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Federal Election Commission  
Office of General Counsel  
1050 First Street NE  
Washington, D.C. 20463

Re: Petition for Rulemaking to Revise 11 C.F.R. § 110.6

Dear Commissioners:

Pursuant to 11 C.F.R. §§ 200.1-200.6, WinRed, Inc. (“WinRed”) petitions the Federal Election Commission (“FEC” or the “Commission”) to conduct a rulemaking to amend its “earmarked contributions” rule to harmonize it with other reporting requirements in Commission regulations. Specifically, WinRed requests that the Commission amend 11 C.F.R. § 110.6 to apply the itemization threshold found at 11 C.F.R. § 104.3(a)(4) to reports filed by political committees that receive and forward earmarked contributions by generally functioning as conduits. WinRed further asks the Commission to (1) develop a new reporting schedule on which a political committee can disclose earmarked contributions that it received and forwarded and (2) issue guidance regarding proper disclaimers for fundraising pages maintained by political committees that generally function as conduits for earmarked contributions. These changes would ease administrative burdens on political committees that function as conduits and also enhance the privacy interests of small-dollar donors, increase transparency, and promote public comprehension of disclosure reports filed with the FEC.

## I. FACTUAL BACKGROUND

WinRed is a non-connected political action committee (“PAC”) registered with the FEC that largely operates as an intermediary through which donors may make earmarked contributions to the political committees of the donors’ choosing.<sup>1</sup> In other words, WinRed serves as a pass-through platform, allowing donors to route their contributions to designated candidates or other political committees. The process works as follows:

- A political committee contracts to establish a contribution page on the WinRed website, which is hosted and maintained by WinRed’s vendor, WinRed Technical Services, LLC;
- Pursuant to an end-user agreement, the political committee creates a fundraising page in accordance with the committee’s specifications;
- When creating a customized contribution page, the political committee has full discretion to determine how to use the website to solicit donors, including the ability to fully customize

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<sup>1</sup> For convenience purposes, this petition will hereafter refer to committees like WinRed, that primarily or exclusively receive and forward earmarked contributions, as “conduit PACs.”

the content or the website, and the full authority as to how to share the URL for the site with donors, if at all;

- Contributions made via the political committee’s page on the WinRed site result in a nearly instantaneous notification being sent to the recipient committee, as designated by the donors; and
- Contributions made to the political committee are forwarded by WinRed to the recipient committees within 10 days (often instantaneously) in accordance with FEC rules and regulations.

WinRed, which registered with the Commission in January 2019, exercises no discretion over the timing, recipient, or amount of earmarked contributions.

## II. LEGAL BACKGROUND

### A. Reporting Requirements Regarding Individual Contributor Information

The Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”), requires that “[e]ach treasurer of a political committee shall file reports of receipts and disbursements . . . .”<sup>2</sup> The Act further provides that each report submitted by a political committee must disclose *inter alia* “the identification of each person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of \$200 . . . together with the date and amount of any such contribution . . . .”<sup>3</sup> In other words, political committees are not required to include itemized information about individual donors who do not exceed the \$200 aggregate contribution threshold. The Commission regulations that implement this donor itemization threshold largely mirror the corresponding statutory language.<sup>4</sup>

The itemization thresholds were increased to \$200 as part of the 1979 amendments to the Act.<sup>5</sup> The report accompanying Senate passage of the bill identified that one of the “two major goals” of the amendments was “[t]o simplify reporting requirements for candidates and committees under the Federal Election Campaign Act . . . .”<sup>6</sup> To this point, the report notes that, in the election cycles following the passage of the 1974 amendments to the Act, “many candidates and committees were burdened by the large number of reports and volume of information required to be maintained and submitted.”<sup>7</sup> Thus, raising the itemization threshold was intended to “alleviate the reporting burdens” shouldered by political committees and reduce the number of “files required to be processed and stored by the Commission.”<sup>8</sup>

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<sup>2</sup> 52 U.S.C. § 30104(a)(1); *see* 11 C.F.R. § 104.1(a).

<sup>3</sup> 52 U.S.C. § 30104(b)(3).

<sup>4</sup> 11 C.F.R. § 104.3(a)(4)(i); *see also id.* § 104.8(a),(b).

<sup>5</sup> Federal Election Campaign Act Amendments of 1979, Pub. L. 96-187, 93 Stat. 1339, 1351 (1980).

<sup>6</sup> S. Rep. 96-319, at 1 (1979).

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

Easing administrative burdens, however, was not the only objective behind increasing the itemization threshold. The amendment was also designed to further protect the individual privacy of small-dollar donors. Under the heading, “Impact on personal privacy of individuals affected by the bill,” the Senate Report stated: “The impact would principally be to reduce the marginal intrusion on personal privacy resulting from disclosure of individual contributions. Raising the threshold for individual contributions . . . would reduce the number of instances in which personal contributions would have to be reported.”<sup>9</sup>

## B. Reporting Requirements Regarding Earmarked Contributions

The Act requires that “all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, *including 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.”<sup>10</sup> With respect to disclosure, however, the Act states only that “[t]he intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.”<sup>11</sup> This provision was introduced in the 1974 Amendments to the Act.

The Commission regulation implementing FECA’s disclosure requirement for earmarked contributions provides that “[t]he intermediary or conduit of the earmarked contribution shall report the original source and the recipient candidate or authorized committee to the Commission . . . , and to the recipient candidate committee.”<sup>12</sup> And in cases where a political committee receives and forwards earmarked contributions, “[t]he report to the Commission . . . shall be included in the conduit’s or intermediary’s *report for the reporting period in which the earmarked contribution was received . . .*”<sup>13</sup> Itemized reporting of earmarked contributions must include, among other things, “the name and mailing address of each contributor and, for each earmarked contribution in excess of \$200, the contributor’s occupation and the name of his or her employer . . . .”<sup>14</sup> Under the Commission’s existing reporting provision, *all* earmarked contributions must be individually itemized, including earmarked contributions of \$200 or less.

In terms of timing, “[t]he report to the recipient candidate or authorized committee shall be made when the earmarked contribution is forwarded to the recipient candidate or authorized committee pursuant to 11 C.F.R. § 102.8.”<sup>15</sup> The candidate committees that receive earmarked contributions must “report each conduit or intermediary who forwards one or more earmarked contributions which in the aggregate exceed \$200 in any election cycle.”<sup>16</sup> Unlike a conduit PAC’s report, a recipient committee’s

<sup>9</sup> *Id.* at 6. The Senate Committee on Rules and Administration held a hearing in 1979 on amending the Act, and as part of the hearing record, it included a letter urging Congress to simplify the disclosure requirements, which “would assure at least some privacy to small contributors . . . .” *To Amend the Federal Election Campaign Act of 1971, as Amended, and for Other Purposes*, 96<sup>th</sup> Cong. 163 (1979).

<sup>10</sup> 52 U.S.C. § 30116(a)(8).

<sup>11</sup> *Id.*

<sup>12</sup> 11 C.F.R. § 110.6(c)(1)(i).

<sup>13</sup> *Id.* § 110.6(c)(1)(ii) (emphasis added).

<sup>14</sup> *Id.* § 110.6(c)(1)(iv)(A).

<sup>15</sup> *Id.* § 110.6(c)(1)(iii).

<sup>16</sup> *Id.* § 110.6(c)(2)(i).

report is subject to the individual contributor itemization threshold (*i.e.*, more than \$200 during an election cycle) discussed above.<sup>17</sup>

Our review of the relevant legislative history and explanations and justifications (“E&Js”) related to the statutory and regulatory language regarding earmarked contributions does not reveal a justification explaining why, for purposes of the itemization threshold, a political committee’s disclosure of earmarked contributions as part of its regularly filed reports should be treated differently from any other report filed by a political committee. Nor is there any discussion why the interests in reducing burdensome reporting requirements and protecting donor privacy is any less compelling when the disclosure involves earmarked contributions.

It is worth noting that, while the Act’s earmarked contributions language refers simply to “report[ing] the original source and the recipient candidate,” the corresponding Commission regulation spells out a much more detailed requirement regarding disclosure of donor information, including a trigger for when occupation and employer information must be reported.<sup>18</sup> Thus, in this instance, the Commission clearly exercised its discretion to impose a weightier burden on conduiting committees and require disclosure of certain information about earmarked contributions that is not explicitly mandated by the Act.

### III. DISCUSSION

The Internet has revolutionized political fundraising, creating a cost-effective and time-saving environment in which candidates can readily solicit and receive contributions from a wide range of potential donors. In particular, the Internet’s unique characteristics have allowed small-dollar contributions to flourish in a manner that would never have been possible in the pre-online fundraising environment in which contributions were given primarily via paper checks transmitted through the mail in stamped envelopes. As Open Secrets noted in its analysis of fundraising in the 2020 election cycle, “record-breaking cash from small donors” is due in large part to “increased reliance on technology.”<sup>19</sup>

The advent of the “conduit PAC” has been an especially impactful online fundraising innovation. The Commission first dealt in earnest with the concept of conduit PACs in the Internet age in 2006 when it considered an advisory opinion submitted by ActBlue,<sup>20</sup> a conduit PAC that formed in 2004. Since then, the Commission has considered numerous advisory opinions that involve conduit PACs as online fundraising efforts have rapidly expanded.<sup>21</sup> The low transaction costs and convenient software interfaces provided by conduit PACs have made them increasingly attractive vehicles for making contributions, especially for individuals donating small amounts. During the 2020 election cycle,

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<sup>17</sup> *Id.* § 110.6(c)(2)(ii)(C).

<sup>18</sup> *See id.* § 110.6(c)(1)(iv)(A).

<sup>19</sup> Ollie Gratzinger, *Small Donors Give Big Money in 2020 Election Cycle*, Open Secrets (Oct. 30, 2020), <https://www.opensecrets.org/news/2020/10/small-donors-give-big-2020-thanks-to-technology/>.

<sup>20</sup> FEC Advisory Op. 2006-30 (ActBlue)

<sup>21</sup> *See, e.g.*, FEC Advisory Op. 2007-31 (Edwards); FEC Advisory Op. 204-13 (ActBlue); FEC Advisory Op. 2014-19 (ActBlue); FEC Advisory Op. 2019-11 (Pro-Life Democratic Candidate PAC).

WinRed received and forwarded over \$2.2 billion in earmarked contributions,<sup>22</sup> while ActBlue, having a fourteen-year head start, conduited over \$4.2 billion in earmarked contributions.<sup>23</sup>

The sheer volume of transactions processed and reported by a conduit PAC like WinRed is extraordinarily large. For instance, WinRed's April 2022 Quarterly Report alone disclosed more than 3.9 million itemized receipts<sup>24</sup> and was over 2.7 million pages long.<sup>25</sup> Notwithstanding the fact that the vast majority of these contributions are for \$200 or less—in fact, most are for less than \$25, with many as low as \$1—current FEC regulations require that every single receipt must be itemized, since the \$200 itemization threshold applicable to reports filed by the recipients of earmarked contributions is not similarly in effect for conduit PAC reports. This leads to the incongruous result whereby the name and address information of small -dollar donors who make earmarked contributions is disclosed on conduit PAC reports but that information is not subsequently included on the reports of the recipients of those same earmarked contributions. In other words, a donor contributing five dollars to a federal candidate committee via WinRed will be itemized on WinRed's report, but will not be reported by name on the recipient committee's report.

The lack of consistency in how the itemization threshold applies to conduit PAC reports and reports of recipient committees defeats the threshold's underlying purposes—namely, easing administrative burdens related to reporting and protecting the privacy interests of small-dollar donors. We are unable to identify any rationales in either the Act's legislative history or in the explanations and justifications for the earmarked contributions rule that attempt to explain, let alone justify, this disparity.<sup>26</sup> To be sure, the relevant statutory and regulatory language was enacted when the Internet did not exist (or at best, was rudimentary), contributions were made primarily by paper checks, and earmarked contributions were significantly less common. Nevertheless, to the extent that the lack of an itemization threshold applicable to conduit reports reflects a bygone era when the prevailing modes of political fundraising yielded few small-dollar earmarked contributions, the time is ripe for the Commission to update 11 C.F.R. § 110.6 to reflect the new realities of political fundraising.

The inconsistent application of the itemization threshold imposes significant real-world hardships on both conduit PACs and individuals who make small-dollar earmarked contributions. These serious reporting and privacy concerns will only intensify going forward as the use of conduit PACs to make political contributions becomes ever more prevalent,<sup>27</sup> and there is absolutely no indication that

<sup>22</sup> WinRed Financial Summary, 2019-20, FED. ELECTION COMM'N, <https://www.fec.gov/data/committee/C00694323/?tab=summary&cycle=2020>.

<sup>23</sup> ActBlue Financial Summary, 2019-20, FED. ELECTION COMM'N, <https://www.fec.gov/data/committee/C00401224/?tab=summary&cycle=2020>.

<sup>24</sup> WinRed April 2022 Quarterly Report, Itemized Receipts, <https://docquery.fec.gov/cgi-bin/forms/C00694323/1586719/sa/11AI>.

<sup>25</sup> WinRed Committee Filings, 2021-22, FED. ELECTION COMM'N, <https://www.fec.gov/data/committee/C00694323/?tab=filings&cycle=2022#statements>.

<sup>26</sup> It is also possible that this discrepancy indicates that the rule's lack of an itemization threshold applicable to conduit reports is not consistent with the Act.

<sup>27</sup> See Melissa Holzberg, *ActBlue Still Outraises WinRed, But the GOP Platform is Catching Up*, Open Secrets (Aug. 4, 2021), <https://www.opensecrets.org/news/2021/08/actblue-outraises-winred-gop-catching-up/> (describing the increased use of conduit PACs by both parties to raise political money).

the use of this fundraising methodology will slow down at any point in the future. Regarding the compliance obligations for conduit PACs, as noted above, the massive amounts of additional personal information that a conduit PAC must currently disclose certainly puts a strain on compliance resources. Indeed, it is often impossible to download and view conduit PAC reports using regular-bandwidth internet access. This certainly does not serve the public interest in accessible donor data when the over-production of data leads to all data being inaccessible.

Conduit PAC overreporting also impacts the privacy interests of small-dollar political donors, interests that have only become more pronounced in an increasingly vitriolic political environment. As the Supreme Court stated in a recent case involving donor disclosure requirements applicable to contributions to nonprofit organizations, the risks associated with such disclosure “are heightened in the 21<sup>st</sup> century and seem to grow with each passing year, as anyone with access to a computer [can] compile a wealth of information about anyone else, including such sensitive details as a person’s home address . . . .”<sup>28</sup> Furthermore, it unfortunately remains true that bad actors can use the FEC’s data for solicitation or commercial purposes, “appending” email addresses and phone numbers to small-dollar donor records available via the FEC in order to reverse engineer donor files for profit. A political committee’s data is usually its most valuable asset – often the only cognizable asset – held by the committee. When all contributions, even those under \$200 in the aggregate, must be publicly reported, it only becomes that much more enticing to improperly access and use data, as there is so much of it now available. WinRed has always put the online security and general protection of its users – both donors and political committees – as priority number one. Not only would including an itemization threshold in the earmarked contributions rule protect the privacy interests of small-dollar donors, but it would also create a stronger shield for political committees that endeavor to do everything possible to protect their greatest asset from bad actors.

In consideration of both inequitable burdensome reporting requirements and a desperate need for donor privacy where lawfully possible, the Commission’s earmarked contributions rule must be amended to include the same individual donor itemization threshold that has applied to all other reports for many years, which in turn would harmonize reporting among committees. It is well within the Commission’s authority to exercise discretion over this decision, just as it did when it adopted an earmarked contributions rule that requires disclosure of more robust donor information in conduit reports than is demanded by the Act.

#### IV. REQUEST FOR RULEMAKING

To vindicate the interests underlying the itemization threshold—*i.e.*, reducing reporting-related burdens and protecting the privacy interests of small-dollar donors—WinRed hereby requests that the Commission publish, pursuant to 11 C.F.R. § 200.3(a), a Notice of Availability of this petition in the Federal Register and thereafter commence a rulemaking to amend its earmarked contributions rule (11 C.F.R. § 110.6) to include an itemization threshold consistent with 11 C.F.R. § 104.3(a)(4) with respect to reports of earmarked contributions filed by conduit PACs. Amending § 110.6 in this manner will not only bring about a more equal realization of the purposes that led Congress to enact the updated

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<sup>28</sup> *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021) (internal quotes omitted).



itemization threshold, but it will also bring greater internal consistency to the reporting requirements set forth in Commission rules.

## V. ADDITIONAL CONSIDERATIONS

In addition to the rulemaking described above, WinRed further requests that the Commission take the following actions that do not necessarily require a rulemaking to effectuate.

*Develop a new reporting schedule for disclosing earmarked contributions.* The current system for reporting earmarked contributions requires a conduit to disclose the same contribution twice: first, as a receipt on Schedule A and, second, as a disbursement on Schedule B, linked by memo text. This unwieldy reporting mechanism not only creates the misleading impression that a conduit PAC possesses money in its account that it does not actually have, but it also makes it difficult for members of the public to follow the transaction chain regarding an earmarked contribution. Having a separate schedule for disclosing earmarked contributions would reduce administrative burdens by eliminating redundant reporting of the same transaction and would assist the public by providing much-needed transparency and clarity to what is currently an opaque reporting process.

*Provide guidance regarding proper disclaimers for candidate/committee fundraising webpages provided by conduit PACs.* There has been some confusion about what disclaimer should be included on a fundraising webpage provided by a conduit PAC's platform to a candidate or other committee. Out of an abundance of caution, two disclaimers are often included—one for the candidate (or other fundraising committee) and another for the conduit PAC. This, however, can confuse potential donors, who may be left with the mistaken impression that the webpage is not actually an official page of the candidate or committee being featured. WinRed, therefore, seeks guidance from the Commission on acceptable disclaimers for fundraising pages furnished by conduit PACs.

Respectfully submitted,



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