FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Statement of Commissioner Ann M. Ravel on REG 2014-09
(Amendment of 11 C.F.R. Part 115)

January 11, 2016

For over a century, Congress and the courts have been concerned about the unique dangers of corruption posed by the federal contracting process. The Federal Election Campaign Act ("the Act") and Commission regulations prohibit any person who is negotiating or performing a contract with the United States government or any of its agencies or departments from "directly or indirectly" making a contribution to any political party, political committee, federal candidate, or "any person for any political purpose or use" (the "Pay-to-Play Law").[1] While the current Pay-to-Play Law was codified in the Act in 1976, the antecedents of the law date back to the 1870s.[2] The same corruption concern—confirmed by repeated government contracting scandals through the years—has prompted states to enact similar laws: seventeen states also limit contributions from state contractors or licensees, as do a number of municipalities.[3]

The *Citizens United v. FEC* decision and the decisions interpreting that decision in the lower courts[4] opened up substantial new avenues for election-related independent spending by corporations and labor unions. In October 2014, I joined with my Republican colleagues to remove regulations that the Court had ruled unconstitutional in *Citizens United*, in order to provide guidance to the public.[5] My Republican colleagues then also voiced their strong support for providing such guidance to the public and those regulated by the Commission. Since then, however, the Commission has failed to provide much-needed answers to important regulatory questions arising from corporate and labor union election-related spending permitted by the *Citizens United* decision.[6]

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[1] 52 U.S.C. § 30119(a); 11 C.F.R. § 115.2(a).

[2] *Wagner v. FEC*, 793 F.3d 1, 10 (D.C. Cir. 2015).

[3] *Id.*

[4] *See SpeechNow.org v. FEC*, 599 F.3d. 686 (2010) ("*SpeechNow*"); *Carey v. FEC*, 791 F.Supp.2d 121 (2011).

[5] *See* Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. 62,797-819 (Oct. 21, 2014) (codified at 11 CFR Parts 104 and 114).

[6] In a bid to address these issues, Commissioner Ellen L. Weintraub and I filed a petition with the Commission in June 2015, asking the FEC to promulgate new rules in response to the *Citizens United* case to ensure, among other things, adequate public disclosure of corporate and labor spending. *See* Letter from Ann M. Ravel and Ellen L.

In a petition submitted to the Commission in November 2014, Public Citizen identified the Pay-to-Play Law as yet another area in which the Commission's rules should be clarified in response to the *Citizens United* case.[7] Until 2010, the federal Pay-to-Play Law was effectively subsumed by the Act's broader prohibition on corporate and labor union contributions and expenditures.[8] Since the *Citizens United* and *SpeechNow* decisions, corporations that are government contractors remain subject to the Pay-to-Play Law,[9] while most other corporations are free to make contributions to committees that make only independent expenditures ("super PACs"). In light of this change, Public Citizen's rulemaking petition asked the Commission to clarify how the Pay-to-Play Law applies to entities in the same corporate family when one or more of those entities is a federal contractor.

Regulators from the State of Connecticut and New York City, the mayor of the City of Philadelphia, and over 19,000 individual commenters urged the Commission to open a rulemaking to address this question. Numerous commenters described how the Pay-to-Play Law could be, in the words of one commenter, "easily evaded by technical legal maneuvering that leaves the intent of the law completely thwarted."[10] Commenters pointed to an enforcement matter in which the Commission did not pursue an investigation into a complaint that the Pay-to-Play Law had been violated when the parent corporation of a federal contractor made a contribution to a super PAC, instead closing the file.[11]

After *Citizens United*, the courts have continued to affirm the constitutionality of laws that limit government contractors from making political contributions. In July 2015, the U.S. Court of Appeals for the District of Columbia Circuit, in an en banc decision, rejected a constitutional challenge to the Act's Pay-to-Play Law as applied to individual contractors making contributions to candidates, parties and committees that contribute to candidates and parties,

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Weintraub to the Federal Election Commission, *available at* http://www.fec.gov/members/statements/Petition_for_Rulemaking.pdf. A version of that petition was published for public comment and the Commission received nearly 12,000 comments filed in support of those proposed rule changes. *See* Rulemaking Petition: Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (*Citizens United*), 80 Fed. Reg. 45,116 (Jul. 29, 2015); public comments available at http://sers.fec.gov/fosers/ (search for "REG 2015-04"). Unfortunately, the three Republican commissioners voted against opening a rulemaking on that petition. *See* Certification for Motion to Open a Rulemaking in REG 2015-04 in Response to Public Comment, dated December 18, 2015, available at http://sers.fec.gov/fosers/showpdf.htm?docid=346628.

[7] *See* Rulemaking Petition: Federal Contractors, 80 Fed. Reg. 16,595 (Mar. 30, 2015).

[8] *See* 52 U.S.C. § 30118(a).

[9] *See* Advisory Opinion 2011-11 (Colbert) at 4; Advisory Opinion 2011-24 (StandLouder.com); FEC Statement on *Carey v. FEC:* Reporting Guidance for Political Committees that Maintain a Non-Contribution Account at n.1 (Oct. 5, 2011) *available at* http://www.fec.gov/press/press2011/20111006postcarey.shtml.

[10] *See* Connecticut State Elections Enforcement Commission Comment at 1 (May 29, 2015) *available at* http://sers.fec.gov/fosers/showpdf.htm?docid=336374.

[11] *See* First General Counsel's Report in MUR 6726 (Chevron Corporation, Chevron U.S.A., Inc.), dated Nov. 14, 2013, at 1-2 *available at* http://eqs.fec.gov/eqsdocsMUR/14044353483.pdf.

reasoning that "our national experience supports Congress' fear that political contributions by government contractors can corrupt and interfere with merit-based administration" of government.[12] Federal courts throughout the country have also upheld state-level pay-to-play laws post-*Citizens United*.[13]

Because of the lack of clarity in the agency's regulations, the importance of the Pay-to-Play Law, and the public's interest in this issue, I, together with two other commissioners, voted to open a rulemaking to provide clarity on how the Pay-to-Play Law applies to interrelated corporate entities. Given the long-standing concerns of Congress regarding corruption in the federal contracting process, and the courts' repeated affirmance of the constitutionality of laws prohibiting government contractor political contributions, the Commission was obliged to act. Unfortunately, my Republican colleagues suddenly became uninterested in providing necessary guidance and did not support opening a rulemaking. Consequently, the Commission will not even propose possible new rules or consider public comment on those proposals.[14]

On this issue and on many others, our regulations are outmoded and applicable only to a previous era's campaign finance system. Without sorely-needed clarifying regulations, the Commission is not providing essential guidance to people and groups who must comply with the law. This failure to act is also a disservice to the citizens who rely on the FEC to perform our important function enforcing and implementing the law.

Jan. 11, 2016
Date

Ann M. Ravel
Commissioner

[12] *Wagner v. FEC*, 793 F.3d 1, 21 (D.C. Cir. 2015).

[13] *See, e.g., Green Party of Connecticut v. Garfield*, 616 F.3d 189 (2d Cir. 2010); *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015), *cert. denied*, No. 15-215 (Nov. 30, 2015).

[14] Certification for Motion to Open a Rulemaking in REG 2014-09 in Response to Public Comment, dated November 13, 2015, available at http://sers.fec.gov/fosers/showpdf.htm?docid=346292. Because three Commissioners opposed opening a rulemaking, there were not the four votes required to proceed. *See* 52 U.S.C. § 30106(c) (requiring "the affirmative vote of 4 members of the Commission" in order to engage in rulemaking).