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March 4, 2013

BY EMAIL: SECRETARY@FEC.GOV

Ms. Shawn Woodhead Werth
Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Draft Interpretive Rule on Reporting Ultimate Payees of Political Committee Disbursements

Dear Ms. Werth:

On behalf of the Perkins Coie LLP Political Law Group, we submit these comments in response to the above-referenced draft interpretive rule. As practitioners who counsel and prepare and file reports for numerous political committee clients, we submit these views as our own, and not on behalf of any particular clients.

A. The Proposed Interpretative Rule Lacks a Sufficient Statutory Basis

Congress has established explicit reporting requirements that apply to political committees. Under the statute, committees must report the name and address of each person to whom they make expenditures or other disbursements aggregating more than $200 per calendar year (or, in the case of authorized committees, per election cycle), as well as the dates, amounts, and purposes of the payments.[1] The statute makes no mention, explicit or otherwise, to the sub-itemization of ultimate payees, as the Commission's rulemaking seems to contemplate.

[1] *See* 2 U.S.C. 434(b)(5),(6).

Current Commission regulations reflect these limited, statutorily authorized reporting requirements.[2] However, the proposed interpretive rule would expand these requirements to include information not found in the statutes, and not contemplated by Congress. There is no evidence that Congress ever expected the statute to compel subvendor disclosure – for example, a pollster's payments to telemarketers, or a media firm's payment to a camera crew. Yet the interpretive rule's logic suggests that the statute can be read and enforced to require just this sort of disclosure, even if the Commission, in this particular instance, does not yet propose to do so.

For support, the Commission looks to section 102.9(b)(2) of its current regulations. But this is a recordkeeping rule, not a reporting statute: it applies only to the maintenance of receipts or invoices from a payee in the limited context of travel and subsistence.[3] While this specific recordkeeping regulation imposes a limited obligation with respect to payee receipts, the reporting statute does not contemplate this same definition of "payee" – it requires committees simply to disclose "the name and address of every person to whom any disbursement is made."[4] Moreover, section 102.9(b)(2)'s recordkeeping obligations cannot serve to establish a committee's reporting obligations; there is simply no basis in law for importing section 102.9(b)(2)'s requirements and definitions into other sections of the Commission's regulations.

When a statute is clear, an agency must give effect to the expressed intent of Congress.[5] Given that Congress has directly spoken to the issue of political committee reporting, and that the proposed interpretative rule is not based upon any framework apparently contemplated by Congress, the Commission should refrain from imposing these proposed changes to political committee reporting requirements.

B. The Interpretive Rule Would Disrupt the Current Uniform System for Reporting Disbursements and Increase Compliance Costs for Committees

Section 104.9 of the regulations provides for the "uniform reporting of disbursements."[6] But the proposed interpretive rule would disrupt this uniformity. It would require committees to disclose some ultimate payees, but not others. Such a system is at odds with section 104.9. It would also

[2] 11 CFR 104.3(b)(3)(i),(vii) (unauthorized committees); 11 CFR 104.3(b)(4)(i),(vi) (authorized committees); *see also* 11 CFR 104.9(a), (b).

[3] Notice at 2; *See also* FEC Adv. Op. 1996-20, n.3 (June 14, 1996).

[4] *See* 2 U.S.C. § 432(c)(5).

[5] *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

[6] 11 C.F.R. § 104.9

increase compliance costs for political committees, particularly those that cannot afford to retain outside consultants to handle their compliance work.

Section 104.9(a) requires political committees to "report the full name and mailing address of each person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year ... is made from the reporting political committee's federal account(s), together with the date, amount and purpose of such expenditure."[7] The rule is simple and straightforward: it requires disclosure of the person who receives *direct payments* from the political committee, once the person has received more than $200 from the committee in the calendar year or election cycle. It does not require disclosure of indirect payees; it does not distinguish between travel expenses and non-travel expenses; and it does not condition disclosure based on the amount of outstanding debt owed to an employee or volunteer.

The interpretive rule, however, would inject these variations into the system, making Schedule B reporting even more complicated, and increasing the compliance burden for reporting committees:

- *It would require committees to classify each payment as travel-related or non-travel related.* For example, if a committee reimbursed an employee who purchased $250 of office supplies at Staples, the payment to Staples would have to be disclosed; but if the employee spent $250 at Goodyear on a tire for the campaign van, no disclosure of the payment to Goodyear would be required.

- *It would require committees to determine whether the travel advances to an employee were in excess of $500.* For example, if a committee reimbursed an employee for a $450 Southwest plane ticket *and* had $75 outstanding in mileage reimbursements to the employee, disclosure of the payment to Southwest would be required. But if the staffer's mileage reimbursements had been paid in full, the payment to Southwest would not have to be disclosed.

- *It would require committees to track the aggregate payments by each individual staffer or volunteer to each vendor.* The rule provides that "[a] memo entry is required for any reimbursement of expenses other than travel and subsistence expenses *if the individual's payments* to the vendor on behalf of the committee aggregate more than $200 ...."[8] For example, if a committee reimbursed Staffer A for purchasing $150 of office supplies at Staples, and then reimbursed Staffer B for

[7] 11 C.F.R. § 104.9(a)

[8] Notice at 3 (emphasis added).

purchasing $175 of office supplies at Staples, no memo entry would be required. But if Staffers A and B had also been reimbursed for purchasing $65 of office supplies at Staples earlier in the calendar year (or election cycle), a memo entry would be required for the $150 and $175 payments to Staples.

- *It would result in an artificial distinction between consultant and employee reimbursements*. The Commission's proposed interpretation requires increased disclosure only for reimbursements to individuals not acting as vendors. But committees regularly reimburse both individual employees, and individual and corporate consultants for incurred expenses. This interpretative rule would require a confusing two-track system depending on the classification of the person being reimbursed; such an artificial division is not only an invitation for errors, it is also – as we note above – not contemplated anywhere in the statute.

- *It would not provide additional meaningful disclosure*. Through the description of the purpose of the reimbursement, the public already has access to the type of expense being reimbursed. There is no demand by the public to know the details of where committee employees ate when traveling, or what gasoline stations they used, and no evidence that such additional disclosure would provide any benefit to the public, much less a benefit justified by the additional administrative burden that this interpretive rule would create.

These new requirements would require committees to track significantly more information than they do today. Smaller committees would have a hard time meeting this burden. But bigger committees would, as well: with large numbers of staff and volunteers, who are often dispersed across the country, they would be hard-pressed to track and sub-itemize reimbursements as the draft interpretive rule would require. In any case, the paucity of information disclosed would not remotely justify the investment that would be needed to track it.

C. Adopting the Interpretive Rule Would Set the Stage for Additional, Unsupported Reporting Requirements

The apparent purpose of the draft interpretive rule is to support an enforcement practice that has been going on for years, even while lacking clear statutory or regulatory support. As the Notice concedes, the Commission's Reports Analysis Division ("RAD") has been sending Requests for Additional Information ("RFAIs") to authorized committees that did not itemize the ultimate payee for reimbursements to staff at least as far back the 1999-2000 election cycle, and has been sending RFAIs to party and non-party committees since the 2005-2006 election cycle.[9]

[9] Notice at 4, n. 2.

It is beyond dispute – or at least it should be – that the Commission's various divisions may not create new substantive legal requirements. But from a lone footnote in a 1996 advisory opinion, RAD did exactly that, sending public notices to many committees, demanding they disclose information not expressly required by section 104. Moreover, until 2011, committees had no way to challenge this "requirement" without courting enforcement or audit.

Adoption of the draft interpretive rule would simply set the stage for future, extralegal "innovation." As discussed above, 2 U.S.C. § 434(b)(5) requires disclosure simply of "the name and address of every person to whom any disbursement is made ..." It treats payments to individuals no differently than payments to anyone else. If today the Commission is asked to bless fourteen years of RFAIs demanding subitemization of staff reimbursements, then tomorrow it could face another series of RFAIs that demanded a breakdown of media production expenses, or pollster phone bank expenses.

D. If Adopted, the Interpretive Rule Should be Prospective in Application

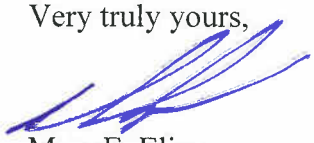
If the Commission decides to adopt the Interpretive Rule, it should make clear that the rule may only be applied prospectively. It should withdraw the RFAIs that are now asking committees effectively to comply with the yet-to-be adopted rule, and should send no further RFAIs on the same subject for reports preceding the effective date of the rule. Likewise, the Commission should not consider a committee's "failure" effectively to comply with the yet-to-be-adopted rule when making decisions to proceed with enforcement actions and audits.

Requiring committees to comply retroactively with the Interpretive Rule – as indeed the Commission already appears to be doing – raises basic questions of due process. *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, Matter Under Review 5724 (Dec. 11, 2009) ("The Commission owes it to the public to provide clarity to an area of the law that has become profoundly murky. And the appropriate vehicle for doing so is not an enforcement action but rather through a rulemaking or a policy statement."); Statement of Reasons of Vice Chairman Karl J. Sandstrom, Matter Under Review 4538 (Aug. 12, 2002) (declining to pursue enforcement until Commission "provide[s] clarity to party committees and candidates" about applicable legal standard). Prudent committees would need to review months, if not years, of records to determine whether amendments are required.

One certainly cannot dispute the imperative to know "where political campaign money comes from and how it is spent." Buckley v. Valeo, 424 U.S. 1, 66 (1976). Still, the Commission's reporting requirements must be grounded in law. And even if they were in this case, the Commission still should consider the practical burdens on reporting committees that operate within strict contributions limits and source restrictions, in a world of bewildering legal change. The value of whatever additional information the Commission might obtain through the draft

interpretive rule would be significantly outweighed by its costs. We urge the Commission not to adopt the draft interpretive rule.

Very truly yours,



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