FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: **The Commission**
Staff Director
General Counsel
Public Disclosure and Media Relations Division

FROM: **Commission Secretary's Office** DCB

DATE: **May 22, 2019**

SUBJECT: **Comment on Draft Interpretive Rule on Paying for Cybersecurity Using Party Segregated Accounts**

Transmitted herewith is a comment from Mr. Fred Wertheimer on behalf of Democracy 21.

Attachment

RECEIVED
By Office of the Commission Secretary at 3:50 pm, May 22, 2019

DEMOCRACY 21

May 22, 2019

By Electronic Mail

Chair Ellen L. Weintraub
Vice Chair Matthew S. Petersen
Commissioner Caroline C. Hunter
Commissioner Steven T. Walther
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: Draft Notice of Interpretive Rule on Paying for Cybersecurity Using Party Segregated Accounts (Agenda Doc. No. 19-21-A)

Dear Commissioner:

Democracy 21 objects in the strongest terms to the proposed adoption of an Interpretive Rule that would create an entirely new and unauthorized category of spending from political party "building fund" accounts which are funded by massive contributions from individuals of up to $213,000 per donor per election cycle per account and, for all three national committees of a political party (*e.g.*, the DNC, DCCC and DSCC), as much as $639,000 per donor.[1]

Under the proposed Interpretive Rule, the national party committees would be permitted to use their headquarters building fund accounts to pay for "secure information communications technology and cybersecurity products or services for national and state party committees and federal candidate committees…." Draft Rule at 2. The Commission explains that it would promulgate this rule in fulfillment of its "obligation to curb the current threat of foreign cyberattacks and the unique challenges faced in enforcing violations regarding such cyberattacks," *id.* at 6, and that this action is "necessary to carry out its obligation to prevent foreign interference in American elections…." *Id.* at 7.

Although the FEC does have the obligation to administer and enforce 52 U.S.C. § 30121, the existing ban on foreign national spending, no statute has authorized the FEC to permit

[1] *See* Agenda Doc. No. 19-21-A (May 20, 2019) (Proposed Notice 2019-09, "Interpretive Rule on Paying for Cybersecurity Using Party Segregated Accounts").

massive individual contributions from a "building fund"—contributions of a size that plainly can corrupt officeholders and create the appearance of corruption—to be used for cybersecurity costs. The FEC is an administrative agency. It is not a legislative body and it cannot legislate new laws or ignore limits in existing laws.

Democracy 21 strongly supports robust measures to guard against foreign interference in U.S. elections. We have supported legislation to strengthen and expand the scope of the current statutory ban on foreign spending.[2] We have filed complaints with the Commission seeking enforcement of the existing ban.[3] And we have previously urged the Commission to strengthen its rules implementing the existing ban and to take enforcement actions to vigorously deter and punish violators. In comments filed with the Commission in November 2017, we said:

> The nation is facing a crisis in its need to restore the integrity of our democracy by safeguarding future elections from foreign interference, and it is the Commission which has primary civil jurisdiction to administer and enforce 52 U.S.C. § 30121, the primary statutory provision which prohibits foreign nationals from making expenditures to influence U.S. elections. The Commission should be doing everything in its power with all deliberate speed to take steps to ensure that section 30121 is deployed with maximum effectiveness, through interpretation and enforcement, to help ensure that no foreign national, much less a hostile foreign government, again spends large sums for the purpose of influencing American elections.[4]

But the proposed Interpretive Rule to allow parties to use their building fund accounts for cybersecurity spending is <u>not</u> the way to do this. Good ends do not justify illegal means, and the proposed rule, in service of a worthy cause, twists the law beyond recognition. This rule does not "interpret" the law so much as rewrite it.

In the 2015 Omnibus Appropriations Act, Congress created three new "separate, segregated" political party accounts with an annual contribution limit (as adjusted for inflation) of $106,500 per account per donor per year, in addition to other permissible party contributions.[5] Thus, an individual can now contribute $213,000 to each of a committee's three special party accounts per election cycle (or a total of $639,000 per cycle to all three accounts of a single party committee).

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[2] *See* Letter of March 7, 2019 from Fred Wertheimer to all Representatives urging support for amendment 124 to H.R. 1 to close loopholes in 52 U.S.C. § 30121.

[3] *See* Complaint against Donald J. Trump for President, Inc., *et al.* (MUR 7266) (July 13, 2017).

[4] Comments of Democracy 21 on REG 2011-02—Internet Communication Disclaimers (Nov. 2, 2017) at 2.

[5] Consolidated and Further Continuing Appropriations Act, 2015, Pub.L. No. 113-235, 128 Stat. 2130, 2772 (2014); *see also* 52 U.S.C. §§ 30116(a)(9) (party accounts), 30116(a)(1)(B) (contribution limit) and 30116(c) (increases on limits based on increases in price index).

One of the accounts, the building fund, is to be used "solely to defray expenses incurred with respect to the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party," or to repay loans or restore funds to defray such expenses. 52 U.S.C. 30116(a)(9)(B) (emphasis added).

As the commentary to the Draft Rule notes, the building fund account is to be used for funding buildings, "particularly expenses involving their construction, purchase, renovation, operation and furnishing. . . ." Draft Rule at 5. Though the Commission has to date promulgated no rules to interpret or implement the statutory language at issue,[6] the Draft Rule does cite interpretations made of an earlier incarnation of a "building fund" provision that was in the law prior to its repeal by the Bipartisan Campaign Reform Act of 2002. Through advisory opinions, the Commission had interpreted that earlier language to allow payments for, *e.g.*, "capital expenditures," A.O. 1998-07 (Pennsylvania Democratic Party), and expenses "directly and solely" related to a building renovation, such as construction management expenses and architectural fees. A.O. 2001-01 (N.C. Democratic Party).

As worthy a goal as cybersecurity is, it simply does not fit into the language of the statute or into any of these categories of building-related expenses. The Commission has no authority to just assert, by *ipse dixit*, that it does. And the Commission's two-sentence effort in the Draft Rule to make that assertion is unpersuasive. The Draft Rule states:

> Like a headquarters building, an entity's information-technology infrastructure is an increasingly important factor in the health of an organization like a national party or campaign. Similarly, internet services are similar to utilities, which the Commission long permitted to be paid for using pre-BCRA building fund accounts.

Draft Rule at 7. The first statement is a non-sequitur. Just because some proposed spending is for a service or product that may be an "important factor in the health of an organization" does not qualify it as a legitimate expenditure from the building fund. Many things might be an "important factor" in the "health of an organization"—effective recruitment of members or customers, good TV campaigns to market products, generous benefits for employees—but none of those expenses relates to the costs of its buildings. And while some types of "internet services"—such as the services provided by an ISP— may be "similar to utilities," that cannot mean that every type of spending that is in any way related to "internet services" is the equivalent of a utility payment that can be charged to the building fund.

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[6] And in failing to issue any rules to implement the party account language to date, the Commission has been seriously derelict in its duty, a point we have previously made to the Commission. *See* Letter to the Commissioners of May 27, 2016 from Democracy 21 and Campaign Legal Center, at 4 ("The fact that the agency has not, over 17 months, been able to write simple regulations to implement only three paragraphs of statutory text is inexplicable and has no conceivable justification."); *see also* Comments of Democracy 21 and Campaign Legal Center on REG 2015-04 (Oct. 27, 2015) at 15 ("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. . . . .")

In distorting the building fund provision by expanding it beyond its reasonable boundaries, the proposed Rule is not harmless error. The special party accounts created by the Omnibus spending bill are meant to have limited and narrow purposes, in order to cabin the pernicious effects of the extraordinarily high contribution limits that apply to donations to the accounts. These accounts are not intended to serve as an all-purpose slush fund that the parties can be permitted to dip into, no matter how attenuated the statutory rationale, whenever some admittedly virtuous purpose can be served by the proposed spending.

The Commission should not play fast-and-loose with the law, even when it thinks that a worthy goal might be served by doing so. In A.O. 2014-12 (DNC and RNC), a majority of the Commission voted to allow the parties to each set up a separate account to raise money for convention expenses under a separate contribution limit, thus fabricating out of whole cloth a doubling of the party contribution limits that was nowhere supported by the statute. To their credit, Chair Weintraub and Commissioner Walther voted against this ploy, even though it was arguably serving the worthwhile policy goal of providing extra resources to support legitimate party convention expenses. As a practical matter, the proposed Interpretive Rule at issue here is no different: it does violence to the statute in order to serve an arguably good cause. And while the convention accounts doubled the base contribution limit, the threat with the proposed Rule here is even greater because it expands the uses of funds raised by the parties through contribution limits that are tripled.[7]

Once the Commission opens the door to misusing the special party accounts for the worthy purpose set forth in the Draft Rule, it will set the stage for future misinterpretations of the law to allow the spending of these huge contributions for other activities that are not permitted by the statute. If Congress wants to provide additional resources to the parties in order to shore up their cybersecurity defenses, or to better combat foreign influence, that is a policy decision that Congress can (and indeed, should) make. But it is not legal for the Commission to rely on farfetched statutory interpretations in order to allow the parties expanded access to a pool of funds that is narrowly restricted in its use because the funds are raised under contribution limits that are trebled in size.

The threat to our democracy posed by foreign interference in U.S. elections is real. But the statute confers no "emergency" powers on the Commission to issue the campaign finance equivalent of an edict suspending the writ of habeas corpus. Contribution limits still matter. The statutory restrictions on the use of the party building fund accounts still matter. And those restrictions cannot be written out of the law by Commission fiat.

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[7] The Commission has too often accommodated similar past efforts by the political parties to undermine the base party contribution limits through the creation and ever-expanding use of special funds. The scandal that was the national party soft money system outlawed by BCRA was born out of two minor advisory opinions in the late 1970's that had the seemingly limited purpose of encouraging voter registration and GOTV efforts. *See McConnell v. FEC*, 251 F. Supp. 2d 176, 196 (D.D.C. 2003) (recounting history of the soft money system). But what may have appeared at the time to be an insignificant exception to the party contribution limits grew over time into the loophole that swallowed the law.

We have repeatedly called on the Commission to do more to combat the threat posed by foreign interference in our elections. We strongly endorsed the comprehensive list of actions proposed by Chair Weintraub almost two years ago, and that list is still a good place to start.[8] But the Interpretive Rule proposed here is the wrong response. It is a purported "interpretation" of the statute that is not permitted by the language of the statute.

The Commission plainly lacks a statutory basis to adopt the Draft Interpretive Rule, and we urge you to vote against it.

Respectfully submitted,

/s/ Fred Wertheimer

Fred Wertheimer
President

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry
1425 K Street NW, Suite 600
Washington, DC 20005
202-682-0240
dsimon@sonosky.com
Counsel for Democracy 21

Copy to:
Lisa J. Stevenson, Acting General Counsel
Neven F. Stipanovic, Acting Associate General Counsel
Secretary of the Commission

[8] Comments of Democracy 21 on REG 2011-02, *supra* n.3 citing Memorandum from Commissioner Ellen L. Weintraub to The Commission, "Discussion of Commission's Response to Alleged Foreign Interference in American Elections" (June 21, 2017).

Dayna Brown

From: Donald Simon <DSimon@SONOSKY.COM>
Sent: Wednesday, May 22, 2019 2:46 PM
To: Ellen Weintraub; Caroline Hunter; Matthew Petersen; Steven T. Walther
Cc: ExternalCommissionSecretary; Lisa Stevenson; Neven Stipanovic; Fred Wertheimer
Subject: Letter from Democracy 21 re Agenda Doc. 19-21-A
Attachments: Letter from Democracy 21 re Agenda Doc. 19-21-A (Interpretive Rule on Paying for Cybersecurity) (May 22, 2019).pdf

Dear Commissioner: Please find attached a letter from Democracy 21 regarding Agenda Doc. 19-21-A, which transmits a proposed interpretive rule on paying for cybersecurity using party building fund accounts. This matter is on the Commission agenda for the meeting tomorrow, May 23.

Don Simon

Donald J. Simon
Sonosky, Chambers, Sachse,
Endreson & Perry, LLP
Suite 600, 1425 K St. NW
Washington, DC 20005
Telephone: (202) 682-0240
Facsimile: (202) 682-0249
E-Mail: dsimon@sonosky.com
Web: www.sonosky.com