



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**Statement of Commissioner Ellen L. Weintraub
On the Draft Notices of Proposed Rulemakings on Independent Expenditures
and Electioneering Communications by Corporations and Labor Organizations
June 17, 2011**

This week, the Commission made a little bit of progress towards addressing the important issues presented by the Supreme Court's opinion in *Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876 (2010) ("*Citizens United*" or "*CU*"). In approving two notices of availability, the Commission at least put out for public comment the petitions for rulemakings of two members of the public in the wake of *Citizens United*.¹ But this is not enough. In previous years, when laws were changed and important cases decided, the Commission was able to respond within a matter of months.² Yet here we sit, almost eighteen months after *Citizens United* was announced, mired in gridlock over whether certain aspects of the case may be addressed in the rulemaking, over whether the Commission is willing to hear from the public on a part of the case that my colleagues would prefer to pretend is not there. Regrettably, we cannot even agree on whether certain questions may be posed, let alone reach the stage to consider the substance of any final rule. Disclosure, which I have always considered one of the core missions of the FEC,³ has become, like the villain in a children's novel, the topic that may not be named.

¹ Notice of Availability - Petition for Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations submitted by the James Madison Center for Free Speech, Agenda Document 11-35, available at http://www.fec.gov/agenda/2011/mtgdoc_1135.pdf; Notice of Availability - Petition for Rulemaking on Independent Expenditure Reporting filed by Representative Chris Van Hollen, Agenda Document 11-36, available at http://www.fec.gov/agenda/2011/mtgdoc_1136.pdf.

² See, e.g., *McConnell v. FEC*, 540 U.S. 93 (decided Dec. 10, 2003), Notice of Proposed Rulemaking on Coordinated and Independent Expenditures by Party Committees, 69 FR 39373 (approved by the Commission on June 24, 2004, less than 7 months after *McConnell*), Final Rules on Coordinated and Independent Expenditures by Party Committees, 69 FR 63919 (approved by the Commission on October 28, 2004, less than 11 months after *McConnell*); *Wisconsin Right to Life, Inc. v. FEC* ("*WRTL*"), 551 U.S. 449 (decided June 25, 2007), Notice of Proposed Rulemaking on Electioneering Communications, 72 FR 50261 (approved by the Commission on August 23, 2007, less than 2 months after *WRTL*), Final Rules on Electioneering Communications, 72 FR 72899 (approved by the Commission on Dec. 14, 2007, less than 6 months after *WRTL*); *Shays v. FEC* (*Shays I*), 414 F.3d 76 (decided July 15, 2005), Notice of Proposed Rulemaking on Coordinated Communications, 70 FR 73946 (approved by the Commission on Dec. 8, 2005, less than 5 months after *Shays I*), Final Rules on Coordinated Communications, 71 FR 33190 (approved by the Commission on June 2, 2006, less than 11 months after *Shays I*).

³ See, e.g., *Federal Election Commission Strategic Plan FY 2008-2013*, available at <http://www.fec.gov/pages/budget/fy2009/FECStrategicPlan2008-2013.pdf>, at 8 ("Providing a transparent system that timely and accurately discloses the sources and amounts of funds used to finance federal elections is one of the FEC's most significant responsibilities.").

There is no debate over the fact that five justices agreed to strike down the application of the statute to general treasury funds of corporations in *Citizens United*. However, eight justices held:

With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are “‘in the pocket’ of so-called moneyed interests.” 540 U. S., at 259 (opinion of SCALIA, J.); see *MCFL*, *supra*, at 261. The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.⁴

Id. at 916. Ensuring full compliance with the Court’s decision cannot be achieved by cherry-picking those portions with which we agree and ignoring the rest.

To appreciate the level of absurdity to which we have sunk requires a little history. In enacting new campaign finance laws in 2002, Congress prohibited corporations and labor organizations from making electioneering communications. 2 U.S.C. 441b(b)(2).⁵ In 2007, the Supreme Court limited that statutory prohibition to electioneering communications that are the “functional equivalent” of express advocacy, meaning they are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Wisconsin Right to Life, Inc. v. FEC* (“*WRTL*”), 551 U.S. 449, 469-70 (2007). In response, the Commission promulgated regulations (exactly six months after the decision), including 11 C.F.R. 114.15, which specified that corporations and labor organizations could make electioneering communications that are not the functional equivalent of express advocacy. As part of the same rulemaking, the Commission addressed the concomitant disclosure requirements of corporations and labor organizations, by amending 11 C.F.R. 104.20. Ironically, unlike *CU*, *WRTL* did not contain any discussion of disclosure, and some at the time thought we should exclude that topic

⁴ Some of our colleagues expressed the view that the Supreme Court could not have meant that the sources of funding need to be disclosed. However, disclosure of the funding of speech was clearly before the Court and what the Court was considering. See, e.g., *Citizens United*, 130 S.Ct. at 915 (“Even if it disclosed the funding sources for the ads, *Citizens United* says, the information would not help viewers make informed choices in the political marketplace. This is similar to the argument rejected above with respect to disclaimers. Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election.”). Other courts reading *Citizens United* have not had trouble determining that the Court was considering the sources of payment in its disclosure analysis. See, e.g., *Real Truth About Obama, Inc. v. FEC*, Memorandum Opinion, June 16, 2011, at 18-19 (“The Supreme Court has never backed off its judgment that disclosure requirements effectuate the legitimate government interest of providing the electorate with information about the sources of campaign-related spending, which in turn allows voters to make informed choices. See *Citizens United*, 130 S.Ct. at 913-14; *McConnell*, 540 U.S. at 197.”).

⁵ Congress defined an electioneering communication as any broadcast, cable, or satellite communication that refers to a clearly identified candidate for Federal office within 60 days before a general election or 30 days before a primary election and is targeted to the relevant electorate. 2 U.S.C. 434(f)(3).

from consideration in that rulemaking. Then, however, it was important to Republican commissioners to include the disclosure ramifications of the decision in the NPRM, and, back in those more collegial days, Democratic commissioners (including me) did not attempt to prevent them from doing so.

In the course of that rulemaking, the Commission inserted a sentence fragment in one provision of the regulations (11 C.F.R. 104.20(c)(8)) and added a new paragraph (9) to the same regulation, limiting donor disclosure by corporations and labor organizations to donations “made for the purpose of furthering electioneering communications.” 11 C.F.R. 104.20(c)(9). Both of these changes were specifically premised on the new regulation at 11 C.F.R. 114.15. My colleagues now accept that at least part of these 2007 disclosure amendments must be deleted. I (along with Chair Bauerly and Commissioner Walther) would like to explore whether these amendments should be deleted in their entirety.⁶

Section 104.20(c) sets forth the content of electioneering communications reports. Paragraph (c)(8) specifically describes how to report disbursements *not* made from a segregated bank account. The 2007 amendments to this regulation added a phrase to 11 C.F.R. 104.20(c)(8), exempting disbursements “made by a corporation or labor organization pursuant to 11 CFR 114.15.” Paragraph (c)(9) was added to explain how such corporate and labor organization disbursements should be reported. The Commission explained: “This modification clarifies that the preexisting reporting requirements that apply to individuals, QNCs, and unincorporated organizations making ECs do not apply to corporations and organizations making ECs permissible under new section 114.15.”⁷ In other words, some independent speakers have different reporting obligations than others.

So what we are at loggerheads about comes down to this: Now that we all agree that the underpinnings of the *WRTL* rulemaking have been knocked out by *CU*, are we going to repeal all of that rulemaking or just most of it?⁸ With respect to 104.20(c)(8), the question becomes even sillier. All agree that that provision must be amended, but my Republican colleagues have

⁶ Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, Agenda Document 11-33, available at http://www.fec.gov/agenda/2011/mtgdoc_1133.pdf, at 73-74.

⁷ *Electioneering Communications*, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007).

⁸ My colleagues persist in mischaracterizing my position as an attempt to enact the DISCLOSE Act through regulation. That makes for a good sound bite, but it simply is not true. The DISCLOSE Act contained many new and interesting ideas, such as requiring a company’s CEO to appear in ads paid for by their companies, banning spending in political campaigns by companies with more than \$10 million in government contracts and companies controlled by foreign owners, and expanding the relevant time windows for electioneering communications and coordination. None of those ideas were contained in the Democratic rulemaking proposal in January, nor were they contained in our proposal this week. The DISCLOSE Act did reiterate certain disclosure provisions that had been enacted in BCRA, in response to Commission interpretations of those provisions. To the extent that both the DISCLOSE Act and the rulemaking proposals that I have supported are based on *current* provisions of the FECA, there may be some overlap. But regulations must be based on and supported by existing law. To the extent anyone believes that any of my proposals are not, that is a topic that can be fully explored through the public comment that I am seeking, prior to the adoption of any final regulations. My concern with disclosure issues is no recent whim, but a reflection of a career spent interpreting, administering, and enforcing government disclosure laws and advocating for greater government and political transparency.

already decided to delete only the words “pursuant to 11 C.F.R. 114.15,” and refuse to entertain or ask questions about any alternative proposal.⁹ By contrast, the Democratic alternative would ask for public comment on whether the rest of the phrase that was adopted at the same time should also be deleted. In effect, Commissioners cannot agree to ask the public to comment on whether three words have become superfluous or thirteen. My colleagues wish to address part of a sentence but declare the rest of the same sentence off limits. I cannot solicit public suggestions on whether any other alternative exists to effectuate the Court’s decision. They appear to believe that three unelected commissioners should make that decision without any debate or public input. But such a result runs counter to the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

I am puzzled as to how we can justify, in attempting to comply with a Supreme Court decision proclaiming that some speakers may not be favored over others, *id.* at 899, doing exactly that, favoring corporations and labor organizations over all other political speakers by granting them *carte blanche* to speak without the corresponding full disclosure. I also cannot see how such a result would implement a decision that resoundingly upheld disclosure, specifically in the context of disclosure of corporate speech: “Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are ‘in the pocket’ of so-called moneyed interests.” *Id.* at 916.

I am willing to be educated on these points. If we asked the questions, I am sure we would get comments expressing differing points of view. But so far, the only explanation that I have heard from my colleagues for not posing these important questions is that it would complicate the rulemaking. I suppose that is true: allowing debate on and considering alternative points of view is certainly more complicated than rigidly adhering to a party line that permits only one point of view and arrogates to three commissioners the authority to make decisions that close off all debate. However, that is not how our open government laws are supposed to work. I have always thought that the rulemaking process entailed asking questions and seeking public comment first, and making decisions about the final rule only after being so informed. I often find that my initial impressions of an issue are challenged by comments from the public and evolve through debate at public hearings. I invite my colleagues to join me in that exercise with equally open minds.

There are many issues that require Commission consideration in the rulemaking context. That consideration should be fully informed by public comment, particularly by those who are trying to comply with the law. We all agree that the Commission is bound to comply with judicial decisions.¹⁰ We cannot agree, apparently, that other people’s opinions are permitted to

⁹ Draft Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations (Draft B), Agenda Document 11-33-A, available at http://www.fec.gov/agenda/2011/mtgdoc_1133a.pdf, at 16 (“The Commission intends to remove the references to 11 CFR 114.15 in paragraphs (c)(8) and (c)(9) to reflect that corporations and labor organizations may now make electioneering communications that contain express advocacy or its functional equivalent.”).

¹⁰ My colleagues appear to believe that their intuition about how judges will rule is infallible, and that their deregulatory views will always be adopted by courts. But in my time on the Commission, I have seen some courts

inform that process in a meaningful way. I would like to invite fulsome public comment on these weighty issues because the “right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it.” *Citizens United*, 130 S.Ct. at 898.

order the FEC to issue more robust regulations and others less. As this week demonstrates, we win some, we lose some, sometimes the deregulatory view is endorsed by courts and sometimes not. None of us should assume we can accurately predict the result in either instance. See *Carey v. FEC*, No. 11-259 (RMC) (D.D.C. June 14, 2011); *Real Truth About Obama, Inc. v. FEC*, No. 08-483 (E.D. Va June 16, 2011).