CENTER for COMPETITIVE POLITICS

Congress shall make no law...

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VIA ELECTRONIC SUBMISSION SYSTEM

Robert M. Knop
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RE: Notice 2015-10: Rulemaking Petition: Contributions From Corporations and Other Organizations to Political Committees

Dear Mr. Knop:

These comments are submitted on behalf of the Center for Competitive Politics ("the Center")[1] in response to Notice 2015-10: Rulemaking Petition: Contributions From Corporations and Other Organizations to Political Committees, published in the Federal Register on July 29, 2015.[2] On May 14, 2015, the organizations Make Your Laws PAC, Inc. and Make Your Laws Advocacy, Inc., (collectively, "Make Your Laws" or "Petitioner") filed a petition for rulemaking ("the Petition"),[3] asking the "Commission to modify its regulations concerning disclosure of contributions from corporations and other organizations to political committees."[4]

For the reasons set forth below, which are intended as illustrations and not as an exhaustive catalog, the Center believes that the issues presented are not appropriate for rulemaking.

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[1] The Center is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels.

[2] 80 Fed. Reg. 45115 (July 29, 2015).

[3] Sai, Make Your Laws PAC and Make Your Laws Advocacy, Inc., MYL PAC & MYL C4 Petition for Rulemaking to Prohibit Contribution Laundering, May 14, 2015 *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=337855.

[4] 80 Fed. Reg. at 45115.

A. The Petition engages in heated rhetoric without pointing to evidence of a true issue requiring the opening of a rulemaking.

Make Your Laws attempts to co-opt the established moral disapproval of a certain type of criminal behavior—money laundering—when it speaks of "contribution laundering."[5] It justifies the use of this terminology outside its "strict legal sense" by assuming that there is a wrongful intent—"hid[ing] the true source of funds from disclosure"—behind contributions to organizations that represent various individuals' and groups' interests and beliefs.[6] The appeal to emotion reflected in such language is misguided and forecloses full public debate concerning the issue at hand and the costs and benefits of addressing it.

In fact, existing disclosure rules require that money given for the purpose of an independent expenditure or electioneering communication be disclosed.[7] And, where a party attempts to circumvent these rules by giving money to another to accomplish that purpose in another name—an action that is, in a legal sense, fraudulent—it is guilty of a felony and is subject to all concomitant penalties.[8] The federal courts easily punish violations of the existing law.[9] There is no need for further regulation.

Moreover, Make Your Laws overstates its case. According to figures from the Federal Election Commission ("FEC") and the Center for Responsive Politics—an organization whose work is cited by the Petition[10]—approximately $7.3 billion was spent on federal races in the 2012 election cycle.[11] Approximately $309 million was spent by organizations that did not provide

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[5] Petition at 2.

[6] *Id*. at n.3.

[7] *See, e.g.*, 52 U.S.C. § 30104(c) (disclosure for independent expenditures); 52 U.S.C. § 30104(f) (disclosure for electioneering communications); 11 C.F.R. § 104.20 (regulations on reporting of electioneering communications); 11 C.F.R. § 109.10 (regulations on reporting of independent expenditures).

[8] 52 U.S.C. § 30122 (prohibiting contributions in the name of another); 52 U.S.C. § 30109(d)(1)(D) (providing criminal penalties for violations of § 30122); 11 C.F.R. § 110.4(b) (defining when contribution is given in name of another).

[9] *See, e.g., United States v. Danielczyk*, 683 F.3d 611, 616 (4th Cir. 2012) *cert. denied* 133 S. Ct. 1459 (2013) (upholding ban on corporate contributions in the context of criminal prosecution of the officers of a company reimbursing contributions made by employees); *Goland v. United States*, 903 F.2d 1247, 1252 (9th Cir. 1990) (detailing criminal conviction of man charged with making fraudulent $ 120,000 contribution).

[10] Petition at 2.

[11] We derive the $7.3 billion figure by adding the FEC's 2012 election cycle summary data for "Total Disbursements" ($6,982.2 billion) and the Center for Responsive Politics' "Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees" bar graph data for 2012 (approximately $309 million), as the FEC does not report this information. FEC, FEC SUMMARIZES CAMPAIGN ACTIVITY OF THE 2011-2012 ELECTION CYCLE at 1, (Apr. 19, 2013) *available at* http://www.fec.gov/press/press2013/pdf/20130419release.pdf; Center for Responsive Politics, Graph "Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees," http://www.opensecrets.org/outsidespending/disclosure.php.

itemized disclosure of their donors.[12] That is just under 4.3 percent of the total money spent in the 2012 election cycle. Similarly, in the 2014 election cycle, roughly $173 million was spent by non-itemizing groups compared to roughly $5.3 billion spent on federal races overall. That is just 3.3 percent of total political spending—a full percentage point decrease from the 2012 cycle.[13] These facts do not support the Petition.

Similarly, the Petition's fears concerning contributions by foreign nationals[14] is unfounded. Congress specifically banned direct or indirect contributions from or expenditures by foreign nationals.[15] The ban includes the making of independent expenditures and electioneering communications.[16] Pursuant to statute, the Commission has promulgated regulations addressing this ban. Specifically, FEC regulations prohibit *any* participation by foreign nationals in decisions involving election-related activities:

> A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, *such as a corporation*, labor organization, or political committee, with regard to such person's Federal or nonfederal election-related activities, such as decisions concerning the making of contributions or expenditures in connection with elections for any local, State, or Federal office or decisions concerning the administration of a political committee.[17]

Such regulations are constitutional and have been interpreted broadly. In *Bluman v. FEC*,[18] a special three-judge court heard a constitutional challenge to the ban on foreign national activity. The *Bluman* court rebuffed the challenge because the "Supreme Court has long held that the government (federal, state, and local) may exclude foreign citizens from activities that are part of democratic self-government in the United States."[19] The court was clear: "we interpret the statute

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[12] Center for Responsive Politics, Graph, *id*. The Petition states an even smaller amount that such money in 2012 totaled around $257 million. Petition at 2.

[13] We derive the $5.3 billion figure by adding the Commission's 2014 election cycle summary data for "Total Disbursements" by "2014 Congressional Candidates" ($1.6 billion), "Party Committees" ($1.2 billion), and "PACs" ($2.3 billion) for a combined total of $5.1 billion combined, and the Center for Responsive Politics' "Outside Spending by Nondisclosing Groups, Cycle Totals, Excluding Party Committees" bar graph data for 2014 (approximately $173 million), as the FEC does not report this information. FEC, FEC STATISTICAL SUMMARY OF 24-MONTH CAMPAIGN ACTIVITY OF THE 2013-2014 ELECTION CYCLE at 1 (Jan. 29, 2015) *available at* http://www.fec.gov/press/press2015/pdf/20150403release.pdf; Center for Responsive Politics, Graph, *id*.

[14] Petition at 2.

[15] 52 U.S.C. § 30121

[16] 52 U.S.C. § 30121(a)(1)(C).

[17] 11 C.F.R. § 110.4(a)(3) (emphasis added).

[18] 800 F. Supp. 2d 281 (D.D.C. 2011). The matter was heard before a three-judge court consisting of Circuit Judge Brett M. Kavanaugh, and District Judges Ricardo M. Urbina and Rosemary M. Collyer.

[19] *Id*. at 282.

to bar foreign nationals… from making expenditures to expressly advocate the election or defeat of a political candidate; *and from making donations to outside groups when those donations in turn would be used to make contributions to candidates or parties or to finance express-advocacy expenditures*."[20] The *Bluman* opinion thus addressed the Petition's precise worry: that foreign nationals would use corporations as a pass-through for contributions. In a unanimous order, the Supreme Court summarily affirmed the three-judge *Bluman* court.[21]

The Petition appears to seek a ban on foreign national contributions to all nonprofit organizations, a result unanticipated by statute and unsupported by case law. That policy is unnecessary where, as here, existing law adequately addresses the Petition's concerns.

B. Lack of control

Furthermore, the Petition's hypotheticals conflate legally distinct organizations and types of donations. That is, the problem described by Make Your Laws inherently requires either control by the donor over the donee or earmarked contributions rather than money given for general purposes. As discussed above, donations in the first situation may amount to fraud. And while, in the second, it is reasonable to require disclosure, that is already the law.[22] The Petition, however, does not restrict regulation to these circumstances. While pointing to the intent of a donor who either controls a donee or restricts how a donation may be used, the Petition would reach far more broadly to control donations made without any such restriction or control.

Nonprofit organizations are separate entities from their donors, and generally make their own resource-allocation decisions. A person putting a dollar into a Salvation Army Christmas kettle does not direct whether that money will be used to feed a malnourished child, housing for a family after a fire, or spiritual guidance to someone in prison.[23] Similarly, where money is given to a nonprofit group for general purposes and then assigned to a particular communication by the receiving organization, it is simply incorrect to claim that the communication was made by the original donor. This is particularly true where the organization engages in relatively little political activity and the original donor is unlikely to have given for that purpose. But the Petition suggests no limiting principle; it would apply the proposed regulation to *any* contribution made to *any* organization that does *any* political activity.

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[20] *Id*. at 284 (emphasis added).

[21] 132 S. Ct. 1087 (2012).

[22] *See, e.g.*, 52 U.S.C. § 30116(a)(8) ("contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate"); 11 C.F.R. § 110.6 (regulations on disclosure and reporting of originating donor for earmarked contributions); *see also* 52 U.S.C. § 30104(c)(2)(C) (requiring "identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure"); 11 C.F.R. § 109.10(e)(vi) (implementing the 52 U.S.C. 30104(c)(2)(C)).

[23] Salvation Army, Ways We Help, Website http://www.salvationarmyusa.org/usn/ways-we-help.

The Petition fails to draw other relevant distinctions. As an additional example, although the Petition deals with 501(c) organizations,[24] it urges the Commission to "impose all applicable contribution limits" for funds that might ever be "disbursed to a . . . candidate committee[or] party."[25] 501(c) organizations are generally incorporated, however, and corporations are forbidden from giving contributions to candidates or party committees.[26]

C. The proposed rulemaking would undermine the rights recognized by *Citizens United*

The Petition would violate the right recognized in *Citizens United* to make expenditures from general treasury funds.[27] While the Petition claims to offer a "narrowly tailored" regulation,[28] in practice the regulation must sweep much more broadly than admitted. The Petition would require that "any . . . contributions that may *ultimately* be spent on political expenditures" come from segregated accounts.[29] How one is to know this is left unsaid. If organization A donates to organization B that donates to organization C that donates to organization D, which ultimately spent some small portion of that money on a political expenditure, organization A would have to monitor the spending of each organization down the line lest one of them ever make a political contribution or expenditure.

The only way to escape this administrative nightmare would be to avoid making donations out of an organization's general fund, and instead maintaining segregated accounts. In *Citizens United*, the government proffered a similar rationale as justification for the ban on corporate electioneering communications, arguing that since corporations could always speak through separate segregated accounts, such as PACs, corporate First Amendment rights were not infringed by the electioneering communications prohibition. The Court flatly rejected this argument, holding that "[e]ven if a PAC could somehow allow a corporation to speak—and [as a PAC is a separate legal entity] it does not—the option to form PACs does not alleviate the First Amendment problems…"[30] Contrary to *Citizens United*, the Petition advocates a regulation that would drive organizations concerned about issues to speak and donate only from segregated accounts.

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[24] Petition at 1-2.

[25] *Id*. at 4. *See also id*. at 6 (emphasizing sections of *EMILY's List v. FEC*, 581 F.3d 1, 11-12 (D.C. Cir. 2009), dealing with contributions to candidates).

[26] 52 U.S.C. § 30118(a) (banning corporate contributions); 11 C.F.R. § 114.2 (regulations in support of § 30118); *cf* 52 U.S.C. § 30101(8); 11 C.F.R. § 114.1(a) (defining contribution to include anything of value given "to any candidate, political party or committee, organization, or any other person in connection with any election"). This prohibition does not apply to independent expenditures. *See*, *Citizens United v. FEC*, 558 U.S. 310, 372 (2010) (striking prohibition of corporate independent expenditures).

[27] *Citizens United*, 558 U.S. at 365 ("No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations").

[28] Petition at 3.

[29] Petition at 3 (emphasis added).

[30] *Citizens United*, 558 U.S. at 337.

Moreover, the burdens of maintaining such accounts—including the enormous effort required to validate potentially tiny contributions passing innocently through multiple organizations—are likely to be similar to those imposed upon PACs.

It is not for this Commission to overrule the decisions of the Supreme Court. Only the High Court itself can do so.[31] Should Petitioner seek to refine or overrule the Court's precedents, the FEC is not the proper forum.[32]

D. Lack of authority to engage in the rulemaking

Moreover, the Petition asks the Commission to usurp legislative authority from the Congress and act beyond its delegated rulemaking powers. An agency may "elucidate a specific provision of [a] statute by regulation," which the Petition asserts the Commission would be doing here, when Congress has "explicitly left a gap for an agency to fill."[33] In doing so, however, the Commission may not contradict the statute or exceed the authority delegated to it.[34]

Had Congress "wished to assign" the power—which, as discussed *supra*, flies contrary to direct guidance from the Supreme Court—Petitioner asks this Commission to wield, "it surely would have done so expressly."[35] And, in any event, Petitioner's proposed construction of the statute is in no way a "permissible" one. It urges this Commission to impose significant, untailored regulatory burdens on groups for the mere act of engaging in constitutionally protected conduct. Such a rule would be "arbitrary [and] capricious."[36]

Petitioner seeks to re-write core provisions of the Bipartisan Campaign Reform Act. Their arguments are more properly addressed to the Congress.

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Thank you for considering these comments. The Center looks forward to working with the Commission to protect the First Amendment rights of multipurpose nonprofit organizations. In the event that the Commission chooses to take testimony at a public meeting, the Center requests the opportunity to provide testimony through a representative.

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[31] *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("leaving…the prerogative of overruling its own decisions" to the Supreme Court).

[32] *See* AO 2012-14 ("McCutcheon") at 2.

[33] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

[34] *Id*. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent").

[35] *King v. Burwell*, 576 U.S. ___, 135 S. Ct. 2480, 2489 (2015).

[36] *Chevron*, 467 U.S. at 844.

Please do not hesitate to contact us should you have any questions about these comments.

Respectfully Submitted,

s/ Allen Dickerson
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Center for Competitive Politics