January 30, 2017

By email to *NationalPartyAccounts@fec.gov*

Mr. Neven F. Stipanovic
Acting Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington DC 20463

Re: REG 2014-10—Comments on Notice 2016-10: Implementing 2015 Omnibus Appropriation Act

Dear Mr. Stipanovic:

These comments are submitted by Democracy 21 and the Campaign Legal Center with regard to Notice 2016-10, 81 Fed. Reg. 69722 (October 7, 2016), which seeks comment on a petition for rulemaking that asks the Commission to promulgate regulations in order to implement provisions of the Consolidated and Further Continuing Appropriations Act of 2015, Pub. L. 113-235, 128 Stat. 2130, 2772 (2014). That Omnibus Appropriations Act amended the Federal Election Campaign Act to create separate contribution limits on contributions to three types of restricted political party accounts.

1. Timing

To date, 25 months after enactment of the statute and during the entirety of the 2016 election cycle, the Commission promulgated no regulations to implement or construe the new statutory provisions.

Democracy 21 and the Campaign Legal Center strongly support the petition and urge the Commission to undertake a rulemaking on this matter. Indeed, we have twice before urged the Commission to undertake a rulemaking on the same subject as sought by this petition.

On January 15, 2015, in comments submitted in response to the Advance Notice of Proposed Rulemaking (ANPRM) regarding the Supreme Court's decision in *McCutcheon v.*

FEC, 134 S. Ct. 1434 (2014), we said with regard to the new party accounts created by the Omnibus Appropriations bill, which had been enacted just weeks before:

> In order to prevent abuse of these new restricted-use funds, the Commission should promulgate regulations specifying and limiting the permissible uses of these new funds, prohibiting transfer of these funds between party accounts, and requiring detailed disclosure of these funds.[1]

Following months of inaction by the Commission, we wrote another letter to the Commission last May, stating:

> In the 17 months since the enactment of these provisions, the Commission has failed to adopt regulations to implement or administer them. There is no excuse for this failure. . . .
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> In October 2015—10 months after enactment of the statute—the Office of General Counsel prepared an "Outline of Draft NPRM" that would begin the process to start a rulemaking to implement these statutory provisions. Two months later, in December 2015, the Commission discussed the draft "outline" at a meeting, but took no action. At the Commission's meeting last week, on May 19, 2016, Commissioner Weintraub again raised the issue and asked the Commission to undertake a rulemaking, but again the Commission took no action. Some Republican Commissioners expressed solicitude for the "burden" it would impose on party lawyers to have to submit comments in a rulemaking at this point in the election calendar. Ultimately, the chair made vague promises to "look at the outline soon" and perhaps revisit the issue "in a month or two."
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> It was clear from the discussion at the meeting that, having waited 17 months since the law was enacted, no Commissioner thinks that rules can be adopted in time to apply in the 2016 election.
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> Meanwhile, Rome burns. According to an *Associated Press* story last week, the Trump campaign has identified 15 states where it plans to install state directors by the end of May. "The plan will be subsidized, at least in part, by the Republican Party's new 'building fund,' a lightly regulated pool of money that can draw donations of more than $100,000 from individual donors."[2]

And still, the Commission did nothing. Not surprisingly, in the absence of any rules to regulate these accounts in the 2016 election cycle, the parties freely took advantage of the higher contribution limits for these accounts to turbocharge their joint fundraising efforts with their

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[1] Comments of the Campaign Legal Center and Democracy 21 re REG 2014-01: Earmarking, Joint Fundraising, Disclosure and Other Issues (*McCutcheon*) (January 15, 2015) at 15.

[2] Letter of May 27, 2016 from Campaign Legal Center and Democracy 21 to Commissioners, at 1-2.

presidential candidates and state parties, a particularly lucrative opportunity after the invalidation of the aggregate contribution limits by *McCutcheon.*

A *Washington Post* story last year described an RNC joint fundraising account that combined 2015 and 2016 donations to all three new restricted accounts—legal, convention and headquarters—with donations to the general party fund, for a single donation of $668,000 per donor. For contributors who are less well heeled, the RNC had another donor "tier" that combined a donation to each of the three new party accounts with a donation to the national party, 11 state parties and the Trump campaign, for a total contribution of $449,400. The DNC did much the same thing. That party had a donor package combining 2015 and 2016 donations to the party convention accounts and building accounts, with donations to the general party account, for a total contribution of $467,600.[3]

It is no surprise that the parties took maximum advantage of these new fundraising accounts. But that is all the more reason that the agency should have ensured—and now must ensure—that rules are in place to guard against obvious opportunities to abuse these accounts. The fact that the agency, over more than a two-year election cycle, has not been able to write simple regulations to implement only three pages of statutory text is really a shocking dereliction of duty. (By contrast, and by congressional directive, the Commission in 2002 took just 90 days after enactment to write comprehensive regulations to implement all of the Title I (soft money) provisions of BCRA. That was a much more daunting task and it was accomplished in a fraction of the time that was available here.)

Now, prompted by the pending petition for rulemaking filed in June 2016, the Commission again faces this subject. Unfortunately, the Commission waited a full four months after the petition was filed, until October 2016, to take the mandatory ministerial step simply to publish this Notice of Availability, and then set a leisurely three-month period for comment on the Notice.

2. Merits

With regard to the substance of the petition, the Omnibus Act amended FECA's contribution limits section to permit national political party committees to accept contributions in amounts three-times greater than the base limit into each of three new types of separate segregated accounts. These new accounts are for restricted purposes, and can be used, respectively, to pay for (1) presidential nominating conventions, (2) party headquarters building and maintenance and (3) "election recounts and contests and other legal proceedings." *Id.*

These new FECA provisions added by the Omnibus Act will permit wealthy donors to contribute in excess of $1.5 million to a single party's national committees per two-year election cycle. And though the Act purports to restrict the use of these funds for specified purposes—*e.g.*, "solely to defray expenses incurred with respect to a presidential nominating convention," "solely to defray expenses incurred with respect to" headquarters buildings, and "to defray expenses incurred with respect to the preparation for and the conduct of election recounts and

[3] *See* M. Gold, "Here's how a wealthy Trump supporter could give $783,400 to support his campaign and the RNC, *The Washington Post* (May 19, 2016).

contests and other legal proceedings"—the Act contains no definitions of such purposes and no disclosure provisions specific to funds spent out of these new accounts.

In order to prevent abuse of these new restricted-use funds, the Commission should promulgate regulations specifying and limiting the permissible uses of these new funds, prohibiting transfer of these funds between party accounts, and requiring detailed disclosure of these funds.

A. Permissible Uses of New Party Funds

The decades since the enactment of FECA are replete with examples of the political parties abusing funds that they are permitted to raise outside of the base contribution limits for specified purposes. Without action by the Commission, the major parties will undoubtedly stretch beyond recognition the statutory boundaries of the purportedly restricted uses of these new funds. As *Roll Call* explained shortly after the Omnibus Act was enacted, "there's little question that party officials will test the new regulations to the fullest, exploring every possible legal avenue to fatten their coffers."[4]

The history here is very pertinent. Unfortunately, the Commission has too often accommodated past efforts by the political parties to undermine the base contribution limits through the creation and ever-expanding use of special funds. As the district court explained in *McConnell v. FEC*, 251 F. Supp. 2d 176, 196 (D.D.C. 2003), the scandal that was the national party soft money system—ultimately outlawed by the Bipartisan Campaign Reform Act of 2002 (BCRA)—was born out of the Commission's own advisory opinion rulings in AOs 1978-10 and 1979-17.

What may have appeared at the time to be an insignificant exception to the party contribution limits grew into the loophole that swallowed the rule. Recounting in painstaking detail how the national party soft money loophole that was opened by AO 1979-17 grew and grew, the district court in *McConnell* explained that by the 2000 election cycle, the national parties were exploiting supposedly narrow loopholes for "party building" activities to spend a total of $498 million of nonfederal funds—42% of their total spending. *McConnell*, 251 F. Supp. 2d at 200-01.

In its decision in the appeal of this ruling, *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court likewise recognized the Commission's central role in creating the soft money system outlawed by BCRA. The Court explained:

> Shortly after *Buckley* was decided, questions arose concerning the treatment of contributions intended to influence both federal and state elections. Although a literal reading of FECA's definition of "contribution" would have required such activities to be funded with hard money, the FEC ruled that political parties could fund mixed-purpose activities—including get-out-the-vote drives and generic party advertising—in part with soft money. In 1995 the FEC concluded that the

[4] Eliza Newlin Carney, *Parties Poised to Exploit Broad New Rules*, Roll Call, (Jan. 6, 2015), http://blogs.rollcall.com/beltway-insiders/parties-poised-to-exploit-broad-new-rules/?dcz=.

> parties could also use soft money to defray the costs of "legislative advocacy media advertisements," even if the ads mentioned the name of a federal candidate, so long as they did not expressly advocate the candidate's election or defeat.
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> As the permissible uses of soft money expanded, the amount of soft money raised and spent by the national political parties increased exponentially. Of the two major parties' total spending, soft money accounted for 5% ($21.6 million) in 1984, 11% ($45 million) in 1988, 16% ($80 million) in 1992, 30% ($272 million) in 1996, and 42% ($498 million) in 2000.

540 U.S. at 123-24 (emphasis added) (footnotes omitted) (citation omitted).

The political parties have now accomplished through legislation the right to set up separate accounts, subject to separate, higher contribution limits for building expenses, legal proceedings, and party conventions. However, history has taught us that the parties will attempt to expand the permissible uses of these new funds and, if successful, the amount of money candidates and parties will raise for these slush funds will increase exponentially. Just as the *McConnell* Court recognized that the "solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's" contribution limits, 540 U.S. at 126, so too would the Commission's failure to strictly enforce the statutory restrictions on these new party accounts enable parties and candidates to circumvent FECA's base contribution limits.

We urge the Commission to strictly define by regulation what activities constitute expenses incurred with respect to: "a presidential nominating convention"; "the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party"; and "the preparation for and the conduct of election recounts and contests and other legal proceedings." Consolidated and Further Continuing Appropriations Act, 2015, Division N, Sec. 101(a)(3).

For example, the "operation" of a party headquarters building should be construed narrowly to include only payment of utilities and routine maintenance of an actual party headquarters building—not anything that might happen in a party headquarters building, and certainly not payment of staff salaries or any other expenses for general operation of the party itself, such as data mining or opposition research, as some have suggested might be allowable.[5] The phrase "the preparation for . . . other legal proceedings" should be construed narrowly so as to foreclose party claims that all legal expenses—*e.g.*, routine compliance costs—constitute "preparation for legal proceedings."

We further urge the Commission to repeal and supersede its existing regulations and advisory opinions that are based on the flawed premise that funds raised by candidates and national party committees for recounts, election contests, legal defense and other purposes are not "for the purpose of influencing" federal elections. The recent Omnibus Act amendments

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[5] Robert Kelner et al., *National Party 2.0: FECA Amendments in Omnibus Spending Bill Increase Fundraising Power of National Parties*, Covington & Burling Inside Political Law (December 10, 2014), http://www.insidepoliticallaw.com/2014/12/10/national-party-2-0-feca-amendments-in-omnibus-spending-bill-increase-fundraising-power-of-national-parties/.

reflect a clear understanding by Congress that funds raised by parties to pay for nominating conventions, party headquarters building and maintenance, as well as recounts and other legal expenses constitute "contributions" under 52 U.S.C. § 30101(8). If such funds were not "contributions," amendment of the contribution limit section of FECA would have been unnecessary. Properly construed, the law requires all funds raised and spent by national party committees to be both "contributions" and "expenditures" under FECA and Commission regulations.

The Commission should also withdraw Advisory Opinion 2014-12 (DNC and RNC) which, by fiat and without any statutory basis, concluded that the political parties could establish separate convention accounts and raise funds into those accounts under a separate contribution limit. The fact that Congress has now provided a statutory basis for such separate convention accounts both illustrates how *ultra vires* the Commission's prior decision was, and how unnecessary it now is. In order to ensure that the political parties do not argue that Advisory Opinion 2014-12 still has meaning after the Omnibus Act amendments, and that it authorizes yet another convention-related contribution subject to a separate limit (in addition to the new convention account created by the Omnibus Act amendment), the Commission should explicitly state that such double-counting is not permitted, and that Advisory Opinion 2014-12 has been superseded by statute and is withdrawn.

B. Prohibiting Transfer of New Party Funds

The plain language of the Omnibus Act amendments restricts the use of funds in the three new types of "separate, segregated" party accounts to specified purposes. Necessarily, the statute prohibits transfers of funds from these restricted accounts to any other party account. Allowing such transfers would render meaningless the statutory requirement that, in order to be eligible for the increased, separate contribution limit, the contributions must be made to separate, segregated accounts and must be used only for restricted, specified purposes. Allowing transfers out of these restricted accounts would vitiate the use restriction that attaches to the accounts and thus would render meaningless the base party contribution limit of section 30116. We urge the Commission to promulgate a regulation implementing the prohibition on transfers and clarifying that funds in these new separate, segregated accounts cannot be transferred to other party accounts.

C. Disclosure of New Party Funds

FECA requires political committees, generally, to disclose the "purpose" of disbursements in excess of $200. *See* 52 U.S.C. § 30104(b). However, Commission regulations implementing the required disclosure of the purpose of disbursements do not require the degree of specificity that will be necessary to monitor whether funds raised into the new restricted party accounts are, in fact, used "solely" for the purposes stated in the statute.

Under current regulations, examples of statements or descriptions that meet the "purpose" requirements for disbursements by committees other than authorized committees "include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, and catering costs." 11 C.F.R. § 104.3(b)(3)(i)(B). The

Commission's "Examples of Adequate Purposes" document,[6] suggests that committees use codes providing a bit more specificity than the examples listed in the regulation. But neither the regulation nor the "Examples" document requires the specificity that will be necessary to monitor and ensure compliance with the requirement that the party committees use the new segregated account funds only for permissible purposes.

Indeed, it is vital to ensure there is effective and specific disclosure, by account, of all money spent from the three restricted accounts created by the Omnibus Act. Without such reporting, it is impossible for the Commission to administer, and for the public to oversee, whether there is compliance with the requirement that parties spend funds from these accounts only for the specified restricted purpose of each such account.

We urge the Commission to promulgate new, detailed reporting and disclosure requirements applicable to the new party accounts authorized by Omnibus amendments to 52 U.S.C. § 30116, that will enable the Commission and the public to monitor the party spending from these accounts in order to ensure that funds in these accounts are used solely for the limited purposes specified in the statute.

Conclusion

For the reasons set forth above, we urge the Commission to open a rulemaking and publish a Notice of Proposed Rulemaking with regard to the new restricted party accounts created by the Omnibus Act, in order to ensure that such party accounts are administered in compliance with the statutory provisions that authorize them.

Sincerely,

/s/ Brendan Fischer
Brendan Fischer
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Campaign Legal Center

/s/ Donald J. Simon
Donald J. Simon
Counsel to Democracy 21

[6] FEC, *Examples of Adequate Purposes*, http://fec.gov/rad/pacs/documents/ExamplesofAdequatePurposes.pdf (last visited Jan. 15, 2015).