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Federal Election Commission
Lisa J. Stevenson, Acting General Counsel
Office of General Counsel
1050 First Street NE
Washington, DC 20463

Petition to Amend 11 C.F.R. § 104.5(c) to Close the Cycle-Change Loophole

Dear Ms. Stevenson,

Under current Federal Election Commission (FEC) regulations, political committees that report their receipts and disbursements quarterly can evade pre-election disclosures for primary elections by switching to monthly reporting for the last month of the campaign.

Therefore, and pursuant to 11 C.F.R. § 200.2, Campaign Legal Center (CLC) respectfully petitions the Commission to close this cycle-change loophole by amending 11 C.F.R. § 104.5(c) to require any committee that starts an election year as a quarterly filer to maintain that status through any primary elections in which the committee is involved.

Background

Congress required in the Federal Election Campaign Act (FECA) that non-authorized political committees report their receipts and disbursements to the FEC on one of two schedules. 52 U.S.C. §§ 30104(a)(1), (a)(4). They may choose to file: (1) monthly reports plus pre- and post-election reports *for general elections only*, *id.* § 30104(a)(4)(B); or (2) semi-annual reports in non-election years, quarterly reports in election years, and pre- and post-election reports *for primary and general elections*, *id.* § 30104(a)(4)(A).

Each schedule balances the logistical requirements for committees against the public interest “that the voters are fully informed about the person or group who is speaking,” *Citizens United v. FEC*, 558 U.S. 310, 368 (2010). The first keeps the public regularly informed about the actions of the political committee through monthly reporting. The second allows committees to report less frequently, but, in exchange, requires extra, pre- and post-primary reports to highlight election-sensitive spending.

Commission regulations at 11 C.F.R. § 104.5(c) allow a non-authorized political committee to change its filing frequency once per year when it files a report. Then, it can file the next required report on its new filing cycle. But recent evidence indicates that this regulation has undermined the statute by allowing some committees to evade Congress’s intended disclosure scheme.

The Cycle-Change Loophole

In an election year, a non-authorized political committee that files quarterly must also file a pre-election report for any primary or general election in which it makes a contribution or expenditure. 11 C.F.R. § 104.5(c). Pre-election reports must be filed 12 days before the election and must report the committee’s election activities up to 20 days before the election. 52 U.S.C. § 30104(a)(4)(A)(ii). Monthly filers must also file pre-election reports for general elections, but not for primary elections. 11 C.F.R. § 104.5(c).

But crafty political committees have found that a well-timed switch from reporting on a quarterly cycle to a monthly cycle just before a pre-election report is due can allow a political committee to take advantage of the laxer quarterly filing deadline, then avoid disclosing receipts and disbursements from the last few weeks of the campaign until after the election is over—when the information is of less value to voters.

In one egregious example, West Virginia’s voters were denied their right to donor information in the Senate primary held on May 8, 2018. In a quarterly report filed on April 13, West Virginia’s Duty and Country PAC reported only \$150 cash on hand through March 31.¹ On the same day that report was filed, the committee switched to a monthly reporting cycle, so it did not have to file again until its April report was due on May 20.²

¹ Duty and Country, April Quarterly, FEC Form 3X at 6 (filed April 13, 2108), <https://docquery.fec.gov/cgi-bin/forms/C00666388/1220982/>.

² Duty and Country, Miscellaneous Document, FEC Form 99 (filed April 13, 2108), <https://docquery.fec.gov/cgi-bin/forms/C00666388/1220982/>. *See also* 52 U.S.C. § 30104(a)(4).

Had it not switched, the Duty and Country PAC would have been required to file a pre-election report on its activities from April 1 to April 18 in a filing due April 26. *See* 52 U.S.C. § 30104(a)(4). But instead, West Virginia Republicans did not learn until after the election that the PAC was a front for out-of-state Democrats who raised \$1,800,000 to influence their primary.³

Similarly, West Virginia’s Mountain Families PAC reported \$0 on in its quarterly report on April 13.⁴ Then, it switched to monthly reporting and spent \$1.4 million on the primary, which it did not disclose until May 20th—twelve days after Election Day.⁵ The money came from Senate Leadership Fund,⁶ aligned with Senate Majority Leader Mitch McConnell, and most of it was spent on ads against the primary candidate who referred to Senator McConnell publicly as “Cocaine Mitch.”⁷

This tactic is in danger of proliferation. Political committees can game the system in the 2020 primaries by switching their reporting schedule from quarterly to monthly before the pre-election report is due.

For example, in 2020, Oregon is holding its primaries on May 19.⁸ Quarterly reporters will file a report by April 15 disclosing their donations and expenditures for the first quarter of 2020 (through March 31). Then, they will file a pre-election report by May 7, for their activity up through April 30.

But those committees that switch from quarterly to monthly will not file any reports after the first quarter filing. By starting the year as quarterly filers, then switching to monthly filers when they file on April 15, they will not be required to report until the next monthly report is due, on May 20, the day after election day. These committees will gain 30 days of dark-money spending—the entirety of April—at a key time before the Oregon primaries.

³ Duty and Country, May Monthly, FEC Form 3X (filed May 20, 2108), <https://docquery.fec.gov/cgi-bin/forms/C00666388/1233237/>.

⁴ Mountain Families PAC, April Quarterly, FEC Form 3X at 6 (filed April 13, 2108), <https://docquery.fec.gov/cgi-bin/forms/C00674689/1221380/>.

⁵ Mountain Families PAC, May Monthly, FEC Form 3X at 6 (filed May 20, 2108), <https://docquery.fec.gov/cgi-bin/forms/C00674689/1221380/>.

⁶ *Id.*, Schedule A, Itemized Receipts, <https://docquery.fec.gov/cgi-bin/forms/C00674689/1233291/sa/ALL>.

⁷ For further discussion of these examples and other, similar types of gamesmanship by political committees, see “Dodging Disclosure: How Super PACs Used Reporting Loopholes and Digital Disclaimer Gaps to Keep Voters in the Dark in the 2018 Midterms,” *Campaign Legal Center*, November 2018, <https://campaignlegal.org/sites/default/files/2018-11/11-29-18%20Post-Election%20Report%20%281045%20am%29.pdf>.

⁸ “Current Election,” Oregon Secretary of State, at <https://sos.oregon.gov/voting/Pages/current-election.aspx>.

Given the success of this tactic in 2018, and its potential to spread in 2020, the FEC should close the cycle-change loophole.

Request for Rulemaking

Under 52 U.S.C. § 30111(a)(3), the Commission’s statutory duties include developing a filing system “consistent with the purposes of” the statutes it enforces. As noted above, a key purpose of the disclosure requirement is to inform voters as to who is paying to shape their opinion of candidates.

But the regulation that allows committees to switch their reporting schedules has frustrated the efforts of Congress to inform the public of electioneering by quarterly filers. 11 C.F.R. § 104.5(c). Political committees like the Duty and County PAC and Mountain Family PAC have used the regulation to avoid statutorily mandated disclosures.

This practice contravenes Congress’s purpose in creating two options for disclosure requirements, each with benefits and burdens for political committees. Rather than choosing one of the schedules provided by Congress, committees are getting the benefits of both—and leaving voters in the dark.

We request that the Commission amend 11 C.F.R. § 104.5(c) to ensure that quarterly filers are required to file a pre-election report. We propose that any committee that starts an election year as a quarterly filer (defined as any committee that does not file a monthly report for January) must file pre- and post-election reports for primary elections.

This could be achieved by: (1) prohibiting committees from switching their filing schedules during an election year, (2) prohibiting committees from switching from quarterly to monthly filing in any quarter in which they participate in a primary, or (3) establishing that committees that switch to monthly filers automatically revert back to quarterly if they are involved in a primary in their first quarter after the switch.

CLC requests that the Commission promptly publish a Notice of Availability of this petition in the Federal Register, *see* 11 C.F.R. § 200.3(a)(1), and initiate a rulemaking to consider promulgating the proposed regulation set forth above. *See id.* § 200.4(a).

Respectfully submitted,

/s/ Adav Noti _____

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