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VIA SERS.FEC.GOV AND FIRST CLASS MAIL

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

Re: Comments of the National Association of Business Political Action Committees (NABPAC) regarding the Rulemaking Petitions: Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (*Citizens United*) (Notice 2015-09)

Dear Commissioners:

The National Association of Business Political Action Committees ("NABPAC"), by counsel, submits these comments in response to the Federal Election Commission ("FEC" or "Commission") Notice of Availability of two Rulemaking Petitions. *See* 80 Fed. Reg. 45116 (July 29, 2015).

The Notice of Availability seeks comments on whether the Commission should conduct a rulemaking to modify its regulations pursuant to the Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010). The two Petitions are substantively identical and propose four changes to existing regulations. However, the Petitions' second proposed change—that the Commission "clarify" its regulations to prohibit all "campaign-related" and "election-related" spending by U.S. companies owned or controlled by foreign nationals—contradicts decades of legislation, interpretation, and rulemaking. NABPAC offers these comments in opposition to that proposal and urges the Commission not to commence a rulemaking.

I. NABPAC

Founded in 1977, NABPAC is not a political action committee ("PAC"), but a non-partisan 501(c)(6) trade association dedicated to promoting, defending, and professionalizing PACs and political action professionals. NABPAC's membership comprises over 750 PAC and political affairs professionals from more than 220 corporations, associations, and vendors representing some of both the smallest and

largest PACs from across the nation. All together, these members raised in excess of $180 million during the 2014 election cycle.

Among NABPAC's members are numerous U.S. subsidiaries of foreign parent corporations ("U.S. subsidiaries"). NABPAC has actively advocated for equal treatment of U.S. subsidiaries under the Federal Election Campaign Act ("FECA") for more than 25 years. When the Commission previously initiated rulemakings to regulate foreign nationals in 1990 and again in 2002, NABPAC submitted comments in opposition to proposals that would have subjected U.S. subsidiaries to more regulation than other U.S. corporations. In both instances, the Commission declined to impose any additional restrictions on U.S. subsidiaries.

II. The Petitions for Rulemaking

Originally developed by Chair Ravel and Commissioner Weintraub, the current Petitions claim that their proposed changes are necessary to "respond to and comply with" the Supreme Court's decision in *Citizens United.* Pet. at 1. Specifically, the Petitions urge the Commission to restrict "election-related" and "campaign-related" spending by foreign-owned U.S. corporations "in order to faithfully implement the [FECA] in light of the Supreme Court's decision." Pet. at 3.

The Petitions begin by asking the Commission to "clarify" that the FECA's existing prohibition on foreign national "campaign-related spending restricts such spending" by U.S. subsidiaries. Pet. at 5. Several pages later, the Petitions more forcefully explain that they are seeking a complete regulatory prohibition on political activity by U.S. subsidiaries, stating: "[W]hen U.S. companies are owned or controlled by foreign nationals, they are barred from engaging in election-related spending." Pet. at 8.

The Petitions cite the Commission's general "obligat[ion] to formulate policy" with respect to the FECA as authority for the Commission to proceed with the proposal. Pet. at 4. The Petitions also assert that *Citizens United* dictates that the Commission revisit its regulation of U.S. subsidiaries. Pet. at 8.

III. Comments

For decades, federal campaign finance law has recognized the right of U.S. subsidiaries to engage in political activity just like other U.S. corporations with U.S. employees. This non-discriminatory treatment has been apparent in legislation,

rulemakings, and advisory opinions[1] dating back more than 30 years. Congress has consistently declined to further restrict activities by U.S. subsidiaries, and the courts have not spoken to the contrary. The Commission should refrain from unilaterally modifying its regulations to impose unequal treatment on U.S. subsidiaries and should reject the Petitions' invitation to do so.

A. Federal campaign finance law—by its terms and as interpreted by the Commission—has consistently permitted U.S. subsidiaries to engage in the same political activities as other U.S. corporations.

Federal law strictly prohibits foreign nationals from making political contributions and expenditures. But U.S. subsidiaries of foreign owned or controlled corporations have never been "foreign nationals" under the FECA; Congress has consistently regulated them coextensively with other U.S. corporations.

Congress last modified the FECA's foreign national prohibition in the Bipartisan Campaign Reform Act of 2002 ("BCRA"). BCRA amended the FECA to make it unlawful for a foreign national, "directly or indirectly," to make political contributions, independent expenditures, or electioneering communications. 52 U.S.C. § 30121.

The Commission subsequently initiated a rulemaking to implement BCRA's new "directly or indirectly" language.[2] The Commission sought comment on whether this slight change in terminology was evidence of congressional intent to dramatically broaden the scope of the prohibition and extend it to U.S. subsidiaries. 67 Fed. Reg. 54372. Specifically, the Commission asked whether Congress's choice of the word "indirectly" was intended to prohibit U.S. subsidiaries from making (1) corporate contributions in connection with state and local elections, where permitted by state and local law, and (2) federal contributions through their PACs. 67 Fed. Reg. 54372.

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[1] *See, e.g.*, FEC Advisory Opinions 2006-15, 2000-17, 1999-28, 1995-15, 1989-29, 1980-100, 1978-21.

[2] This rulemaking came almost a decade after the Commission undertook a similar rulemaking on this issue in 1990. *See* "Notice of Proposed Rulemaking on Domestic Subsidiaries of Foreign Nationals," 55 Fed. Reg. 34280 (Aug. 22, 1990). That proposed rule would have prohibited election-related activity by a domestic corporation if its foreign national ownership exceeded 50%. NABPAC submitted comments in that proceeding and the Commission declined to implement the proposed rule.

The answer from commenters and then the Commission was a resounding "no." The Commission received "numerous comments" on this issue, including comments from NABPAC. The commenters strongly and uniformly urged the Commission not to extend the prohibition on foreign nationals to U.S. subsidiaries because BCRA did not change substantively the longstanding treatment of U.S. subsidiaries. 67 Fed. Reg. 69943. Commenters noted that nothing in the legislative history suggested that Congress intended the slight alteration in language to suddenly bar U.S. subsidiaries from engaging in political activities. The BCRA sponsors Senators McCain and Feingold themselves submitted comments to explicitly confirm that the legislation "did not address contributions by foreign-owned U.S. corporations, including U.S. subsidiaries of foreign corporations." 67 Fed. Reg. 69943 (internal quotation omitted).

The Commission agreed with the commenters, concluding that "'indirectly' should not be deemed to cover U.S. subsidiaries of foreign corporations." *Id.* This conclusion was

> based upon the lack of evidence of Congressional intent to broaden the prohibition on foreign national involvement in U.S. elections to cover such entities, and upon the substantial policy reasons set forth in the long line of Commission advisory opinions that have permitted U.S. subsidiaries to administer separate segregated funds and to make corporate donations for State and local elections where they are allowed to do so by state law.

67 Fed. Reg. 69943-44.[3]

Thus, the Commission concluded that BCRA did not direct the Commission to adjust its regulations and subject U.S. subsidiaries to prohibitions other than those that applied to all corporations. Since then, there has been no other congressional dictate to the contrary.

[3] Of course, foreign nationals remain prohibited from being "indirectly" involved in any corporation's election-related activity by existing Commission regulations that exclude foreign nationals from involvement in a corporation's election-related decision-making. 11 CFR § 110.20(i).

B. Congress continues to express its intent to regulate the political activities of U.S. subsidiaries in the same way as other U.S. corporations.

Over the course of the past half-decade, Congress has repeatedly reaffirmed its intent to regulate U.S. subsidiaries coextensively with other corporations. Beginning in 2010, Congress considered and rejected the DISCLOSE Act which proposed—as the Petitions do—to subject U.S. subsidiaries to FECA's foreign national prohibition.[4] In particular, the original DISCLOSE Act would have treated a U.S. subsidiary as a "foreign national" if (1) a foreign national directly or indirectly owned at least 20% of the voting shares; (2) the majority of the board members were foreign nationals; or (3) one or more foreign nationals could direct, dictate, or control the corporation's decision-making with respect to its political activities. *See* DISCLOSE Act, H.R. 5175, 110th Cong. § 102(a) (2010).

Notably, even the DISCLOSE Act contained an exception protecting the ability of U.S. subsidiaries to establish and administer PACs. *See id.* § 102(c). And, at the urging of NABPAC in late June 2010, bill manager Rep. Robert Brady incorporated an amendment protecting U.S. subsidiaries' rights to continue to participate in all other corporate election-related activities long permitted by FECA, i.e., communications to stockholders and executive or administrative personnel and nonpartisan registration and get-out-the-vote campaigns. *See* Manager's Amendment to H.R. 5175 (June 22, 2010). Thus, in its final form, the DISCLOSE Act sought only to restrict independent expenditures and electioneering communications by U.S. subsidiaries. However, that proposal was rejected by Congress.

After narrowly passing the House in a 219-206 vote, the DISCLOSE Act's companion bill failed in the Senate. *See* "DISCLOSE Act—Motion to Proceed," Senate vote 220, Congressional Record, daily ed., vol. 156 (July 27, 2010), p. S6285. A second cloture vote failed on September 23, 2010. *See* "DISCLOSE Act—Motion to Proceed—Resumed," Senate vote 240, Congressional Record, daily ed., vol. 156 (September 23, 2010), p. S7388. No additional action on the bill occurred during the 111th Congress. The DISCLOSE Act has been introduced in

[4] *See* DISCLOSE Act, H.R. 5175, S. 3295, S. 3628, 111th Cong. (2010); DISCLOSE Act of 2012, H.R. 4010, S. 2219, S. 3369, 112th Cong. (2012); DISCLOSE Act of 2014, H.R. 148, S. 2516, 113th Cong. (2014); DISCLOSE Act of 2015, H.R. 430, S. 229, 114th Cong. (2015).

every subsequent Congresses; it has often not advanced beyond introduction, and has never made it to a vote.

The DISCLOSE Act's attempt to restrict only independent expenditures and electioneering communications is a far cry from the Petitions' call to enact a complete ban on "campaign-related spending" or "election-related spending" by U.S. subsidiaries. The rejection of DISCLOSE Act proposals demonstrates Congress's continued commitment to regulate U.S. subsidiaries' political activity coextensively with all other U.S. corporations. If the Commission were to proceed to enact regulations to the contrary, it would be doing so in clear contravention of congressional intent.

C. *Citizens United* provides no basis for revised regulation of U.S. subsidiaries' political activities.

Given the lack of a congressional mandate, the Petitions thus assert that *Citizens United* compels the Commission to initiate this rulemaking. However, the Supreme Court expressly declined to address how, if at all, restrictions on foreign owned or operated corporations would be affected by its decision in *Citizens United*. *See Citizens United*, 558 U.S. at 362 ("We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political process."). Thus, the Petitions' contention that *Citizens United* merits Commission rulemaking attention on the topic is demonstrably false.

IV. Conclusion

Federal campaign finance law—as interpreted by the Commission—has consistently treated U.S. subsidiaries in the same fashion as all other U.S. corporations. In addition, Congress has recently and repeatedly rejected proposals to further restrict U.S. subsidiaries. The Supreme Court has not otherwise compelled the Commission to alter this long-standing approach. Therefore, the Commission

need not and should not initiate a rulemaking to restrict political activities by U.S. subsidiaries.

Respectfully submitted,

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