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SUBMITTED ELECTRONICALLY

Amy L. Rothstein, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Notice 2014-12, Aggregate Biennial Contribution Limits

Dear Ms. Rothstein:

On behalf of the Perkins Coie LLP Political Law Group, we submit these comments on the above-referenced advance notice of proposed rulemaking. Our comments are not on behalf of any particular client. However, as practitioners who work regularly with the Commission, we would like to offer some observations that the Commission may find useful. We would request the opportunity to discuss them further at the hearing on February 11, 2015.

First, the Commission should evaluate this proposed rulemaking versus other competing priorities. The Commission must, of course, conform its rules with changes in the statute and judicial orders. We appreciate that the Commission last year adopted a final rule to conform to the decision in *McCutcheon v. FEC,* 134 S. Ct. 1434 (2014), and took steps to conform its rules to the decision in *Citizens United v. FEC,* 558 U.S. 310 (2010).

There are other, major gaps in Commission rules that remain to be addressed:

- The Commission has not yet revised its rules to account for so-called "Super PACs" in the wake of the decision of the United States Court of Appeals for the District of Columbia Circuit in *SpeechNow.org v. FEC,* 599 F.3d 686 (D.C. Cir. 2010) (en banc).

- The Commission also has yet to revise its rules to account for so-called "hybrid PACs" following the United States District Court for the District of Columbia's decision in *Carey v. FEC,* 791 F. Supp. 2d 121 (D.D.C. 2011).

- In November 2014, the United States District Court for the District of Columbia vacated and remanded Commission rules governing the disclosure of electioneering communications in *Van Hollen v. FEC,* No. CV 11-0766, 2014 WL 6657240 (D.D.C. Nov. 25, 2014). While a private intervenor is appealing the court's order, the Commission is not. And, however the case is decided on appeal, the rules governing disclosure of independent expenditures and electioneering communications by persons

other than political committees will remain a confusing, asymmetrical tangle unless Congress or the Commission acts.

- In December 2014, Congress enacted amendments to the Federal Election Campaign Act of 1971 that changed the contribution limits for national political party committees, partly so that they may finance presidential nominating conventions without public funds. *See* Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 101 (2014). In that same law, Congress also established building and recount accounts for the national parties. Commission rules will have to be revised and conformed to these developments in the law.

Thus, there are a number of subjects on which the Commission, rather than considering whether it is advisable to add rules, must change the rules to comply with court orders, or to avoid major gaps between the current rules and actual practice. Some of these subjects directly affect the "collection and presentation of campaign finance data." *Id.* at 62,363. Sound administrative practice suggests that the Commission should turn to these subjects first.

Second, the areas addressed by the advance notice of proposed rulemaking all share certain attributes that should cause the Commission to act judiciously when proposing or making changes to the rules. In particular, the earmarking, affiliation and joint fundraising rules involve very complex areas of law that have developed over decades, and in which the politically active have a strong reliance interest, having organized themselves around them.

The earmarking rules affect not simply how political parties and PACs collect and forward contributions from their adherents to candidates, but also how candidates can motivate their adherents to support the parties and PACs. The litigation in *EMILY's List v. FEC,* 581 F.3d 1 (D.C. Cir. 2009) shows how over-eagerness to find support for a clearly identified candidate in a PAC's fundraising appeal can result in a rule that is insufficiently tailored to meet First Amendment speech and association concerns. The affiliation rules affect not simply anti-circumvention interests, but also associational freedoms: for example, they provide the framework within which the Commission imputes candidate and officeholder soft money fundraising restrictions to non-party, non-candidate groups. Finally, the joint fundraising rules provide a transparent way for candidates and parties to solicit contributions together.

Wholesale changes in any one of these areas would require a substantial reordering of how candidates, parties and PACs now operate. We are inclined to doubt that the advance notice of proposed rulemaking will elicit anecdotal or statistical evidence of a problem caused by *McCutcheon*, for which the solution would justify the cost of such changes at the present time.

Finally, the Commission should consider the asymmetrical impact that a rulemaking would have among the politically active. After *Citizens United,* the world is divided even more sharply

between entities which operate within FECA's limits, restrictions and reporting requirements, and those which do not. Changes to the earmarking, affiliation and joint fundraising rules would inevitably impact the former disproportionately, while doing little to provide more transparency about the latter's financing. Footnote 4 of the advance notice of proposed rulemaking neatly shows this: it states correctly that the earmarking rules and their "rationale do not apply to an independent expenditure-only political committee's solicitations or any contributions it receives that are earmarked for specific independent expenditures." 79 Fed. Reg. at 62,362 n.4 (brackets omitted). While the Commission must lend force and effect to the statutes it enforces, it should move cautiously before further burdening the activities of candidates and committees that are already hard-pressed to compete with Super PACs, corporations and unregistered nonprofits under the constitutional and regulatory standards now in place.

We appreciate the opportunity to comment on these matters.

Very truly yours,

Marc Erik Elias
Robert F. Bauer
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