

October 27, 2015

Federal Election Commission  
Attention: Amy L. Rothstein, Assistant General Counsel  
999 E Street, NW  
Washington, DC 20463

Re: Comments in Response to Notice of Availability of Petition for Rulemaking on  
Independent Spending by Corporations, Labor Organizations, Foreign Nationals,  
and Certain Political Committees (Citizens United)

Dear Commissioners:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully submits these comments in response to the Notice of Availability of Petition for Rulemaking on Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (Citizens United), 80 Fed. Reg. 45116 (Jul. 29, 2015) (REG 2015-04). We welcome this opportunity to provide the Federal Election Commission (“FEC” or “Commission”) comments on adopting or modifying Commission rules, and we urge the FEC to take strong action to increase transparency and, as much as current law allows, to reduce the opportunities for money to influence politics.

The petition asks the Commission to address four separate areas of its rulemaking authority under the Federal Election Campaign Act of 1971, as amended (“FECA”) in light of the Supreme Court’s recent decisions in *Citizens United v. FEC*<sup>1</sup> and subsequent cases. The issues are: disclosure of donors who fund independent expenditures; whether U.S. subsidiaries of foreign corporations can spend money to influence U.S. elections; preventing companies and unions from coercing their employees/members to support independent expenditures; and whether existing coordination rules are adequate. We urge the FEC to take decisive action in each of these areas to require disclosure and reduce spending. Without effective rules in these areas, the Commission cannot meet its primary statutory obligation: to protect the integrity of the federal campaign finance process.

Two campaign finance patterns have emerged in the years since *Citizens United*: federal campaign spending is increasing, but disclosure of the people and companies paying for that spending is decreasing. Total spending on federal elections in the 2012 presidential cycle topped \$6.28 billion, up from \$3.08 billion in 2000, and spending in midterm elections similarly jumped

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<sup>1</sup> 558 U.S. 310 (2010).

from \$2.18 billion in 2002 to more than \$3.76 billion in 2014.<sup>2</sup> At the same time, more and more campaign spending is done by groups that do not disclose their donors. Dark money spending reported to the FEC has increased from about \$5.8 million in 2004 to more than \$300 million in the 2012 presidential cycle and from less than \$5.2 million in the 2006 midterms to about \$173 million in the 2014 midterms.<sup>3</sup> Further, these numbers may understate the amount of dark money in the system; one study indicated that close to half of the television advertising in federal races paid for by groups is paid for by groups that do not disclose their donors.<sup>4</sup> The Commission must ensure that its rules respond to these major shifts in the campaign finance landscape if it is to effectively implement and enforce FECA.

## **I. Disclosure**

As the Supreme Court has said over and over, disclosure of the sources of campaign spending serves several critical public interests. Disclosure provides the public with important information for evaluating campaign ads and other messages supporting or opposing candidates. It also provides citizens and shareholders with the information needed to hold corporations and elected officials accountable for their positions. Disclosure further deters actual corruption and helps avoid the appearance of corruption because knowing that contributions will be made public can discourage those who would use money for improper purposes.<sup>5</sup>

The Commission should initiate rulemaking proceedings to address the most blatant deficiencies in the disclosure required of organizations engaged in independent expenditures and electioneering communications. FECA and its amendments explicitly compel far greater disclosure than required by the current regulations. The FEC's current regulations deny the public any information about the individuals and groups funding these political activities, thereby subverting the law. The FEC should act to strengthen these rules to bring its disclosure rules in line with the law and more effectively inform the American people about who is paying for these advertisements that are so critical to modern campaigns.

## **II. U.S. Subsidiaries of Foreign Companies**

FECA contains strict limitations on contributions by foreign nationals, both individuals and foreign corporations.<sup>6</sup> The Commission's regulations and interpretive guidance implementing this law, however, are not adequate, especially in light of the explosive increase in corporate political spending since *Citizens United*. The Commission has issued numerous

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<sup>2</sup> Open Secrets, Total Cost of Elections, *available at* <http://www.opensecrets.org/bigpicture/index.php?cycle=2012>; Open Secrets, Estimated Cost of Election 2014, *available at* <http://www.opensecrets.org/overview/cost.php>.

<sup>3</sup> Open Secrets, Outside Spending, by Groups, *available at* <https://www.opensecrets.org/outsidespending/summ.php?disp=O>.

<sup>4</sup> Wesleyan Media Project, "Ad Spending Tops \$1 Billion," October 29, 2014, at 16, *available at* [http://mediaproject.wesleyan.edu/wp-content/uploads/2014/10/2014Release6\\_FINAL.pdf](http://mediaproject.wesleyan.edu/wp-content/uploads/2014/10/2014Release6_FINAL.pdf).

<sup>5</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976); *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 196 (2003); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 370 (2010).

<sup>6</sup> 52 U.S.C. § 30121.

advisory opinions applying these limitations to U.S. subsidiaries of foreign companies.<sup>7</sup> In light of the ongoing difficulties presented by the existing rules and the dramatic increase in corporate spending after *Citizens United*, the Commission must provide clear rules regulating these companies' participation in U.S. elections if it is to meet its statutory obligations.

### III. Preventing Coercion

The Commission should further respond to the changes *Citizens United* made to the federal campaign finance landscape by ensuring that employees and union members are not coerced into supporting independent expenditures. As CREW<sup>8</sup> and others<sup>9</sup> have documented, politically active companies have increasingly pushed the boundaries of FEC rules in this regard, pushing their employees to financially support the company's political preferences and accordingly increasing their already considerable political influence. Clearer rules would protect employees' rights as well as the integrity of the campaign finance process.

### IV. Coordination

Effective rules preventing coordination between candidates and those making outside expenditures are critical to the proper implementation and enforcement of FECA. The Supreme Court emphasized in *Buckley*, and reaffirmed in *Citizens United*, that a lack of coordination is central to the conceptual, and therefore legal, distinction between a contribution and an independent expenditure.<sup>10</sup> Recently, the Department of Justice has stepped into the area, prosecuting the first ever criminal case based on illegal coordination of campaign contributions.<sup>11</sup> However, much conduct that constitutes improper coordination cannot realistically be regulated by criminal law alone, and the FEC must ensure that its rules are adequate to meet its statutory obligation to prevent this conduct. As campaigns and outside expenditures become linked, meaningful limits on contributions and spending fall away, and the possibility of corruption increases.

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<sup>7</sup> See, e.g., Federal Election Comm'n, Advisory Opinion 1982-34 (June 9, 1982) (Sonat); Advisory Opinion 2006-15 (May 19, 2006) (TransCanada).

<sup>8</sup> [http://www.citizensforethics.org/page/-/PDFs/Legal/9-16-14\\_Robert\\_Murray\\_Energy\\_FEC\\_Request\\_To\\_Expand\\_Investigation.pdf?nocdn=1](http://www.citizensforethics.org/page/-/PDFs/Legal/9-16-14_Robert_Murray_Energy_FEC_Request_To_Expand_Investigation.pdf?nocdn=1).

<sup>9</sup> <http://www.newrepublic.com/article/politics/108140/coal-miners-donor-mitt-romney-benefactor?page=0,0#>; <http://www.citizen.org/documents/fec-walmart-complaint.pdf>; [http://www.theinvestigativefund.org/investigations/politicsandgovernment/2053/office\\_politics?page=2](http://www.theinvestigativefund.org/investigations/politicsandgovernment/2053/office_politics?page=2).

<sup>10</sup> *Citizens United*, 558 U.S. at 357 (quoting *Buckley*, 424 U.S. at 47). While we do not agree with the Supreme Court's ruling in *Citizens United*, maintaining the lack of coordination – and the disclosure – that were key to the Court's reasoning will prevent even further erosion of meaningful campaign finance regulation than we have already seen.

<sup>11</sup> Department of Justice, Campaign Manager Pleads Guilty to Coordinated Campaign Contributions and False Statements, available at <http://www.justice.gov/opa/pr/campaign-manager-pleads-guilty-coordinated-campaign-contributions-and-false-statements> (Feb. 12, 2015).

**Conclusion**

Five years ago, the Supreme Court premised its decision in *Citizens United* abolishing restrictions on independent political spending on its expectation of “effective disclosure” of the contributors who paid for that spending.<sup>12</sup> The Commission’s current rules, however, subvert FECA’s disclosure provisions. CREW strongly urges the Commission to revise these regulations to provide the public with the information about the sources of campaign spending that Congress and the Supreme Court expected. The Commission also must put in place rules that adequately implement FECA’s provisions regarding the influence of foreign nationals, coercion of employees and union members, and coordination between candidates and independent groups.

Sincerely,

Noah Bookbinder  
Executive Director  
Citizens for Responsibility and Ethics in Washington

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<sup>12</sup> *Citizens United*, 558 U.S. at 370.