PUBLIC INTEREST
LEGAL FOUNDATION

October 26, 2015

Via Electronic Submission

Ms. Amy L. Rothstein and Mr. Robert M. Knop
Assistants General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE: Comments in response to Notice 2015-10 (REG 2015-03) and to Notice 2015-09 (REG 2015-04).

Dear Ms. Rothstein and Mr. Knop:

This letter presents comments on behalf of the Public Interest Legal Foundation and its Board Members, including former FEC Commissioner Hans von Spakovsky in response to Rulemaking Petition: Contributions From Corporations and Other Organizations to Political Committees, published in Notice 2015-10 in the Federal Register on July 29, 2015, and to Rulemaking Petition: Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (Citizens United), published in Notice 2015-09 in the Federal Register also on July 29, 2015. The Foundation is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects freedom of speech and association, election integrity, and educates the public on these issues. Mr. von Spakovsky has several years of experience on the Federal Election Commission ("FEC") administering and enforcing federal campaign finance laws that govern the election process and regulate candidate-related financial activity.

These petitions overlap in the substance of their requests and so are addressed together in these comments.

In short, these petitions should be summarily dismissed and not taken up by the FEC. They are a waste of the agency's time and resources; ask the agency to issue new regulations in areas that are *already* comprehensively covered by *existing* regulations; and are an attempt to have the FEC act unilaterally beyond its statutory authority to overturn aspects of a Supreme Court decision with which the petitioners disagree, *Citizens United v. FEC*, 558 U.S. 310 (2010). The additional regulation of political speech requested by petitioners goes far beyond what was upheld by the Supreme Court, and so must be undertaken by Congress, and not by the FEC. In fact, the regulations demanded in the petitions would effectively undo the effect of the Supreme Court's

primary holding in *Citizens United*, which was that the First Amendment protects the right of corporations to engage in independent expenditures and electioneering communications *as corporations*.

I. REG 2015-04 Requests Redundant Regulation.

A. The law already requires disclosure of corporate and labor organization independent spending, including the disclosure of donors.

Federal law and FEC regulations already require all political committees to report all of their contributions and expenditures, including identifying the source of each contribution above $200. Additionally, all entities, including those that are not political committees, that make so-called "electioneering communications" in excess of $10,000 must report such expenditures to the FEC and must include disclosure of donors. Furthermore, all persons, including individuals and non-political committees, who spend more than $250 on independent expenditures must report these expenditures, including contributions received earmarked for those expenditures.

B. The law already prohibits foreign nationals from making contributions or directing independent spending, including through corporations.

The petition requests that the FEC enact new regulations to "clarify that, when US companies are owned or controlled by foreign nationals, they are barred from engaging in election-related spending." This is contrary to long-standing current regulations that govern the activities of foreign-owned or controlled U.S. companies. Foreign nationals are already prohibited from direct or indirect contributions, as well as from making independent expenditures or electioneering communications.[1] The petition offers no evidence as to how these existing regulations are somehow ineffective or insufficient. A foreign national already cannot direct others to make expenditures or electioneering communications.

C. The law already prohibits coercing employees and members into providing support for political spending.

The petition requests that the FEC "[c]larify that corporations and labor organizations are prohibited from coercing their employees and members into providing financial or other support for the corporation's or labor organization's independent political activites." Yet again, this would constitute a redundant and wasteful regulation. Federal law and FEC regulations already clearly prohibit corporations and labor unions from using coersion to force any individuals to make political contributions or engage in fundraising for particular candidates. In fact, it is unlawful for them to make any expenditure "utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threats of force, job discrimination, or financial reprisals; or by dues, fees, or other moneys required as a condition or membership in a labor organization or as a condition of employment." 52 U.S.C. § 30118(b)(3)(A).

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[1] 52 U.S.C. § 30121(a)(1)(C); 11 C.F.R. § 110.20(i).

D. The law already extensively defines and prohibits coordination between campaigns and independent activities.

The petition demands that the FEC pass regulations to ensure that the independent expenditures made by independent expenditure-only political committees are "truly independent of federal candidates." But 11 C.F.R. § 109.21 already extensively defines and illustrates what are considered to be coordinated expenditures as opposed to independent ones. The regulations lay out in grear detail the parameters for when an activity will be considered coordinated with a federal candidate. It is unclear how much more extensive the FEC's current regulations could be on the issue of coordination.

The petitioners appear to be dissatisfied with anything less than a "zero communication" standard. Given that there is already extensive regulation in this area, the only way there could be further regulation would be to prohibit any communication between anyone working with an independent expenditure-only committee and anyone working with, or who has worked with, a campaign. But the Supreme Court has already rejected such a draconian approach. As a result, the FEC's existing regulations have achieved a good balance of ensuring that there is no coordination, and that independent expenditures are therefore truly independent, while not going so far as to stifle all speech, as the petitioners would like to do through their petition.

Furthermore, the petitioners have presented no evidence indicating that there has been a problem with the current regulations and their enforcement. The FEC has published several advisory opinions illustrating the parameters of coordination and independent activity.[2] And the FEC has brought enforcement actions when they have been violated.[3]

Finally, additional and more extensive regulation of coordination is outside of the administrative authority of the FEC. There is currently legislation pending before Congress that expands the regulation of independent expenditure-only political committees. The appropriate time to adopt implementing regulations would be after such legislation is passed, not before.

II. REG 2015-03 Requests Regulations Beyond the Authority of the FEC and in Direct Contravention of Supreme Court Jurisprudence.

Before *Citizens United*, corporations, including nonprofit corporations, and labor unions could not *themselves* engage in independent expenditures or electioneering communications. They had to create connected political committees, also known as separate segregated funds, which could engage in such independent political speech. But the corporation *itself*, from its general treasury, was banned from engaging in independent political speech. The Supreme Court held that this arrangement, whereby a corporation was banned from speaking itself, but had to create a separate segregated fund in order to speak, was struck down as a violation of the First Amendment.[4] *Citizens United v. FEC*, 558 U.S. 310, 337-39. The petitioners are demanding a

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[2] AO 2011-21.
[3] *See, e.g., United States v. Harber*, No. 14-cr-373 (E.D. Va. 2015).
[4] *Citizens United v. FEC*, 558 U.S. 310, 337.

return to that very same speech-stifling arrangement. Far from suggesting or directing such regulations, the *Citizens United* decision condemns such an approach.

Under current law, a corporation may spend general treasury funds on independent expenditures. *Id.* When they do, and the amount exceeds $250, they must file a report showing the expenditure and attesting to its independence. The report must include the names of donors, whether corporate or natural, who gave to the corporation for the purpose of financing the independent expenditure. In other words, a donation must be disclosed if it was "earmarked" for the expenditure. If no such earmarked donations were received, the expenditure was made from the general treasury and no donations to the corporation are disclosed in the report.

It is essential to the Supreme Court's decision in *Citizens United* that corporations are permitted to do independent expenditures *from general treasury funds* and not to have to set up a separate segregated fund in order to do so.[5] Otherwise, the Court would have simply struck down the source and amount limitations on contributions to corporate separate segregated funds when they engage only in independent expenditures. But the Court did not do that because then the corporation *itself* would still be banned from speaking. A corporation cannot and does not speak through a connected PAC.[6]

There is no logical distinction between what the petitioners are requesting here and a requirement that corporations must make independent expenditures out of separate segregated funds. As recognized in *Citizens United* and in the FEC's advisory opinions, if a corporation cannot be prohibited from doing independent expenditures itself, then it cannot be prohibited from giving to a political committee that only engages in independent expenditures.[7] And the Court explicitly stated that a corporation cannot be forced to do independent expenditures "through" a separate segregated fund. By the very same logic, if a corporation cannot be forced to do independent expenditures through a connected PAC, because that means that the corporation itself is still banned from speaking, then a corporation cannot be forced to contribute to an independent expenditure-only PAC only "through" a connected PAC, because that means that the corporation itself would be banned from making the contribution. Yet this is precisely what the petitioners here are demanding: that corporations *themselves* be banned from making contributions to independent expenditure-only PACs.

Underlying the petition is the notion that contributions from corporate general treasuries, specifically from 501(c)(4) organizations, are somehow "dark money." As if no one knows who the "natural persons" are who are making these decisions. But nothing could be further from the truth. In every 501(c)(4) organization, all of the members of the Board of Directors and all of the officers must be individuals and must be made public. By law, these are the individuals who are making the decision to make the contributions—not the donors, who may not even be aware or may not care that contributions are being made to independent expenditure-only committees.

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[5] *Id.* at 321 ("Corporations and unions are banned from using their general treasury funds for express advocacy . . . .").
[6] *Id.* at 337 (A separate segregated fund "is a separate association from the corporation. . . . [It] does not allow [the] corporation[] to speak.").
[7] *SpeechNow.org v. FEC*, 599 F.3d 686, 698 (D.C. Cir. 2010); AO 2009-10 ("Club for Growth").

Indeed, the petitioners want this regulation to apply to all corporations, even ones for which a potential contribution to a PAC may constitute a tiny fraction of a percentage of their overall revenue. What happens if the directors and officers of a nonprofit corporation wish to make a contribution to a PAC and they have the general treasury funds to do so, but no donors wish to make a donation to the separate segregated fund in order to do so? According to the petitioner's proposed regulation, such a corporation would be banned from making the contribution.

Thus, this petition is an attempt to force nonprofit advocacy organizations that are not political committees and that do not spend a majority of their time and resources on candidate-related activity to reveal their donors, something they are not required to do by federal law or IRS regulations. In fact, the fundamental rights of association, privacy, and free speech of such organizations and their donors are protected by the First Amendment, as the U.S. Supreme Court held in *NAACP v. Alabama*, 357 U.S. 449 (1958). Such mandated disclosure has no purpose other than to try to open up the donors of such organizations to harassment and intimidation for their political and social beliefs in associating with particular membership organizations. The FEC has no statutory authority to mandate such disclosure of organizations that are not political committees.

Thank you for your consideration of these comments submitted on behalf of the Public Interest Legal Foundation. We trust that they illustrate how the petitions at issue suggest redundant regulation; request regulations beyond the FEC's statutory authority; and demand regulations that circumvent clear directives from the Supreme Court and other courts. Please contact me if you have any questions.

Sincerely,

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