FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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)

Citizens for Responsibility and Ethics in Washington v. FEC ("*CREW*")[1] invalidated the longstanding regulation governing disclosure of contributions received by organizations other than political committees ("non-committee organizations") that make independent expenditures. Since then, the Commission has not proffered clear guidance on how those organizations should report contributions "earmarked for political purposes," in accordance with *CREW*'s holding.[2] And although the Commission has acted to excise the unenforceable language from its regulations, the amended regulatory text fails to provide a definitive standard for the statute's application.

The resulting uncertainty has created a chilling effect on individuals' and organizations' First Amendment rights to engage in free speech and free association. The absence of regulatory guidance also raises significant due process issues. Accordingly, it is incumbent upon the Commission to provide what public guidance it can concerning its interpretation and future enforcement of 52 U.S.C. § 30104(c).

Therefore, we are providing this interpretive and policy statement on the proper scope and enforcement of § 30104(c) following the U.S. Court of Appeals for the D.C. Circuit's decision in *CREW*. Our intent is to supply some level of notice as to three Commissioners' understanding of the obligations of non-committee organizations under 52 U.S.C. § 30104(c)(1) and (c)(2)(C) until such time as the Commission promulgates an appropriate regulation.

I. BACKGROUND

A. Reporting of Contributions by Non-Committee Organizations that Make Independent Expenditures

Under the Act, a non-committee organization must report "independent expenditures" made in federal elections aggregating over $250 in a calendar year.[3] On their independent expenditure reports, these organizations must disclose the same information about their receipts required of political committees under 52 U.S.C. § 30104(b)(3)(A), including the identification of

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1 971 F.3d 340 (D.C. Cir. 2020), *aff'g* 316 F. Supp. 3d 349 (D.D.C. 2018).

2 *See id*. at 353; 52 U.S.C. § 30104(c).

3 52 U.S.C. § 30104(c)(1). The Act and Commission regulations define an "independent expenditure" as an expenditure for a communication that (i) expressly advocates for the election or defeat of a clearly identified candidate, and (ii) is not coordinated with a candidate or candidate's authorized committee, a political party committee, or any agent of a candidate or political party committee. 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16(a).

each person who made a "contribution" to the organization in excess of $200 during the calendar year.[4] The Act further requires non-committee organizations to identify "each person who made a contribution in excess of $200 … which was made for the purpose of furthering an independent expenditure."[5]

For almost forty years, the Commission regulation implementing the Act's independent expenditure reporting regime, 11 C.F.R. § 109.10, required disclosure of "each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure."[6] However, in August 2018, the U.S. District Court for the District of Columbia vacated § 109.10(e)(1)(vi) in *CREW v. FEC*, holding that the Commission's rule impermissibly narrowed the reporting required by § 30104(c)(1) and (c)(2)(C) "in significant ways."[7] Vacatur of the rule became effective on September 18, 2018, after a brief stay ordered by Chief Justice John Roberts.[8] Although the Commission did not appeal the district court's ruling, Crossroads GPS—the respondent in the 2012 administrative complaint that gave rise to the litigation—subsequently appealed the decision.

B. The D.C. Circuit's Decision in *CREW v. FEC*

On August 21, 2020, the U.S. Court of Appeals for the D.C. Circuit affirmed the district court's decision in *CREW* holding 11 C.F.R. § 109.10(e)(1)(vi) contrary to federal statute.[9] The D.C. Circuit agreed with the district court that the Commission's regulation conflicted with the Act's provisions "twice over":

> First, the Rule disregards [52 U.S.C. § 30104(c)(1)'s] requirement that IE makers disclose each donation from contributors who give more than $200, regardless of any connection to IEs eventually made. Second, by requiring disclosure only of donations linked to a particular IE, the Rule impermissibly narrows [52 U.S.C. § 30104(c)(2)(C)'s] requirement that contributors be identified if their donations are "made for the purpose of furthering *an* independent expenditure."[10]

Regarding the reporting of contributors under § 30104(c)(1), the D.C. Circuit reasoned that the Commission's rule disregarded the text of the statute, which "unambiguously requires an entity making over $250 in IEs to disclose the name of any contributor whose contributions during the relevant reporting period total $200, along with the date and amount of each contribution."[11] Thus,

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4 52 U.S.C. § 30104(c)(1). Section 30104(b)(3)(A) requires identification of any "person (other than a political committee) who makes a contribution … during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year."

5 52 U.S.C. § 30104(c)(2)(C).

6 11 C.F.R. § 109.10(e)(1)(vi) (2020).

7 316 F. Supp. 3d 349, 422 (D.D.C. 2018).

8 *See Crossroads Grassroots Policy Strategies v. CREW*, 139 S. Ct. 50 (2018).

9 971 F.3d 340 (D.C. Cir. 2020).

10 *Id.* at 350–51.

11 *Id.* at 354.

the court understood § 30104(c)(1) as imposing a standalone requirement—separate from, but supplementary to, § 30104(c)(2)(C)—to report all "contributions" above the $200 threshold "earmarked for political purposes," in accordance with the Supreme Court's limiting construction of the term "contribution" in *Buckley v. Valeo* and later decisions.[12] Despite the import of "earmarked for political purposes" to this reading of the Act's independent expenditure disclosure scheme, the court declined to "to delineate the precise scope" of that phrase, which is not defined by the Act or Commission regulations, or to "decide any constitutional question concerning (c)(1)."[13]

In addition, the more targeted reporting requirements of § 30104(c)(2)(C) of the Act were "naturally read to cover contributions intended to support any IE made by the recipient," as opposed to the narrower reach of the Commission's rule, which applied only to contributions "made for the purpose of furthering *the reported* independent expenditure."[14] While contributions disclosed pursuant to § 30104(c)(2)(C) would often be "duplicative" of those reported under § 30104(c)(1), the D.C. Circuit reasoned that "[§ 30104(c)(2)(C)] still calls for providing information that (c)(1) does not—namely, whether a disclosed 'contribution' was intended to support IEs or instead aimed only at supporting the recipient's other election-related activities."[15]

C. The Commission's Post-*CREW* Guidance for Reporting Contributions under § 30104(c)

After the district court's decision in *CREW*, the Commission issued a press release to provide "guidance to the public on how to proceed consistent with the district court's decision."[16] But rather than offering meaningful insight to the regulated community about the precise scope of donor disclosure after *CREW* or the meaning of "earmarked for political purposes," the Commission largely repeated the district court's vague and imprecise characterization of the Act's reporting mandates, without further exposition.[17]

For example, the press release explained that, to comply with § 30104(c)(1) following *CREW*, non-committee organizations must disclose their "donors of over $200 annually making contributions 'earmarked for political purposes' … which contributions are 'intended to influence

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12 *Id.* at 353 (quoting *Buckley v. Valeo*, 424 U.S. 1, 78 (1976)); *see also FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) (noting that non-committee organization that made "an independent expenditure of as little as $250" would have to "identify all contributors who annually provide in the aggregate $200 in funds intended to influence elections").

13 971 F.3d at 354.

14 *Id.* (quoting 11 C.F.R. § 109.10(e)(1)(vi) (2020)).

15 *Id.* at 356.

16 *FEC provides guidance following U.S. District Court decision in* CREW v. FEC, *316 F. Supp. 3d 349 (D.D.C. 2018)*, FEC (Oct. 4, 2018), https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/?msclkid=55f60bb3b9d911ec9771f4de5eee6e11 [hereinafter *FEC Press Release*].

17 *See* Statement of Chair Caroline C. Hunter and Commissioner Matthew S. Petersen on *CREW v. FEC*, No. 16-CV-259, at 1 (Sept. 6, 2018) (noting the district court in its *CREW* opinion "conjured several reporting standards, which are not easily interpreted or internally consistent").

elections,'" but provided no further explanation of what those terms mean or how reporting entities should determine whether their contributions are "earmarked for political purposes."[18] Quoting the district court's *CREW* opinion, the press release stated that, while § 30104(c)(2)(C) covers contributions "for express advocacy for or against the election of a federal candidate," § 30104(c)(1) broadly requires the reporting of "contributions used for other political purposes in support or opposition to federal candidates by the organization for contributions directly to candidates, candidate committees, political party committees, or super PACs."[19] This description provided no additional clarity about how the Commission would interpret and apply the law to require reporting of "contributions used for other political purposes" going forward, and non-committee organizations were left to guess which of their donors might be subject to mandated disclosure in the future.

That press release, which was published in October 2018, is the only public guidance that the FEC has issued concerning the impact of *CREW v. FEC*. The Commission has not initiated a rulemaking on independent expenditure reporting since the district court's decision.[20] Nor has it clarified its interpretation through any public enforcement action. This continuing lack of direction about the extent of donor disclosure obligations under § 30104(c) has led to new dysfunctions in the Commission's enforcement docket in recent election cycles,[21] and has stoked uncertainty and confusion.[22]

II. INTERPRETIVE STATEMENT ON THE MEANING OF "EARMARKED FOR POLITICAL PURPOSES"

Moving forward, the Commission must formulate a regulatory standard for reporting "contributions earmarked for political purposes" that is consistent not only with *CREW* and the Act's terms, but also with the First Amendment and Supreme Court precedent.[23] Such a rule must

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[18] *FEC Press Release*, *supra* note 16 (quoting *CREW*, 316 F. Supp. 3d at 389).

[19] *Id.* (quoting *CREW*, 316 F. Supp. 3d at 392). The press release also instructed non-committee organizations to identify each donor who contributed more than $200 "for the purpose of furthering any independent expenditure" to comply with § 30104(c)(2)(C)'s requirements. *Id.*

[20] For instance, the Commission has not acted on a rulemaking petition, filed in August 2018, asking it to amend the definition of "contribution" in 11 C.F.R. § 100.52 to account for the *CREW* decision. *See* Rulemaking Petition: Definition of Contribution, 83 Fed. Reg. 62,282 (Dec. 3, 2018).

[21] *See, e.g.*, *Campaign Legal Ctr. v. FEC*, 21-cv-406 (TJK) (D.D.C Feb. 16, 2021); *see also* Statement of Chairman James E. "Trey" Trainor, III on the Dangers of Procedural Disfunction (Aug. 28, 2020), https://www.fec.gov/resources/cms-content/documents/Trainor_Statement_on_FEC_Procedural_Disfunction_REDACTED.pdf.

[22] *See, e.g.*, R. Sam Garrett, CONG. RESEARCH SERV., IF11005, DONOR DISCLOSURE: 501(C) GROUPS AND CAMPAIGN SPENDING (Oct. 18, 2018), https://crsreports.congress.gov/product/pdf/IF/IF11005/2 ("Some politically active 501(c) groups have stated that the [*CREW*] ruling chills their political speech and that they will curtail or refrain from making their planned IEs."); Zachary G. Parks & Kevin Glandon, *FEC Issues New Guidance On Donor Disclosure for Entities Making Independent Expenditures*, COVINGTON: INSIDE POLITICAL LAW (Oct. 4, 2018), https://www.insidepoliticallaw.com/2018/10/04/fec-issues-new-guidance-on-donor-disclosure-for-entities-making-independent-expenditures/ (observing "there is still considerable ambiguity as to how far-reaching the disclosures must be" under § 30104(c) after the publication of the FEC's press release).

[23] *See Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2388 (2021) (observing that a "disclosure requirement 'creates an unnecessary risk of chilling' in violation of the First Amendment" when it "indiscriminately

be fair to non-committee organizations and their donors and feasible for the Commission to administer. As the agency vested with statutory authority in an area of special constitutional delicacy, it is the FEC's responsibility to maintain understandable rules on the scope of public reporting requirements. This requires us to answer certain fundamental questions: Precisely what information must be disclosed, by whom, and based on what conduct? Failure to promulgate those instructions risks chilling constitutionally protected speech and political activity.

Until the Commission provides definitive guidance in the form of a rulemaking, alleged violations of § 30104(c)(1)'s contribution reporting requirements are effectively unenforceable due to the absence of clear direction from the Commission on which donations to non-committee organizations are "earmarked for political purposes" and therefore reportable as "contributions." In hopeful anticipation of such a rulemaking, however, we are providing this interpretive statement on the appropriate application of *CREW*.

As construed in *CREW*, independent expenditure filings by a non-committee organization must identify each donor who made a "contribution" to the organization in excess of $200 that was either (i) "earmarked for political purposes," or (ii) "made for the purpose of furthering any independent expenditure." Like the statutory definition of "contribution," though, "earmarked for political purposes" is itself an ambiguous standard and, if read too broadly, could envelop and chill substantial amounts of protected speech outside of the Act's permissible purview.[24] The Commission must tread carefully in defining this phrase.

Helpfully, the U.S. Court of Appeals for the Second Circuit has already had the opportunity to "give content to the phrase 'earmarked for political purposes,' which is used but not explained in *Buckley*."[25] In *FEC v. Survival Education Fund, Inc.*, that court determined that contributions were "earmarked for political purposes," and subject to disclosure under the Act, only if they "will be converted to expenditures subject to regulation under FECA."[26] The Second Circuit reasoned that "disclosure is only required for … contributions that are earmarked for activities or 'communications that expressly advocate the election or defeat of a clearly identified candidate.'"[27] Importantly, this interpretation of "earmarked for political purposes" applies *Buckley*'s "limiting principle" of express advocacy in defining a reporting standard for contributions to non-committee organizations.[28]

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sweep[s] up the information of *every* major donor with reason to remain anonymous") (quoting *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 968 (1984)); *Buckley*, 424 U.S. at 66 ("[C]ompelled disclosure has the potential for substantially infringing the exercise of First Amendment rights."); *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action.").

[24] *See Bonta*, 141 S. Ct. at 2384 ("Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly."); Statement of Chair Caroline C. Hunter and Commissioner Matthew S. Petersen on *CREW v. FEC*, No. 16-CV-259, at 1 n.2 (Sept. 6, 2018).

[25] 65 F.3d 285, 294 (2d Cir. 1995).

[26] *Id.* at 295.

[27] *Id.* (quoting *Buckley*, 424 U.S. at 80).

[28] *Id.*

We agree with the reasoning in *FEC v. Survival Education Fund, Inc.* that a donation made to a non-committee organization is "earmarked for political purposes" within the meaning of § 30104(c)(1) only if it is 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.[29] Thus, for example, a donor who gives money to a non-committee organization with a specific instruction that the organization use the funds for independent expenditures or other activities to expressly advocate for or against a federal candidate, or who gives in direct response to a solicitation for funding such expenditures or activities, makes a contribution "earmarked for political purposes." On the other hand, a donor who makes an unrestricted donation to a non-committee organization or designates a donation for non-electoral purposes like issue advocacy, or who responds to a general solicitation to support the organization's mission, does not make a contribution "earmarked for political purposes." The latter donations are not subject to disclosure under § 30104(c)(1), even if the non-committee organization decides in the same reporting period to use its general funds for express advocacy activities, because the only relevant determinant is the cognizable intent and understanding of the donor at the time he or she gave money to the organization.

This construction of "earmarked for political purposes" recognizes that many, if not most, citizens who financially support non-committee organizations do so for reasons completely unrelated to electoral advocacy. It also adheres to the terms of § 30104(c)(1), is consistent with the meaning of "contribution" as limited in *Buckley*, harmonizes with judicial precedent, and avoids issues of vagueness and overbreadth, better protecting the constitutional rights of privacy and association enjoyed by non-committee organizations and their donors.[30] Accordingly, this is the interpretation of *CREW* and the Act that we intend to follow pending a final rulemaking by the Commission.

III. ENFORCEMENT OF 52 U.S.C. § 30104(c)(1) AND 30104(c)(2)(C)

Consistent with the foregoing, we intend to implement this interpretation of 52 U.S.C. § 30104(c)(1) and (c)(2)(C) in enforcement matters, with our precise approach dependent upon when the relevant conduct took place.

First, for complaints based on conduct preceding or contemporaneous with this statement, we generally intend to exercise the Commission's prosecutorial discretion to dismiss complaints alleging failure to disclose contributions under § 30104(c)(1) and seeking general donor disclosure from non-committee organizations that engage in express advocacy activities.[31] Prosecutorial discretion is appropriate in such situations, both to preserve agency resources and as a matter of

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[29] Existing definitions in the Commission's rules are possible models for further defining "earmarked" and "solicited" for purposes of reporting contributions under § 30104(c). *See* 11 C.F.R. § 110.6(b)(1) (defining "earmarked"); 11 C.F.R. § 300.2(m) (defining "to solicit").

[30] *Bonta*, 141 S. Ct. at 2389 ("[T]he Attorney General's disclosure requirement imposes a widespread burden on donors' associational rights.").

[31] *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

due process and fair notice.[32] It violates principles of fundamental fairness to hold respondents liable for violating legal rules that have not been previously announced, and any attempts by the Commission to enforce vague and confusing guidance risks waste, inefficiency, and significant litigation. Discretionary dismissals are therefore appropriate and within the Commission's authority as the agency vested with interpretation and enforcement of the Act.[33]

At the same time, we may, in appropriate and meritorious cases, pursue enforcement of disclosure violations relating to § 30104(c)(2)(C). This latter provision, which was also the subject of the *CREW* decision, requires reporting of all "contributions intended to support any [independent expenditure] made by the recipient" non-committee organization. [34] Because the scope of that statutory provision is less ambiguous, the same concerns about regulatory vagueness and due process do not necessarily counsel in favor of discretionary dismissal.

Second, for administrative complaints concerning future conduct, we intend to pursue enforcement in appropriate cases under 52 U.S.C. § 30104(c)(1) and (c)(2)(C) consistent with our interpretation of the *CREW* decision, until such time as the Commission issues a final rulemaking. That is, in cases supported by sufficient evidence, we will vote in favor of pursuing appropriate enforcement action against non-committee organizations that fail to properly report "contributions earmarked for political purposes" or contributions intended to support any independent expenditure by the recipient organization, as interpreted here. We believe that this enforcement policy is consistent with our statutory duty to enforce the Act while still respecting Americans' First Amendment and due process rights.

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The Federal Election Commission "has as its sole purpose the regulation of core constitutionally protected activity—'the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.'"[35] This constitutionally sensitive mission requires us to be especially respectful of the fundamental pillars of due process: "first, that regulated parties should know what is required of them so they may act accordingly; second, [that] precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[36] Mindful of these protections, and anticipating an appropriate rulemaking in due course, we provide this public articulation of our view of the relevant statutory text.

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[32] *Buckley*, 424 U.S. at 41 n.48 ("[V]ague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone … than if the boundaries of the forbidden areas were clearly marked.") (quotation marks omitted); *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) ("Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'") (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

[33] *See* 52 U.S.C. §§ 30107, 30109.

[34] *CREW*, 971 F.3d at 354.

[35] *Am. Fed'n of Labor-Congress of Indus. Orgs. v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (quoting *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981)).

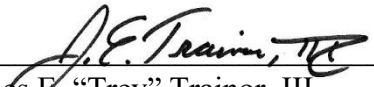
[36] *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

Allen Dickerson
Chairman

June 8, 2022
Date

Sean J. Cooksey
Commissioner

June 8, 2022
Date



James E. "Trey" Trainor, III
Commissioner

June 8, 2022
Date