March 4, 2019

Robert M. Knop
Assistant General Counsel
1050 First Street NE
Washington, DC 20463
Submitted electronically to www.fec.gov/fosers

Re: Comments on Notice 2018-03: Rulemaking Petition: Definition of Contribution

Dear Mr. Knop,

The Campaign Legal Center ("CLC") respectfully submits these comments in response to Notice 2018-03, regarding the Commission's notice of availability on the definition of contribution, 83 Fed. Reg. 62282 (Dec. 3, 2018).

The underlying petition[1] follows the decision in *Citizens for Responsibility & Ethics in Washington v. FEC* ("*CREW*"), 316 F. Supp. 3d 349 (D.D.C. 2018), where

[1] Institute for Free Speech, Petition for Rulemaking to Revise 11 C.F.R. 100.52 (Aug. 27, 2018), http://sers.fec.gov/fosers/showpdf.htm?docid=400007.

the U.S. District Court for the District of Columbia vacated Commission rules that undermined the statutory disclosure requirements enacted by Congress.

CLC urges the Commission to proceed with a rulemaking and, as the district court suggested, to promulgate "a new rule in accordance with the statute" that will provide "members of the public with the information that they need to participate as an informed electorate," and that will help the Commission and law enforcement in "enforcing limitations on foreign funds being funneled into domestic political campaigns." *Id.* at 414. As part of this rulemaking, the Commission should consider whether any amendments to the regulatory definition of "contribution" are necessary.

The Federal Election Campaign Act ("FECA") requires that a person other than a political committee that makes independent expenditures must file a report with the Commission disclosing, among other things, "the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2)(C). FECA and Commission regulations define a "contribution" as "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." 52 U.S.C. § 30101(8)(A)(i); 11 C.F.R. § 100.52.

Previously, Commission regulations interpreted 52 U.S.C. § 30104(c)(2)(C) to only require disclosure of each person who made a contribution in excess of $200

"which contribution was made for the purpose of furthering the reported independent expenditure." 11 C.F.R. § 109.10(e)(1)(vi).

On August 3, 2018, the U.S. District Court for the District of Columbia held that the regulation was invalid and contrary to the statute it purported to implement. *CREW*, 316 F. Supp. 3d at 423. The court found that the Commission's regulation "impermissibly narrow[ed] the mandated disclosure in 52 U.S.C. § 30104(c)(2)(C), which requires the identification of such donors contributing for the purpose of furthering the not-political committee's own express advocacy for or against the election of a federal candidate, even when the donor has not expressly directed that the funds be used in the precise manner reported." *Id.* at 423. The court found that FECA's "[u]se of the indefinite article 'an' before 'independent expenditure' indicates a broader coverage than a particular, specified independent expenditure and instead means that disclosure must be made as to each non-trivial donor contributing to fund 'an independent expenditure' to a candidate, without regard to the actual reported form of the express advocacy funded by the expenditure." *Id.* at 390-91.

The court additionally found that the regulation failed to implement another FECA disclosure provision, one which requires that a person other than a political committee that makes independent expenditures disclose the information "required under subsection (b)(3)(A) for all contributions received." 52 U.S.C. § 30104(c)(1). Subsection (b)(3)(A) requires disclosure of each person (other than a political

committee) whose total contributions exceed $200 during the calendar year, along with the date and amount. *Id.* § 30104(b)(3)(A).

The court held that the Commission's regulation "blatantly undercut[ ] the congressional goal of fully disclosing the sources of money flowing into federal political campaigns, and thereby suppresse[d] the benefits intended to accrue from disclosure, including informing the electorate, deterring corruption, and enforcing bans on foreign contributions being used to buy access and influence to American political officials." *Id.* at 423.

The court stayed its order "to provide time for the FEC to issue interim regulations that comport with the statutory disclosure requirement of 52 U.S.C. § 30104(c)."[2]

The Commission did not issue interim regulations. However, on October 4, 2018, the Commission issued a press release offering "guidance to the public on how to proceed consistent with the district court's decision."[3] The guidance stated that "the Commission will enforce the statute for independent expenditures made

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[2] The D.C. District Court stayed its order vacating 11 C.F.R. § 109.10(e)(1)(vi) for 45 days. *Id.* at 415, 423. On September 15, 2018, the Chief Justice of the United States stayed the district court's order, *Crossroads GPS v. CREW*, No. 18A274, 2018 WL 4389245 (U.S. Sept. 15, 2018), and on September 18, 2018, the U.S. Supreme Court lifted the Chief Justice's stay, *Crossroads GPS v. CREW,* No. 18A274, 2018 WL 4441781 (U.S. Sept. 18, 2018). The vacatur of the regulation took effect on September 18, 2018. *See* Press Release, FEC, *U.S. Supreme Court vacates stay in CREW v. FEC (16-259)* (Sept. 19, 2018), https://www.fec.gov/updates/us-supreme-court-vacates-stay-crew-v-fec-16-259/ ("As a result of the Supreme Court's action, the vacatur of the regulation at issue is in effect as of September 18, 2018.")

[3] Press Release, FEC, *FEC provides guidance following U.S. District Court decision in CREW v. FEC, 316 F. Supp. 3d 349 (D.D.C. 2018)* (Oct. 4, 2018), https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/.

on or after Sept. 18, 2018," and that "[i]n the interests of fairness, since no one was on notice until the district court's decision was handed down on Aug. 3, the Commission will exercise its prosecutorial discretion for the quarterly reports due Oct. 15, 2018."[4] As a result, the Commission stated, "[p]ersons (other than political committees) that made independent expenditures on or after Sept. 18, 2018" exceeding $250 in an election must disclose on their October quarterly reports the information required by 52 U.S.C. § 30104 (c)(1) and (c)(2)(C), "[f]or contributions received between Aug. 4, 2018 (the date after the district court's opinion) and Sept. 30, 2018 (the end of the reporting period)."[5]

Citing the district court's decision, the press release stated that the Commission will enforce the statute as follows: ""[S]ubsection (c)(1) applies to '*all* contributions received by such' reporting not-political committee . . . and . . . requires disclosure of donors of over $200 annually making contributions 'earmarked for political purposes,' . . . which contributions are 'intended to influence elections . . . .'"[6] Additionally, "[S]ubsection (c)(2)(C) requires reporting not-political committees to identify those donors of over $200 who contribute 'for the purpose of furthering *an* independent expenditure,'" but because "[t]hese donors are a subset of

[4] *Id.*

[5] *Id.*

[6] *Id.* (brackets and emphasis in original).

those contributors required to be identified in subsection (c)(1)," the report need not repeat the date and amount of such contributions.[7]

The Commission's press release resulted in almost no disclosure. In the first reports filed after the district court's order took effect, CLC identified 17 non-political committees that made independent expenditures between September 18 and September 31, 2018, and which should have reported the identity of all "donors of over $200 annually making contributions 'earmarked for political purposes'" on their October Quarterly reports.[8] However, only four of those 17 groups reported the identity of any contributors on their October Quarterly reports.[9] On the next quarter's reports—the first reflecting activity in the months after the decision took effect—CLC identified 101 non-political committees that made independent expenditures between October 1 and December 31, 2018, yet only 24 of those groups named any contributors on their year-end reports.[10] Just eight percent of the $50.7 million spent on independent expenditures by non-political committees in the final quarter of 2018 was accounted for with some form of reported contributions.[11]

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[7] *Id.* (brackets and emphasis in original).

[8] Campaign Legal Center, *CLC Analysis: FEC Rule Kept As Much As $769 Million in Political Spending in the Dark* (October 2018), https://campaignlegal.org/sites/default/files/2018-10/10-04-18%20CLC%20onepager%20dark%20money%20Crossroads%20decision_0.pdf.

[9] *See* Brendan Fischer and Maggie Christ, *How the FEC Is Still Allowing Dark Money Groups to Remain Dark,* Campaign Legal Center website (Oct. 17, 2018), https://campaignlegal.org/update/how-fec-still-allowing-dark-money-groups-remain-dark.

[10] *See* Brendan Fischer and Maggie Christ, *New Reports Show Why the FEC Needs to Clarify Disclosure Requirements for Dark Money Groups—and Why Congress Should Go Even Further,* Campaign Legal Center website (Feb. 6, 2019), https://campaignlegal.org/update/new-reports-show-why-fec-needs-clarify-disclosure-requirements-dark-money-groups-and-why.

[11] *Id.*

Against this backdrop, petitioners express concern that "the current definition of contribution under 11 C.F.R. 100.52(a) incorrectly categorizes too many donations as contributions when they are not, misleading speakers and increasing the risk of reporting errors."[12] Petitioners offer no evidence for this assertion. However, there is substantial evidence that the Commission's now-vacated regulation was failing to provide the disclosure anticipated by the statute, and that the Commission's failure to enact new rules in the wake of the *CREW* decision has had the effect of continuing to keep the public in the dark about the sources of funding for independent expenditures.

The Commission should proceed with a rulemaking that will ensure the disclosure required by 52 U.S.C. § 30104(c), and should also consider whether any amendments to the definition of contribution at 11 C.F.R. 100.52(a) are necessary.

CLC thanks the Commission for the opportunity to submit these comments. If the Commission decides to hold a hearing on this matter, CLC respectfully requests an opportunity to testify at that hearing.

Sincerely,

/s/

Brendan Fischer
Director, Federal Reform

[12] Petition at 5.