

Robert F. Bauer  
RBauer@perkinscoie.com  
D. (202) 434-1602  
F. (202) 654-9104

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**SUBMITTED ELECTRONICALLY**

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

Dear Ms. Rothstein:

I am pleased to comment on the Advance Notice of Proposed Rulemaking published by the Commission on October 17, 2014, which is the subject of a hearing on February 11. The following comments are offered in my individual capacity, and I will also be joining my colleagues in the Perkins Political Law Group in another set of comments. As for the ones I am submitting, I would ask that they be considered along with a request to testify on February 11.

In the first place, the Commission is to be commended for putting out these questions through the Advance Notice of Proposed Rulemaking, and for acting as it did last year to address with rulemakings *McCutcheon* and *Citizens United*. At a minimum, the ANPRM serves as an opportunity for an important discussion about the implications of the *McCutcheon* decision. It is to the benefit of all concerned -- the agency, the "regulated community", and the general public -- to have informed and timely consideration of significant developments in the law.

That having been said:

The Commission should pause before launching actively into rule-making on the specific issues identified in the ANPRM. Certainly any number of these questions are more properly the responsibility of the Congress. The Court in *McCutcheon* directed certain of its suggestions to Congress, and that is the forum for the thoroughgoing consideration and, eventually, majority support and public acceptance that further regulatory development is best built on.

But even on matters that may be within the sphere of the FEC, there is good reason for the agency to reserve judgment on additional regulations of the kind raised for comment in the ANPRM. Should the rules be expanded in various ways-- most of the time made more complex and restrictive--it is important that the Commission proceed only on the best information available about the significance of the problems it is proposing to attack. Observers of the

debate over *McCutcheon* heard much about circumvention strategies assumed to be inevitable if the aggregate limits were stuck down. The concerns were typically expressed in highly speculative terms. It is reasonably concluded from the American experience with campaign finance regulation that, it develops against expectation, confounding even the experts. There are exceptions to that rule -- for example, the rise in third-party or "outside" group spending and the diminishment of the political parties -- but these are truly exceptions.

As a result, there is a risk of poor rulemaking if it is conducted in the absence of a hard data and information about what, in fact, is taking place in political practice. A rule constructed around hypothetical scenarios will all too often lack meaningful practical impact: the remedy proposed may remain as hypothetical as the problem it is supposed to address. Of course, that a rule is ineffective does not mean that it is without cost-- cost that can be measured in compliance burdens and expense, opportunity for expanded charges and counter charges, and the inevitable frustration of discovering that the agency has added to the regulatory rule-book without an appreciable gain in enforcement effectiveness or public confidence.

It is not difficult to see how certain of the issues framed the problems. In discussing earmarking, for example, the Commission considers whether it should reconstruct the earmarking rules to focus on "implicit" agreements to circumvent the limits. This is a road the Commission has traveled before and it is perilous. Any time this agency regulates on the basis of "implicit" understandings, it is adding to the uncertainty of its regulatory standards and opening wider the invasiveness of its investigative process. How far it might go depends entirely on whether it is solving a real or an assumed problem. Aggressive rulemaking uninformed by actual experience, and in particular in the absence of Congress' involvement, is a choice that the Commission should make with care, and sparingly, at this stage in the development of the campaign finance laws.

Restraint on the part of the agency is also appropriate in circumstances where the need for further factual development may be more limited, but where the regulatory expansion under consideration calls on the FEC to make judgments beyond its capacity and invites certain litigation. An example in the ANPRM is the suggestion that the rules could be strengthened by limiting the number of candidates a PAC could support or "establishing a maximum percentage of PAC funds that can go to a single candidate." These are challenging judgments for the government to make: it is neither clear how they could be made or, once made, how they could be made persuasive to the larger community of those affected by them. And there is the question of upholding them in the face of constitutional challenge.

One exception to caution urged in these comments is the question of disclosure, also included in the ANPRM. To the extent that the Commission can modernize disclosure practice, taking into account technological developments, and do so with sensitivity to the concerns about unnecessary invasions of privacy, it certainly should do so.

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Overall, however, the Commission should concentrate on the day-to-day business of presenting the law clearly, conforming its rules to legal developments, offering assistance as imaginatively and flexibly as possible to those affected by the law, and adopting high-quality administration as its highest priority. The more complex and abstract questions raised by this ANPRM are best left to the Congress, and the FEC should approach them with care only when a meaningful record of the need for regulatory action and expansion has been established.

I thank you for the opportunity of presenting these comments and look forward to testifying on February 11.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'R. Bauer', with a long horizontal flourish extending to the right.

Robert F. Bauer