



December 22, 2022

Federal Election Commission
1050 First St. NE
Washington, DC 20463

**Re: REG 2022-05: Conduit Reporting Threshold Rulemaking
Petition**

Dear Commissioners:

Campaign Legal Center (“CLC”) respectfully submits this comment on REG 2022-05: Conduit Reporting Threshold. CLC urges the Federal Election Commission (the “Commission” or “FEC”) to decline to open a rulemaking to alter the reporting requirements that apply to political committees (“PACs”) operating as conduits (referred to herein as “conduit PACs”). As explained below, at least for contributions made to or on behalf of a candidate, the Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”), expressly precludes the Commission from revising its regulations to allow conduit PACs to avoid disclosing the original source of those contributions, as requested in the petition. Moreover, revising Commission regulations as the petition requests would result in substantially less disclosure regarding political contributions, significantly reducing the overall transparency of the federal campaign finance system, hurting voters’ ability to meaningfully participate in federal elections, and preventing the public from accessing important data about our election system.

I. Background

WinRed, the petitioner, is a conduit PAC that accepts contributions earmarked for candidates and political committees, and then transfers those contributions to the designated recipients; its petition essentially requests that the Commission allow WinRed to stop reporting certain information about its conduit activities, at the cost of depriving the public of vital information about this major source of federal election spending.¹

¹ Letter from WinRed re: Petition for Rulemaking to Revise 11 C.F.R. § 110.6, to FEC (Aug. 19, 2022) (“Petition for Rulemaking”).

Under the Commission’s regulations, a conduit PAC currently must report to the FEC the name and mailing address of each person who makes an earmarked contribution, the amount of the contribution, the date it received the contribution, the committee to which it forwards the contribution, and the date on which it forwards the contribution.² If the earmarked contribution exceeds \$200, the conduit PAC must also report the contributor’s occupation and employer.³ WinRed asks the Commission to alter this rule so that it does not have to report any of this information for contributions aggregating \$200 or less from a single source.⁴ It proposes instead to report the total of the massive volume of such contributions as one unitemized lump sum, resulting in a dramatic decrease in publicly available information.⁵

As explained below, WinRed’s rulemaking request should be denied for at least two distinct reasons. First, the disclosure requirements WinRed seeks to escape are specifically dictated by FECA, and the Commission thus lacks the authority to eliminate them. Second, the conduit disclosure requirements serve an important transparency function. Indeed, conduit PAC reports are the only source of information about the true sources of a significant percentage of many committees’ funding. In the absence of existing conduit disclosure rules, the sources of huge swaths of political spending would become dark. Moreover, conduit PAC reports provide information that has enabled extensive, valuable analysis and reporting about the influence of political spending on our electoral system.

II. The FEC lacks the legal authority to promulgate the regulation WinRed seeks

When a federal agency promulgates a regulation interpreting its enabling statute, as the FEC does when it interprets FECA, the regulation must adhere to the statute.⁶ Courts reviewing the permissibility of an agency regulation apply the familiar *Chevron* framework to confirm that the rule does not exceed the bounds of the statute, the first part of which asks if Congress “has directly spoken to the precise question at issue” through the enabling statute.⁷

Congress, through FECA, “has directly spoken” on the conduit reporting requirement as it applies to contributions made “on behalf of” candidates. The FEC — like any administrative agency in the same position — lacks the authority to implement a regulation at odds with the statutory command, including, *e.g.*, a regulation prescribing lesser disclosure requirements for such contributions.

² 11 C.F.R. § 110.6(c)(1).

³ *Id.* § 110.6(c)(1)(iv)(A).

⁴ *See* Petition for Rulemaking at 5-6.

⁵ *See id.*

⁶ *See Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

⁷ *See Shays v. FEC*, 414 F.3d 76, 96 (D.C. Cir. 2005). The *Chevron* test has two steps: (1) if “Congress has directly spoken to the precise question at issue,” the regulation must match the statute; but (2) “if the statute is silent or ambiguous,” then the regulation will stand so long as it is a “reasonable” interpretation of the statute. *Chevron*, 467 U.S. at 842-44.

In relevant part, FECA provides:

For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. *The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.*⁸

This reporting requirement is categorical. It mandates the reporting — to the Commission and to the recipient — of the “original source” of *every* earmarked contribution made on behalf of a candidate through a conduit.⁹ At a minimum, reporting the “original source” of a contribution would require the intermediary or conduit to disclose the name and address of the contributor to the Commission and the public — along with the “intended recipient” of the contribution — as the regulations currently require. If the Commission were to enact a rule allowing conduit PACs to report, as an unitemized lump sum, the total of all contributions aggregating \$200 or less during an election cycle — precisely what WinRed requests — such a rule would therefore countermand FECA and fail the first step of the *Chevron* test.¹⁰

Accordingly, unless Congress alters the conduit reporting framework set forth in FECA, any contribution made on behalf of a candidate must be fully disclosed per the requirements set forth in 52 U.S.C. § 30116(a)(8). While WinRed argues that political committees that do not serve the same conduit function as WinRed are subject to different reporting requirements, that distinction is one arising out of FECA.¹¹ As such, WinRed’s petition should be denied, because it asks the FEC to take action that would be “counter to the ‘unambiguously expressed intent of Congress.’”¹²

⁸ 52 U.S.C. § 30116(a)(8) (emphasis added).

⁹ The statutory language “on behalf of a particular candidate” supports the conclusion that conduit PACs must report every earmarked contribution designated not only for a candidate’s authorized campaign committee, but for any committee that acts “on behalf of” a candidate, including super PACs and other non-connected committees or vehicles (such as the non-contribution accounts of hybrid PACs) that support a single candidate. The Commission has long recognized that candidates’ authorized committee(s) and “single-candidate” committees should be treated similarly, as evidenced by its regulation providing that a donor shares a single contribution limit between a candidate’s authorized committee(s) and any “single candidate committee” supporting the same candidate. See 11 C.F.R. § 110.1(h)(1). The Supreme Court has cited that regulation and the earmarking restrictions as important protections that work together to ensure people cannot circumvent the Act. See *McCutcheon v. FEC*, 572 U.S. 185 (2014).

¹⁰ See *Shays*, 414 F.3d at 105.

¹¹ See 52 U.S.C. § 30104(b)(3)(A).

¹² *Shays*, 414 F.3d at 96 (quoting *Chevron*, 467 U.S. at 843).

III. Transparency concerns also counsel in favor of maintaining the current conduit PAC reporting rule

Even if FECA did not explicitly preclude the rule this petition requests, strong prudential considerations also argue against opening a rulemaking.

First, conduit PAC reports are the only source of information about the true sources of a significant percentage of many committees' funding. Particularly in instances where a large portion of a committee's funding is unitemized, *i.e.*, because it consists of individual contributions aggregating \$200 or less, which many committees are not statutorily required to itemize, the public is left entirely in the dark as to who is actually funding the committee's activities.¹³

However, under the current reporting regime, the public can often turn to conduit PAC disclosure reports to ascertain the sources of those unitemized contributions, providing important insights. For example, the public can use these reports to determine how many people financially support the committee, the geographic areas from which the committee derives support, whether the committee garners support from a particular industry or type of occupation, and the partisanship of the committee's supporters (by cross-referencing public voter registration records). These data points can help other candidates, the press, individual contributors, and voters to evaluate whether they want to donate to the committee or support a particular candidate.

Second, researchers and academics rely on conduit PAC reports to understand political donor behavior and educate the public about trends in politics. To name just a few ways researchers have used conduit PAC data, they have:

- Compared the fundraising performance of 2020 Democratic primary candidates for President among donors giving \$200 or less.¹⁴
- Examined the phenomenon of small-dollar Democratic donors crossing party lines.¹⁵

¹³ See Anu Narayanswamy, *et al.*, *How Small-Dollar Donors are Reshaping the Democratic Party*, WASH. POST (Aug. 3, 2019), https://www.washingtonpost.com/politics/how-small-dollar-donors-are-reshaping-the-democratic-primary/2019/08/03/50d66e04-b205-11e9-951e-de024209545d_story.html (noting that Donald Trump consistently received half or more of his campaign contributions from donors giving less than \$200); R. Michael Alvarez, Jonathan N. Katz & Seo-young Silvia Kim, *Hidden Donors: The Censoring Problem in U.S. Federal Campaign Finance Data*, 19 ELECTION L.J. 1 (2020), available at <https://www.liebertpub.com/doi/10.1089/elj.2019.0593> (estimating that the 2012 presidential nominees obtained 80 percent or more of their funding from small donors).

¹⁴ Narayanswamy, *et al.*, *supra* note 13.

¹⁵ Caitlin Gilbert, Lauren Fedor & Sam Learner, *Democratic Donors Cross Party Lines to Support Anti-Trump Republicans*, FINANCIAL TIMES (Feb. 15, 2022),

- Traced how small-dollar donors are contributing to races outside of their home states, which reshapes those races, and the increase in volume of donors using conduit PACs over the course of recent election cycles.¹⁶
- Measured the partisan imbalance in small-donor fundraising in swing races during the 2022 midterm elections.¹⁷
- Explored employment-based patterns in small-dollar political giving in the 2020 presidential election.¹⁸
- Determined that a majority of the support for President Trump’s committees after 2020 came from people giving \$50 or less.¹⁹
- Compared trends in the behaviors of small-dollar donors to donors reaching the itemization threshold.²⁰
- Assessed the impact of climate-change driven weather disasters on communities’ political giving.²¹

Without conduit PAC reports providing itemized information regarding contributions of \$200 or less, none of these studies — and the insights they provide into our campaign finance and election systems — would have been possible. The

https://www.google.com/search?q=financial+times+democratic+donors+cross+party+lines+to+support+anti+trump+republicans&rlz=1C1GCEU_enUS1032US1032&oq=financial+times+democratic+donors+cross+party+lines+to+support+anti+trump+republicans&aqs=chrome..69i57.11711j0j7&sourceid=chrome&ie=UTF-8.

¹⁶ Carrie Levine & Chris Zubak-Skees, *How ActBlue is Turning Small Donations Into a Blue Wave*, CTR. FOR PUB. INTEGRITY (Oct. 25, 2018), <https://publicintegrity.org/politics/how-actblue-is-trying-to-turn-small-donations-into-a-blue-wave/>.

¹⁷ Courtney Weaver & Caitlin Gilbert, *Megadonors Tighten Grip on Republican Fundraising*, FINANCIAL TIMES (Nov. 21, 2022), <https://www.ft.com/content/87c5687f-d564-4e8e-a1e7-5828a77cfeaa>.

¹⁸ Jackie Gu, *The Employees Who Gave Most to Trump and Biden*, BLOOMBERG (Nov. 2, 2020), <https://www.bloomberg.com/graphics/2020-election-trump-biden-donors/?leadSource=uverify+wall>.

¹⁹ Jason Lange, *Trump Helped Raise More than \$56 Million Online in Early 2021*, REUTERS (July 31, 2021), <https://www.reuters.com/world/us/trump-helped-raise-more-than-56-million-online-early-2021-2021-07-31/>.

²⁰ Alvarez, Katz & Kim, *supra* note 13.

²¹ Yanjun Liao & Pablo Ruiz Junco, *Extreme Weather and the Politics of Climate Change: A Study of Campaign Finance and Elections*, 111 J. OF ENVTL. ECON. & MGMT. 102550 (2022).

public, political actors, and government entities alike can rely on these and similar studies to decide how to engage in, and regulate, the electoral system.

Third, the regulatory change WinRed proposes would have little bearing on the scope of WinRed's recordkeeping and informational obligations, since even if the Commission were to eliminate the requirement that conduit PACs itemize every contribution, conduit PACs would still have to gather and transmit that information to the committees receiving earmarked contributions. Political committees must be able to accurately assess how much money they have received from a contributor — directly or via conduit PACs — to ensure both (1) that they itemize the relevant contributions when a contributor has crossed the \$200 itemization threshold, and (2) that no contributor exceeds the relevant contribution limits. As such, even under the regulatory scheme that the petition requests, conduit PACs would still have to record and transmit contributor data to the recipient committees; regardless of the *public* reporting requirements, to comply with FECA, conduit PACs would still have to create and transmit a *private* record of every contribution they receive.²² The marginal increase of providing that same information to the Commission accordingly pales in comparison to the benefits of the information to the public.

It is therefore entirely reasonable to continue requiring conduit PACs to take the additional step of submitting this already-gathered contributor information to the Commission, especially when the alternative would result in depriving other candidates and committees, the press, academic researchers, and the voting public of valuable information regarding the sources of spending in our election system.

IV. Conclusion

WinRed has asked the FEC to initiate a rulemaking that is contrary to law. For that reason alone, its petition should be rejected. But the petition is flawed for the additional reason that any reduction to WinRed's reporting burdens that would result from this proposal would be outweighed by the significant harm to transparency by massive amounts of unitemized money flowing through WinRed to influence our elections. As demonstrated herein, there are major legal roadblocks to promulgating any such regulation, and even if it were possible to grant WinRed's wish, the Commission should nonetheless decline to do so. Eliminating the regulation requiring conduit PACs to itemize contributions aggregating \$200 or less would greatly reduce the public's understanding of electoral financing and reduce transparency in the political system, with only limited benefit for conduit PACs. To avoid legal challenge, and to advance the Commission's mission of protecting voters

²² 52 U.S.C. § 30116(a)(8).

while increasing integrity and transparency in elections, the Commission should deny the petition.

Respectfully submitted,

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