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* litigation[3] (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 interpreted[30] 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 *WRTL* 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] S*ee*, *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
Commissioner