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Submitted Electronically

Federal Election Commission
Attn: Robert M. Knop
1050 First Street, NE
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RE: Comments on REG 2018-03, Definition of Contribution

Public Citizen urges the Federal Election Commission (FEC) to revisit its regulations on donor disclosure of independent expenditures and electioneering communications in light of the recent District Court decision, *CREW v. FEC*. However, the petition for rulemaking by the Institute for Free Speech for the agency to revise its definition of "contribution" (11 CFR 100.52) is not responsive to the court ruling.

In *CREW v. FEC*, the District Court made it clear that the FEC's regulation regarding donor disclosure of independent expenditure campaigns (11 CFR 109.10) is invalid and must be rewritten to conform with the intent and plain language of the Federal Election Campaign Act (FECA). The Commission has interpreted the language "for the purposes of furthering" an independent expenditure in an extremely narrow sense to mean that only donations that are specifically earmarked for an independent expenditure campaign need be disclosed. This has resulted in widespread evasion of the disclosure requirement and runs contrary to the law.

By implication, the donor disclosure regulation for electioneering communications (11 CFR 104.20) has been similarly interpreted by the FEC in such a narrow sense as to render the disclosure law nearly null and void, contrary to the law.

The Commission must address its regulatory shortcomings in 11 CFR 109.10 and 11 CFR 104.20 in order to properly administer the donor disclosure requirements for independent expenditures under FECA and for electioneering communications under the Bipartisan Campaign Reform Act (BCRA). The regulations need to make clear that the term "for the purpose of furthering" is not interpreted as earmarking, but is intended according to the law to include any significant donations used by the electioneering group to finance independent expenditures or electioneering communications.

FEC Regulation, Not the Law, Gutted Federal Disclosure

This collapse of the disclosure regime at the federal level, which has been mirrored in states that have not unilaterally implemented new state disclosure laws or regulations, is primarily due to the Federal Election Commission (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,[1] in which the Roberts Court began the slippery slope to *Citizens United*[2] and ruled that corporations could provide funds for electioneering communications as long as those political ads were issue oriented.

With that first salvo at BCRA, the FEC wrestled with the donor disclosure requirement under BCRA for electioneering communications made by corporations. Section 201 of BCRA lays out the disclosure requirements for groups funding electioneering communications. BCRA clearly states that all major donors to the person making the electioneering communication must be disclosed, not just those who contributed for a campaign ad. The provision reads in part: "Every person who makes a disbursement for the direct costs of producing and airing electioneering communications in an aggregate amount in excess of $10,000 during any calendar year shall, within 24 hours of each disclosure date, file with the Commission a statement containing . . . the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to the person making the disbursement during the period beginning on the first day of the preceding calendar year and ending on the disclosure date."

BCRA donor disclosure requirement was not written with any consideration of corporate disclosure, since corporations were not allowed to make electioneering communications or independent expenditures. The Commission queried: if an electioneering communication is financed by a corporation from its general treasury, need the corporation disclose all customers who purchased $1,000 or more of the company's products?

Obviously, that would be an absurd disclosure requirement, since a company's customers are clearly not providing their money for any purpose other than purchasing a product. That is why all state and local jurisdictions across the nation that had previously allowed corporate political spending, and required donor disclosure, imposed the standard exemption from disclosure for regular commercial exchanges unrelated to the electioneering activity.

But the FEC chose a different path. The Commission 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.[3] Thus, corporations, trade associations and other nonprofit groups could spend money for issue-oriented electioneering communications without disclosing the sources of those funds as long as the donors did not *specifically* give money to finance electioneering advertisements.

This was a critical mistake which has had devastating consequences.

Just before the 2010 elections, the three Republicans on the FEC issued a statement endorsing an even narrower interpretation of the disclosure rule. They opined that electioneering groups should only have to disclose those donors who specified that their money would be used for a

[1] Wisconsin Right to Life v. Federal Election Commission, 551 US 449 (2007).
[2] Citizens United v. Federal Election Commission, 558 US 310 (2010).
[3] 11 C.F.R. §104.20(c)(9).

specific ad, aired in a specific race.[4] When Ellen Weintraub, a Democratic commissioner on the agency who voted for the disclosure rule in 2007, read the Republican statement, she commented: "This is an unprecedented narrow reading of the regulation. It's certainly not what I intended when I voted for that regulation."[5]

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. BCRA states that any group conducting electioneering communications must fully disclose the donors of $1,000 or more behind those expenditures. But so far the regulators at the FEC have decided otherwise.

This errant decision by the FEC to override the law's donor disclosure requirement for electioneering communications quickly spread to independent expenditures as well, which had similar "for the purpose of furthering" language in its disclosure law. Outside groups immediately seized upon the new regulatory language for electioneering communications and interpreted the language in the narrowest sense as requiring disclosure only of donations "earmarked" for campaign ads. Many outside groups stopped disclosing donors, since few donors actually earmark their contributions. Once outside groups realized they could evade the disclosure law this way for electioneering communications, they began poking the same loophole in the disclosure law for independent expenditures.

After nearly 100 percent of groups revealed the donors funding their electioneering communications in the 2004 and 2006 election cycles, fewer than 50 percent did so in 2008. In the primary season of the 2010 election cycle, fewer than one-third of groups disclosed their funders, a Public Citizen analysis shows.

Disclosure of Donors for Electioneering Communications, 2004 to 2010

Election Cycle	Number of Groups Making Electioneering Communications*	Number of Groups Reporting the Donors that Funded their Electioneering Communications	Pct. of Groups Reporting the Donors that Funded their Electioneering Communications
2004	47	46	97.9
2006	31	30	96.8
2008	79	39	49.3
2010**	22	7	31.8

Source: Public Citizen analysis of FEC electioneering communications reports, available at www.fec.gov/finance/disclosure/ec_table.shtml

* Regards electioneering communication defined by BCRA, *i.e.*, broadcast advertisements depicting the likeness of a federal candidate (but stopping short of expressly voting for or against the candidate) within 60 days of a general election or 30 days of a primary.

** Includes electioneering communications through Sept. 2, 2010, the day before the general election reporting period began.

[4] Statement of Reasons for Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, Freedom's Watch, Inc., MUR 6002 (Aug. 13, 2010), available at: http://eqs.sdrdc.com/eqsdocsMUR/10044274536.pdf

[5] Robert Wechsler, "Ethical Officials and Disclosure Rules," CityEthics.org (Sep. 16, 2010).

Among groups making independent expenditures (expenditures expressly intended to influence elections) disclosure of donors fell from 90 percent in 2004 and 97 percent in 2006 to only 70 percent in 2010. Notably, the only groups that could withhold information about their funders in the past were "qualified non-profits," groups that have no business purpose and receive their funding exclusively from individuals. No such assurance exists for the independent expenditures groups that concealed their donors in 2010.

Disclosure Among Top 30 Groups Making Independent Expenditures, 2004-2010

Year	Groups Disclosing Funders	Groups Not Disclosing Funders	Pct. Of Groups Reporting the Donors funding IEs
2004*	26	3	89.7
2006	29	1	96.7
2008	25	5	83.3
2010	21	9	70.0

Source Public Citizen's analysis of Federal Election Commission data and the Center for Responsive Politics: www.opensecrets.org/outsidespending/index.php
* One case is ambiguous and was not included

With the once-excellent disclosure regimes for electioneering communications and independent expenditures now in disarray, the 2010 *Citizens United* decision unleashed a torrent of dark money in federal elections. *Citizens United* bestowed personhood on corporations for campaign spending purposes and allowed any domestic entity to make unlimited electioneering communications and independent expenditures.

The explosion in corporate and outside group spending prompted by *Citizens United* was even more shocking than expected in 2010. Spending by outside groups jumped to $294.2 million in the 2010 election cycle from just $68.9 million in 2006, the previous mid-term election cycle. The 2010 figures nearly matched the $301.7 million spent by outside groups in the 2008 presidential cycle. Because spending in presidential cycles normally dwarfs spending in mid-term elections, the uncharacteristically high spending in 2010 presaged blockbuster spending in future elections – and with it, more dark money.

Aggregate figures compiled by the Center for Responsive Politics show the obvious impact the FEC earmarking rule change has had in promoting undisclosed funds in federal elections.

Aggregate "Dark Money" Spending in Federal Elections

Election Cycle	**Total Dark Money**
2002	$4 million
2004	$6 million
2006	$5 million
2008	$102 million
2010	$139 million

2012	$313 million
2014	$178 million
2016	$184 million
2018	$148 million

Source: Center for Responsive Politics

On August 3, 2018, the U.S. District Court for the District of Columbia recognized the harm done by the FEC's earmarking disclosure regulation for independent expenditures and vacated the Commission's regulation for failing to implement the statute's donor disclosure requirement.[6] The court did not specifically address electioneering communications, but the ruling no doubt will impact the donor disclosure requirement for both types of election ads. On August 27, 2018, the Institute for Free Speech petitioned the Federal Election Commission to reconsider its earmarking disclosure rule by clarifying that the definition of "contribution" in 11 C.F.R. 100.52 subject to disclosure and limits.

Conclusion: The Petition for Rulemaking to Revise the Definition of "Contribution" Misses the Real Problem

The District Court's ruling in *CREW v. FEC* is not that the FEC's definition of "contribution" in 11 C.F.R. 100.52 is overly broad and contains "hazards of uncertainty" – as asserted in the petition for rulemaking by the Institute for Free Speech – but that the agency's interpretation of "for the purpose of furthering an independent expenditure" runs contrary to the intent and plain meaning of the law.

The clear objective of the Federal Election Campaign Act regarding independent expenditures (52 U.S.C. 30104) is to ensure full disclosure of the sources of donations in excess of $250 per year that financed the independent expenditure campaign. The court stated that the law must be read to avoid rendering any part of the statute "inoperative or superfluous, void or insignificant" and that doing so "is essential to ensuring meaningful disclosure." In regard to the FEC regulation interpreting the donor disclosure requirement for independent expenditures as just requiring disclosure of earmarked contributions, the court found that the FEC regulation requires "significantly less" disclosure than intended by the law.

Consequently, it is not the definition of contribution that the FEC should reevaluate; it is the earmarking interpretation of the donor disclosure regulation for independent expenditures (11 CFR 109.10) that the agency needs to revisit – and in context the same loophole in the campaign finance law posed by the earmarking donor disclosure regulation for electioneering communications (11 CFR 104.20).

Public Citizen encourages the Commission to reverse its earmarking interpretation of the donor disclosure law for independent expenditures and electioneering communications, and to restore the original intent and previous practice of the disclosure law to ensure full transparency of the sources of donations financing campaign ads by outside groups.

[6] CREW v. Federal Election Commission, No. 16-259 (BAH) (D.D.C. Aug. 3, 2018).

Sincerely,

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