



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Statement of Commissioner Steven T. Walther

***Van Hollen v. FEC*
and Judicial Option to Commence Rulemaking
on Electioneering Communications Disclosure Regulations**

October 4, 2012

On September 18, 2012, the United States Court of Appeals for the District of Columbia Circuit reversed the judgment of the District Court in *Van Hollen v. FEC*.¹ The Court of Appeals found that the lower court had erred in holding that Congress “spoke plainly” when it enacted 2 U.S.C. § 434(f) of the Bipartisan Campaign Reform Act.² The Court of Appeals concluded that “[t]he statute is anything but clear, especially when viewed in the light of the Supreme Court’s decisions in *Citizens United v. FEC*, 558 U.S. 310 (2010), and *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).”

The Court of Appeals then remanded the case to the District Court with instructions to “first refer the matter to the FEC for further consideration. The FEC will promptly advise the District Court whether it intends to pursue rulemaking.” On September 20, 2012, the District

¹ See *Center for Individual Freedom v. Van Hollen*, __ F.3d __, 2012 WL 4075293, at *__ (D.C. Cir. Sept. 18, 2012) and 851 F. Supp. 2d 69 (D.D.C. 2012). Documents related to the litigation are available at www.fec.gov/law/litigation/van_hollen.shtml.

² The Bipartisan Campaign Reform Act (BCRA) defines an electioneering communication as any broadcast, cable or satellite communication that refers to a clearly identified candidate for federal office, is publicly distributed within certain time periods before an election and is targeted to the relevant electorate. 2 U.S.C. § 434(f)(3). Under the BCRA, every person who makes disbursements for an electioneering communication aggregating over \$10,000 per year must file a report with the FEC identifying, among other things, the person who made the disbursement. 2 U.S.C. § 434(f)(1), (2). If the disbursement is paid out of a segregated account consisting of funds contributed by individuals directly to the account for electioneering communications, then the report must disclose the names and addresses of all those who contributed an aggregate of \$1,000 or more within a certain time period to the account. If the disbursements were not made from a segregated account, then the report must disclose the names and addresses of all contributors who contributed over \$1,000 within a certain time period to the person making the disbursement. 2 U.S.C. § 434(f)(2)(E).

Court directed the Commission to inform the court by October 12, 2012, whether the Commission “intends to pursue rulemaking or defend its current regulation.”

I support a rulemaking, and have supported a rulemaking on the issues before the court in this case – as well as on all other issues raised in the aftermath of *Citizens United*.

On January 20, 2011, and again on December 15, 2011,³ I twice supported adoption of draft notices of proposed rulemaking (“NPRMs”) to address, *inter alia*, whether the Commission’s regulations implementing BCRA § 434(f) needed to be revised to be consistent with the Supreme Court decision in *Citizens United*. Once again, today, I support launching such a rulemaking. Unfortunately, the third time is not “a charm” in this instance.

By an 8-1 vote in the *Citizens United* decision, the Supreme Court has endorsed, supported, and given rationale for transparency and public disclosure of campaign finance information. The question is, however, in the aftermath *Citizens United*, what kind of disclosure should be required for person, which now includes corporations, making electioneering communications. Until *Citizens United*, there was no consideration of corporate disclosure given by Congress, nothing to look back to, because at the time BCRA was enacted all corporations were prohibited from spending on electioneering communications. Now that corporations are able to engage in spending – in unlimited amounts – on electioneering communication, what kind of disclosure should be required?

There are many significant questions and issues that arose resulting from *Citizens United* – now almost three years old – and it is the Commission’s responsibility to do its best to promptly determine – and act on – the regulatory consequences on this momentous decision. It is my view that the Commission should issue an NPRM to solicit public comment on these important issues, or in the absence of that, offer a time for generic comment to be made at a public hearing that could assist the Commission in making a determination regarding the scope of such a rulemaking proceeding. Although it might be breaking new ground for this Commission, I would also support holding a series of plenary public meetings with interested stakeholders to allow the public to provide comment. At the very least, and regardless of the

³ See Statement of Chair Cynthia L. Bauerly and Commission Steven T. Walther regarding Notices of Proposed Rulemaking to Address *Citizens United*, available at www.fec.gov/members/statements/Statement_of_Bauerly_and_Walther_on_CU_Petition_NPRMs.pdf

methodology used or approach taken, a rulemaking procedure to consider the issues pending before this court should be held promptly. I recognize certain of my colleagues contend the Commission does not have jurisdiction to adopt rules in this area since there is not a specific statutory grant in this area, and they contend there is in effect a statutory vacuum left barren by *Citizens United*. Regardless, the Supreme Court has made it clear that disclosure – information made available to the voting public – is a necessary ingredient to a successful democracy. This judicial impetus should be considered in weighing the direction the Commission should take. More to the point, the Commission is confronted with a court order that leaves no doubt that the court believes we can “pursue rulemaking.”

I also recognize – following such a rulemaking hearing, if one were to be held – we may not be able to reach consensus on a number of issues raised or advocated. However, in my opinion, we owe it to the public, and in no small measure to the mission of this Commission, which we have sworn to uphold, to at least provide a meaningful opportunity for the public to be heard, and to *listen to what the public has to say* about these issues, and to act constructively to the maximum extent possible.


Steven T. Walther
Commissioner