



June 29, 2021

Federal Election Commission
Lisa J. Stevenson, Acting General Counsel
Office of the General Counsel
1050 First Street, NE
Washington, DC 20463
Submitted via email and U.S.P.S.

Petition for Rulemaking to Revise and Amend Regulations Relating to Subvendor Reporting Transparency

Dear Ms. Stevenson,

Pursuant to 11 C.F.R. § 200.1 et seq., Campaign Legal Center (“CLC”) and the Center on Science & Technology Policy at Duke University hereby petition the Federal Election Commission to open a rulemaking to revise and amend Commission regulations to implement statutory transparency requirements by closing the Commission’s subvendor reporting loophole.

The law as enacted by Congress requires political committees and certain advertisers to report disbursements over \$200, but the Commission has created a loophole: if a disclosed vendor subcontracts with a third party, the payment to the subcontractor might not be disclosed, even when the subcontractor is providing substantial and important services to the political committee or group.

This loophole deprives voters of information about how candidates and committees are operating and leaves donors in the dark about how their contributions are being spent. Voters and donors have a right to know, for example, if campaign funds are being routed to the candidate’s businesses, to the candidate’s family members, or to firms owned by a PAC’s operators—details that are readily disguised via payments to intermediary firms. Moreover, this loophole makes it nearly impossible for academics and researchers to track digital political advertising, because FEC reports routinely only disclose a committee’s digital advertising payments to a consulting firm, without separately itemizing that firm’s “subcontracted” payments to digital advertising platforms on the committee’s behalf.

The Commission should close this loophole by making clear that political committees and other reporting persons must itemize all expenditures or disbursements made on



behalf of or for the benefit of the committee or reporting person, whether made via an agent, independent contractor, vendor, or subvendor. Such a requirement would be consistent with and would further the purposes of FECA's disbursement disclosure requirements. Moreover, such a disclosure requirement would be entirely workable: California, for example, has already adopted and implemented similar disclosure regulations.¹

Background

FECA requires that a political committee's reports filed with the Commission disclose the name and address of each person to whom operating expenditures or certain other disbursements in excess of \$200 are made, together with the date, amount, and purpose of those operating expenditures or other disbursements.² When reporting independent expenditures, political committees and all other persons must also itemize the name and address of each person to whom disbursements over \$200 are made in connection with an independent expenditure.³ When reporting electioneering communications, persons other than political committees must similarly report the identification of each person to whom disbursements over \$200 are made in connection with an electioneering communication.⁴

Commission regulations similarly require itemized disclosure of the persons to whom expenditures and disbursements over \$200 are made, along with the date, amount, and purpose of the disbursement.⁵ "Purpose" is defined as "a brief statement or description of why the disbursement was made."⁶

Public reporting requirements like these help inform the public about "where political campaign money comes from and how it is spent."⁷ Such reporting serves important

¹ Cal. Code Regs. tit. 2, § 18431 (2021); *see also* Cal. Fair Pol. Prac. Comm'n ("FPPC"), *Campaign Disclosure Manual 1 - Information for State Candidates, Their Controlled Committees, and Primarily Formed Committees for State Candidates*, at 194-95 (2020), https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Manuals/Manual_1/Entire-Manual-1.pdf (state candidate instruction manual describing how to report "subvendor payments"); FPPC, *Campaign Disclosure Manual 5 - Major Donor Committees*, at 64 (2020), https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Manuals/Manual_5/Final_Manual_5.pdf ("subvendor payments" reporting instructions for "major donor" committees); FPPC, *Campaign Disclosure Manual 6 - Independent Expenditure Committees*, at 46, 48 (2020), https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Manuals/Manual_6/Final_Manual_6.pdf ("subvendor payments" reporting instructions for independent expenditure committees).

² 52 U.S.C. § 30104(b)(5)(A), (b)(6)(B)(v).

³ 52 U.S.C. § 30104(b)(6)(B)(iii), (c)(2)(A).

⁴ 52 U.S.C. § 30104(f)(2)(C).

⁵ 11 C.F.R. § 104.3(b)(3)(i), (b)(4)(i) (content of reports by political committees); 11 C.F.R.

§ 109.10(e)(1)(ii-iii) (reporting independent expenditures); 11 C.F.R. § 104.20(c)(4) (reporting electioneering communications).

⁶ *Id.* § 104.3(b)(3)(i)(A), (b)(4)(i)(A).

⁷ *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (quoting H.R. Rep. No. 92-564, p.4 (1971)).

informational interests; as the Supreme Court has explained, “transparency enables the electorate to make informed decisions.”⁸

However, in Advisory Opinion 1983-25 (Mondale), the Commission determined that under specific circumstances, a committee need not separately itemize a vendor’s “payments to other persons, which are made to purchase services or products used in performance of [the vendor’s] contract with the Committee.”⁹ The committee must still “include on its reports an adequate description of the purpose of each expenditure to Consultants.”¹⁰

Since then, political committees and other persons have routinely relied on the reporting loophole created by Advisory Opinion 1983-25 to avoid itemizing the ultimate payees of millions of dollars in disbursements or payments.¹¹ Despite FECA’s requirement that every disbursement over \$200 be separately itemized, a substantial portion of FEC-reported political spending now consists of large payments to a small number of consulting firms that disguise where political money is ultimately going.

In the 2020 election cycle alone, at least 571 political committees routed over half of their overall spending to a single vendor, according to the Center for Responsive Politics.¹² Those vendors then made payments to the individuals, firms, digital platforms, or other vendors on behalf of the committee, but those payments largely do not appear on FEC reports.

To be clear, the subvendor reporting loophole is not absolute. The Commission has applied and clarified Advisory Opinion 1983-25 in a series of enforcement matters, finding that itemized subvendor reporting is required when the vendor receiving the

⁸ *Citizens United v. FEC*, 558 U.S. 310, 371 (2010).

⁹ FEC Advisory Op. 1983-25 at 2 (Mondale) (Dec. 22, 1983), <https://saos.fec.gov/aodocs/1983-25.pdf>.

¹⁰ *Id.*

¹¹ See, e.g., Sandy Bergo, Agustín Armendariz & John Perry, *Airtime is Money*, CTR. FOR PUB. INTEGRITY, <https://publicintegrity.org/politics/elections/airtime-is-money/>, (May 19, 2014) (noting, in 2006, the range of services that lump-sum payments to media consultants cover, and additionally noting the lack of information about commission rates because the FEC does not require such itemizations); Dan Eggen & Tom Hamburger, *Private consultants see huge election profits*, WASH. POST (Nov. 10, 2012), https://www.washingtonpost.com/politics/decision2012/private-consultants-see-huge-election-profits/2012/11/10/edaab580-29d8-11e2-96b6-8e6a7524553f_story.html (reporting that, in the 2012 presidential election, “the two main media firms working for President Obama and Republican challenger Mitt Romney earned profits for handling more than half a billion dollars of campaign advertising,” and that while “[m]any of the biggest recipients of money on both sides have close ties to the candidates,” they “do not have to reveal how much they made from the campaign because they are employed by private consultants”); Danny Hakim, Maggie Ator & Jo Becker, *Inside the Lincoln Project’s Secrets, Side Deals and Scandals*, N.Y. TIMES (Mar. 8, 2021), <https://www.nytimes.com/2021/03/08/us/politics/lincoln-project-weaver.html> (describing one super PAC’s founders “agree[ing] to pay themselves millions of dollars in management fees” via FEC-reported payments to only a single firm—a “private arrangement [that] shielded even from other senior officials the size of the individual payments”).

¹² Anomaly Tracker, *More than 50 Percent of a Committee or Candidate’s Spending Is Paid to a Single Vendor, 2020 Cycle*, CTR. FOR RESPONSIVE POLITICS, <https://www.opensecrets.org/resources/learn/anomaly-tracker?cycle=2020&type=V#anomaly> (last visited May 24, 2021).

itemized disbursement does not have an “arm’s-length” relationship with the committee; when the payments to the ultimate payee were unrelated to the services provided pursuant to the itemized vendor’s contract with the committee; and/or when the itemized vendor was merely acting as a “conduit” for disbursements to the ultimate payees.¹³ In the 2020 election cycle, at least two campaign committees violated 52 U.S.C. § 30104(b)(5) by routing most of their spending through newly created LLCs that had no other clients and that functioned as conduits to disguise the campaign’s ultimate vendors.¹⁴

Yet given the breadth of the subvendor reporting loophole, such violations are generally difficult to detect. Moreover, even when committees stay within legal lines, there are significant consequences for the American people.

One consequence of the subvendor reporting loophole is that it becomes nearly impossible for researchers and academics to monitor digital political ad practices. FEC reports might disclose that a committee paid a political consulting firm for digital advertising production or placement, but the report won’t disclose how much was spent on Hulu, versus NBC’s website, versus Parler, versus some other platform.¹⁵ As the attached report from the Duke Center for Science and Technology demonstrates, this poses a problem for researchers and academics seeking to monitor digital political ad practices and the impact of self-regulatory policies, such as platform political ad bans. The report estimates that 93% of advertising-related disbursements in the final month of the 2020 election were routed through consultancies. The subvendor loophole therefore obscures if and how committees shifted advertising money to other platforms or other media in response to recent platform political ad bans and restrictions.

Another consequence of the subvendor reporting loophole is that it deprives voters of information they use to assess candidates and cast informed votes. The loophole might allow an authorized committee to disguise contracts with, say, a controversial

¹³ See, e.g., MUR 3847 (Stockman), <https://www.fec.gov/data/legal/matter-under-review/3847/>; MUR 4872 (Jenkins), <https://www.fec.gov/data/legal/matter-under-review/4872/>; MUR 6724 (Bachmann for President), <https://www.fec.gov/data/legal/matter-under-review/6724/>.

¹⁴ See MUR 7784 (Donald J. Trump for President, Inc.); MUR 7774 (Antone for Congress).

¹⁵ Kate Holliday & Jordan Lieberman, *Digital Political Advertising in 2020: What We Learned*, CAMPAIGNS & ELECTIONS (Nov. 30, 2020), <https://www.campaignsandelections.com/campaign-insider/digital-political-advertising-in-2020-what-we-learned> (“Political digital spending was off the charts. It was literally immeasurable, as we will never know the exact numbers because the FEC doesn’t require sub-vendor reporting, and most states are even more lenient. There will be no precise statements about total political spending because nobody actually knows.”).

data firm known for abusing personal data¹⁶ or an extremist militia group,¹⁷ or to hide payments made to attract opposite-party votes.¹⁸ In fact, in many cases, no one reviewing a committee's FEC reports would even be able to identify the staffers on the campaign payroll; that's because political committees regularly pay staff salaries by reporting payments to consulting firms or LLCs, rather than to the staffers themselves.¹⁹

The subvendor reporting loophole can also disguise FECA violations, such as violations of the personal use ban.²⁰ If an authorized committee pays a vendor without reporting that vendor's subsequent payments, there is no way of monitoring whether the vendor then makes excessive payments to the candidate or their family, or pays above market rate to a candidate-owned business, because only the original payment to the vendor is required to be itemized on the committee's FEC report. The loophole can also disguise evidence of common vendor coordination between an authorized committee and a super PAC: when committees only disclose payments to

¹⁶ See, e.g., Jesse Witt & Alex Pasternack, *The Strange afterlife of Cambridge Analytica and the mysterious fate of its data*, FAST COMPANY (Jul. 26, 2019), <https://www.fastcompany.com/90381366/the-mysterious-afterlife-of-cambridge-analytica-and-its-trove-of-data> (“Even determining which firms are working on political campaigns—especially digital ones—is challenging under existing transparency rules in the U.S. . . . ‘The FEC generally doesn’t require disclosure of payments to subvendors, and only requires a minimal description of the purpose of the disbursement, which can allow campaigns to disguise much of their spending.’”).

¹⁷ See FEC Advisory Op. 2021-03 (NRSC & NRCC) (Mar. 25, 2021), <https://www.fec.gov/data/legal/advisory-opinions/2021-03/> (advisory opinion request regarding the use of campaign funds to pay for private security services, but where some raised concerns about a candidate paying private militia groups for security); see Tina Sfondeles, *Brute squads. Goon platoons. A campaign finance case meant to make congressional lawmakers safer could have unintended consequences*, BUS. INSIDER (Mar. 25, 2021), <https://www.businessinsider.com/congress-threat-security-insurrection-militia-proud-boys-protection-2021-03>). If a candidate is going to use campaign funds to hire militia members, voters have a right to know about it. But thanks to the subvendor reporting loophole, a campaign might disguise such payments by hiring a security firm that then sub-contracted with a militia organization.

¹⁸ First Gen. Counsel's Report at 2, MUR 6698 (United Ballot PAC) (Sept. 3, 2014) <https://www.fec.gov/files/legal/murs/6698/16044390137.pdf> (describing allegations that a Republican Congressional candidate “wanted to garner Democratic votes but did not want Republican voters to know that his campaign committee was responsible for mailers that endorsed him along with President Obama” from a Democratic group); Certification at 1, MUR 6698 (United Ballot PAC) (Feb. 25, 2016) <https://www.fec.gov/files/legal/murs/6698/16044390166.pdf> (3-3 deadlock).

¹⁹ See, e.g., S.V. Date, *Apparent 33% Pay Cut for Campaign Manager Hints at Money Trouble for Trump*, HUFF POST (Sept. 11, 2020), https://www.huffpost.com/entry/trump-campaign-stepien-pay-cut_n_5f5be681c5b62874bc1cf4fb (describing how the name of 2020 Trump campaign manager Bill Stepien does not appear in the campaign's FEC reports, apparently because he was getting paid via a consulting firm); see also Anna Massoglia, *Shell companies and ‘dark money’ may hide details of Trump ties to DC protests*, CTR. FOR RESPONSIVE POL. (Jan. 22, 2021), <https://www.opensecrets.org/news/2021/01/trump-tied-to-dc-protests-dark-money-and-shell-companies/> (describing the challenges in using FEC records to identify Trump staffers and vendors who helped organize the January 6, 2021 rally that led to the deadly attack on the Capitol, “since so much of [the Trump campaign's] spending was routed through shell companies, making it difficult to know who the campaign paid and when.”); Eliza Newlin Carney, *Rules of the Game: Dissecting Super PAC Consulting*, ROLL CALL (Apr. 16, 2012), <https://www.rollcall.com/2012/04/16/rules-of-the-game-dissecting-super-pac-consulting/> (describing multiple super PACs in the 2012 presidential election cycle that paid individuals close to the super PACs millions of dollars in payments to newly formed consulting firms).

²⁰ 52 U.S.C. § 30114(b).

first-order vendors, it becomes difficult to detect the use of shared vendors that may be facilitating illegal coordination.²¹

The loophole can also provide further cover for so-called “scam PACs”—political committees that raise funds with promises to support candidates or causes, but that instead divert most of the money into consulting firms owned by the PAC’s operators. The FBI has advised citizens to protect themselves against scam PACs by visiting the FEC website and using Commission records to “see what vendors [a PAC] is using,” since “[o]ften, in a scam PAC, you will see the vendors are also associated with the operators.”²² But the subvendor reporting loophole makes it possible for a scam PAC to cover up such self-dealing by disguising where the money is ultimately going.²³

Request for Rulemaking

FECA requires that reports filed with the Commission disclose the name and address of each person to whom disbursements or expenditures in excess of \$200 are made.²⁴

However, the Commission has interpreted and applied these statutory provisions in a way that undermines FECA’s transparency guarantees. We therefore request that the Commission open a rulemaking to close loopholes that have undermined FECA’s disclosure mandate.

For political committees, the Commission could add a new paragraph 104.3(b)(5) that reads:

“(5)(i) Any person reporting expenditures or disbursements under this section must report expenditures or disbursements made by an agent or independent contractor, including any vendor or subvendor, on behalf of or for the benefit of the reporting person.

²¹ 52 U.S.C. § 30116(a)(7)(B)(i); 11 C.F.R. § 109.21(d)(4).

²² *Scam PACs are on the Rise: Do Your Research Before Giving to Candidates and Causes*, FBI.GOV (Apr. 15, 2021), <https://www.fbi.gov/news/stories/scam-pacs-are-on-the-rise-041521>.

²³ *See, e.g.*, Indictment at 12-13, *United States v. Rogers*, 1:19-cr-270, (E.D. Va. Sept. 17, 2019), <https://assets.documentcloud.org/documents/6420249/RogersIndictment.pdf> (describing how a scam PAC operator itemized payments to vendors, and those vendors then made undisclosed payments back to the PAC operator). Conversely, the subvendor reporting loophole has also been used as a *defense* against scam PAC accusations, since there is no way for the public to know or prove whether itemized payments to a firm run by the PAC’s operators might have been sub-contracted to another vendor without itemization. *See* Maggie Severns, *Trump campaign plagued by groups raising tens of millions in his name*, POLITICO (Dec. 23, 2019), <https://www.politico.com/news/2019/12/23/trump-campaign-compete-against-groups-money-089454> (PAC co-chair arguing that substantial payments from the PAC to his consulting firm are not evidence of self-dealing, since allegedly “the payments for ‘management services’ to his firm . . . were for a range of services, including money that was not kept and was routed through his firm to place ad buys.”)

²⁴ 52 U.S.C. § 30104(b)(5)(A), (b)(6)(B)(v) (regular reports from political committees); 52 U.S.C. § 30104(b)(6)(B)(iii), (c)(2)(A) (independent expenditures); 52 U.S.C. § 30104(f)(2)(C) (electioneering communications).

(ii) An agent or contractor, including a vendor or subvendor, who makes an expenditure or disbursement on behalf of or for the benefit of a reporting committee or person that is required to be reported under this section shall promptly make known to the reporting committee or person all the information required for reporting the expenditure or disbursement.”

Similar language could be added to sections 109.10(e)(1) (independent expenditures) and 104.20(c) (electioneering communications).

Accordingly, petitioners request that the Commission promptly publish a Notice of Availability of this petition in the Federal Register, 11 C.F.R. § 200.3(a)(1), and thereafter initiate a rulemaking to consider promulgation of the proposed regulation set forth above, *id.* § 200.4(a).

Sincerely,

_____/s/_____

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