CREW

CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

February 18, 2025

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

Re: Comments Regarding Notice of Proposed Rulemaking REG 2024-06: Modification and Redaction of Contributor Information

Dear Mr. Knop:

Citizens for Responsibility and Ethics in Washington ("CREW") submits the following comment in regard to the Notice of Proposed Rulemaking, REG 2024-06, regarding the modification and redaction of contributor information, 89 Fed. Reg. 103701 (Dec. 19, 2024) (the "Proposed Rulemaking").

The Proposed Rulemaking reflects significant improvements over the original proposal considered by the Commission, *see* Agenda Document No. 24-19-A, May 2, 2024, https://www.fec.gov/resources/cms-content/documents/mtgdoc-24-19-A.pdf, that respond to concerns raised by CREW, *see* Letter from Stuart McPhail, Dir. of Campaign Finance Litigation, CREW, to Hon. Sean J. Cooksey et al., Chair, FEC, May 14, 2024, https://www.fec.gov/resources/cms-content/documents/CREW_comment_on_Agenda_Document_No._24-19-A.pdf. Most importantly, the limitation of a grant of redaction to a two-year period and the exclusion of contributor names from the types of information that may be redacted more appropriately targets the relief to ameliorating legitimate concerns over harassment while showing attentiveness to the public's right to know the "interests to which a candidate is most likely to be responsive" and to give "special favors," *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), and further reflects the fact that the nature of the relief contemplated here harms the First Amendment rights of wholly innocent parties, *see, e.g.*, *Collin v. Chicago Park Dist.*, 460 F.2d 746, 754-55 (7th Cir. 1972) ("[A] hostile audience is not a basis for restraining otherwise legal First Amendment activity."). CREW appreciates the responsiveness reflected in these changes to the concerns CREW raised in its initial commentary on this matter.[1]

[1] The Proposed Rulemaking continues to include, among potentially redactable information, the contributor's "occupation." It is unclear how the redaction of "occupation" provides any meaningful protection from qualifying harm where such term is understood to not include the name or address of the contributor's specific employer. Such information is also useful to the public who may wish to understand, for example, a candidate's support from the fossil fuel industry or the bar. CREW recommends the Proposed Rulemaking not cover the redaction of a contributor's occupation.

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Nevertheless, the Proposed Rulemaking continues to include objectionable provisions that counsel against its adoption as written. Of greatest concern is the secret process by which the Commission contemplates awarding relief that shields the Commission's judgment from public scrutiny. In addition, CREW suggests changes to the Proposed Rulemaking to give due weight to the public's interest in full transparency. Namely, CREW recommends limiting the relief afforded by the Proposed Rulemaking to natural persons making small contributions, and CREW also recommends the Commission provide a unique identifier for each redaction awarded to be filed in the place of withheld information.

The Commission's Award of Relief Must be Subject to Public Scrutiny

As written, the Proposed Rulemaking contemplates in a new procedure to be codified at 11 C.F.R. § 400.9 that "requests, notifications, and findings" regarding the redaction of personal information "will generally be kept confidential." 89 Fed. Reg. at 103706. It reiterates that, except for notification to various committees that may alter their reports to conform with the agency's relief, that "no request submitted to the Commission, nor any notification sent by the Commission, nor any findings made by the Commission, will be made public by the Commission without the prior written consent of the requestor." *Id.* The Proposed Rulemaking asks for comment on this proposed procedure and generally about "the appropriate mechanisms by which the Commission may preserve the confidentiality of potentially at-risk requestors while maintaining appropriate transparency as to the Commission's actions regarding redaction and modification requests." *Id.*

The proceedings contemplated by the Proposed Rulemaking would fail to provide any "transparency as to the Commission's actions," never mind the "appropriate" amount, while going far beyond anything necessary to protect "potentially at-risk requestors." It would deny the public not only the information that may eventually be subject to redaction, but also the requestor's name, the nature of the threat they claim warrants relief, the Commission's vote on the request, and the victorious commissioners' rationale for so voting. The proposed procedure contravenes "Congress' intention that agencies must 'conduct their deliberations in public to the greatest extent possible.'" *Common Cause v. Nuclear Regul. Comm'n*, 674 F.2d 921, 932 (D.C. Cir. 1982) (quoting Senate report to Sunshine Act).

The proposed secret proceedings would, in violation of law, deny the American public any ability to scrutinize the agency and determine whether, for example, the Commission's conclusions are reasonable and well-supported by credible evidence, whether the Commission is acting in an even-handed manner or rather demonstrating bias or favor, or whether any changes to this proposed program are warranted. The contemplated secrecy also prevents public correction of or response to any misrepresentations in an applicant's materials before or after relief is granted: an ability of all the greater importance given the Commission's stated intent to eschew "independent investigation to verify or supplement the information in the request." 89 Fed Reg. at 103705.

Unfortunately, requestors have made exaggerated claims about suffering threats and harassment, for example, when they have only incurred a "large number of emails from people who disagree" with their position. See Pl's. Not. of Mot. and Mot. for TRO and Prelim. Inj. at 4, *John Doe # 1 v. Reed*, No. 09-cv-05456 (W.D. Wash. 2009), *available at* https://volokh.com/files/ref71motion.pdf; *see also Protectmarriage.com v. Bowen*, 599 F. Supp.

2d 1197, 1201 (E.D. Cal. 2009) (alleging expressions of "displeasure with [plaintiff's] support of the ballot initiative" constituted threats and harassment warranting court-ordered anonymity); Stuart McPhail, *Dark money faces accountability, not assaults; just as the First Amendment requires*, CREW (Jan. 28, 2022), https://www.citizensforethics.org/news/analysis/dark-money-faces-accountability-not-assaults-just-as-the-first-amendment-requires/ (discussing other examples). Such repercussions are protected speech that work no injury cognizable by this agency and cannot justify censoring the public. *See John Doe #1 v. Reed*, 561 U.S. 186, 228 (2010) (Scalia, J., concurring) ("[H]arsh criticism … is a price our people have traditionally been willing to pay for self-governance."); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982) (boycotts are protected by the First Amendment); *see also Barr v. Am. Assoc. of Political Consultants, Inc.*, 591 U.S. 610, 654 (2020) (Gorsuch, J., concurring) ("Having to tolerate unwanted speech imposes no cognizable constitutional injury on anyone; it is life under the First Amendment, which is almost always invoked to protect speech some would rather not hear."). Other claims of harm involve unconstitutional retaliation by the government that is already subject to more narrowly targeted injunctive relief that would protect the applicable while not injuring the public's interest. *See Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions … for speaking out."). The mere fact that these persons may feel freer to speak without risk of response cannot warrant relief, as "[t]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Citizens United v. FEC*, 558 U.S. 310, 349-50 (2010).

In the absence of any mechanism to scrutinize claims of injury or to correct misrepresentations, or even to reveal them after the fact, it is likely the public's interest will be harmed without any countervailing justification.

In contrast, the contemplated total secrecy goes far beyond any reasonable measure to protect potentially at-risk requestors. There is no reason, for example, why simply redacting the requestor's "mailing address…or employer name" from the submitted materials—the relief the Commission contemplates for other public filings for those who have demonstrated a risk of harm—would not be sufficient for the request itself. Limiting the redaction to the information that could locate the requestor would significantly reduce risks to them while permitting the public to respond to the request and review the Commission's consideration of it. The publication of such materials with only targeted redactions would further aid those in need of relief by alerting them to the nature of the materials that they must submit to be awarded relief by the Commission. It would also allow the public to oversee the Commission's grant or denial of relief against the submissions to determine the appropriateness of the Commission's actions. Indeed, it is difficult to see how a desire to protect potentially at-risk requestors should justify the total nondisclosure contemplated which would preclude public insight into even such anonymized facts as the number of requests the Commission received and the number it granted.

Nor, indeed, is there any stated or apparent justification for the secrecy of these contemplated proceedings when no such secrecy is available to those who request redactions through the advisory opinion process or through judicial relief. Requestors pursuing relief through either of those processes would do so in public. Neither has proven

hostile to legitimate claims nor resulted in any harm to the requestors. There is no reason the process contemplated by the Proposed Rulemaking should have far greater secrecy.

In sum, CREW urges the Commission to reject the confidentiality provisions of the proposed 11 C.F.R. § 400.9.

Relief Should be Limited to Small Non-Corporate Donors

The Proposed Rulemaking asks whether the "the proposed procedure [should] also apply to requests from committees or organizations that seek to withhold their contributors' information?" No, the procedure should not. Moreover, it should exclude from its reach any non-natural person and any contribution of significant amount.

First, with respect to requests by the recipient, the nature of the request is sufficiently different from a request of a contributor that a separate procedure is warranted. With respect to an individual contributor, the request may be made because the release of identifying information will, with reasonable probability, result in harm to that contributor—something the contributor may credibly establish based on personal knowledge. The Commission will also be able to consider that contributor's characteristics and the attendant public interest in their full disclosure. With regard to a recipient organization, however, the organization will not be able to establish that each and every one of its contributors will, with reasonable probability, be harmed in the event of the release of their identifying information. Rather, it will rely on a probability of harm to a significant portion of its contributors, each who will likely face individual circumstances either increasing or decreasing their risk of harm, and also varying levels of public interest in their full disclosure. Moreover, the Commission may be required to make an assessment of the public's interest in the organization and its past contributors; *see, e.g.*, *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 95 (1982) (relief available only to minor parties "unlikely to win elections" with small donors); an assessment that will not necessarily carry over to new contributors who make contributions in the two-year time span.

To the extent such organizations seek relief, their exclusion from this proposed procedure does not preclude it—they remain free to seek relief either through the Advisory Opinion or judicial process, just as the Socialist Workers did. *See, e.g.*, *Socialist Workers*, 459 U.S. at 95; Advisory Opinion 2012-38 at 11-12 (Socialist Workers Party), Apr. 25, 2013, https://saos.fec.gov/aodocs/AO%202012-38.pdf (granting exemption for four years, subject to an obligation to renew). These organizations are far more likely than individual donors to have the resources to pursue these avenues effectively.

Second, not only should the proposed procedure exclude committee or organizational recipients, but it should also exclude any non-natural contributor. While federal law precludes such organizations from making contributions to candidates, 52 U.S.C. § 30118, such organizations can and do make contributions to other entities that are subject to reporting. These entities typically have the resources to pursue other avenues of relief. Further, these entities are, by their very nature, distinct from natural persons in the types of harms they may suffer and the risks they face. The repercussions organizations face are far more likely to fall into, for example, categories of protected speech that cannot constitutionally justify censorship. Rather, the cognizable harms any such organizations

might suffer are sufficiently distinct from natural persons that they warrant special consideration.

Moreover, the relief contemplated by the Proposed Rulemaking is likely to be of little use to non-natural contributors. The withholding of their "mailing address, occupation, or employer name" is of little use—to the extent it is even applicable—since such information is typically already public with respect to non-natural persons and its redaction is unlikely to afford any relief to the requesting entity.

Third, to accord with judicial and agency precedent, even though the contemplated relief now excludes an individual's name, the proposed relief should still be unavailable to large donors. *See Reed*, 561 U.S. at 201 (recognizing *Buckley*'s exception to disclosure is limited to "minor parties"); *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914, 930–31 (E.D. Cal. 2011) (recognizing "[s]ince *Buckley*, as-applied challenges have been successfully raised only by minor parties" and collecting cases); Agenda Document No. 17-01-C at 9, AO 2016-23 (Socialist Workers Party) Draft C, Mar. 23, 2017, https://www.fec.gov/files/legal/aos/2016-23/201623_2.pdf (draft earning three commissioners' votes stating "[t]he Commission must first determine whether the SWP continues to maintain its status as a minor party"; finding such status based on vote totals and "small total amounts of contributions" when largest contributor provided $1,000); Agenda Document No. 17-01-B at 11, AO 2016-23 (Socialist Workers Party) Draft B, Mar. 9, 2017, https://www.fec.gov/files/legal/aos/2016-23/201623_1.pdf (draft earning other two commissioners' votes, applying mandatory analysis but finding Socialist Workers Party was no longer a minor party). To the extent the relief is expanded to include the individual's name, it must be so limited.

As such precedent makes clear, the public's interest in disclosure, and consonant deprivation in non-disclosure, is highly correlated to the size of the contribution. Notably, the statute already excludes from disclosure those direct contributors who contribute less than $200 a year. *See, e.g.* 52 U.S.C. § 30104(b)(3)(A). Accordingly, disclosure is only contemplated for the 1% of Americans with the financial resources and inclination to make significant contributions. *See Donor Demographics*, OpenSecrets.org, https://www.opensecrets.org/elections-overview/donor-demographics (last visited February 18, 2025). This incredibly small group is more likely to have the resources to pursue alternate avenues of relief, so limiting the relief afforded by this Proposed Rulemaking to only the relatively small donors who contribute $1,000 or less to federal candidates, parties, committees, or reporting entities, in aggregate, in an election cycle is likely to work no hardship. It would also reflect the public's significant interest in larger donors—which include donors who, due to their largess, appear able to exert the powers of office if their favored candidate wins. *See, e.g.*, Trisha Thadani, Clara Ence Morse & Maeve Reston, *Elon Musk donated $288 million in 2024 election, final tally shows*, Washington Post, Jan. 31, 2025, https://www.washingtonpost.com/politics/2025/01/31/elon-musk-trump-donor-2024-election/. In the event a small donor is awarded relief but then chooses to make a contribution in excess of the limit, their relief should be removed.

Limiting the availability of relief also reflects the fact that larger donors are likely to already have a public persona and accompanying public notoriety. Unfortunately, such notoriety may bring with it "harassment, threats, and reprisals." Nevertheless, the cause of those harms is not the disclosure of the individual's contribution or its attendant

information, but rather their other activities. Where the threatened harm is unconnected to and not dependent on the release of filings with the Commission, the redaction of such information simply works a harm to the First Amendment rights of innocent third parties without securing any comparative benefit to the requestor.

In sum, CREW recommends the relief contemplated in the Proposed Rulemaking be limited to individual natural persons who contribute less than $1,000 in an election cycle.

Those Afforded Relief Should be Provided and File a Unique Identifying Marker

The Proposed Rulemaking currently contemplates only the redaction of a requestor's "mailing address, occupation, or employer name" and does not contemplate any relief permitting a filing entity to withhold the name of the contributor. As noted above, this limit is a significant improvement over the initial proposal and ensures the release of the information most useful to the public in identifying the "interests" likely to curry "special favors," *Buckley*, 424 U.S. at 67, while withholding only that information that could be used for unlawful purposes. Nevertheless, the information proposed to be covered is useful where two donors have similar names. *See, e.g.*, FEC, Receipts from "Smith, John," https://www.fec.gov/data/receipts/individual-contributions/?contributor_name=smith%2C+john&two_year_transaction_period=2024&min_date=01%2F01%2F2023&max_date=12%2F31%2F2024 (last visited Feb. 18, 2025) (showing as many as 21,880 contributions from John Smith in 2023-24 alone).

To permit the accurate identification of contributors, and to prevent the false association of non-identical contributors, CREW recommends that the Commission, in the process of awarding relief, provide the requestor with a unique identifying code. The requestor would then have the code reported in place of any withheld information. That would allow the public to both confirm that two contributors with redacted identifying information are in fact the same person and permit them to then look up the particular award that afforded that requestor relief (at least insofar as the Commission meets its legal obligation to publish such materials). The use of such a code would further permit the Commission to confirm that the redacted information is in fact associated with an award of relief it granted.

* * *

CREW respectfully requests the Commission reject the proposed secret proceedings to be codified at 11 C.F.R. § 400.9 and to amend the remainder of the Proposed Rulemaking to limit the relief to small natural contributors and to provide unique identifiers to permit Americans to track and scrutinize redactions.

Sincerely,

Stuart McPhail
Director of Campaign Finance Litigation