



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**Statement of Commissioner Steven T. Walther
on Final Rules in *Citizens United* Rulemaking**

October 9, 2014

Today the Commission voted to approve final rules to implement the Supreme Court's 2010 decision in *Citizens United*.¹ I could not support these rules because (a) I am concerned that today's decision could be viewed as ratifying a misinterpretation of an important disclosure regulation, *especially in view of ongoing litigation as to the validity of that regulation*,² and (b) I believe the Commission again missed an opportunity to address important issues implicated by this decision, and on which the public has not been given a chance to comment. Had these final rules remained innocuous, my concerns may have been tempered enough for me to support them. To that end, and as a compromise, I moved to amend the motion to adopt these rules by striking a paragraph that has been misconstrued in the wake of *Citizens United*, and by making a conforming edit to the preceding paragraph.³ However, that motion did not garner the necessary four votes, resulting in less disclosure of the sources of funding in federal campaigns.

Despite some of my colleagues' pronouncements that this is an event of great moment, we have actually taken only a small step forward in providing additional guidance to the public. In fact, on February 5, 2010, just 15 days after the Supreme Court's decision, the Commission issued a written statement that provides essentially the same guidance we voted on today, i.e., that the Commission will no longer enforce statutory and regulatory provisions prohibiting corporations and labor organizations from making independent expenditures or electioneering communications.⁴ Accordingly, these rules merely formalize the guidance provided more than four-and-a-half years ago, and accomplish only the bare minimum necessary to comply with *Citizens United*.

¹ *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (Jan. 21, 2010).

² See *infra* footnote 13.

³ Specifically, I moved to amend the motion by striking the phrase "and were not made by a corporation or labor organization pursuant to 11 CFR 114.15" in paragraph (c)(8) from section 104.20 of the Commission's regulations, entitled "Reporting Electioneering Communications," and by striking paragraph (c)(9) in its entirety. Commissioner Weintraub also supported my motion.

⁴ See Attachment A ("Statement on the Supreme Court's Decision in *Citizens United v. FEC*," issued Feb. 5, 2010), also available at <http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml>.

Notwithstanding the fact that today’s decision is a worthwhile housekeeping measure, the public has been deprived, once again, of a valuable opportunity to strengthen our democracy, consistent with the Supreme Court’s strong endorsement of the right to know how money is raised and spent in U.S. elections.⁵ It has been a long and frustrating process, and I believe we could have done much more than simply trim our regulatory provisions to fit the contours of the *Citizens United* decision.

Despite our colleagues’ assertions that they support transparency and uninhibited public debate on these issues,⁶ they have shown unalterable reluctance to listen to what the public might have to say about these and other issues emanating from *Citizens United*. Needless to say, there has been insufficient motivation and conviction on the part of the Commission to allow public participation and, ultimately, to provide comprehensive rules consistent with the transparency endorsed by the Supreme Court. Below is a chronology of relevant events that have marked this long and arduous process.

I. Chronology of *Citizens United* Rulemaking and Other Relevant Events

A. January 20, 2011 NPRM Drafts

On January 20, 2011, the Commission voted on two drafts of a Notice of Proposed Rulemaking (NPRM) in response to the *Citizens United* decision; however, there were not four votes to approve either draft. Both drafts would have (1) removed regulations prohibiting the use of corporate and labor organization funds to finance expenditures, independent expenditures (“IEs”) and electioneering communications (“ECs”); (2) removed a regulation that permitted corporations and labor organizations to make only ECs that are not the functional equivalent of express advocacy; (3) removed regulations concerning express advocacy in communications to the general public and revising the standards for voter registration and get-out-the-vote drives; and (4) revised the Commission’s corporate facilitation rules.

However, the two drafts differed in significant respects. The draft I supported along with Commissioner Weintraub and then-Commissioner Bauerly (“Draft A”) would have gone further in seeking public comment, consistent with the Supreme Court’s endorsement of transparency and the potential impact of its decision on our restrictions on foreign nationals, by (1) revising certain reporting requirements related to IEs and ECs to provide more comprehensive disclosure of such spending; and (2) revising the regulations addressing financial participation by foreign nationals in our election process.

⁵ *Citizens United*, 130 S. Ct. at 914-16.

⁶ For example, our colleagues favorably noted the Supreme Court’s recent admonition that the First Amendment reflects a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Snider v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)), cited in February 27, 2014 letter to the Secretary of the Treasury and Commissioner of Internal Revenue signed by Chairman Goodman and Commissioners Hunter and Petersen, *available at* http://www.fec.gov/members/goodman/statements/Goodman_Petersen_Hunter_IRS_Comment.pdf. Their comments have not been translated into action with respect to encouraging public input and providing more thorough guidance in the aftermath of *Citizens United*.

With regard to the disclosure of ECs as covered by 11 C.F.R. § 104.20, the draft our colleagues supported (“Draft B”) was bare-bones in its approach, seeking only to remove a brief cross-reference to a regulation that had placed restrictions on corporate payments for ECs (and therefore clearly invalidated by *Citizens United*). In contrast, Draft A contained proposed rules aimed at seeking a broad and diverse swath of public input. Not only did we include our colleagues’ bare-bones approach as one option, we added another proposal that would have sought comment on requiring corporations or labor organizations that make ECs with funds from an account other than a segregated bank account to report information regarding all sources of their funding. Our proposal was intended to address concerns that certain language in section 104.20(c)(9) – which unfortunately remains unaltered as a result of today’s vote – was being misconstrued to undermine disclosure of funding sources for ECs.⁷

When this provision was adopted by the Commission on December 14, 2007, the decision to require disclosure of those persons whose donations were “made for the purpose of furthering” ECs was meant to exclude only those donors who gave “for purposes *entirely unrelated* to the making of ECs.”⁸ In the aftermath of *Citizen United*, however, those few words have been misinterpreted to unduly reduce the obligation of corporations and labor organizations to disclose the names of donors whose funds are used by those entities for ECs.⁹ Specifically, the language has been viewed by some as limiting disclosure only to those donors who specifically earmark their donations *for a particular EC*.

The two Commissioners who approved this EC disclosure rule in 2007 and still remain on the Commission – of which I am one – both agree that the language has been read in a different manner than what was intended at the time. I am therefore concerned that today’s decision could be viewed as ratifying that misinterpretation, especially in view of the pending litigation on the issue. Under our proposed option in Draft A, this language would have been removed as superfluous, since corporations can simply use segregated accounts if they want to report only those donors whose funds were donated for the purpose of making ECs. More importantly, the language would no longer be used to nullify a clear disclosure obligation. In addition, our draft asked for comments on any intermediate approaches that would provide meaningful disclosure of the sources of EC funding.

⁷ The final rule merely removed references from 11 C.F.R. § 104.20(c)(9) to now-removed section 114.15 and added language to clarify that that section applies only when the reporting entity does not use the segregated account option in paragraph (c)(7).

⁸ *Explanation and Justification for Final Rules on Electioneering Communications*, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007) (emphasis added), available at http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-26.pdf. The Commission explained that a “corporation’s general treasury funds are often largely comprised of funds received from investors such as shareholders who have acquired stock in the corporation and customers who have purchased the corporation’s products or services, or in the case of a non-profit corporation, donations from persons who support the corporation’s mission . . . [but] . . . do not necessarily support the corporation’s electioneering communications.” *Id.*

⁹ See Attachment B (“Statement of Commissioner Steven T. Walther Regarding the Petition for Rulemaking to Update 11 C.F.R. § 104.20(c)(8) and (c)(9) Filed by the Center for Individual Freedom,” dated Mar. 7, 2013) (also available at http://www.fec.gov/members/walther/statements/stw_final_signed_statement_cfif_petition_ec_disclosure_3-7-13.pdf).

Draft A would have also sought comment on crucial questions as to what impact the *Citizens United* decision may potentially have on the Federal Election Campaign Act's ("FECA") longstanding prohibition on the involvement of foreign nationals in U.S. elections – an issue that is completely ignored in the bare-bones rule approved today. Because for-profit corporations were already prohibited by the FECA from spending their funds on political speech, the Commission never needed separate rules to specifically prohibit foreign national corporations from spending money. However, as a direct result of *Citizens United*, the Commission is still faced with the issue of when a corporation is a "foreign national" and therefore still subject to the specific prohibition on all foreign nationals. For example, the public should have had the opportunity to comment on what level of foreign ownership should the Commission conclude that a domestic corporation is "owned or controlled" by a foreign national, and whether the Commission should apply different thresholds to privately held and publicly held corporations.

With respect to corporate officers, directors and executives, we should have solicited public comment on whether the Commission's analysis of corporate control should be limited to members of a corporation's board of directors, or are there other corporate employees who might be capable of exercising corporate control. Additionally, because corporations, including foreign corporations, often create partnerships and other business combinations through which they operate in the United States, we should have asked for public comment on what extent should the rules address political spending on IEs and disbursements for ECs by such partnerships and business combinations.

B. June 15, 2011 NPRM Drafts

On June 15, 2011, the Commission again voted on competing NPRM drafts in response to the *Citizens United* decision. Once again, there were not four votes to approve either draft. While I voted against the draft proposed by Commissioner Weintraub and then-Commissioner Bauerly because I preferred the more comprehensive approach to foreign national issues included in our earlier draft, I fully supported most of the draft, including the EC and IE provisions, and I would have voted to approve it if there was any chance it would have garnered a least one vote from our other three colleagues. But even though the draft represented a good-faith attempt to minimize areas of disagreement while still asking important questions about the reporting requirements for IEs and ECs, our colleagues once again refused to budge, preferring a bare-bones approach that would have discouraged public input on these crucial issues.

C. December 15, 2011 NPRM Drafts

On December 15, 2011, as we neared the two-year anniversary of the *Citizens United* decision, the Commission voted on two draft NPRMs which, if approved, would have bifurcated the rulemaking process between (1) addressing important questions surrounding disclosure of IEs which were necessarily implicated by the *Citizens United* decision, and (2) addressing regulatory restrictions on political activities of corporations and labor organizations, which needed to be revised to comply with the Supreme Court's decision. Although our colleagues

voted against the first draft NPRM¹⁰ – which I fully supported – there were five votes to approve the second draft NPRM. As I stated at the time – in a joint statement with then-Commissioner Bauerly¹¹ – I believed that supporting both NPRMs was the appropriate and responsible thing to do.

By addressing important questions in this limited manner, the Commission left numerous aspects of its regulations unrevised and unexplored. In particular, the draft I approved made no mention of the EC disclosure regulation at issue, missing a valuable opportunity to ask for comments on what approaches would provide meaningful disclosure about the sources of such funding.

D. March 7, 2012 Hearing

On March 7, 2012, after gathering comments in response to the limited NPRM approved by the Commission on December 15, 2011, the Commission held a hearing on the proposed rules in response to the *Citizens United* decision. In light of the truncated nature of the NPRM, we predictably received a very narrow range of comments. Several U.S. Senators, however, issued a comment urging that the Commission use its rulemaking authority to implement broad but clearly defined disclosure requirements in the post-*Citizens United* era:

In order to achieve clarity in the regulations, we ask the Commission to precisely define the requirements for corporations and unions to minimize the possibility of misinterpretation or legal ambiguity. The Commission should clearly define the new disclosure requirements in the post-*Citizens United* world of campaign-related spending.¹²

However, given the constraints on the scope of the NPRM, the public was again deprived of the opportunity to effectively participate in the process, and the Commission abrogated its responsibility to address several core issues implicated by the *Citizens United* decision.

¹⁰ As noted in the rulemaking petition discussed in the draft, the Commission’s IE reporting regulations were in need of revision because 2010 had witnessed millions of dollars of spending on IEs by non-profit corporations with “little or no disclosure of numerous contributors” to these corporations. See Agenda Document 11-73 (“Draft Notice of Proposed Rulemaking for Independent Expenditure Reporting”), dated Dec. 15, 2011.

¹¹ See Attachment C (“Statement of Chair Cynthia L. Bauerly and Commissioner Steven T. Walther regarding Notices of Proposed Rulemakings to Address Citizens United,” dated Dec. 15, 2011) (also available at http://www.fec.gov/members/statements/Statement_of_Bauerly_and_Walther_on_CU_Petition_NPRMs.pdf).

¹² See Comment filed by eleven U.S. Senators dated February 21, 2012, available at <http://sers.fec.gov/fosers/>.

E. October 4, 2012 Statement

On October 4, 2012, following the reversal by the D.C. Circuit of a District Court judgment in a litigation matter regarding the EC disclosure regulations,¹³ the Commission again deadlocked on whether to commence a rulemaking to address section 104.20(c)(9). I issued a statement reiterating my support for a rulemaking on the issues before the court as well as on all other issues raised in the aftermath of *Citizens United*.¹⁴ I suggested in my statement other options in addition to an NPRM to solicit public comment on these important issues, such as 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, and perhaps even a series of plenary public meetings with interested stakeholders to allow the public to provide comment. Despite my ongoing efforts to reach a consensus on any number of available options, some colleagues resisted all such ideas, maintaining the view that the Commission did not have jurisdiction to adopt rules in this area without a specific statutory grant.

F. March 7, 2013 Vote on Petition for Rulemaking

At the open meeting of March 7, 2013, the Commission discussed and voted on a petition for a rulemaking on EC reporting that asked only that the Commission strike references to section 114.15 (governing the use of corporate and labor union funds for certain ECs, which no longer applied post-*Citizens United*) from the EC disclosure provisions at 104.20(c)(8) and(9).¹⁵ I was not able to support granting the requested relief because, as stated earlier, I believe that the phrase “which was made for the purpose of furthering” ECs has been misinterpreted to limit disclosure, as discussed above.

¹³ See *Ctr. For Individual Freedom v. FEC*, 694 F.3d 108 (D.C. Cir. 2012). This litigation has a long and complex history. Rep. Christopher Van Hollen filed suit against the FEC in 2011, arguing that section 104.20(c)(9) should be struck down because the “purpose” requirement in the regulation violated the plain meaning of 52 U.S.C. § 30104(f) (formerly 2 U.S.C. § 434(f)). The district court granted summary judgment in favor of Van Hollen. The Commission did not appeal; however, two intervenors filed an appeal seeking reversal of the judgment. The D.C. Circuit subsequently reversed the judgment of the district court, finding that it erred in holding that Congress “spoke plainly” when it enacted 52 U.S.C. § 30104(f). After several related developments, the district court is now considering summary judgment motions concerning whether the regulation is entitled to appropriate deference and whether it survives arbitrary and capricious review (documents related to the litigation are available at http://www.fec.gov/law/litigation/van_hollen.shtml). Given the pending litigation and ongoing misinterpretation of the language of 104.20(c)(9), I believe it was premature, and possibly prejudicial, for the Commission to approve the disclosure rule today.

¹⁴ See Attachment D (“Statement of Commissioner Steven T. Walther [on] *Van Hollen v. FEC* and Judicial Option to Commence Rulemaking on Electioneering Communications Disclosure Regulations,” dated Oct. 4, 2012) (also available at http://www.fec.gov/members/walther/statements/Walther_Statement_on_Van_Hollen_10-4-12.pdf).

¹⁵ See “Petition for Rulemaking to Update 11 C.F.R. § 104.20(c)(8) and (c)(9)” filed by the Center for Individual Freedom, available at <http://sers.fec.gov/fosers>.

II. Conclusion

The negative impact of the Supreme Court’s decision – along with lower court decisions in the wake of *Citizens United* – was entirely predictable. During the 2012 election cycle, “outside groups” – political organizations, including corporations, that operate independently from candidates and their parties – spent over triple the amount they spent in 2008, exceeding \$1 billion.¹⁶ Although so-called “SuperPACs” (which may accept unlimited funds from corporations and labor organizations), like other political committees, must disclose their expenditures and receipts through regular campaign filings, *Citizens United* freed incorporated tax-exempt social welfare organizations to make large political expenditures while being subject to far fewer disclosure requirements than political committees. Negative advertisements costing hundreds of millions of dollars, with little or no public accountability as to their sources, have consequently inundated our federal political system as a direct result of the Supreme Court’s decision.¹⁷

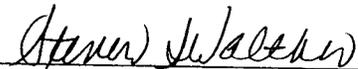
However, some solace can be taken from the fact that, although the Court in *Citizen United* gutted much of the FECA’s limits on corporations, the ruling did not affect the FECA’s ban on direct corporate contributions or the reporting and disclaimer requirements for IEs and ECs. In fact, all but one member of the Court upheld the reporting and disclaimer requirements for IEs and ECs in federal elections. The Court emphasized that “effective disclosure . . . enables the electorate to make informed decisions and give proper weight to different speakers and messages.”¹⁸

¹⁶ See <http://www.opensecrets.org/outsidespending/index.php>; <http://sunlightfoundation.com/elections2012>. Although *Citizens United* is frequently cited as paving the way for SuperPACs (also called Independent Expenditure Only PACs), their creation is more directly tied to *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), a decision handed down by the District of Columbia Circuit Court of Appeals just two months after the *Citizens United* decision. SuperPACs are political committees that only make expenditures independent of candidates, but make no direct contributions to candidates.

¹⁷ Over \$300 million was spent by “dark money” sources in 2012, and at least \$120 million has already been spent so far this election cycle, primarily on negative TV ads tied to races that could determine which political party controls the U.S. Senate. See, e.g., Robert Maguire, *Outside Groups, Dark Money Organizations Fuel 2014 Midterms*, OPENSECRETS BLOG (Sept. 4, 2014), <http://www.opensecrets.org/news/2014/09/outside-groups-dark-money-organizations-fuel-2014-midterms/>; Lee Drutman, *No, Less Disclosure Will Not Reduce Dark Money*, SUNLIGHT FOUND. BLOG (Jul. 17, 2014, 11:49 AM), <http://sunlightfoundation.com/blog/2014/07/17/no-less-disclosure-will-not-reduce-dark-money>; Robert Maguire, *How 2014 is Shaping Up to be the Darkest Money Election to Date*, OPENSECRETS BLOG (Apr. 30, 2014), <https://www.opensecrets.org/news/2014/04/how-2014-is-shaping-up-to-be-the-darkest-money-election-to-date/>; Joshua Fechter & David Saleh Rauf, *‘Dark Money’ Group Riles Up Attorney General Candidates*, HOUS. CHRON., May 24, 2014, at B2; Theodor Meyer, *IRS Delays New Rules for Dark Money Groups*, PROPUBLICA (May 23, 2014, 12:05 PM), <http://www.propublica.org/article/irs-pushes-back-new-rules-for-dark-money-groups>; Fredreka Schouten, *‘Dark Money’ Surges Ahead of Midterms: Certain Groups Spending Tops \$23M This Week*, USA TODAY, May 14, 2014, at 3A; Erika Franklin Fowler & Travis N. Ridout, *Negative Angry, and Ubiquitous: Political Advertising in 2012*, THE FORUM, Dec. 2012, at 59, available at <http://www.degruyter.com/view/j/for.2012.10.issue-4/forum-2013-0004/forum-2013-0004.xml> (“[f]ully 85% of ads sponsored by non-party organizations were purely negative, and another 10% were contrasting, leaving only 5% positive.”).

¹⁸ 130 S. Ct. at 916.

Although there was much in the final rules that I agreed with, I could not support a provision that is misread to negate a clear disclosure obligation. Accordingly, my vote against these rules is consistent with my position that, as a result of the *Citizens United* decision, the Commission should do its utmost to ensure the American public is provided with meaningful and timely information about *who* is spending money on political speech as well as *how much* is being spent.¹⁹



Steven T. Walther
Commissioner

¹⁹ There may be some overlap between disclosure proposals I have supported and campaign finance legislation being debated in Congress. For example, the most recent version of the DISCLOSE Act (“Democracy Is Strengthened by Casting Light on Spending in Elections Act of 2014,” S. 2516) which was introduced in the Senate on June 24, 2014, would, *inter alia*, establish additional disclosure requirements for corporations, labor organizations, superPACs and other entities. Although I applaud and encourage such efforts, I do not believe we need to wait for Congress to fill in the disclosure gaps that have resulted from the *Citizens United* decision, given that the proposals I have supported are firmly rooted in existing law.

Text of Commission Statement Issued on February 5, 2010

FEC Statement on the Supreme Court's Decision in *Citizens United v. FEC*

Washington – The Federal Election Commission today announced that, due to the Supreme Court's decision in *Citizens United v. FEC*, it will no longer enforce statutory and regulatory provisions prohibiting corporations and labor unions from making either independent expenditures or electioneering communications. The Commission also listed several actions it is taking to fully implement the *Citizens United* decision.

In *Citizens United v. FEC*, issued on January 21, 2010, the Supreme Court held that the prohibitions in the Federal Election Campaign Act (FECA) against corporate spending on independent expenditures or electioneering communications are unconstitutional. The Supreme Court upheld statutory provisions that require political ads to contain disclaimers and be reported to the Commission. Provisions addressed by the decision are described below.

- The Court struck down 2 U.S.C. 441b, which prohibits, in part, corporations and labor organizations from making electioneering communications and from making independent expenditures—communications to the general public that expressly advocate the election or defeat of clearly identified federal candidates.
- The Court upheld 2 U.S.C. 441d, which requires that political advertising consisting of independent expenditures or electioneering communications contain a disclaimer clearly stating who paid for such communication.
- The Court upheld 2 U.S.C. 434, which requires certain information about electioneering communications and independent expenditures, and the contributions received for such spending, to be disclosed to the Commission and to be made public.

The Commission is taking the following steps to conform to the Supreme Court's decision.

- The Commission will no longer enforce the statutory provisions or its regulations prohibiting corporations and labor organizations from making independent expenditures and electioneering communications.
- The Commission is reviewing all pending enforcement matters to determine which matters may be affected by the *Citizens United* decision and will no longer pursue claims involving violations of the invalidated provisions. In addition, the Commission will no longer pursue information requests or audit issues with respect to the invalidated provisions.
- The Commission is considering the effect of the *Citizens United* decision on its ongoing litigation.

Text of Commission Statement Issued on February 5, 2010

- The Commission intends to initiate a rulemaking to implement the *Citizens United* opinion. It is reviewing the regulations affected by the invalidated provisions, including but not necessarily limited to the following:
 1. 11 CFR 114.2(b)(2) and (3), which implement the FECA's prohibition on corporate and labor organization independent expenditures and electioneering communications;
 2. 11 CFR 114.4, which restricts the types of communications corporations and labor organizations may make to those not within their restricted class;
 3. 11 CFR 114.10, which permits certain qualified nonprofit corporations to use their treasury funds to make independent expenditures and electioneering communications under certain conditions;
 4. 11 CFR 114.14, which places restrictions on the use of corporate and labor union funds for electioneering communications; and
 5. 11 CFR 114.15, which the Commission adopted to implement the Supreme Court's decision in *Wisconsin Right to Life, Inc. v. FEC*.
- The Commission is also considering the effect of *Citizens United* on the ongoing Coordinated Communications rulemaking. 74 FR 53893 (Oct. 21, 2009). The Commission is issuing a [Supplemental Notice of Proposed Rulemaking](#) so that interested persons may submit comments regarding issues presented by *Citizens United*. The additional comment period will close on February 24, 2010. The Commission intends to hold a hearing on the Coordinated Communications rulemaking on March 2 and 3, 2010.
- Revisions to Commission reporting requirements, forms, instructions, and electronic software, may be required.

Corporations and labor organizations that intend to finance independent expenditures or electioneering communications should:

- Include disclaimers on their communications, consistent with FEC regulations at 11 CFR 110.11;
- Disclose independent expenditures on FEC Form 5, consistent with FEC regulations at 11 CFR 109.10; and
- Disclose electioneering communications on FEC Form 9, consistent with FEC regulations at 11 CFR 104.20.

The Commission notes that the prohibitions on corporations or labor organizations making contributions contained in 2 U.S.C. 441b remain in effect.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**Statement of Commissioner Steven T. Walther
Regarding the Petition for Rulemaking
to Update 11 C.F.R. § 104.20(c)(8) and (c)(9)
Filed by the Center for Individual Freedom**

March 7, 2013

I write to set forth my reasons why I was unable to support granting the relief requested in the “Petition for Rulemaking to Update 11 C.F.R. § 104.20(c)(8) and (c)(9)” filed by the Center for Individual Freedom (the “CFIF Petition,”) which came before the Commission for consideration at today’s Open Meeting.

On October 18, 2012, the Commission unanimously approved a Notice of Availability (“NOA”) regarding the CFIF Petition seeking what CFIF characterized as a “narrow and focused rulemaking to update 11 C.F.R. § 104.20(c) subsections (8) and (9),” which govern disclosure requirements for corporations and labor organizations that fund electioneering communications.¹ As discussed further below, I voted, together with my colleagues, to approve the NOA. Because publishing an NOA after the filing of such a petition for a rulemaking is not discretionary, the Commission exercised its ministerial duty to publish the request.²

The CFIF Petition was filed on October 5, 2012, one day after a deadlock vote of the Commissioners as to whether to commence a rulemaking on the Commission regulation at issue in the pending *Van Hollen* litigation³ (in which CFIF is also a party-in-intervention) over the regulation’s validity. I write (a) to discuss the reason for, and the impact of, the deadlocked vote on the *Van Hollen* litigation, (b) to provide background regarding the status of the *Van Hollen* litigation as I see it, and (c) to make clear that the relief sought by the CFIF Petition, in my opinion, does not address or implicate (at least to the extent in which the District Court in the *Van Hollen* litigation was possibly concerned) the issues that are central to the *Van Hollen* litigation.

¹ See Notice of Availability, Rulemaking Petition: Electioneering Communications Reporting, 77 Fed. Reg. 65332 (Oct. 26, 2012). Documents related to the Petition are available at www.fec.gov/fosers.

² The Commission’s regulations require publication of an NOA for any document that “qualifies as a petition.” See 11 C.F.R. Part 200.

³ *Van Hollen v. Federal Election Comm’n*, 851 F. Supp. 2d 69 (D.D.C. Mar. 30, 2012); stay denied by *Van Hollen v. Federal Election Comm’n*, 2012 WL 1758569 (D.C. Cir. May 14, 2012) and judgment reversed by *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. Sept. 18, 2012). Documents related to the litigation are available at www.fec.gov/law/litigation/van_hollen.shtml.

I. The NOA Vote

On September 20, 2012, the District Court in the *Van Hollen* litigation entered an order directing the Commission to advise the court whether the Commission was going to (a) proceed to conduct a rulemaking on the validity of 11 C.F.R. § 104.20(c)(9), or (b) defend the regulation's validity in the *Van Hollen* litigation. The Commission, on October 4, 2012, deadlocked on whether to initiate a rulemaking;⁴ the consequence of the deadlock was that, without further vote, according to Commission practice (a) the Commission would not be conducting a rulemaking and (b) the regulation would automatically continue to be defended, even though the defense might not be supported by more than three Commissioners.⁵

The very next day, CFIF filed the CFIF Petition with the Commission to initiate a “narrow and focused rulemaking.” On October 18, 2012, the Commission unanimously voted to issue the NOA – which it was required by law to do. The District Court in the *Van Hollen* litigation then issued a stay to remain in effect pending the outcome of the Commission's decision on the petition and any possible rulemaking.⁶

II. The *Van Hollen* Litigation Issues

A. The Purpose Behind Adoption of 11 C.F.R. § 104.20(c)(9)

As mentioned, section 104.20(c)(9) is currently being challenged in the pending *Van Hollen* litigation, in which, as mentioned, CFIF is a party. By way of background, the Bipartisan Campaign Reform Act (BCRA) – which amended the Federal Election Campaign Act of 1971 (FECA) – created a new term, electioneering communications (“ECs”), and defined ECs as any broadcast, cable or satellite communication that refers to a clearly identified candidate for federal office, is publicly distributed within certain

⁴ At the October 4, 2012, Commission meeting, then-Vice Chair Weintraub moved that the Commission (1) initiate a rulemaking to address the rules governing disclosure of electioneering communications by corporations and labor unions, (2) direct the General Counsel to inform the District Court that the Commission is pursuing this rulemaking as required by the Court's order of September 20, 2012, and (3) direct the Office of the General Counsel to prepare a draft notice of proposed rulemaking for the Commission's consideration. That motion failed by a vote of 3-3 with then-Vice Chair Weintraub and Commissioners Bauerly and Walther voting affirmatively for the motion. Then-Chair Hunter and Commissioners McGahn and Petersen dissented. Then-Chair Hunter then stated that since the motion failed, the Commission would proceed in defending the current regulation, which is the Commission's normal practice. See *Agenda Document No. 12-73*, Minutes of the October 4, 2012, Open Meeting of the Federal Election Commission, available at www.fec.gov/agenda/2012/mtgdoc_1273.pdf.

⁵ The Commission's Office of General Counsel informed the District Court that same day that the Commission “does not intend to pursue a rulemaking and that it will continue to defend 11 C.F.R. § 104.20(c)(9) before the Court.” See October 4, 2012, Status Report of Defendant Federal Election Commission, available at www.fec.gov/law/litigation/van_hollen_status.pdf.

⁶ See October 9, 2012, District Court Minute Order, available at www.fec.gov/law/litigation/van_hollen_minute_order_100912.pdf.

time periods before an election and is targeted to the relevant electorate.⁷ Under BCRA, every person who makes disbursements for an EC aggregating over \$10,000 per year must file a report with the Commission identifying, among other things, the person who made the disbursement.⁸ If the disbursement is paid out of a segregated account consisting of funds contributed by individuals directly to the account for ECs, then the report must disclose the names and addresses of all those who contributed an aggregate of \$1,000 or more *to that account* within a certain time period.⁹ If the disbursements were not paid out of 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.¹⁰

At the time Congress passed BCRA in 2002, BCRA prohibited all labor organizations and almost all corporations (except so-called “*MCFL* corporations”)¹¹ from making ECs, so Congress did not specify a particular disclosure regime for such communications. In 2007, however, in *FEC v. Wisconsin Right to Life (WRTL)*,¹² the Supreme Court determined that corporations and labor organizations could make certain types of ECs for the first time. In response to *WRTL*, the Commission promulgated a regulation, 11 C.F.R. § 104.20(c)(9), to specifically address disclosure by these corporations and labor organizations.¹³

Specifically, the Commission’s regulation requires corporations or labor organizations that make *WRTL*-permitted ECs to disclose the name and address of each person who made a donation aggregating \$1,000 or more to the corporation or labor organization, *which was made for the purpose of furthering electioneering communications*.¹⁴ In adopting the regulation, the Commission explained that “[a] corporation’s general treasury funds are often largely comprised of funds received from

⁷ See 2 U.S.C. § 434(f)(3).

⁸ See 2 U.S.C. § 434(f)(1), (2).

⁹ See 2 U.S.C. § 434(f)(2)(E) (emphasis added).

¹⁰ See 2 U.S.C. § 434(f)(2)(F) (emphasis added).

¹¹ In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (“*MCFL*”), the Supreme Court ruled that FECA’s prohibition on corporate expenditures is unconstitutional as applied to independent expenditures made by a narrowly defined type of nonprofit corporations that (1) are formed for the express purpose of promoting political ideas and cannot engage in business activities; (2) have no shareholders or other persons affiliated so as to have a claim on the corporation’s assets or earnings; and (3) are not established by a business corporation or labor organization and have a policy against accepting donations from such entities.

¹² 551 U.S. 449 (2007).

¹³ See Explanation and Justification for Final Rules on Electioneering Communications, 72 Fed. Reg. 72899 (Dec. 26, 2007) (“2007 E&J”), available at www.fec.gov/fosers.

¹⁴ 11 C.F.R. § 104.20(c)(9) (2007) (emphasis added).

investors such as shareholders who have acquired stock in the corporation and customers who have purchased the corporation's products or services, or in the case of a non-profit corporation, donations from persons who support the corporation's mission . . . [but] . . . do not necessarily support the corporation's electioneering communications."¹⁵ Accordingly, the decision by the Commission to require disclosure of only those persons whose donations were "made for the purpose of furthering electioneering communications" – was meant by the Commission only to exclude those donors who gave "for purposes *entirely unrelated* to the making of electioneering communications."¹⁶

B. The District Court Decision

In the pending *Van Hollen* litigation regarding section 104.20(c)(9), the District Court applied the so-called "*Chevron Step One*" analysis,¹⁷ holding that BCRA clearly requires every person who funds ECs to disclose all contributors, "and there are no terms limiting that requirement to call only for the names of those who transmitted funds accompanied by an express statement that the contribution was intended for the purpose" of making ECs.¹⁸ The District Court further stated that Congress did not delegate authority to the Commission to narrow BCRA's disclosure requirement through agency rulemaking.¹⁹ In response to the argument that *WRTL* and *Citizens United*²⁰ (which struck down all FECA prohibitions on independent expenditures and ECs by corporations and labor organizations) altered the reach of the statutory language, the District Court held that the plain language of the statute was broad enough to cover the new circumstances and did not render it ambiguous.²¹ The District Court stated that the Commission "cannot unilaterally decide to take on a quintessentially legislative function; if sound policy suggests that the statute needs tailoring in the wake of *WRTL* or *Citizens United*, it is up to Congress to do it."²² Because the statutory text, in the District Court's

¹⁵ *Id.*

¹⁶ *Id.* (emphasis added).

¹⁷ When a plaintiff challenges an agency action that interprets a statute the agency administers, the court must, *inter alia*, analyze the agency's interpretation of the statute by following the two-step procedure set forth in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The first step of the analysis ("*Chevron Step One*") is to determine whether Congress has directly spoken to the precise question at issue. If the court concludes that the statute is either silent or ambiguous with respect to the issue in question, the court then conducts a second step in the analysis ("*Chevron Step Two*") whereby it determines whether the interpretation proffered by the agency is based on a permissible construction of the statute.

¹⁸ 851 F. Supp. 2d at 80.

¹⁹ 851 F. Supp. 2d at 84, 89.

²⁰ *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876 (2010).

²¹ Certainly, if the Supreme Court in *Citizens United* left the statute uncertain in this regard, the Court could have made it clear in the opinion; instead the Court left the reading of the statute unimpaired, even in view of the impact of its decision.

²² 851 F. Supp. 2d at 89.

view, is “unambiguous,” the court determined that the judicial inquiry was complete, and that it “need not reach step two of the *Chevron* framework.”²³ The District Court therefore granted summary judgment to the plaintiff, Representative Chris Van Hollen, and against the FEC.

C. The Court of Appeals Remand

On appeal, however, the Court of Appeals for the District of Columbia Circuit rejected the District Court’s “*Chevron* Step One” analysis and the lower court’s conclusion that section 104.20(c)(9) could not be reconciled with the unambiguous text of 2 U.S.C. § 434(f).²⁴ The appellate court found that the District Court erred in holding that Congress spoke plainly in enacting 2 U.S.C. § 434(f). The appellate court concluded that 2 U.S.C. § 434(f) is “anything but clear, especially when viewed in the light of the Supreme Court’s decisions in [*Citizens United* and *WRTL*].”²⁵ Instead, it found that 2 U.S.C. § 434(f)(2)(F) could be construed to include a “purpose” requirement, since that subsection only applied to disbursements for the direct costs of producing and airing ECs. The appellate court also noted that there was no indication that Congress anticipated the circumstances at issue in this case. The appellate court found that it was “due to the complicated situation that confronted [the FEC in promulgating section 104.20(c)(9)] in 2007 and the absence of plain meaning in the statute that the FEC acted pursuant to its delegated authority . . . to fill ‘a gap’ in the statute The FEC’s promulgation of 11 C.F.R. § 104.20(c)(9) reflects an attempt by the Commissioners to provide regulatory guidance under the BCRA following the partial invalidation of the speech prohibition imposed on corporations and labor unions in the context of ‘electioneering communications.’”²⁶

The Court of Appeals stated that, since the FEC did not participate in the appeal, the appellate court did not fully understand the FEC’s position and would not “divine how the [FEC] would resolve the [many issues raised by this appeal].”²⁷ Instead, the appellate court vacated the District Court’s decision and remanded the case to the District Court with an order to refer the matter back to the FEC for a “prompt” decision on whether it intends to pursue a rulemaking or whether it will further defend the current regulation in District Court.²⁸

²³ 851 F. Supp. 2d at 89 (citation omitted).

²⁴ *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108, 110-11 (D.C. Cir. Sept. 18, 2012) (citation omitted).

²⁵ *Id.* at 110.

²⁶ *Id.* at 111 (citations omitted).

²⁷ *Id.* (citation omitted).

²⁸ *Id.* at 112.

III. The Issues Raised by the CFIF Petition and the Scope of the NOA

The limited changes sought in the CFIF Petition would not address or resolve the merits of the central issue of the pending *Van Hollen* litigation related to the regulation's fundamental shortcomings (as interpreted) regarding disclosure by corporations and labor organizations of their donors. In fact, were the Commission to make such a limited change, it could be read to imply that the remaining balance of the rule has some validity since the claimed major infirmity was not addressed. The core concern, as expressed by the District Court, regarding section 104.20(c)(9) is that the regulation appears to unduly reduce the obligation of corporations and labor organizations to disclose the names of those donors whose funds are used by corporations and labor organizations for ECs – effectively resulting in non-disclosure.²⁹ The source of this unanticipated consequence, however, is not an anachronistic cross-reference to 11 C.F.R. § 114.15, as has been suggested in the CFIF Petition. Rather, the consequence stems from the regulation's final clause – *which was made for the purpose of furthering electioneering communications* – ten words that have, unfortunately, been interpreted³⁰ to limit disclosure by corporations and labor organizations only to those donors who specifically earmark their donations for a given EC.³¹

The Commission promulgated sections 104.20(c)(9) and 114.15 in a single rulemaking prompted by the Supreme Court's decision in *WTRL*.³² Among other things, section 114.15 attempted to define the types of ECs that the Supreme Court's decision in *WTRL* permitted corporations and labor organizations to make. Section 104.20(c)(9)'s disclosure requirements by their terms apply only to communications permitted under section 114.15 precisely because those were the only type of ECs that could be funded by

²⁹ Prior to the 2008 election cycle, almost all individuals and entities making ECs disclosed their donors. In the 2008 cycle, fewer than half did so, and by the 2010 election cycle almost two thirds were *not* disclosing any donors. See Public Citizen, *Disclosure Eclipse* (Nov. 18, 2010), available at <http://www.citizen.org/documents/Eclipsed-Disclosure11182010.pdf>.

³⁰ See, e.g., MUR 6002 (Freedom's Watch, Inc.), Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn (Aug. 13, 2010), at 5; see also Julius Chen, *Electioneering Communications Start to Reemerge After D.C. Circuit's Van Hollen Ruling*, INSIDEPOLITICALLAW.COM, Oct. 1, 2012, available at www.insidepoliticallaw.com/2012/10/01/electioneering-communications-start-to-reemerge-after-d-c-circuits-van-hollen-ruling/.

³¹ The determination as to which donors should be disclosed cannot simply be left to speculation, feigned or otherwise, by the recipient of funds as *to the intent of each donor*. Rather, the recipient has actual knowledge of whose funds have, in fact, been *used* to fund an EC; additionally, the recipient already has incentives central to the relationship it maintains with its donors, and separate from FECA's reporting requirements, to keep an accurate accounting of how its donated funds are spent. Further, BCRA only requires disclosure of donations aggregating over \$1,000 and, at that level of funding, recipients are undoubtedly already motivated to keep a watchful eye over how such donations are being spent and whether that spending is consistent with a donor's wishes. Accordingly, the word "made" should be construed, in this context, to mean, and was intended, in my view, to have the same import as, the word "used."

³² 551 U.S. 449 (2007); see also 2007 E&J.

corporations and labor organizations at that time. In *Citizens United*, however, the Court struck down *all* prohibitions on ECs by corporations and labor organizations.³³ While removing the cross reference to section 114.15 in section 104.20(c)(9) is certainly something the Commission must consider in light of the Supreme Court’s decision in *Citizens United*, it is by no means the only thing that the Commission must consider – it is undoubtedly not even the most important thing to consider.³⁴

The far more important issue that must be addressed in any rulemaking related to section 104.20(c)(9) (and not sought to be resolved by the CFIF Petition) is the misinterpretation of those final ten words and the resulting limited disclosure that only applies to corporations and labor organizations. Whether the inclusion of this text in the regulation was beyond the Commission’s authority – either under *Chevron* Step One or Step Two – misses the broader point that these ten words should not nullify a clear disclosure obligation.³⁵ To not require the disclosure of the names of those donors whose funds are used by corporations and labor organizations for ECs is not only inconsistent with what Congress intended when it enacted the relevant provisions of the BCRA, inconsistent with what I believe was the clear and intent of the Commissioners who voted for the rule, but also cannot be reconciled with either the Supreme Court’s recent and resounding 8-1 endorsement in *Citizens United* of “effective disclosure,” which “enables the electorate to make informed decisions and give proper weight to different speakers and messages,” or with the Court’s admonition against rules that “distinguish[] among different speakers.”³⁶

³³ 130 S. Ct. at 913.

³⁴ See, e.g., Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, Agenda Document No. 11-33, June 9, 2011, at pp. 66-73 (proposing alternate revisions to sections 104.20(c)(8) and (c)(9)), available at www.fec.gov/agenda/2011/mtgdoc_1133.pdf. I express no opinion here on whether section 114.15 or any part thereof should be retained or revised for other purposes, a question posed in the Notice of Proposed Rulemaking that the Commission approved on December 15, 2011. See Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 76 Fed. Reg. 80803, 80814 (Dec. 27, 2011), available at www.fec.gov/fosers. Public comments were filed in response to the Notice of Proposed Rulemaking and, on March 7, 2012, the Commission heard testimony from five witnesses at a public hearing. As of today, this rulemaking remains pending. Documents related to the rulemaking are available at www.fec.gov/fosers.

³⁵ I, along with Chair Weintraub, voted for the rule. It was adopted before the three other Commissioners currently on the Commission joined the Commission. Had I anticipated the interpretation and implementation that has been given to that phraseology – in the aftermath of *Citizens United* – I surely would not have supported the adoption of the 2007 amendment to the 2003 regulation.

³⁶ 130 S. Ct. at 899, 914-16. If one were to assume that 104.20(c)(9) had never been adopted, and the court is confronted, after *Citizens United*, with the stark option of considering whether the clear words of the statute, which provides for disclosure, should survive and continue to require disclosure, or none at all; and in view of the clear and cogent call for transparency emanating from the 8-1 *Citizens United* decision, the court must balance that governmental interest against a policy of secrecy and no disclosure at all. Under such circumstances, when balancing those competing governmental interests (the public’s informational interest in transparency balanced against the burden of disclosure) in interpreting the statute, the conclusion should be in favor of transparency, not secrecy.

Because the CFIF Petition's "narrow and focused rulemaking" would ignore this paramount issue of providing the electorate with useful information, I am unable to support going forward with the rulemaking as proposed by CFIF. If the pending *Van Hollen* litigation results in a final order or decision providing essentially the same result or relief as the District Court in its initial decision, there may be very little else to consider; if not, then the remaining issues should be addressed in a composite rulemaking taking those remaining issues, and the issues raised in the CFIF Petition, if they also remain, into consideration. In the meantime, the CFIF Petition should be dismissed.

In summary, based upon (a) the inconsequential effect the rulemaking would have, (b) the fact that it does not implicate the merits of the *Van Hollen* litigation, (c) the chance that attempting such a small fix on a rule that has much bigger problem may lend credence to those who would argue that the rest of the regulation does not need fixing, (d) the chance of significant delays in the rulemaking that often occur, (e) the chance of further litigation arising out of the rulemaking itself, (f) the need to resolve all issues relating to the rule in a single rulemaking instead of on a piecemeal basis, and, finally, (g) the delay that proceeding on the rulemaking would cause to a needed final determination on the merits of the *Van Hollen* litigation, I could not support moving forward with the CFIF Petition at this time.

Accordingly, as a result of the Commission vote today, the District Court, once again, will be advised by the Office of General Counsel that the Commission will not be considering the CFIF Petition or initiating another rulemaking in the ascertainable future and will instead continue to defend the regulation despite the divided views of the Commissioners on what the outcome of the *Van Hollen* litigation should be on the merits. This result, in my view, is unfortunate.

3/7/13
Date

Steven T. Walther
Steven T. Walther
Commissioner



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 15, 2011

**Statement of Chair Cynthia L. Bauerly and Commissioner Steven T. Walther regarding
Notices of Proposed Rulemakings to Address *Citizens United***

Today, we voted to issue two draft notices of proposed rulemaking (“NPRMs”). One addresses certain regulatory restrictions on corporate and labor union activity that needed to be revised to be consistent with the Supreme Court decision in *Citizens United*.¹ The other would have addressed important questions surrounding disclosure of independent expenditures which, we believe, are necessarily implicated by the *Citizens United* decision.² While we are disappointed that the Commission has been unable to approve a comprehensive rulemaking to address all of the issues raised by the *Citizens United* decision, including disclosure and foreign nationals, we believe supporting both NPRMs was the appropriate and responsible thing to do.

On January 20 of this year, approximately one year after the Supreme Court’s decision in *Citizens United*, we voted to issue a notice of proposed rulemaking that represented a comprehensive effort to address the impact of the *Citizens United* decision on the Commission’s regulations.³ That NPRM included proposals to address our regulations governing corporate and labor organization activity, as well update our reporting requirements and consider possible amendments to our restrictions on foreign nationals made necessary by *Citizens United*. Our proposal failed to receive majority support, and we have since supported even more scaled back approaches in an effort to reach consensus with our colleagues. The NPRM adopted today addresses what might be called the bare minimum necessary to make our regulations consistent with *Citizens United*. Nonetheless, if the decision or the proposed changes to our regulations contained in this NPRM require additional changes to our regulations, we expect – and encourage – those submitting comments to make those arguments part of the record.

By issuing today’s NPRM, nearly two years after *Citizens United* was decided, we are finally beginning the process of developing revised rules in the areas that lie at the core of our political process. And though the proposals issued today may bring our regulations out of clear conflict with the *Citizens United* decision, addressing these important questions in this limited way will leave numerous aspects of our regulations unrevised and unexplored. We lose something important by taking such a narrow approach to this process. We remain convinced that supporting both NPRMs today was the right thing to do. But while necessary, today’s votes are not sufficient to effectively respond to such a hugely important decision.

¹ This rulemaking was initiated in response to a Petition for Rulemaking filed by the James Madison Center for Free Speech. See Agenda Document 11-74, available at http://www.fec.gov/agenda/2011/mtgdoc_1174.pdf.

² This draft NPRM was initiated in response to a Petition for Rulemaking from Representative Chris Van Hollen. See Agenda Document 11-73, available at http://www.fec.gov/agenda/2011/mtgdoc_1173.pdf.

³ Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, Draft A, Agenda Document 11-02, available at http://www.fec.gov/agenda/2011/mtgdoc_1102.pdf.



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