581 F.3d 1 (2009).

The problem with super PACs is not so much disclosure, but whether these groups are in fact "independent" of candidate campaigns and party committees. Public Citizen has provided extensive documentation that these groups tend not to be independent at all – in fact, super PACs tend to be "super-connected" to a specific candidate. Not only are these groups frequently established by former campaign workers or family of a candidate, share the same campaign vendors, and have the beneficiary candidate fundraise for the super PAC, super PACs are very likely to support only one single candidate or one single party committee.

Regular political action committees will support a wide number of candidates, oftentimes from both political parties. Not so with super PACs. Among outside electioneering groups that receive unlimited campaign donations, in the 2012 presidential elections 49 percent spent all of their money supporting a single candidate. In the 2014 congressional elections, 35 percent spent all of their money supporting a single candidate. Nearly all of these groups were super PACs. The percentage goes up when including super PACs that support a single party committee. Cumulatively, single-candidate and party-connected super PACs accounted for 65 percent of the money spent by these groups in the 2012 presidential election and 45 percent of the money spent in the 2014 congressional elections. Among just super PACs in the 2014 elections, 45 percent spent all of their money supporting a single candidate. Most of these super PACs were established and run by people who worked on the candidate's campaign.[11]

This information strongly supports what many political observers already treat as an undisputed fact: that a large percentage of super PACs are not truly independent of the candidate they support.

But the close working relationship between a super PAC and a candidate passes muster under the inadequate FEC coordination rules. While super PACs are not supposed to coordinate their activities with a candidate or party committee, super PACs can easily be established and run by former campaign staff of the candidate, share campaign vendors with the candidate, support only the one candidate, and the candidate may help raise funds for his or her super PAC – all without be considered coordinated under FEC rules.

According to the FEC coordination rule, illegal coordination between a super PAC and a candidate usually only occurs if the two discuss and plot campaign strategy within 120 days before a primary for a presidential candidate and 90 days before an election for a congressional candidate.[12] They can share the same vendors even within that time period so long as the vendor does not reveal strategic campaign strategy. And the candidate may raise funds for his or her super PAC at any time, so long as the candidate does not specifically ask for contributions in excess of the $5,000 limit for regular PACs.

This rule leaves a whole lot of room for coordination. "Coordination limits are essentially a joke if you want to avoid them," said Michael Franz, an associate professor of government at Bowdoin College. At least one professional joke-teller agrees: Comedian Stephen Colbert

---

[11] Taylor Lincoln, *Super-connected*, Public Citizen (2012); and Taylor Lincoln and Andrew Perez, *Super-connected*, Public Citizen (2014).

[12] For further explanation of the FEC coordination rule, see: http://www.fec.gov/pages/brochures/indexp.shtml#CC

recently seized on the issue, ridiculing how some groups seem to be cutting it laughably close with the law.[13]

For instance, in the earliest days of the 2012 presidential campaign, the campaign manager of eventual nominee Mitt Romney initiated a super PAC called "Restore Our Future," which was run by staff from Romney's 2008 presidential campaign. Members of the Romney campaign and the Restore Our Future staff reportedly strategized for much of the first half of 2011. Then, to avoid violating coordination rules, the two teams parted company 120 days before the first date on which the super PAC might have wished to air its first ad. (*See* Appendix B, "Super-connected")

The problem of super PAC coordination with candidates and party committees is even more accentuated with the *McCutcheon* decision. The Roberts Court recognized the problem that the end of aggregate contribution limits may well lead to circumvention of the base limits by unscrupulous PACs – and recommended that the FEC strengthen its regulations to address the problem.

According to Chief Justice Roberts:

> *"Other alternatives might focus on earmarking. Many of the scenarios that the Government and dissent hypothesize involve at least implicit agreements to circumvent the base limits – agreements that are already prohibited by the earmarking rules. 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."*[14]

Public Citizen encourages the FEC to do exactly what Chief Justice Roberts advises: strengthen the coordination and earmarking rules to capture the obvious circumvention to the individual contribution limits that we see at play with today's super PACs.

The FEC should strengthen its coordination rule to include shared vendors and campaign staff between an outside group and a candidate. Coordination between a candidate and outside group should be defined to include:

- Candidates and outside groups that support the candidate may not share the same vendors;
- Any person who has been employed or retained by a candidate over the previous four years is deemed coordinated with the candidate when it comes to establishing and/or running an outside electioneering group that supports the candidate.
- The candidate would be considered coordinated with an outside electioneering group that supports the candidate if the candidate raises funds for the group during an election cycle.

---

[13] Marian Wang, "Uncoordinated coordination: Six reasons limits on super PACs are barely limits at all," ProPublica (Nov. 21, 2011), available at: http://www.propublica.org/article/coordination-six-reasons-limits-on-super-pacs-are-barely-limits-at-all

[14] McCutcheon v. FEC, 572 U.S. __ at 35.

- An outside electioneering group will be considered earmarking funds for the candidate if it spends more than 10 percent of its resources on express advocacy advertisements or electioneering communications directly supporting the candidate in an election.

3. Joint Fundraising Committees

An analysis by Public Citizen shows exactly how much wealthy individuals may drown out the voices of the general public. In a post-*McCutcheon* world, a wealthy donor may contribute up to $3.6 million in an election cycle to the candidates and committees of a single party, and up to $5.9 million if officeholder leadership PACs are included in the calculation.[15]

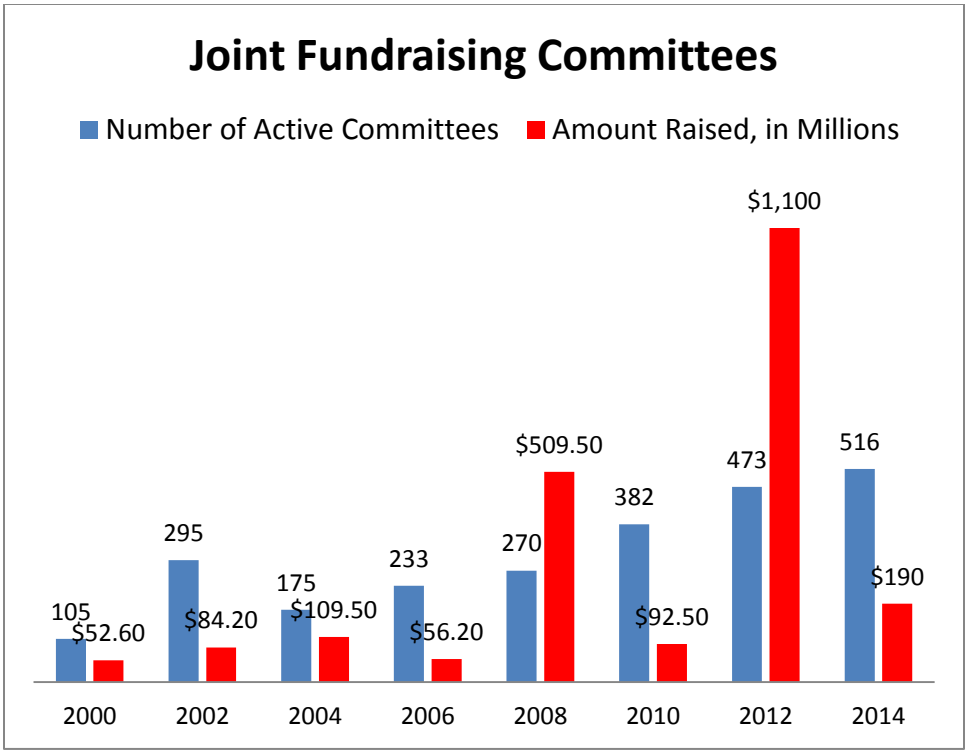
In addition to drowning out the voices of the general public in the political process, the *McCutcheon* decision dangerously raises the specter of actual corruption. It would be quite a bit of tedious work for a wealthy donor to hand out separate checks to hundreds of candidates, but that is not how campaign fundraising tends to work in the real world. Fundraising for groups of candidates and party committees is done through a single "joint fundraising committee," usually run by a congressional leader or party boss. The person heading a joint fundraising committee receives a single large check from a wealthy donor and then doles the money out to participating candidates and party committees in accordance to the base limits.

Joint fundraising committees originally were envisioned as useful fundraising tools in which a couple of candidates joined resources to stage an affordable fundraising event. Joint fundraising committees were few in number and generally accounted for modest donations. But they quickly grew in number and significance since the presidential elections of 2000. Presidential candidates began making extensive use of joint fundraising committees to collect checks from wealthy donors by joining their campaign committees with state and federal party committees, the latter of which already had high base limits of $25,000 or more depending on the year. By the 2012 presidential election, presidential joint fundraising committees, such as the Obama Victory Fund, could receive checks as large as $75,800 from a single donor – the maximum amount allowed under the aggregate contribution limits of that year –which was then disbursed to the presidential campaign and party committees dedicated to support the presidential campaign.

Congressional leaders and party bosses took note of the massive campaign funds that could be raised through joint fundraising committees and followed suit. According to the Center for Responsive Politics, the number of active joint fundraising committees in presidential and congressional elections rose from 105 in the 2000 election cycle, raising $52.6 million for their candidates, up to 473 joint fundraising committees in the 2012 election cycle, raising more than $1.1 billion. In the 2014 midterm elections there were 516 such committees raising about $190 million.

---

[15] Adam Crowther, Beware of a Naïve Perspective (Part 1 of 2), Public Citizen (Jan. 7, 2014) at 7, available at: http://www.citizen.org/*McCutcheon*-campaign-finance-analysis-report. On a separate note, the 2014 Crominbus legislation passed in the waning hours of the 113th Congress contained an unvetted provision creating seven new national party accounts, each of which can raise $92,700 per donor. These accounts are on top of an FEC approved fourth national party committee to raise funds and pay for the national party conventions. Given that legislation has created a plethora of new fundraising vehicles for the national parties, the FEC should reverse its new rule creating a separate national party committee.



Following the *McCutcheon* decision, joint fundraising committees are expected to explode in number and significance for financing all federal campaigns. Without aggregate contribution limits, the sky's the limit for these entities, which will be run by a congressional leader or party boss. A wealthy individual who seeks to curry favor with the Speaker of the House or Senate Majority Leader now has a legal avenue to hand over a single multi-million dollar check to that officeholder.

To make matters worse, transfers between candidates and parties will make evasion of even the base limits very likely. While joint fundraising committees are required under FEC regulations to create a distribution formula for divvying up their largess among participating candidates and party committees,[16] the recipient candidates and party committees are not so bound. They may make large and, in the case of candidates to parties, unlimited transfers of those funds. As a result, candidates in noncompetitive elections may participate in a joint fundraising committee, receive an allocated contribution through the committee from a donor who maxed out to the national party committees, and then transfer those funds directly to the national party committees, indirectly but legally sidestepping the base limits for that donor.

Chief Justice Roberts specifically stated in *McCutcheon*'s plurality opinion that restrictions on transfers of funds involving joint fundraising committees, or limits on the size of joint fundraising committees, may be an appropriate policy response.

[16] 11 C.F.R. 102.17

Roberts wrote:

> *"One possible option for restricting transfers would be to require contributions above the current aggregate limits to be deposited into segregated, nontransferable accounts and spent only by their recipients. Such a solution would address the same circumvention possibilities as the current aggregate limits, while not completely barring contributions beyond the aggregate levels. In addition (or as an alternative), if Congress believes that circumvention is especially likely to occur through creation of a joint fundraising committee, it could require that funds received through those committees be spent by their recipients (or perhaps it could simply limit the size of joint fundraising committees)."*[17]

Joint fundraising committees are authorized by statute[18] and subject to FEC regulations.[19] The federal election campaign law does not prescribe the structure of joint fundraising committees, other than allowing transfers of funds among participating committees of a joint fundraising committee. It is within the purview of the Federal Election Commission to limit the size of joint fundraising committees, especially in light of the removal of aggregate contribution limits under the *McCutcheon* decision.

Public Citizen strongly encourages the FEC to heed the advice of Chief Justice Roberts and place reasonable limits on the size of joint fundraising committees in order to prevent wealthy donors from handing over very large campaign contributions to those heading a joint fundraising committee. Section 102.17 of Title 11 of the Code of Federal regulations should be amended by requiring: (1) that a joint fundraising committee may only be established by, and serve to benefit, an authorized candidate committee; and (2) that no more than three candidate committees may participate in a single joint fundraising committee.

Limiting the size of joint fundraising committees in this fashion would preserve the original intent of joint fundraising – to allow candidates with limited financial resources to pool fundraising resources – while averting the potentially corrupting influence and circumvention of the individual contribution limits posed by the *McCutcheon* decision.

Conclusion: *McCutcheon* Decision Calls for Remedial Regulatory Responses

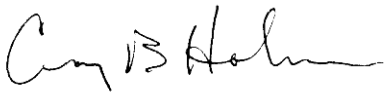
The Roberts Court in the *Citizens United* and *McCutcheon* decisions has fundamentally re-written the nation's campaign finance laws, posing several new and grave dangers for our democratic system of governance. Some of these dangers have been wrought by the Federal Election Commission's regulatory decisions that are wholly inconsistent with the assumptions and rationale of the Court; other dangers the Court has even recognized and advised the FEC to take appropriate remedial actions.

---

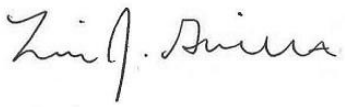
[17] McCutcheon v. FEC, 572 U.S. __ at 34.
[18] 2 U.S.C. 432(e)(3)(A)(ii), and 2 U.S.C. 441a(a)(5)(A).
[19] 11 C.F.R. 102.17

In the rulemaking to address the *McCutcheon* decision, Public Citizen strongly recommends that the Federal Election Commission adopt at least three appropriate responses to the new campaign finance environment. First and foremost, the FEC must re-establish the comprehensive campaign finance disclosure system that the agency undermined in 2007 – a system of transparency of money in politics that the Court concluded is so essential. Second, the FEC should recognize what is quite evident to the casual observer that an appropriate regulatory response to the *McCutcheon* decision is to strengthen the coordination and earmarking rules to prevent circumvention of the base contribution limits by such entities as super PACs. Even the Roberts Court recognizes this danger and suggests strengthening these rules. Finally, as recommended by Chief justice Roberts, the FEC should place reasonable limits on joint fundraising committees to prevent these entities from becoming a major vehicle for circumvention of the base limits.

Respectfully Submitted,



Craig Holman, Ph.D.
Government affairs lobbyist
Public Citizen's Congress Watch



Lisa Gilbert
Director
Public Citizen's Congress Watch

Taylor Lincoln
Director of Research
Public Citizen's Congress Watch

Appendix A

Disclosure Eclipse

Appendix B

Super-connected (2014)