

June 30, 2020

James Edwin “Trey” Trainor III
Chair, Federal Election Commission
1050 First St. NE
Washington, DC 20463

Dear Chair Trainor:

Welcome to the Federal Election Commission. As organizations committed to the non-partisan enforcement and administration of campaign finance law, we write to address your recent public comments regarding “dark money” and the FEC’s role in addressing it.

The FEC has a vital role and responsibility—indeed, a statutory mandate—to address secret election spending and to protect voters’ right to know which wealthy special interests are secretly spending millions of dollars to influence our vote and our government. This mandate was upheld by the Supreme Court in *Citizens United v. FEC* in an opinion joined by 8 of 9 justices then on the court.

Voters across the political spectrum overwhelmingly agree: in a poll commissioned by CLC, 71% of voters across partisan lines said that they would like the FEC to take a more active role in enforcing campaign finance laws, and voters identified unlimited, secret political donations as one of the biggest problems facing the country.¹

Yet in a recent interview with Dave Levinthal, you stated that:

I’ve never really been able to nail anyone down with regard to what “dark money” is. Because “dark money” is always what the other side is doing that I

¹ ALG Research & GS Strategy Group, *Poll Finds Overwhelming Support for a More Active Federal Election Commission* (Nov. 8, 2020), <https://campaignlegal.org/sites/default/files/2019-11/CLC%20FEC%20MEMO.pdf>.



don't like. It may still be fully within the bounds of legality, but it's money that I don't like. That's typically how I see the "dark money" issue coming up. And especially now that you've seen both sides of the political aisle become very active in the independent expenditure world, I'm not even sure that the appetite is out there to address it or if it even needs to be addressed beyond where we sit right now. There are reporting mechanisms in place. At least right now, there are lower court decisions that are requiring the disclosure of donors, at least those within the quarter when the expenditures being made. I don't know how those will hold up to scrutiny going forward. But a lot of that issue is playing out the courtroom, not necessarily at the commission.²

Allow us to nail it down for you: "dark money" is political spending by groups that hide who is truly funding their electoral advocacy. The FEC has jurisdiction over dark money spending on independent expenditures and electioneering communications, over political committees that masquerade as social welfare nonprofits to hide their donors, and over straw donor schemes and other efforts to evade statutory disclosure requirements.

Certainly, some partisans might complain more loudly about dark money from the other side, and some advocates have used the term expansively. But that is no excuse for the FEC to ignore its statutory responsibility to ensure real transparency about who is spending big money on elections.

As you know, Congress has mandated donor transparency for groups that spend money on independent expenditures³ and electioneering communications,⁴ and the Supreme Court has upheld and endorsed the constitutionality of such transparency laws.⁵ As the only agency charged with implementing the campaign finance laws

² Dave Levinthal, *Q&A With Trey Trainor, the FEC's Newest Commissioner* (June 18, 2020), <http://davelevinthal.com/blog-trey-trainor-fec-elections/>.

³ 52 U.S.C. § 30104(c)(1-2).

⁴ 52 U.S.C. § 30104(f)(1-2).

⁵ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 369-71 (2010) ("With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation's political speech advances the corporation's interest in making profits, and citizens can see whether elected officials are 'in the pocket' of so-called moneyed interests . . . The First Amendment protects political speech; and disclosure permits citizens and

passed by Congress, the FEC is charged with administering and enforcing Congress' anti-dark money statutes.

Yet the FEC has largely failed in this mission: it has failed to adopt rules that ensure fulsome disclosure, and it has failed to enforce even those rules that already exist.

For example, in 2018, the U.S. District Court for the District of Columbia struck down FEC rules that undermined Congress' transparency requirements for independent expenditures. 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 suppress[ed] 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."⁶

The court gave the FEC the opportunity to adopt new rules that would guarantee the transparency anticipated by the statute, but nearly 20 months later, the Commission still has failed to do so. It has merely issued a press release, and dark money groups that fund independent expenditures continue to keep the identities of their contributors hidden from the public.⁷

Once the Commission's quorum is again restored, the agency can and should proceed with a rulemaking that will protect voters' right to know the sources of funding for independent expenditures; and the agency should additionally proceed with a rulemaking to guarantee the fulsome disclosure of donors who fund electioneering communications. Moreover, the Commission should commit itself to diligently enforcing FECA's transparency requirements.

shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.")

⁶ *Citizens for Responsibility & Ethics in Washington v. FEC* ("CREW"), 316 F. Supp. 3d 349, 423 (D.D.C. 2018).

⁷ See, e.g., Brendan Fischer & 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 (Feb. 6, 2019), <https://campaignlegal.org/update/new-reports-show-why-fec-needs-clarify-disclosure-requirements-dark-money-groups-and-why>.

We agree that both sides of the political aisle have become increasingly active in dark money spending in recent years: in fact, it was Issue One that first highlighted how Democratic dark money surpassed Republican dark money in the 2018 election cycle;⁸ and Campaign Legal Center regularly files complaints against both Democrats and Republicans.

Yet the fact that dark money abuses are bipartisan doesn't limit the "appetite" for addressing the problem: it only strengthens the case for Commission action.

We stand ready to assist you and the Commission in these and other matters,

/s/

Trevor Potter
President, Campaign Legal Center
(Republican FEC Commissioner, 1991-1995)

/s/

Meredith McGehee
Executive Director, Issue One

⁸ Michael Beckel, *In 2018 Midterms, Liberal Dark Money Groups Outspent Conservative Counterparts for First Time Since Citizens United*, ISSUE ONE (Jan. 23, 2019), <https://www.issueone.org/in-2018-midterms-liberal-dark-money-groups-outspent-conservative-counterparts-for-first-time-since-citizens-united/>.