October 27, 2015

Federal Election Commission
Att: Amy L. Rothstein
Assistant general Counsel
999 E Street, N.W.
Washington, D.C. 20463

Disclosure, Foreign Nationals, and Coordination Rulemaking
in the Wake of Citizens United

Comments on REG 2015-04

Dear Ms. Rothstein:

Please accept the attached coalition comment on REG 2015-04 [Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (Citizens United)] signed by: Campaign for Accountability; Center for Media and Democracy; Daily Kos; Franciscan Action Network; Friends of the Earth; Iowa Citizens for Community Improvement; James A. Thurber; Mayday.US; MoneyOut! PeopleIn! Coalition; Norman J. Ornstein; and Public Citizen.

Respectfully Submitted,

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Comments on REG 2015-04

Dear Ms. Rothstein:

We, the undersigned, encourage the Federal Election Commission (FEC) to update existing rules and issue new rules implementing the Federal Election Campaign Act of 1971, as amended, in order to comply with and respond to the Supreme Court's 2010 decision, *Citizens United v. Federal Election Commission* decision and its progeny.[1] In some areas, such as disclosure, the Commission's regulations run contrary to both the Supreme Court decision and the law itself; in other areas, such as campaign spending by foreign nationals and coordination between candidates and outside groups, the Commission's regulations fail to address the new campaign finance environment created by *Citizens United*.

This comment to the petition for rulemaking REG 2015-04 is submitted by: Campaign for Accountability; Center for Media and Democracy; Daily Kos; Franciscan Action Network; Friends of the Earth; Iowa Citizens for Community Improvement; James A. Thurber; Mayday.US; MoneyOut! PeopleIn! Coalition; Norman J. Ornstein; and Public Citizen.

A. *Citizens United* and the Changing Campaign Finance Environment

Since the 2010 *Citizens United* decision, each election cycle has seen dramatic changes in the campaign finance environment. Yet, the rules and regulations of the Federal Election Commission have not kept pace. The Commission has made some technical updates to its rules in the wake of the *Citizens United* and *McCutcheon* decisions on October 9, 2014, in response to an overture by Commissioner Ann Ravel. However, the Commission has neglected to address several key issues, which are the subject of this petition for rulemaking.

In the aftermath of the *Citizens United* decision and its progeny, the Court has opened a floodgate of outside spending. Corporations and unions, which had previously been prohibited from spending treasury funds in federal and many state elections, could now spend unlimited treasury funds for and against federal, state, local and judicial candidates. Independent expenditure-only political committees, which had previously been subject to a $5,000 contribution limit per donor at the federal level, may now receive unlimited donations from any legal source for spending on campaigns, earning these outside groups the moniker "super

[1] Citizens United v. Federal Election Commission, 588 U.S. 310 (2010); SpeechNow.org v. Federal Election Commission, 599 F.3d 686(D.C. Cir. 2010); and McCutcheon v. Federal Election Commission, 572 U.S. ___ (2014).

PACs."[2] And 501(c) non-profit organizations have become a convenient vehicle for concealing the sources of campaign funds ("dark money") for those who want to spend heavily in elections but not be held accountable.

The impact on the political environment was immediately felt in the 2010 elections, and the reverberations have grown increasingly monumental in each successive election cycle. According to the Center for Responsive Politics, campaign spending by outside groups in federal elections reached $310 million in the 2010 elections, more than a fourfold increase over outside spending in the previous midterm election cycle. Outside spending increased almost another fourfold in the following 2012 election cycle, in excess of $1 billion. The 2014 midterm elections was the most expensive in history, with outside spending in excess of $500 million, yet the number of donors plummeted 11 percent compared to the midterm elections in 2010. So far in the current 2016 election cycle, outside spending and total spending are both on par to set astounding new records. Super PACs and dark money nonprofit groups have spent more than $25.1 million as of September 21, 2015 – that is a 34 percent increase over the same time period in 2014 and a fivefold increase over 2012.[3] The total cost for the 2016 federal election is expected to exceed $10 billion.[4]

While campaign spending by outside groups is skyrocketing, the bulk of that money is coming from a small but very wealthy clan of individuals. Just 158 families, along with the companies they own or control, have provided nearly half of the outside money for efforts to capture the White House in 2016.[5] Not since Watergate have so few people and business provided so much early money in the campaign. These campaign investors do not reflect the diversity of the American population. They are mostly white; reside around nine wealthy cities; and mainly come from the finance and energy sectors.

Accompanying the rise in campaign spending by outside groups is an equally dramatic rise in "dark money" – campaign spending by nonprofit groups that do not disclose the sources of their funds. 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, the FEC revised the disclosure rule by exempting groups that made electioneering communications from disclosing contributors' identities except in special cases in which donors expressly earmarked money for that purpose.[6] The FEC was erroneously

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[2] The term "super PAC" was coined by reporter Eliza Newlin Carney. Carney, a staff writer covering lobbying and influence for *CQ Roll Call*, "made the first identifiable, published reference to 'super PAC' as it's known today while working at *National Journal*, writing on June 26, 2010, of a group called Workers' Voices, that it was a kind of 'super PAC' that could become increasingly popular in the post-Citizens United world." Dave Levinthal, "How Super PACs Got Their Name," *Politico* (Jan. 10, 2012).

[3] Robert Maguire and Will Tucker, "Fivefold Upsurge: Super PACs, Dark Money Group Spending," Press release, Center for Responsive Politics (Sep. 21, 2015), available at: http://www.opensecrets.org/news/2015/09/five-fold-upsurge-super-pacs-dark-money-groups-spending-far-more-than-in-12-cycle-at-same-point-in-campaign/

[4] Mark Hensch, "FEC Chief: We Can't Stop the Abuse," *The Hill* (May 3, 2015).

[5] Nicholas Confessore, Sarah Cohen and Karen Yourish, "The Families Funding the 2016 Presidential Election," *New York Times* (Oct. 10, 2015).

[6] 11 C.F.R. §104.20(c)(9).

concerned that with new corporate spending on such ads, customers of the corporation would be subject to disclosure. The Commission ignored the fact that normal commercial transactions are to be exempt from the definition of contribution under FECA.

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 of "all contributors who contributed an aggregate of $1,000 or more" behind the electioneering communication.[7]

While the statutory language for disclosure of donors for independent expenditures, as opposed to electioneering communications, uses the language of disclosure of donors making contributions "for the purposes of furthering an independent expenditure,"[8] this language had never before been interpreted in the narrow sense of only disclosing contributions expressly earmarked to pay for a specific ad. However, due to the FEC's 2007 narrow disclosure requirement for electioneering communications, a similar earmarking requirement for disclosure is now also being applied to independent expenditures.

According to an analysis by Public Citizen,[9] donor disclosure for groups making electioneering communications reached nearly 100 percent in the 2004 and 2006 election cycles following passage of the Bipartisan Campaign Reform Act of 2002. In the 2008 elections, following the *Wisconsin Right to Life* decision and the revised FEC rule on disclosure, the share of groups disclosing their funders plummeted to less than 50 percent. In 2010, barely a third of electioneering communications groups disclosed their donors.

A similar but somewhat less dramatic trend can be seen for independent expenditures. Disclosure of donors behind independent expenditures fell from 90 percent in 2004 and 97 percent in 2006 to only 70 percent in 2010.

According to the Center for Responsive Politics, in the 2012 elections, 24 percent of outside spending groups provided no donor disclosure, another 24 percent provided partial disclosure, and only about 52 percent of outside spending groups provided full disclosure of their funding sources.[10] The total amount of "dark money" in the 2012 elections – at least $310 million – exceeded the amount of undisclosed money in any previous election.[11] Dark money in the 2014 midterm elections reached about $173 million, the highest of any previous midterm. Dark money is once again expected to break all previous records in the 2016 elections.

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[7] 2 U.S.C. 434(f)(2)(F).

[8] 2 U.S.C. 434(c)(2)(C).

[9] Taylor Lincoln and Craig Holman, 12 Months After: The Effects of Citizens United on Elections and the Integrity of the Legislative Process (2011), available at: http://www.citizen.org/documents/Citizens-United-20110113.pdf

[10] Center for Responsive Politics, analysis of disclosure of donors by outside spending groups in the 2012 federal elections, available at: http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&disp=O&type=A&chrt=D

[11] Center for Responsive Politics, at: https://www.opensecrets.org/outsidespending/disclosure.php

Super PACs did not come about due to the lack of needed FEC regulation. Instead, they owe their existence to several court rulings, including *SpeechNow.org v. FEC* (2010),[12] *Emily's List v. FEC* (2009)[13] as well as *Citizens United*. Based on the assumption that super PACs only make independent expenditures, rather than campaign contributions directly to candidates, the anti-corruption rationale for limiting donations to super PACs is sometimes viewed as no longer relevant. As a result, super PACs may receive unlimited donations from corporations, unions and individuals and spend that money independently of candidate campaigns.

The problem with super PACs is not so much disclosure, but whether these groups are truly "independent" of candidate campaigns and party committees. Public Citizen has provided extensive documentation that these groups often are not independent at all – in fact, super PACs tend to be "super-connected" to a specific candidate. Not only are these groups frequently established by former campaign workers or family of a candidate, share the same campaign vendors, and have the beneficiary candidate fundraise for the super PAC, super PACs are very likely to support only one single candidate or one single party committee.

Among outside electioneering groups that receive unlimited campaign donations in the 2012 presidential elections, 49 percent spent all of their money supporting a single candidate. In the 2014 congressional elections, 35 percent spent all of their money supporting a single candidate. Nearly all of these groups were super PACs. The percentage goes up when including super PACs that support a single party committee. Cumulatively, single-candidate and party-connected super PACs accounted for 65 percent of the money spent by these groups in the 2012 presidential election and 45 percent of the money spent in the 2014 congressional elections. Among just super PACs in the 2014 elections, 45 percent spent all of their money supporting a single candidate. Most of these super PACs were established and run by people who worked on the candidate's campaign.[14]

The rise of single-candidate super PACs drives home what many political observers already treat as an undisputed fact: that a large percentage of super PACs are not truly independent of the candidates they support.

B. In Light of the *Citizens United* Decision and the Law, the FEC Should Make the Following Changes to Its Rules

In the course of this rulemaking, we strongly recommend that the FEC make several key changes to its rules implementing FECA. In many cases, especially the disclosure requirements, current FEC rules simply defy both the rationale of the Court and the law itself and should be brought in compliance. In some cases, especially concerning the ban on foreign contributions into American elections, current FEC rules have not been appropriately updated since the Citizens United decision. And in other cases, such as the coordination between candidates and their super PACs, current FEC rules ignore the realities of today's political environment.

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[12] SpeechNow.org v. Federal Election Commission, 599 F.3d 674 (2010).

[13] Emily's List v. Federal Election Commission, 581 F.3d 1 (2009).

[14] Taylor Lincoln, *Super-connected*, Public Citizen (2012); and Taylor Lincoln and Andrew Perez, *Super-connected*, Public Citizen (2014).

1. Donor Disclosure of Electioneering Communications and Independent Expenditures

Today's flood of dark money in federal elections via both electioneering communications and independent expenditures is almost wholly the creation of the Federal Election Commission and the Commission should take responsibility for correcting this problem.

Dark money is not authorized by law. FECA established a framework of full disclosure of donors behind these campaign activities, a framework that had largely been respected until new FEC rules in 2007 that narrowed the meaning of the law to cover only those contributions expressly earmarked for specific campaign ads.

Dark money is not authorized by the *Citizens United* or subsequent decisions by the Court. The FEC is repeatedly reminded of the fact that the *Citizens United* decision upheld the constitutionality of disclosure by an 8-to-1 vote. In fact, the Court premised its ruling largely on the ameliorative effects of an excellent disclosure regime. In *Citizens United*, Justice Kennedy wrote for the majority:

> *"With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests."*[15]

But current FEC disclosure rules ignore the law and defy the *Citizens United* decision.

We strongly urge the FEC to reestablish the excellent disclosure regime that had existed prior to recent erroneous rulemaking by the Commission: all donors of $1,000 or more to an account used to make electioneering communications, and all donors in excess of $200 to a person making independent expenditures, other than regular commercial transactions, must be disclosed on the prescribed FEC disclosure filings.

2. Prohibition on Contributions and Expenditures from Foreign Nationals

FECA and current FEC rules explicitly prohibit contributions and expenditures made "directly or indirectly" by foreign nationals "in connection with a federal, state or local election."[16] This is an expanded scope of the prohibition on foreign intervention in U.S. elections. Prior to the Bipartisan Campaign Reform Act of 2002, the restriction applied only to elections for "political office." Today, the ban is far more sweeping to cover elections generally.

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[15] Citizens United, 588 U.S. at 370.

[16] 52 U.S.C. 30121; 11 CFR 110.20.

The *Citizens United* decision, however, has made this prohibition increasingly difficult to enforce, with multiple side effects.

American subsidiaries of foreign companies have long been allowed to make certain contributions and expenditures through PACs at the federal level, so long as the funds come exclusively from American sources and foreign nationals play no role in directing the contributions or expenditures. The FEC generally has the capability of tracking these campaign contributions to ensure compliance with the law. However, *Citizens United* opened up a whole new potential avenue for foreign money to influence U.S. elections: independent expenditures and electioneering communications through outside groups. This is particularly problematic when such campaign expenditures are made by dark money groups, such as the Chamber of Commerce which has extensive financial links throughout the globe.

On another front, a deadlocked FEC declined to enforce the law against a foreign national who openly provided more than $300,000 in an effort to defeat a Los Angeles local ballot measure.[17] The absence of an enforcement decision provides foreign nationals with a green light to finance state and local ballot measure campaigns. This lack of enforcement of the broad ban against foreign intervention in elections comes despite the *Bluman v. FEC* decision in 2011, in which the court ruled: "It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government."[18] Ballot measure elections are clearly a close part of our democratic self-government.

To address the potential problem of foreign money being used by dark money groups to finance independent campaign expenditures, the FEC should strengthen its rule to require that foreign nationals receive written assurances from any organization that conducts electioneering activity that the foreign funds will not be used for campaign purposes. To address the ballot measure problem, the FEC should recognize in its rules that ballot measure campaigns are not only an integral part of our democratic self-government, but they are also conducted simultaneously, and on the same ballot, as candidate campaigns, and often affect candidate elections. As such, ballot measure campaigns are "in connection" with federal, state and local elections and fall under the broad prohibition against foreign intervention in U.S. elections.

3. Coordination between Super PACs and Campaign Committees

While court decisions thus far have invalidated contribution limits to independent expenditure-only committees that "are truly independent of federal candidates,"[19] the record is convincing that many super PACs are far from independent of the candidates or party committees they support. Super PACs are routinely created and run by former staff of a candidate or party committee, sometimes even established by a potential candidate well into the campaign period, as long as candidacy is not yet declared. In the 2016 presidential elections,

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[17] Manwin Licensing International, MUR Case 6678 (2015).

[18] Bluman v. FEC, 800 F. Supp. 2d 281 at 288 (D.D.C. 2011).

[19] SpeechNow.org v. FEC, 599 F.3d 686 (D.C. Cir. 2010).

many super PACs are assuming the regular duties of the candidate campaign they support, including fundraising, television advertising, direct mail and a range of other duties typically done by the campaign organizations. They often share the same campaign vendors. Under existing FEC rules, candidates are even allowed to fundraise for their own super PAC so long as they do not ask for contributions in excess of the hard money limits. Most telling, however, is many of these super PACs exclusively support the candidate responsible for setting them up.

Frequently, the coordination between super PACs and their candidates is laughable and the subject of televised comedy acts, as shown in this exercise of "McConnelling." What is indisputably obvious to the public and election experts, the lax coordination rules enable candidates to evade the contribution limits by setting up a closely coordinated super PAC.

The current FEC coordination rule is woefully inadequate to address today's political environment.[20] It is essential that the Commission update its coordination rule to ensure that unregulated super PACs and other outside electioneering groups are truly independent of candidate and party committees.

Recent rulemaking by California's Fair Political Practices Commission (FPPC) shows how this can be done. Under the new FPPC rules, a presumption of coordination would exist when a candidate raises funds for the super PAC or outside group primarily formed to support the candidate. A presumption of coordination also would exist when the super PAC or outside group relies on former staffers of the candidate or shares campaign consultants. The new rules also presume coordination when the campaign spending by the super PAC or outside group is based on information provided "directly or indirectly" by the candidate.[21]

The FEC should strengthen its coordination rule such that coordination between a candidate and outside group should be defined to include:

- Candidates and outside groups that support the candidate sharing the same vendors;
- Any person who has been employed or retained by a candidate over the previous four years is deemed coordinated with the candidate when it comes to establishing and/or running an outside electioneering group that supports the candidate.
- The candidate would be considered coordinated with an outside electioneering group that supports the candidate if the candidate raises funds for the group during an election cycle.
- An outside electioneering group would be presumed coordinating with a candidate if it spends more than half of its resources on express advocacy advertisements and/or electioneering communications directly supporting a single candidate in an election.

[20] For further explanation of the FEC coordination rule, see: http://www.fec.gov/pages/brochures/indexp.shtml#CC

[21] Kenneth Doyle, "California Adopts Tough Rules for Super PACs," *BNA Money and Politics Report* (Oct. 15, 2015).

C. Conclusion: The FEC Should Update Existing Rules and Create New Rules in Key Areas to Comply with the Law and the *Citizens United* Decision

The Federal Election Commission has fallen short in updating and creating new rules to implement FECA in compliance with the *Citizens United* decision and the emerging political environment. Most notoriously, the FEC has promulgated a unique and disastrous disclosure rule – in defiance of both the law and *Citizens United* – that is primarily responsible for the flood of dark money in federal elections. The Commission has neglected to address the new avenues of foreign money that may well be flowing into U.S. elections, despite explicit federal laws prohibiting contributions and expenditures from foreign nationals. And critically, the FEC has repeatedly refused to update its coordination rules to deal with the obvious and even comical level of coordination between candidates and super PACs and outside electioneering groups.

We offer reasonable steps the FEC should take to address these shortfalls.

Sincerely,

Campaign for Accountability
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Franciscan Action Network
Friends of the Earth
Iowa Citizens for Community Improvement
James A. Thurber
Mayday.US
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