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Acting General Counsel
Federal Election Commission
1050 First St. NE
Washington, DC 20463

Re: Interim Final Rule Amending 11 C.F.R. § 110.4(b)(1)(iii)

Dear Ms. Stevenson:

Campaign Legal Center (“CLC”) respectfully submits this comment on the Federal Election Commission’s (the “Commission” or “FEC”) draft Interim Final Rule Amending 11 C.F.R. § 110.4(b)(1)(iii), which is Agenda Document 23-11-A on the Commission’s May 18, 2023, open meeting agenda. This interim final rule would repeal, without advance notice and comment, an FEC regulation that prohibits knowingly helping or assisting any person in making a contribution in the name of another (the “help or assist” regulation), which implements 52 U.S.C. § 30122 (“Section 30122”), a provision of the Federal Election Campaign Act (“FECA”) prohibiting contributions in the name of another. As explained below, the FEC’s proposed repeal of this regulation in reliance on the “good cause” exception of the Administrative Procedure Act (“APA”) is improper.

The Commission’s draft states that the Commission intends to repeal the “help or assist” regulation without advance notice and comment under the APA’s “good cause” exception, purportedly because this regulatory repeal is “necessary to conform the Commission’s regulations” to a federal district court order and “does not involve any Commission discretionary or policy judgments.”¹ In particular, the Commission’s interim final rule references a 2018 case in which the FEC sought to enforce the regulation against a defendant who allegedly assisted a co-defendant in making about 20 straw donor contributions to a federal candidate.² The district court found the “help or assist” regulation to be invalid, refused to enforce it, and granted the defendant’s motion to dismiss the FEC’s claim against him.³ The district

¹ Interim Final Rule at 3.

² *Id.* at 2-3; see *FEC v. Swallow*, 304 F. Supp. 3d 1113, 1114 (D. Utah 2018).

³ *Swallow*, 304 F. Supp. 3d at 1118.

court's order further enjoined the FEC from enforcing the rule and "ordered [the regulation] stricken from the Code of Federal Regulations."⁴

The draft interim final rule states that repeal of the regulation is "necessary" to conform the Commission's regulation to this single district court's order and thus appropriately done "without advance notice and comment" under the APA's "good cause exception."⁵ But the draft itself recognizes agencies' discretion to reject or acquiesce to a district court's order — or even a Circuit court's decision — in future cases in other jurisdictions.⁶ The FEC states that its failure to appeal the district court decision means that it "chose not to take this path in this case."⁷ But the FEC's *choice* not to appeal the district court's decision in *Swallow* does not preclude the agency from litigating the same legal question in a different jurisdiction, and that means that the proposed repeal of the Commission's regulation *is* discretionary.

As the Supreme Court has explicitly recognized, although the federal government may have discretionary reasons for declining to appeal a particular adverse decision, it remains free to defend its position in a future case involving a different opposing party.⁸ The Supreme Court has also stated that this ability is particularly critical to the functioning of executive agencies, as the government's policy objectives may change depending on agency leadership.⁹ Put simply, a single district court's decision regarding the validity of a regulation does not bind the Commission in every other jurisdiction for all future enforcement matters. Indeed, even if the Commission had appealed the decision and lost the appeal, the FEC has previously observed that "declining to follow one Circuit Court's decision nationwide" is "the norm."¹⁰ Thus, Supreme Court precedent and the FEC's own statements contradict the notion that this regulatory repeal is non-discretionary and undermine the Commission's purported reliance on the APA's "good cause" exception.

Particularly given the serious ramifications of this draft interim final rule, which would signal that it is legally permissible to help or assist someone in making illegal

⁴ *Id.* at 1119.

⁵ Interim Final Rule at 3.

⁶ *Id.* at 3 n.1.

⁷ *Id.*

⁸ *See United States v. Mendoza*, 464 U.S. 154, 160-62 (1984) ("The government of course may not now undo the consequences of its decision not to appeal the District Court judgment in the *68 Filipinos* case; it is bound by that judgment under the principles of *res judicata*. But we now hold that it is not further bound in a case involving a litigant who was not a party to the earlier litigation.").

⁹ *See id.* at 161.

¹⁰ Definition of "Express Advocacy," 63 Fed. Reg. 8363, 8364 (Feb. 19, 1998). As confirmed by the Commission's own past experience, a district court or Circuit Court decision invalidating a regulation does not require the agency to stop enforcing the regulation altogether. *See id.* at 8363-64. As the Commission explained in denying a petition to remove the regulatory definition of "express advocacy" based on a pair of lower court decisions holding the regulation invalid, "it is not unusual for an agency to find that different courts have interpreted its statutes or rules in different ways." *Id.* at 8363 (citing the Supreme Court's recognition that "an agency is free to adhere to its preferred interpretation in all circuits that have not rejected that interpretation").

straw donor contributions and thus undermine the Commission’s responsibility and mission to protect voters by preventing corruption and enhancing transparency, the Commission should reconsider this improper procedural approach to revising its regulation without advance notice and comment.

Section 30122’s prohibition of contributions in the name of another supports FECA’s disclosure regime, which maintains vital electoral transparency, and prevents the circumvention of federal contribution limits and provisions that prohibit corporate, federal contractor, and foreign national contributions. Put simply, FECA requires that every contribution must be made, and disclosed, in the name of the true contributor providing the funds. The “help or assist” regulation advances that crucial statutory command by making it unlawful for someone to knowingly organize, execute, or facilitate an illegal straw donor scheme — *i.e.*, proscribing the conduct that helps effectuate or accomplish such a scheme. As such, the “help or assist” regulation reasonably implements Section 30122 because, as the Commission argued in the *Swallow* litigation, it is “substantially related and closely drawn to the disclosure and anti-circumvention interests” that animate Section 30122.¹¹

Given the extremely important transparency and anti-corruption interests at stake in this rulemaking, and precedent demonstrating that the Commission does not have to abandon all reliance on a regulation called into question by just one district court, we urge the Commission to reject this improper interim final rule.

Respectfully submitted,

/s/ Shanna (Reulbach) Ports

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¹¹ *FEC v. Jeremy Johnson*, FEC’s Memorandum in Opposition to Motion to Dismiss at 8.