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Subject New comment on REG 2011-01 submitted by Dickerson, Allen

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CENTER *for* COMPETITIVE POLITICS
Congress shall make no law...

August 22, 2011

VIA ELECTRONIC FILING

Robert M. Knop
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

RE: Petition of Representative Christopher Van Hollen concerning 11 CFR § 109.10

Dear Mr. Knop:

The Center for Competitive Politics ("CCP") submits these comments in opposition to the Petition for Rulemaking filed with the Federal Election Commission ("FEC") on April 21, 2011 by Representative Christopher Van Hollen. *See* 76 Fed. Reg. 36000. For the reasons stated below, CCP believes that Representative Van Hollen's petition misinterprets existing law and serves as an inappropriate attempt to enact by regulatory action what Congress has rejected as a matter of legislation. The FEC's existing regulation concerning the reporting of independent expenditures by persons other than political committees,[1] found at 11 CFR § 109.10(e)(1)(vi), is an appropriate interpretation of the underlying statute, providing Congressionally-mandated disclosure of independent expenditures without delving into the unwarranted, and Constitutionally-suspect, additional disclosure advocated by Representative Van Hollen. In the event that hearings are held concerning the Petition, CCP requests the opportunity to have a representative provide testimony further explaining our views.

1. The definition of "contribution" provided by Congress precludes any regulation that delinks reporting of a contribution from the intent of the contributor to "influence" Federal elections.

11 CFR § 109.10(e)(1)(vi) requires reporting of certain "contributions," a category that Representative Van Hollen would expand considerably. But the FEC is limited in its ability to comply by the language of the statute itself. The definition of "contribution" found at 2 USC § 431(8) does not cover all money received by an organization. Instead, the definition explicitly applies only to "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office..." 431(8)(A)(i). Consequently, any regulation that delinks an intent to "influence [an] election"

[1] Political Committees, of course, have to report all funding. 11 CFR § 104.3.

from an organization's reporting requirements would lack any basis in the statute. To the extent that Rep. Van Hollen is requesting the full contributor list for any group that engages in independent expenditures, his remedy must be found with his colleagues, in a change to the statute.

2. Where donors to persons other than political committees do not designate or control the manner in which their donations may or may not be used, any independent expenditure by a receiving person cannot be ascribed to the donors, and disclosure under the FEC rules is inappropriate.

Congressman Van Hollen's complaint that 2 U.S.C. § 434(c)(2)(C) extends to the general intention to fund some, unspecified and untargeted, independent expenditure is misplaced.

First, the use of the phrase "an independent expenditure" simply does not support the reading he advances – at most, it is an ambiguous pronouncement appropriately subject to the Commission's rulemaking discretion. *See Chevron USA, Inc. v. NRDC, Inc.,* 467 U.S. 837, 843-44 (1984).

Second, the purpose of independent expenditures is to be the speech of a particular person or entity, uncoordinated with a candidate or candidate committee. To the extent that a donor does not have this necessary connection to a particular independent expenditure, and does not designate or have control over either its message or to whom it is targeted, it is, simply, not his speech. Rather, the organization that retains entire control over the message, formatting, timing, and all other relevant aspects of the independent expenditure is the relevant speaker and must disclose its involvement. That is precisely what the challenged regulation, appropriately, requires.

While political committees are focused primarily on political activities, the entities regulated by § 109.10(e)(1)(vi) have broader organizational goals. Indeed, the Supreme Court has recognized that organizations funding political expenditures may have "varied purposes… several of which are not inherently political." *Austin v. Mich. State Chamber of Commerce,* 494 U.S. 652, 662 (1990), *rev'd on other grounds, Citizens United v. FEC,* 130 S. Ct. 876, 913 (2010). Indeed, in *Austin,* the Chamber's wide range of activities – including training, insurance, and other benefits – was one of the principal arguments advanced against treating it as a voluntary ideological or political association. *Id.* Specifically, the Court held that "the Chamber's political agenda [was] sufficiently distinct from its educational and outreach programs that members who disagree[d] with the former [might] continue to pay dues to participate in the latter." *Austin,* 494 U.S. at 663. Put differently, the payment of dues, or any other undesignated donation, might say nothing about the payers' political views, including their agreement or disagreement with any specific independent expenditure. This is precisely why *spending* on political speech must be disclosed: the speaker, who has the necessary relationship with the content of a communication, discloses his involvement therewith.

Representative Van Hollen's proposal would, consequently, add little useful disclosure while potentially providing large amounts of misleading information to the public. The warning

provided by *Austin* applies here. How are donations to be handled that are annual dues or donations to a general fund, given for the purpose of obtaining benefits such as professional or business insurance, entirely divorced from political activities? Similarly, some donors may wish to oppose a specific piece of legislation – concerning collective bargaining rights or environmental regulations, for instance – and support an organization's lobbying efforts on that basis without any desire that the donation be used to influence an election. The Petition provides no basis for discriminating between these donations and those intended for political communications. The Regulations does. To require reporting of these donations would be misleading, suggesting support of opposition by a donor where none was intended. Such confusion would undermine the public's informational interest in knowing the source of campaign speech. *See Citizens United,* 130 S. Ct. at 915.

Moreover, there are significant practical barriers to implementing the Petition. Under what rubric can specific donations be linked to specific expenditures? Any adopted accounting approach, such as a first-in-first-out system, would likely mismatch donations and expenditures. For instance, a donor may wish to support an organization's activities in one state, but his donation might be paired with an independent expenditure in a different state. And simply disclosing *all* donations with each independent expenditure report would flood the public with information that is misleading: in addition to the weaknesses mentioned previously, such a report would double-count donations (in that each report would list the same donors). Finally, each report could randomly match donors to an expenditure, but such a random approach would almost certainly lead to incorrect results, and further mislead the public. Representative Van Hollen's petition suggests no way to avoid either double-counting or arbitrariness (or both) in the required reports.

3. Representative Van Hollen's Petition is a naked attempt to accomplish by regulatory action what Congress declined to do through the DISCLOSE Act.

At bottom, this request is directed at a regulation that could have been challenged at an earlier date, and was not. Van Hollen was a member of Congress at the time it was written, but waited until now to file his petition. His emphasis on *Citizens United* is telling, but more relevant is the failure of the DISCLOSE Act, which he introduced, and which was expressly intended to counter *Citizens United.*[2] It is inappropriate for a losing member of Congress to seek recourse to an administrative agency where Congress chose not to act.[3] To claim that the suggested

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[2] Van Hollen, Statement on Passage of the DISCLOSE Act, June 24, 2010, http://vanhollen.house.gov/News/DocumentSingle.aspx?DocumentID=192278 ("I applaud my colleagues for supporting this bill, which addresses the very serious threats to our democracy created by the Supreme Court's decision in Citizens United, and I and [sic] look forward to the Senate taking up the legislation in short order").

[3] This is especially true given the partisan nature of the DISCLOSE Act. *See* Sam Stein, *Axelrod, Van Hollen: Losing DISCLOSE Act was a "Significant" Blow,* Huffington Post (Oct. 21, 2010), http://www.huffingtonpost.com/2010/10/21/axelrod-van-hollen-losing_n_771530.html (noting

administrative action is the intent of Congress, in circumstances showing precisely the opposite, is unpersuasive. Moreover, such a precedent would put administrative agencies in the uncomfortable, and inappropriate, position of serving as a backup for failed legislation.

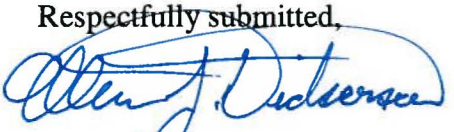
The DISCLOSE Act would have required covered organizations to provide additional information in their reports concerning independent expenditures. *See* H.R. 5175, 111th Congress, § 211.[4] This information would have included the identification of "each person who made unrestricted donor payments to the organization" under certain circumstances. *Id.* at § 211(a)(5)(A)(ii). The Act failed to pass in the Senate, and did not become law. Moreover, there are possible Constitutional infirmities to the DISCLOSE Act's approach, in that it seeks information about an organization's membership that may constitute "compelled disclosure of affiliation with groups engaged in advocacy" protected by existing case law. *See, e.g., NAACP v. Alabama,* 357 U.S. 449, 462 (1958) (state of Alabama not entitled to membership list of NAACP); *Thomas v. Collins,* 323 U.S. 516, 539 (1945) ("As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly.").

The Petition asks the Commission to undertake regulatory action toward objectives Congress has rejected. Moreover, such regulations would invite Constitutional challenge. Under such circumstances, the FEC should refrain from leading where the legislature has chosen not to go.

* * *

CCP appreciates the opportunity to comment on this Petition, and looks forward to participating in any future hearings and commenting on any proposed rulemaking.

Respectfully submitted,



Allen Dickerson
Legal Director

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that top Democrats, including Van Hollen, believed passage of the Act "could have drastically altered the [Democratic] party's sagging fortunes" in the 2010 elections).

[4] Available online: http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.5175:.