FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Statement of Caroline C. Hunter
Vice Chair, Federal Election Commission

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INTRODUCTION

Chairman Harper, Ranking Member Gonzalez, and Members of the Subcommittee: Thank you for inviting me here today to speak with you about the Federal Election Commission. Since members of the Commission last appeared before Congress several years ago, there have been significant changes in campaign finance law. Courts at all levels have stricken down laws regulating political speech, most notably in the landmark *Citizens United* Supreme Court decision.[1] Accordingly, I would like to use this opportunity to supplement the agency's joint testimony by updating the Subcommittee on the FEC's efforts to comply with *Citizens United*, as well as other significant rulings. Additionally, I would like to share some updates on the new processes and procedures we have implemented at the Commission in recent years.

I. FEC POLICY IN LIGHT OF RECENT LEGAL DEVELOPMENTS

A. *Citizens United* and Corporate and Labor Organization Activity

In *Citizens United*, the Supreme Court struck down the Federal Election Campaign Act's ("FECA") prohibition on corporations making independent expenditures ("IEs") and electioneering communications ("ECs").[2] In response to the Court's decision, the FEC released a statement in February 2010 confirming it would no longer enforce the statutory provisions and the agency's regulations prohibiting IEs and ECs by corporations and labor organizations.[3] The FEC also announced it intended to initiate a rulemaking to address various other regulatory provisions implicated by *Citizens United*.

At two FEC open meetings on January 20 and June 15 this year, the Commission considered alternative draft Notices of Proposed Rulemaking. Generally, these drafts, consistent with the FEC's public statement last year, proposed removing the regulations prohibiting corporate and labor organization IEs and ECs. In addition, the drafts asked whether the agency should remove the prohibition against all corporate and labor organization expenditures

[1] *Citizens United v. FEC*, 130 S.Ct. 876 (2010).
[2] *Id.*
[3] "FEC Statement on the Supreme Court's Decision in Citizens United v. FEC," Federal Election Commission, Feb. 5, 2010, *available at* http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml.

(including, for example, voter registration and get-out-the-vote activities) – so long as they are not coordinated with any candidate or political party – as opposed to removing only the specific prohibitions on IEs and ECs.[4] The drafts also asked about certain other provisions of the FEC's so-called "corporate facilitation" regulations. I regret we have yet to remove the regulations related to the statutory provisions stricken by the Supreme Court; however, I remain hopeful there may yet be agreement to initiate a formal rulemaking in the near future. Pending a rulemaking, the public may continue to rely on the Commission's public statement from last year as well as the agency's advisory opinion process to obtain guidance on specific questions that may arise.

B. *EMILY's List*, *SpeechNow*, and Independent Political Spending

In 2009, the D.C. Circuit Court of Appeals invalidated the FEC's regulations requiring entities such as EMILY's List, which engaged in both independent expenditures and direct contributions to candidates, to split their administrative expenses evenly between their direct contributions accounts (which are subject to the federal source prohibitions and amount limitations) and their expenditures accounts.[5] In effect, to the extent such organizations engaged in more independent political activities than they did in making direct contributions, the invalidated rule required such organizations to allocate a portion of their federally regulated funds to subsidize the administrative costs for their independent spending. Notably, the D.C. Circuit held that "non-profit entities are entitled to make their expenditures – such as advertisements, get-out-the-vote efforts, and voter registration drives – out of a soft-money or general treasury account that is not subject to source and amount limits."[6]

Following *Citizens United*, the D.C. Circuit expanded on its *EMILY's List* ruling, holding in *SpeechNow* that the FECA's source prohibitions and amount limitations on contributions to political committees were unconstitutional as to those committees that make only independent expenditures.[7] In two advisory opinions, the FEC confirmed it would act in accordance with the *SpeechNow* decision.[8]

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[4] An expenditure is defined generally as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for federal office." *See* 2 U.S.C. § 431(9)(A). An independent expenditure, in relevant part, is defined as a "communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate a candidate's authorized committee, or their agents, or a political party committee or its agents." *See* 11 C.F.R. § 100.16(a); *see also* 2 U.S.C. § 431(17) . An electioneering communication, in relevant part, is defined generally as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office," is "publicly distributed within 60 days before a general election" or "within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate," and "[i]s targeted to the relevant electorate." *See* 11 C.F.R. § 100.29(a); *see also* 2 U.S.C. § 434(f)(3)(A).

[5] *EMILY's List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009).

[6] *Id.* at 16. The D.C. Circuit also suggested that if *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) were overruled, such groups could accept unlimited donations from for-profit corporations or labor organizations to their non-contributions accounts. *See id.* at 16 n.11. In *Citizens United*, the Supreme Court overruled *Austin*. 130 S.Ct. at 885.

[7] *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (*en banc*).

[8] Advisory Opinions 2010-09 (Club for Growth) and 2010-11 (Commonsense Ten).

Subsequently, the National Defense PAC asked the FEC for an advisory opinion confirming that, as a political committee that made direct contributions to federal candidates, it could also accept unlimited corporate funds to make independent expenditures if it established a separate bank account for such purposes.[9] After the Commission deadlocked on an affirmative response, NDPAC sued the agency in *Carey v. FEC*.[10] The D.C. District Court recently ruled in favor of NDPAC's motion for a preliminary injunction,[11] and the FEC agreed to a stipulated judgment and consent order under which it would not enforce the FECA's source prohibitions and amount limitations with respect to NDPAC's independent spending account.[12] Furthermore, the FEC last week issued a public statement confirming this posture applies not only to NDPAC, but to all similarly situated political committees that maintain separate bank accounts for funding direct candidate contributions and independent political activities.[13]

Even without rulemakings on *Citizens United*, *EMILY's List*, *SpeechNow*, and *Carey*, the public has not waited to act on these decisions. Immediately following the *Citizens United* decision, we saw roughly a four-fold increase in spending on independent expenditures reported to the FEC in the 2010 election cycle (a total of more than $300 million), as compared with the 2008 cycle. Over that same period, independent-expenditure-only committees established pursuant to *SpeechNow* and other outside groups (including corporations, labor organizations, and non-profit organizations) outspent traditional PACs by roughly 2:1 on independent expenditures reported to the FEC. Meanwhile, spending by the political party committees remained roughly the same. For the 2011-2012 election cycle, all indications point to this trend continuing and expanding. Already, more new independent-expenditure committees have registered this cycle than in the previous cycle.

The FEC has been able to accommodate this shift in political spending on its reporting forms, but rulemakings may still be useful to clarify some questions relating to the mechanics of handling contributions, disbursements, and reporting, and also the full range of permissible activities for groups engaged in independent political spending.

The recent court decisions and rise in outside spending have also affected the Commission's enforcement docket. Already, we have received several complaints for this election cycle alleging that certain outside groups not currently registered with the FEC have triggered political committee status by virtue of their spending on independent expenditures.[14] These cases, which are currently pending, involve some of the more legally significant issues on our enforcement docket.

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[9] Advisory Opinion 2010-20 (National Defense PAC).
[10] *Carey v. FEC*, Civ. No. 11-259 (D. D.C. filed Jan. 31, 2011).
[11] *Carey v. FEC*, Civ. No. 11-259, Memorandum Opinion on Motion for Preliminary Injunction (D. D.C. Jun. 14, 2011).
[12] *Carey v. FEC*, Civ. No. 11-259, Stipulated Order and Consent Judgment (D. D.C. Aug. 19, 2011).
[13] "FEC Statement on *Carey v. FEC*, Reporting Guidance for Political Committees that Maintain a Non-Contribution Account," Oct. 5, 2011, *available at* http://www.fec.gov/press/Press2011/20111006postcarey.shtml.
[14] The complainants in these matters have publicized their complaints, and thus it does not violate the confidentiality provision of 2 U.S.C. § 437g(a)(12) to describe the basis of these complaints.

II. Agency Processes, Procedures, and Mission

Just as the Federal Election Commission was created to ensure more transparency in the political process, we believe it has also been beneficial for the agency to operate with more transparency. Not only does greater agency transparency benefit the parties who interact with the agency, but it also helps the agency operate more equitably and more efficiently. By receiving more input from interested parties in its decision-making processes, the agency benefits from more informed decision-making.

To that end, the Commission has implemented several new reforms over the past three years in its enforcement and policymaking functions. On the enforcement side, these reforms have started with the initial stages. Many of the agency's enforcement proceedings are initiated by our Reports Analysis Division ("RAD"), which reviews the reports filed by political committees, party committees, and candidate committees. If RAD notices enough discrepancies in a committee's reports, RAD may refer the committee for an audit and / or to the Office of General Counsel for enforcement. RAD also may ask committees to take corrective action by explaining themselves on the public record or suggest that committees amend their reports.

In audit proceedings, agency auditors also frequently ask committees to take various corrective actions when the interim audit is completed. However, oftentimes alleged discrepancies in a committee's reports or records will hinge on uncertain legal questions that are open for interpretation. Accordingly, we have put in place a procedure for committees that are the subject of RAD inquiries or audit proceedings to raise unsettled legal questions directly with the Commissioners. We also passed an internal directive allowing for RAD and the Audit Division to raise those questions on their own initiative to the Commission. By having the Commissioners resolve these issues on the front end, we believe we can avoid lengthy legal proceedings that are expensive for both the committees and the Commission.

In the audit process, we have also implemented hearings for committees to present oral arguments and to respond to questions from the Commissioners prior to the Commissioners' approval of final audit reports. Audits frequently involve significant issues of law as they relate to a committee's activities, and may also serve as the basis for additional enforcement proceedings. Thus, it is critically important to get the audit reports right, and allowing the Commissioners to interact directly with audited committees helps ensure that we fully understand all of the legal and factual nuances in a given audit.

Before the Reports Analysis or Audit Divisions refer matters over to the Office of General Counsel for enforcement, we have also required the basis of such referrals to be provided to respondents, and to allow them an opportunity to respond. The FECA requires respondents to be notified when a complaint from outside the agency is filed against them and to be given a chance to respond,[15] and we thought it was only fair that respondents in internally generated matters also be informed of the charges against them. Moreover, having a truly two-sided adversarial proceeding furthers the Commissioners' fact-finding role by allowing them to hear both sides of a matter in the earliest stages.

[15] *See* 2 U.S.C. § 437g(a)(1).

On the policy side, we have also implemented a procedure whereby requesters of advisory opinions are given an opportunity to appear before the Commission to answer our questions about the legal issues they have presented, and the facts of their proposed activities as they relate to the legal issues. Because advisory opinions set forth the Commission's interpretation of the FECA and its regulations, and any similarly situated parties are entitled to rely on those opinions,[16] we believe the opportunity to clarify the issues with requesters leads to more informed decision-making by the Commission.

The fairness and efficiency interests running through all of these procedural reforms reflects our concern that the campaign finance laws and the FEC's processes should not be unduly burdensome on those Americans who are engaged in the most basic of civic activities. As the Supreme Court has reminded us, in this area of the law, we must employ "minimal if any discovery, to allow parties to resolve disputes quickly without chilling speech through the threat of burdensome litigation . . . eschew 'the open-ended rough-and-tumble of factors,' which 'invit[es] complex argument in a trial court and a virtually inevitable appeal' . . . [and] give the benefit of any doubt to protecting rather than stifling speech."[17]

Most of the enforcement respondents who appear before the Commission tend to be inexperienced participants in the political process, or even otherwise experienced participants who nonetheless got caught up in the complexities of campaign finance law inadvertently. Moreover, we believe the agency's enforcement process is not the appropriate place for making new law or otherwise clarifying ambiguous law, and, in fact, we are prohibited by law from doing so in enforcement proceedings.[18]

On the subject of enforcement, there has been some discussion on trends in the Commission's civil penalties. The statute permits the agency to seek conciliation agreements with respondents involving civil penalties, but the agency itself does not have the authority to impose its own penalties other than through the ministerial administrative fines program.[19] Having said that, it is not a secret that our average conciliation amounts have gone down in recent years. However, simply looking at the numbers is not particularly illuminating, since they fluctuate depending on the types of cases on the enforcement docket in any given year. For example, in 2006, the average conciliation penalty was $179,000, but that included a $3.8 million settlement with Freddie Mac involving prohibited corporate fundraising activity.[20] In 2007, the average dropped to $73,427, and then ticked back up to $103,000 in 2008, when the current Commission was constituted. Since then, the average has dropped to five figures.

There are a number of reasons for this decline. First, as discussed before, recent court decisions have invalidated several statutory and regulatory provisions and, accordingly, respondents can no longer be found in violation of those provisions. Secondly, we have placed a

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[16] *See* 2 U.S.C. § 437f.
[17] *Wisconsin Right to Life v. FEC*, 551 U.S. 449, 451 (2007) (internal citations omitted).
[18] *See* 2 U.S.C. § 437f(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title.").
[19] 2 U.S.C. §§ 437g(a)(4)(C) and (a)(5)(A).
[20] MUR 5390 (Delk).

greater emphasis on the statute's mandate that the FEC "encourage voluntary compliance,"[21] as opposed to seeking hefty penalties from grassroots non-profit groups and campaign committees that tend to rely on volunteers and staff who are assembled on an *ad hoc* basis.

Thank you again for the opportunity to update the Subcommittee on the FEC's policies, processes, and procedures. I am happy to answer any questions you may have.

[21] 2 U.S.C. § 437d(a)(9).