FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Statement of Vice Chair Ellen L. Weintraub
on the Proposal to Commence a Rulemaking to
Address Electioneering Communication Disclosure Rules

October 4, 2012

Today, the Commission deadlocked 3-3 on whether to commence a rulemaking to address numerous issues that have arisen with respect to 11 C.F.R. § 104.20(c)(9), our regulation governing disclosure requirements for corporations and labor organizations that fund electioneering communications. The D.C. Circuit's recent decision to reverse and remand a District Court ruling invalidating this rule was hardly a resounding endorsement of the regulation.[1] While disagreeing with the District Court's reasoning, the appellate court lamented that current section 104.20(c)(9) "has raised as many questions as it purported to resolve," and expressed confusion about "the agency's position on numerous issues . . . with respect to the meaning of the statute, the intended reach of the disputed regulation, and the import of the Supreme Court's decisions addressing campaign finance law."[2]

To remedy this situation, the court invited the Commission to initiate a new rulemaking, and instructed the District Court to stay its hand pending the outcome of our proceeding, should one begin.[3] I would have taken the appellate court up on its offer, for three basic reasons: 1) As the court noted, the current rule is confusing and unworkable, "rais[ing] as many questions as it purported to resolve." 2) Our experience with the rule in practice has shown that, contrary to the Commission's expectations and intent, the rule has served as a mechanism for undermining the statutory disclosure provisions it was supposed to implement. 3) The Supreme Court has subsequently clarified its views on those disclosure provisions, finding them to be both constitutional and important to guarantee an informed electorate.

The Commission promulgated current section 104.20(c)(9) as part of a broader rulemaking in the wake of the Supreme Court's 2007 decision in *FEC v. Wisconsin Right to Life* ("*WRTL*").[4] *WRTL* allowed corporations and labor unions to finance some issue-

[1] *See Center for Individual Freedom v. Van Hollen*, __ F. 3d. __, 2012 WL 4075293 (D.C. Cir. Sept. 18, 2012) (reversing *FEC v. Van Hollen*, 851 F. Supp. 2d 69 (D.D.C. 2012)).

[2] *Id.* at *3.

[3] *Id.* at *4.

[4] 551 U.S. 449 (2007); *see also* Explanation and Justification for Final Rules on Electioneering Communications, 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007) ("2007 E&J").

based electioneering communications, which they had previously been prohibited from doing in most cases.[5] The Commission at that time believed that the regulated community would benefit from further guidance in light of this change in the governing law. In that rulemaking, the Commission also considered whether to amend its disclosure rules in light of the significant number of new entities that would be permitted to fund electioneering communications.[6]

WRTL itself did not address disclosure. However, some commissioners were convinced that it was only a matter of time before the Supreme Court would limit the government's ability to require disclosure, just as the Court had limited the ability to prohibit certain entities from making electioneering communications. That conviction, which turned out to be wholly inaccurate, animated the subsequent rulemaking.

Experience has shown what resulted. From the time the electioneering communication provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA) took effect until *WRTL*, nearly 100% of groups that reported electioneering communications also disclosed their donors.[7] Following *WRTL* and the Commission's subsequent rulemaking, that number dropped to less than 50% in 2008.[8] In the 2010 election cycle, nearly *two-thirds* of groups reporting electioneering communications failed to disclose their donors.[9] The numbers are even more striking in terms of total dollars reported versus donors disclosed. Collectively, of the $74.3 million spent on electioneering communications, donors were disclosed for only $17.3 million, or about 23 percent by conservative estimates.[10] Moreover, of the $63.5 million in electioneering communication spending reported by the top 10 electioneering communication groups in the 2010 election cycle, the groups reported donors for only $6,878,000. In other words,

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[5] Electioneering communications include any broadcast, cable or satellite communication that is made within 60 days of a general election or 30 days of a primary election, caucus or nominating convention, and that refers to a candidate but may stop short of expressly advocating the candidate's election or defeat. 2 U.S.C. § 434(f)(3)(A). If the communication refers to a candidate for Congress, it also must be targeted to the candidate's electorate to qualify as an electioneering communication. *Id.*

[6] 2007 E&J, 72 Fed. Reg. at 72911.

[7] Public Citizen, *Disclosure Eclipse* (Nov. 18, 2010), at 1, *available at* http://www.citizen.org/documents/Eclipsed-Disclosure11182010.pdf ("*Disclosure Eclipse*"); *accord* Center for Responsive Politics, *2004, 2006 Outside Spending, by Groups, at* http://www.opensecrets.org/outsidespending/summ.php?cycle=2006&chrt=D&disp=O&type=E. Analyses by both Public Citizen and the Center for Responsive Politics are based on raw data filed with the FEC, and available at www.fec.gov.

[8] *Disclosure Eclipse*, at 1; *accord* Center for Responsive Politics, *2008 Outside Spending, by Groups, at* http://www.opensecrets.org/outsidespending/summ.php?cycle=2008&chrt=D&disp=O&type=E.

[9] *Disclosure Eclipse*, at 1.

[10] *Id.* at 4. The Center for Responsive Politics estimates that donors were disclosed for only $8.8 million, or less than *12 percent*, of the money spent on electioneering communications in the 2010 cycle. *See* Center for Responsive Politics, *2010 Outside Spending by Groups, at* http://www.opensecrets.org/outsidespending/summ.php?cycle=2010&disp=O&type=E&chrt=D.

the top 10 groups disclosed donors for just 10.8 percent of the money they spent on electioneering communications.[11] That left $56,629,064, almost *90 percent*, unaccounted for.

Today, in short, organizations that fund electioneering communications are disclosing less information about their donors than ever before. Moreover, we continue to face the widespread problem, acknowledged by the Supreme Court in *Citizens United*, of "independent groups … running election-related advertisements 'while hiding behind dubious and misleading names.'"[12]

As this evidence shows, current section 104.20(c)(9) is simply not working. The limiting phrase "for the purpose of furthering electioneering communications" has been widely misinterpreted, resulting in *less* disclosure from corporations and labor unions than our rules impose on other individuals and entities that fund electioneering communications. And the current Commission has only exacerbated this trend. Notably, in our consideration of MUR 6002 (Freedom's Watch, Inc.), three of my colleagues announced that they would apply section 104.20(c)(9) only to those donors who *specifically earmark* their donations to fund a particular advertisement that is the subject of a particular report.[13] In their view, even if a donor gives vast amounts for the purpose of furthering an organization's political activities, including electioneering communications, the donor's name would not need to be disclosed.

As one of two remaining Commissioners who participated in the post-*WRTL* rulemaking, I can say with confidence that this is not what we anticipated or intended. The limiting language in section 104.2(c)(9) requiring disclosure of only those donors who gave "for the purpose of furthering electioneering communications" was meant to exclude those donors who gave "for purposes *entirely unrelated* to the making of electioneering communications."[14] It was not intended to exclude the disclosure of donors supporting millions of dollars in electioneering communications. That would defeat the very purpose of the provision we were attempting to implement.

Ironically, the dramatic decline in electioneering communication disclosure has gained momentum even as the Supreme Court's teaching in this area has developed in the

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[11] *Disclosure Eclipse*, at 4-5.

[12] *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 914 (2010) (quoting *McConnell v. FEC*, 540 U.S. 93, 197 (2003)).

[13] 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. In contrast, I voted with then-Vice Chair Cynthia L. Bauerly to follow the advice of the Commission's Office of General Counsel and find reason to believe that Freedom's Watch violated 11 C.F.R. § 104.20(c)(9), which would have allowed the Commission to open an investigation into whether or not the organization received donations made for the purpose of furthering electioneering communications. Commissioner Walther recused himself and did not vote in this matter.

[14] 2007 E&J, 72 Fed. Reg. at 72911 (emphasis added).

exact *opposite* direction from that anticipated by my former colleagues. In *Citizens United v. FEC*, the Court upheld the disclosure provisions applicable to electioneering communications and reiterated the importance of disclosure in "enabl[ing] the electorate to make informed decisions and give proper weight to different speakers and messages."[15] The principles that the Court reaffirmed in *Citizens United* were hardly new.[16] In the words of former Supreme Court Justice Louis D. Brandeis, "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[17] Instead, what the American public has experienced post-*WRTL* has been an effective blackout on donor disclosure for electioneering communications.

The public deserves better. Section 104.20(c)(9) in its current form has not fulfilled the clear goals of the Act with respect to disclosure, which the Supreme Court resoundingly upheld. Nor has it been true to the Supreme Court's admonition against discriminating between different types of speakers,[18] given that the rule imposes different obligations on corporations and unions than our rules impose on other types of entities and individuals who fund electioneering communications.

No credible agency simply promulgates a regulation and then allows it to ossify, even in the face of overwhelming empirical evidence of the regulation's ineffectiveness and new guidance from the Supreme Court. We should at least have the courage to start a conversation with the public about whether current section 104.20(c)(9) needs to be changed, as I have repeatedly urged.[19] For these reasons, I voted to begin a rulemaking as the D.C. Circuit suggested.

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[15] 130 S. Ct. at 916; *see also id.* at 915-16 (declaring that "the public has an interest in knowing who is speaking about a candidate shortly before an election").

[16] *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 66-68 (1976) (noting that disclosure provisions serve governmental interests that fall into three categories: providing the electorate with information about candidates and the financing of campaigns; "deter[ing] actual corruption and avoid[ing] the appearance of corruption"; and "detect[ing] violations of the contribution limits.").

[17] Louis D. Brandeis, *What Publicity Can Do*, HARPER'S WEEKLY, Dec. 20, 1913.

[18] *Citizens United*, 130 S. Ct. at 898.

[19] *See, e.g.*, Statement of Vice Chair Ellen L. Weintraub on the Commission's March 7, 2012 Hearing (Mar. 7, 2012); 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); Statement of Chair Cynthia L. Bauerly and Commissioner Ellen L. Weintraub (Jan. 20, 2011).