CREW
CITIZENS FOR RESPONSIBILITY & ETHICS IN WASHINGTON

July 14, 2022

Mr. Robert M. Knop
Assistant General Counsel
Federal Election Commission
1050 First Street, N.E.
Washington, DC 20463

By submission to https://sers.fec.gov/fosers/

Re: Comments Regarding the Interim Rulemaking REG 2020-05

Dear Mr. Knop:

Citizens for Responsibility and Ethics in Washington ("CREW") submits the following comment in regard to the Interim Final Rule Amending 11 C.F.R. § 109.10(e)(1)(vi), REG 2020-05 (the "Interim Rule"), set to go into effect on September 30, 2022. FEC, Reporting Independent Expenditures, 87 Fed. Reg. 35,863, 35,863 (June 14, 2022). These comments are in addition to the three comments CREW submitted to the Commission about the proposed rule prior to the Commission's approval of the interim rulemaking for publication.

CREW appreciates the Commission's attempts to bring the regulations into conformity with unambiguous terms of the Federal Election Campaign Act ("FECA"), as recognized by the D.C. Circuit in *CREW v. FEC*, 971 F.3d 340 (D.C. Cir. 2020). CREW acknowledges that the Interim Rule recognizes that the FECA requires those making qualifying independent expenditures disclose "each person (other than a political committee) whose contribution to the person filing such statement aggregated in excess of $200 within the calendar year, together with the date and amount of such contribution" and that they must also disclose "each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure." FEC, Reporting Independent Expenditures, 87 Fed. Reg. at 35,863 (citing 52 U.S.C. § 30104(b)(3)(A), (c)(1), (c)(2)(C)). CREW recognizes that by adopting this rule, the Commission is affirmatively agreeing with the D.C. Circuit's recently articulated understanding of this unambiguous language and that it seeks to have the FECA's obligations reflected in the regulations.

CREW remains concerned, however, about the approach the Interim Rule proposes. Rather than adopt the obligations clearly stated in the FECA that the interim rulemaking itself recognizes in Supplementary Information, the Interim Rule proposes to entirely eliminate the regulatory provision related to contributor disclosure. FEC, Reporting Independent Expenditures, 87 Fed. Reg. at 35,863–64 (repealing 11 C.F.R. § 109.10(e)(1)(vi)). In its place, the Commission proposes to include a note, directing readers to the recent judicial decisions on the FECA's reporting obligations for those making qualifying independent expenditures, and alerting readers that "the statutory provision at 52 U.S.C. 30104(c) remains in force." *Id.*

The import of that note, its binding effect on regulated parties, and its sufficiency for fair notice concerns all remain indeterminate. While the statute of course remains in effect regardless of the Commission's actions, *McConnell v. FEC,* 540 U.S. 93, 322 (2003) (Kennedy, J., concurring in part and dissenting in part) ("Adoption of a regulation that does not implement the statute in its full extent does not erase the statutory requirement."), the FEC has in the past been sympathetic to claims of lack of fair notice when the regulation did not clearly mimic the statutory language, *see CREW v. FEC*, 316 F. Supp. 3d 349, 363 (D.D.C. 2018) (noting the OGC recommended dismissing claim that respondent failed to report as required by the statute because the regulation was silent on that disclosure obligation). Further, it is unclear what status courts—and future Commissions—will afford this note. *See, e.g.*, *In re Sealed Case*, 141 F.3d 337, 343 (D.C. Cir. 1998) (an "Advisory Committee Note is not the law").

In fact, the same day that the Commission approved the interim rulemaking, three Commissioners of the FEC (a sufficient number to block action) issued a "Policy Statement" that stated the three Commissioners would abandon enforcement of 52 U.S.C. § 30104(c)(1) and utilize their erroneous authority to block judicial review of any such decisions. *See* Policy Statement of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Concerning the Application of 52 U.S.C. § 30104(c), June 8, 2022, https://www.fec.gov/resources/cms-content/documents/CREW_contributions_earmarked_political_purposes_Dickerson_Cooksey_Trainor_06082022.pdf ("Policy Statement"). The three Commissioners plan to carry out their abdication by interpreting "contribution" in 52 U.S.C. § 30104(b)(3)(A), incorporated by referenced 52 U.S.C. § 30104(c)(1), to be limited to funds "designated or solicited for, or restricted to, activities or communications that expressly advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 6. That is, funds donated for the purpose of furthering independent expenditures. *See* 52 U.S.C. § 30101(17).

The three Commissioners' abdication is plainly contrary to law. The D.C. Circuit already addressed the scope of "contribution" in § 30104(b)(3)(A) as incorporated in § 30104(c)(1) and rejected the claim that it could be limited to funds earmarked to independent expenditures. "Rather than limit the term 'contribution' to donations earmarked to support [independent expenditures]," the D.C. Circuit recognized Supreme Court authority interpreted the term "more broadly" to "cover any donation 'earmarked for political purposes'" or "'intended to influence elections.'" *CREW*, 971 F.3d at 353 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) and *Buckley v. Valeo*, 424 U.S. 1, 78 (1976)); *see also CREW v. FEC*, 316 F. Supp. 3d 349, 392 (D.D.C. 2018) (recognizing covered contributions would include funds earmarked for independent expenditures, but also funds intended to influence elections through other means such as making further contributions to others). In so doing, the D.C. Circuit expressly rejected an argument that contributor disclosure is limited to funds earmarked for independent expenditures premised on the sole authority the three Commissioners cite in the Policy Statement, *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995). *See CREW*, 971 F.3d at 353; *see also CREW*, 316 F. Supp. 3d at 401 n.43. Notably, the D.C. Circuit interpreted these provisions when considering a contribution given to an independent expenditure maker "to support the election of [a specific] Republican Senate candidate in Ohio," which the FEC subsequently unanimously found to be a reportable contribution notwithstanding the lack of any designation or restriction to fund express advocacy. *CREW*, 971 F.3d at 345; *see also* First General Counsel's Report 2, 12 MUR 6696R (Crossroads GPS) (Aug 24, 2018), https://perma.cc/AF3X-3B4M (concluding donation was contribution covered by subsection (c)(1)), *adopted unanimously by FEC*, Certification MUR 6696 (Crossroads GPS) (Aug. 28, 2018), https://perma.cc/E428-YZF8. The three Commissioners' narrowing of § 30104(c) disclosure simply repeats the errors in the previous regulation that was struck down. *See, e.g.*, *CREW*, 971 F.3d at 353 (noting reading would cause § 30104(c)(1) and (c)(2)(C) to "entirely overlap[]"); *CREW*, 316 F. Supp.

3d at 388 (noting narrower interpretation of "contribution" incorporated in (c)(1) ignored fact the statute "[i]ncorporat[es] the same statutory disclosure requirement imposed on political committees into the statutory provision applicable to reporting" independent expenditure makers).

The unlawful behavior of the three Commissioners simply underlines the need to improve the approach reflected in the Interim Rule. The regulation should state what the D.C. Circuit has already held the statute unambiguously requires: covered contributions are a "broad[er]" set than those "designated or solicited for, or restricted to" funding independent expenditures. *CREW*, 971 F.3d at 340; *cf.* Policy Statement at 6. Rather, funds intended "to be used in some manner that would aid the election" of a federal candidate are covered. *See CREW*, 316 F. Supp. 3d at 358. For example, funds donated in response to a solicitation accompanied by example electioneering are reportable contributions. *Id.* at 408. And so too are funds solicited for the purpose of "stopp[ing]," "elect[ing]," "reduc[ing] support for" a candidate, or declaring a candidate "clearly unfit for command." *See Survival Educ. Fund, Inc.* 65 F.3d at 295; FEC, Political Committee Status, Supplemental Explanation & Justification, 72 Fed. Reg. 5596, 5604–05 (Feb. 7, 2007) (*citing* Conciliation ¶¶ 18–21, MUR 5604 (SwiftBoat Vets) (Dec. 13, 2006), https://perma.cc/KF6F-XVAW; Conciliation ¶¶ 12–13, MUR 5753 (LCV 527 and LCV 527 II) (Dec. 13, 2006), https://perma.cc/LPK7-E7V6; Conciliation ¶¶ 14–15, MUR 5754 (MoveOn.org Voter Fund) (Dec. 13, 2006), https://perma.cc/XU7U-KUNM). In short, reportable contributions cover any funds donated or solicited to promote or support the nomination or election of a federal candidate or candidates, or attack or oppose the nomination or election of a federal candidate or candidates, by any means, regardless of whether such activity constitutes express advocacy.

At the very least, the regulations should clearly repeat in the regulation the dual statutory disclosure obligations imposed by the FECA, just as the Interim Rule does in the section on Supplementary Information. That approach would provide clear notice to all parties through binding law, and avoid any ambiguity or other concerns parties might raise in the future.

We respectfully request the Commission amend Interim Rule 2020-05 to repeat the FECA's disclosure obligations provided in 52 U.S.C. § 30104(b)(3)(A), as incorporated by 52 U.S.C. § 30104(c)(1), and 52 U.S.C. § 30104(c)(2)(C), and provide guidance on the unambiguous scope of contributor disclosure.

Sincerely,

Stuart McPhail
Senior Litigation Counsel