AGENDA DOCUMENT NO. 11-36

FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM

For the Meeting of 6-15-11

June 13, 2011

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey pch
Acting General Counsel

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SUBJECT: Notice of Availability – Petition for Rulemaking on Independent Expenditure Reporting filed by Representative Chris Van Hollen

On April 21, 2011, the Commission received a Petition for Rulemaking ("Petition") from Representative Chris Van Hollen. The Petition asks the Commission to revise and amend its regulations regarding the reporting of independent expenditures by persons other than political committees. *See* Attachment 1.

The Office of General Counsel has examined the Petition and determined that it meets the requirements of 11 CFR 200.2(b). Therefore, we have drafted the attached Notice of Availability ("Notice") seeking comment on whether the Commission should initiate a rulemaking on the proposal in the Petition. *See* Attachment 2. The Notice will be published in the *Federal Register* pursuant to 11 CFR 200.3(a)(1).

In keeping with the Commission's usual procedure, the Notice does not address the merits of the Petition. Instead, it states that consideration of the merits will be deferred until the close of the comment period.

The Office of General Counsel requests that this draft be placed on the agenda for the June 15, 2011, open meeting.

Attachments

"Donald Simon"
<DSimon@SONOSKY.COM>

04/21/2011 10:06 AM

To <chughey@fec.gov>
cc <rsmith@fec.gov>, <secretary@fec.gov>
bcc
Subject Petition for Rulemaking

Mr. Hughey – Pursuant to 11 CFR 200.2(a), please find attached for filing on behalf of Representative Chris Van Hollen a Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures.

Thank you.

Don Simon

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Van Hollen -- FEC petition re disclosure -- FINAL (April, 2011).PDF

Before the Federal Election Commission

Petition for Rulemaking
To Revise and Amend Regulations Relating to Disclosure of Independent Expenditures

Pursuant to 11 C.F.R. § 200.1 *et seq.*, Representative Chris Van Hollen hereby petitions the Federal Election Commission to conduct a rulemaking to revise and amend 11 C.F.R. § 109.10(e)(1)(vi), the regulation relating to disclosure of donations made to persons, including corporations and labor organizations, which make independent expenditures, in order to conform the regulation with the law. In support of this request, petitioner states:

1. Following the Supreme Court's decision in *Citizens United v. FEC,* 130 S.Ct. 876 (2010), corporations and labor organizations may now use their treasury funds to make "independent expenditures." 2 U.S.C. § 434(17). Such expenditures are subject to the disclosure requirements of the Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act (BCRA), which apply to independent expenditures made by any "person." 2 U.S.C. § 434(c).

2. Under 2 U.S.C. §434(c), every person (other than a political committee) who makes independent expenditures in excess of $250 during a calendar year "shall file a statement containing the information required under subsection (b)(3)(A) of this section for all contributions received by such person." 2 U.S.C. § 434(c)(1). Subsection (b)(3)(A), in turn, requires disclosure of "the identification of each person (other than a political committee) who

makes a contribution to the reporting committee during the reporting period" in excess of $200 within the calendar year. 2 U.S.C. § 434(b)(3)(A).

3. In a separate provision, § 434(c)(2)(C) requires every person who makes independent expenditures in excess of $250 during the calendar year to disclose "the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure."

4. Thus, corporations and labor organizations that make independent expenditures are subject to two overlapping contribution disclosure requirements in § 434(c). Subsection 434(c)(1) requires them to disclose the identity of "each. . . person . . .who makes a contribution" to them of more than $200, 2 U.S.C. § 434(b)(3)(A); *see id.* § 434(c)(1) (requiring disclosure of information set out in subsection (b)(3)(A)), and subsection (c)(2) requires them to disclose the identity of "each person who made a contribution in excess of $200 . . . for the purpose of furthering an independent expenditure." 2 U.S.C. § 434(c)(2)(C).

5. The Commission's regulation implementing these disclosure requirements is codified at 11 C.F.R. § 109.10. That regulation provides that every person that is not a political committee and that makes independent expenditures aggregating more than $250 with respect to a given election in a calendar year shall file a disclosure report "containing the information required by paragraph (e)." 11 C.F.R. § 109.10(b). Subparagraph (e) provides that the disclosure report must include: "The identification of each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the reported independent expenditure." 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

6. The regulation is manifestly inconsistent with the statute. Whereas the statute requires the disclosure of "each...person...who makes a contribution" of more than $200 to the person making the independent expenditures, 2 U.S.C. § 434(b)(3)(A); *see id.* § 434(c)(1), the regulation requires disclosure only of those contributors who made a contribution "for the purpose of furthering the reported independent expenditure." 11 C.F.R. § 109.10(e)(1)(vi). Thus, the regulation requires far less disclosure than the statute requires. Whereas the statute requires disclosure of all contributors of more than $200 to the person making independent expenditures, the regulation requires disclosure only of those contributors who state a specific intent to fund a specific ("the reported") independent expenditure. Conversely, under the regulation, all contributions to the person making independent expenditures that were not given for the *specific purpose of furthering the specific reported independent expenditure* are not required to be disclosed. This is in direct contradiction to the language and purpose of the statute.

7. Subsection (c)(2) of § 434 also mandates more disclosure than the regulation requires. The statute requires "identification of each person who made a contribution in excess of $200 ... for the purpose of furthering an independent expenditure." 2 U.S.C. § 434(c)(2)(C) (emphasis added). The indefinite article "an" preceding the term "independent expenditure" in subsection (c)(2)(C) is significant and should be given effect: it requires disclosure of all persons who made contributions for the purpose of furthering independent expenditures in general. The indefinite "an" means that the person making the contribution need not have a purpose to further any particular independent expenditure. The regulation, however, requires disclosure only of those persons who made contributions "for the purpose of furthering the reported independent expenditure." 11 C.F.R. § 109.10(e)(1)(vi). The insertion of the definite article "the" in the

regulation radically narrows the scope of the § 434(c)(2)(C) disclosure requirement. A purpose to further "an" independent expenditure encompasses any expenditure, whereas a purpose to further "the" independent expenditure encompasses only one. In addition, the statute does not connect the "contribution" to the "reported" expenditure, and accordingly does not condition disclosure on intent to further the particular independent expenditure that is the subject of the report.

8. Under present-day 11 C.F.R. § 109.10(e)(1)(vi), even if a contributor gave money to a person making independent expenditures with knowledge that the contributed funds would be used for independent expenditures, and specifically intended that the funds be used for that purpose, the contribution would still not be subject to disclosure under the regulation unless the contributor intended that the funds be earmarked and used for a specific independent expenditure. This ineffectual disclosure regime is contrary to the language of the statute, which requires disclosure of the contribution if it was made for the purpose of furthering an independent expenditure, even if it was not made for the purpose of furthering any specific independent expenditure. The regulation also contradicts the clear purpose of the statute, which is to obtain disclosure of the identity of all donors, subject to a threshold, whose donations are being used to fund independent expenditures.

9. The Commission's regulation is thus contrary to the language of the statute and frustrates Congress's intent to require disclosure of the sources of funds used by persons making independent expenditures. The Commission's regulation permits a corporation or labor organization that makes independent expenditures to avoid disclosing its contributors—even contributors who gave money specifically for the purpose of furthering the corporation's or labor organization's independent expenditures. The regulation enables a corporation or labor

organization to take the position that the because persons who made contributions to it did not express a specific intent to further the specific independent expenditure that is being reported, no disclosure of such persons is required. As a practical matter, the regulation enables corporations and labor unions that do not wish to abide by Congress's disclosure requirements to evade them entirely, without fear of sanction.

10. Not surprisingly, as a result of the regulation, the public record reflects little or no disclosure of the numerous contributors to non-profit corporations that made substantial independent expenditures in the 2010 congressional races. According to information on the website of the Center for Responsive Politics, the following section 501(c) corporations made independent expenditures in the 2010 election and disclosed none of their contributors:

501(c) Corporation	Amount Spent on Independent Expenditures in 2010 Elections	Disclosure of Contributors Funding Independent Expenditures in 2010
Crossroads GPS	$16 Million	None
American Future Fund	$7.4 Million	None
60 Plus Association	$6.7 Million	None
American Action Network	$5.6 Million	None
Americans for Job Security	$4.4 Million	None
Americans for Tax Reform	$4.1 Million	None
Revere America	$2.5 Million	None

http://www.opensecrets.org/outsidespending/summphp?cycle=2010&disp=O&type=I&chrt=D.

The CRP website lists an additional twenty-four § 501(c) corporations that made independent expenditures in the 2010 congressional elections, and disclosed none of their contributors. *Id.* In addition, the CRP website lists the League of Conservation Voters as a section 527 organization that spent $3.9 million on independent expenditures in the 2010 elections and disclosed none of its contributors.

11. This wholesale and widespread absence of donor disclosure by groups making independent expenditures to influence the 2010 congressional elections could not possibly be

what Congress intended when it passed the statutory disclosure provisions. This data only serves to make crystal clear that the current regulation is contrary to law and must be revised to carry out the purpose, meaning and language of the statute.

12. Although Section 109.10 was promulgated in its current form in 2003, 68 Fed.Reg. 404 *et seq.* (Jan. 3, 2003), the insufficiency of the current regulation has been heightened by the *Citizens United* decision. Prior to *Citizens United*, the bulk of independent spending was done by political committees, including party committees, which are required to disclose all of their donors of more than $200 to the FEC, or by § 527 groups, which are required to disclose all of their donors of more than $200 to the IRS, or by individual spenders, for whom the donor disclosure issue is largely inapplicable. Thus, prior to *Citizens United,* there generally was comprehensive disclosure of donors to groups making independent expenditures. Post-*Citizens United,* however, corporations, including non-profit corporations, and labor organizations are now able to use their treasury funds to make independent expenditures and to contribute funds to other corporations that make independent expenditures. This has created a new universe of independent spenders who can raise and spend contributions from other persons (including from corporations and labor organizations) to finance their independent expenditures. And that development has in turn highlighted the insufficiency and illegality of the Commission's existing regulation on disclosure of contributors to corporations and labor organizations that make independent expenditures.

13. After *Citizens United*, the Commission's existing regulation enables corporations or labor organizations to use front groups with nondescript and unrevealing names to make independent expenditures and thereby to serve as vehicles to mask the identity of those who are the true sources of funds for spending to influence the outcome of federal elections. Section

501(c) corporations, which are not otherwise subject to any obligation to disclose their donors, are particularly well suited to serve this purpose. The fact that so many § 501(c) corporations made substantial independent expenditures in the 2010 election cycle while so few of them disclosed their donors demonstrates that they are being used to play precisely this role as vehicles to hide the identity of those funding independent expenditures. They can do so only because the FEC's unlawful disclosure regulation facilitates easy circumvention of the overlapping statutory requirements that any person making independent expenditures must disclose "each. . . person . . . who makes a contribution" in excess of $200, 2 U.S.C. § 434(b)(3)(A), and "each person who made a contribution" in excess of $200 ". . .which was made for the purpose of furthering an independent expenditure." 2 U.S.C. § 434(c)(2)(C). The statute does not permit § 501(c) non-profit corporations that make independent expenditures to hide their contributors who are funding their expenditures. The Commission's existing regulation, however, permits precisely this kind of secret funding of independent expenditures by hidden donors, in direct contradiction to the purpose and language of the statutory disclosure provisions.

14. The *Citizens United* decision itself stresses the importance of disclosure of contributors to corporations making campaign-related expenditures. After striking down the ban on corporate expenditures in federal campaigns, the Court strongly reaffirmed the constitutionality of and need for laws that require disclosure of corporate spending to influence federal elections. The Court in *Citizens United* – by an 8 to 1 majority – rejected the argument that disclosure requirements "chill" the exercise of First Amendment rights. Disclosure requirements, the Court said, "impose no ceiling on campaign related activities," and "do not prevent anyone from speaking." 130 S.Ct. at 914. The Court held that requiring the disclosure

of campaign-related expenditures serves an important governmental interest in "provid[ing] the electorate with information about the sources of election-related spending." *Id.* The Court – including four of the five Justices who voted to strike down the ban on corporate spending – recognized that "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." *Id.* at 916. The Court further stated, "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." In short, the Court said that "the public has an interest in knowing who is speaking about a candidate shortly before an election." *Id.* at 915.

15. The Commission should amend 11 C.F.R. § 109.10(e)(1) by striking existing subparagraph (vi) and replacing it with the following text:

> (vi) The identification of each person who made a contribution during the calendar year to the person filing such report, whose contributions have an aggregate amount or value in excess of $200 within the calendar year, or in any lesser amount if the person filing such report should so elect, together with the date and the amount of any such contribution; and
>
> (vii) The identification of each person who made a contribution during the reporting period in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering an independent expenditure.[1]

16. Accordingly, petitioner requests that the Commission promptly publish a Notice of Availability of this petition in the Federal Register, 11 C.F.R. § 200.3(a)(1), and thereafter

[1] This proposal is the same as that set forth in Agenda Document No. 11-02 (Jan. 18, 2011).

ATTACHMENT 1 OF 2

initiate a rulemaking to consider promulgation of the proposed regulation set forth above. *Id.* § 200.4(a).

17. Because this matter is of urgent public importance, petitioner requests the Commission to conduct this rulemaking on an expedited basis, so that a sufficient and lawful regulation can be in place prior to the 2012 elections so that citizens will receive the basic campaign finance information that they are entitled to have by law.

Respectfully submitted,

/s/ Fred Wertheimer

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Counsel for Rep. Chris Van Hollen,
Petitioner

April 21, 2011

ATTACHMENT 1 OF 2

FEDERAL ELECTION COMMISSION

11 CFR Part 109

[NOTICE 2011 - XX]

Rulemaking Petition: Independent Expenditure Reporting

AGENCY: Federal Election Commission

ACTION: Rulemaking petition: Notice of Availability

SUMMARY: On April 21, 2011, the Commission received a Petition for Rulemaking from Representative Chris Van Hollen. The Petition urges the Commission to revise and amend the regulations at 11 CFR 109.10(e)(1)(vi) regarding the reporting of independent expenditures by persons other than political committees. The Petition is available for inspection in the Commission's Public Records Office, on its website, http://www.fec.gov/fosers/, and through its Faxline service.

DATES: Statements in support of or in opposition to the Petition must be submitted on or before [insert date 60 days after the date of publication in the Federal Register].

ADDRESSES: All comments must be in writing. Comments may be submitted electronically via the Commission's website at http://www.fec.gov/fosers/. Commenters are encouraged to submit comments electronically to ensure timely receipt and consideration. Alternatively, comments may be submitted in paper form. Paper comments must be sent to the Federal

Election Commission, Attn.: Robert M. Knop, Assistant General Counsel, 999 E Street, NW., Washington, D.C. 20463. All comments must include the full name and postal service address of a commenter, and of each commenter if filed jointly, or they will not be considered. The Commission will post comments on its website at the conclusion of the comment period.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Ms. Cheryl A. F. Hemsley, Attorney, 999 E Street, NW., Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION:

The Federal Election Commission ("Commission") has received a Petition for Rulemaking from United States Representative Chris Van Hollen. The petitioner asks that the Commission revise and amend 11 CFR 109.10(e)(1)(vi) "relating to disclosure of donations made to persons [other than political committees], including corporations and labor organizations, which make independent expenditures, in order to conform the regulation with the law." The Commission seeks comments on the petition.

Copies of the Petition for Rulemaking are available for public inspection at the Commission's Public Records Office, 999 E Street, NW., Washington, D.C. 20463, Monday through Friday between the hours of 9 a.m. and 5 p.m., and on the Commission's website, http://www.fec.gov/fosers/. Interested persons may also obtain a

copy of the Petition by dialing the Commission's Faxline service at (202) 501-3413 and following its instructions, at any time of the day and week. Request document # 271.

Consideration of the merits of the Petition will be deferred until the close of the comment period. If the Commission decides that the Petition has merit, it may begin a rulemaking proceeding. Any subsequent action taken by the Commission will be announced in the Federal Register.

Cynthia L. Bauerly
Chair
Federal Election Commission

DATED: _____
BILLING CODE: 6715-01-U

ATTACHMENT 2 OF 2