

October 4, 2021

Federal Election Commission
Lisa J. Stevenson, Acting General Counsel
Office of the General Counsel
1050 First Street, NE
Washington, DC 20463
Submitted electronically to www.fec.gov/fosers


Re: Comment on REG 2021-02: Subvendor Reporting

Dear Ms. Stevenson,

Campaign Legal Center (“CLC”), the Center on Science & Technology Policy at Duke University (“CSTP”), and the University of North Carolina’s Center on Technology Policy respectfully submit this comment on REG 2021-02, the Commission’s notice of availability regarding rulemaking on subvendor reporting transparency. We thank the Commission for publishing this notice regarding CLC and CSTP’s June 29, 2021, petition and for this opportunity to comment. This comment supplements the petition by providing further reasons for the Commission to act, in addition to those laid out in the earlier filing.

As described in the petition, current Commission regulations and advisory opinions leave a significant gap in FECA’s transparency regime: the subvendor reporting loophole. Under this loophole, political committees and other regulated entities at times report only direct disbursements to vendors, without including the identities of subvendors or the ultimate recipients of the funds. As the petition explained, political committees routinely take advantage of the loophole to forgo itemizing the ultimate payees of their disbursements, instead routing most spending through a small number of consulting firms.

The petition documented several significant harms that result from this loophole. First, the lack of subvendor reporting prevents researchers and academics from monitoring digital ad practices, as political committees’ FEC reports will generally disclose bulk payments to consulting firms for digital ad production or placement without indicating the platforms on which ads ultimately appear. This vague reporting makes it difficult to assess the impact of both platform political ad policies and the government’s efforts to regulate online political advertising. Second, the loophole deprives voters of relevant information about candidates by allowing



political committees to hide their interactions with controversial groups or use of unpopular tactics behind multiple levels of vendors. Third, limited reporting facilitates FECA violations: candidates can channel unlawful payments to themselves or their families or businesses through vendors without reporting on the funds' ultimate destination, or impermissibly coordinate with super PACs through unreported subvendors. Fourth, the loophole benefits "scam PACs" by making their self-dealing difficult to detect and prove.

The facts discussed in the petition demonstrate the need for rulemaking by the Commission to close the subvendor reporting loophole. The following additional facts provide further support for such action.

Use of Digital Political Ads Continues to Expand

Reporting published after the petition was filed confirms that digital ad usage will continue to increase in future election cycles. Industry groups project that the 2022 midterm election will see \$1.5 billion spent on political advertising on online streaming services,¹ with a further \$1.3 billion expended on Facebook and Google.² This high level of spending is consistent with the trendline of recent elections, in which streaming services have made up a growing share of the political advertising market.³ Overall 2022 spending will likely dwarf that of previous midterms and match that of the 2020 general election, ensuring that campaigns will spend enormous sums on digital advertising.⁴ As the petition explained, the subvendor reporting loophole allows political committees to engage in this form of advertising without meaningful disclosure: by paying consulting firms lump sums for ad development and placement, campaigns can conceal where their ads ultimately appear.⁵

¹ See John McCormick, *Midterm-Election Ad Spending Poised to Soar as Streaming TV Attracts Campaigns*, WALL ST. J. (July 19, 2021), <https://www.wsj.com/articles/midterm-election-ad-spending-poised-to-soar-as-streaming-tv-attracts-campaigns-11626685200>; *Introducing 2022 Spending Projections*, ADIMPACT, <https://adimpact.com/2022-political-spending-projections> (last visited Sept. 29, 2021).

² See Brad Adgate, *The 2021-22 Midterm Election Cycle Is Forecast to Set a Record for Political Ad Dollars*, FORBES (Aug. 12, 2021), <https://www.forbes.com/sites/bradadgate/2021/08/12/the-2021-22-midterm-election-cycle-is-forecast-to-set-a-record-for-political-ad-dollars>; *Introducing 2022 Spending Projections*, *supra* note 1.

³ See Sara Fischer, *The Future of Political Advertising Is Connected TV*, AXIOS (Apr. 15, 2021), <https://www.axios.com/future-political-advertising-connected-tv-3f31db94-945e-47ef-b200-243b2b1a0f46.html>.

⁴ See Adgate, *supra* note 2; McCormick, *supra* note 1.

⁵ See, e.g., Kate Holliday & Jordan Lieberman, *Digital Political Advertising in 2020: What We Learned*, CAMPAIGNS & ELECTIONS (Nov. 30, 2020),

This expansion of non-transparent digital advertising will only exacerbate the harms created by the subvendor reporting loophole. As digital advertising becomes a more important component of political messaging, the ability of researchers and academics to monitor, evaluate, and report on digital ad practices becomes more critical. Moreover, given the largely unregulated nature of online advertising, disclosure of how campaigns are spending on and distributing digital ads would play an important role in ensuring voters are informed consumers of online messages. As the petition explained, the subvendor reporting loophole undermines those goals. With digital advertising's role in politics expanding, the damage done by the loophole will expand as well, contravening both the letter and the intent of FECA's transparency requirements.

Lack of Subvendor Reporting Conceals Campaign Activities and Deprives the Public of Information

As the petition explained, political committees now routinely use the subvendor reporting loophole to conceal the ultimate recipients of disbursements. This comment provides two additional examples of this deleterious trend.

First, during the 2012 election, several staffers of the Ron Paul presidential campaign attempted to exploit the subvendor reporting loophole to conceal payments made to an Iowa state senator in exchange for his endorsement.⁶ To hide the payments from political rivals and the public, the staffers channeled them through a vendor, labeling the disbursements generically as “audio/visual expenses.”⁷ In court, the staffers claimed that this concealment was permissible under the subvendor reporting loophole.⁸ To be clear, the loophole did not actually authorize the staffers' conduct: a political committee still is not allowed to mischaracterize the purposes of a payment or use a vendor to make an indirect payment to a third party for a service unrelated to the vendor's dealings with the committee.⁹ However, the loophole's existence facilitates (or even encourages) this form of FECA violation—because the staffers did not need to identify the ultimate recipient of the funds, they could attempt to hide the payment by reporting only the initial vendor.

<https://campaignsandelections.com/campaigntech/digital-political-advertising-in-2020-what-we-learned>.

⁶ See *United States v. Benton*, 890 F.3d 697, 704-10 (8th Cir. 2018).

⁷ *Id.* at 706-07.

⁸ See *id.* at 708.

⁹ See *id.* at 708-10 (concluding that the staffers violated FECA).

Second, the loophole enabled a North Carolina congressional campaign to not report its connections with a subvendor engaged in election fraud. Following the 2018 election, an investigation by the North Carolina State Board of Elections of the results in the state's Ninth Congressional District determined that McCrae Dowless, a subcontractor indirectly employed by Republican Mark Harris's campaign, had engaged in widespread absentee ballot fraud.¹⁰ Because of the subvendor reporting loophole, Dowless did not appear in Harris's FEC reports; rather, those filings listed payments to a consulting firm, which in turn employed Dowless.¹¹ Testimony from Harris's son indicated that the candidate had been warned that Dowless had employed "illegal tactics . . . in a previous election," and evidence produced by the state's investigation suggested that "Harris structured his campaign so that it did not directly pay Dowless."¹² In other words, because of the subvendor reporting loophole, the Harris campaign's FEC reports contained no indication of its links with Dowless's election fraud.

In both cases, the existence of the subvendor reporting loophole acted to deprive the public of relevant information. Importantly, although the misconduct in North Carolina and Iowa ultimately became public knowledge, the disclosures filed by the campaigns involved did not bring the issues to light. Rather, because of the subvendor reporting loophole, the campaigns' FEC reports gave no meaningful information on the events at issue.

In light of these facts, as well as the evidence and arguments presented in the petition itself, we respectfully reiterate the petition's request that the Commission open a rulemaking to close the subvendor reporting loophole. As the petition described, the Commission could add language to 11 C.F.R. §§ 104.20(c), 104.3(b),

¹⁰ See Amy Gardner & John Wagner, *N.C. Political Operative Indicted, and Prosecutor Signals that More Charges Are Likely*, WASH. POST (Feb. 28, 2019), https://www.washingtonpost.com/politics/north-carolina-political-operative-indicted-in-election-fraud-case-that-upended-congressional-race/2019/02/27/b0d5f004-3aaf-11e9-aaae-69364b2ed137_story.html.

¹¹ See *id.*; Fredreka Schouten, *North Carolina's Mark Harris Owes \$53,000 to Firm at Center of Absentee Ballot Effort, Records Show*, CNN (Dec. 7, 2018), <https://www.cnn.com/2018/12/07/politics/north-carolina-mark-harris-red-dome-group-debt;Mark-Harris-for-Congress:Spending>, FEC.GOV, <https://www.fec.gov/data/committee/C00649236/?cycle=2018&tab=spending> (last visited Sept. 29, 2021).

¹² Gardner & Wagner, *supra* note 10.

and 109.10(e)(1) to require subvendor reporting and give effect to FECA's intended transparency guarantees.

Respectfully submitted,

/s/ Adav Noti
Campaign Legal Center
Adav Noti
Sam Horan
1101 14th Street, NW, Suite 400
Washington, DC 20005

/s/ Scott Babwah Brennen
Scott Babwah Brennen
Center on Science & Technology Policy
304 Research Dr,
Durham, NC 27708
**This request does not represent the views or
position of Duke University*

/s/ Matt Perault
Matt Perault
Center on Technology Policy
School of Information and Library Science,
University of North Carolina at Chapel Hill
100 Manning Hall
Chapel Hill, NC 27599-3360
**This request does not represent the views or
position of the University of North Carolina*