FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Statement of Chair Ellen L. Weintraub on the
Petition for Rulemaking filed by the Center for Individual Freedom

March 7, 2013

Today, the Commission considered whether to open a rulemaking in response to a petition from the Center for Individual Freedom ("Petitioner"). The Petitioner asks the Commission to make one small change to 11 C.F.R. § 104.20(c)(9) and suggests that doing so would be sufficient to square the regulation with *Citizens United v. FEC*.[1] I disagree. Section 104.20(c)(9) sets out disclosure requirements for corporations and labor organizations that make electioneering communications.[2] This provision has been misinterpreted (over my objection) to virtually eliminate any obligation for such organizations to disclose their donors. This is inconsistent with the statutory objectives of Congress with respect to disclosure — objectives *Citizens United* wholeheartedly embraced. Petitioner's proposal does nothing to fix the regulation's deficiencies – on the contrary, it would cement them in place. I could not agree to do so.

As I have previously explained, section 104.20(c)(9) is a last relic of a broader rulemaking that the Commission promulgated in response to *FEC v. Wisconsin Right to Life* ("*WRTL*").[3] The regulation has been erroneously interpreted to obviate any disclosure obligations except when the donor earmarks a contribution for a specific electioneering communication – which, naturally, donors rarely do.[4] As a result, disclosure of donors for electioneering communications has declined from nearly 100%

[1] 558 U.S. 310, 130 S. Ct. 876 (2010). The Petitioner also advocates a parallel change to section 104.20(c)(8).

[2] 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 does not expressly advocate 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.*

[3] 551 U.S. 449 (2007); *see also* Statement of Vice Chair Ellen L. Weintraub on the Proposal to Commence a Rulemaking to Address Electioneering Communication Disclosure Rules, Oct. 4, 2012 ("Oct. 4 Statement"), *available at* http://www.fec.gov/members/weintraub/statements/Weintraub_Statement_10.4.12.pdf; 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 ("June 17 Statement"), *available at* http://www.fec.gov/members/weintraub/nprm/statement20110617.pdf.

[4] *See* Oct. 4 Statement at 3.

in the 2004 and 2006 election cycles to less than 20% in 2012.[5] As one of only two remaining Commissioners who participated in the post-*WRTL* rulemaking, I can say with confidence that this result is not what the Commission intended when it promulgated the rule. It is also plainly not what Congress had in mind when it passed the relevant provisions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), which were designed to significantly *expand* disclosure requirements with respect to electioneering communications.[6] The rule has been widely misconstrued to undermine that goal.

Citizens United finished what *WRTL* started, overturning the ban on corporate (and presumably labor organization) electioneering communications entirely.[7] However, an 8-1 majority of the Court resoundingly upheld BCRA's disclosure requirements, reasoning that robust disclosure is necessary to "enable the electorate to make informed decisions and give proper weight to different speakers and messages."[8] The Court also admonished against governmental discrimination between different types of speakers.[9] By freeing corporations and labor organizations, and only them, from the need to disclose donors who fund almost all their electioneering communications, section 104.20(c)(9) runs afoul of both these teachings.

The Petitioner's proposal does not address these concerns. Petitioner's suggestion – leave the rule as is but for the reference to 11 C.F.R. § 114.15 – has been on the table for more than two years. While the reference to section 114.15 may be anachronistic, there at least two ways to address this issue: delete only the words "pursuant to 11 CFR 114.15" or delete all of section 104.20(c)(9).[10] It is not apparent why Petitioner's

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[5] According to the Center for Responsive Politics, seven of the top ten groups who made electioneering communications in the 2012 cycle reported no donor information whatsoever. Center for Responsive Politics, *2012 Outside Spending, by Group*, *at* http://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt= D&disp=O&type=E; *see also* Oct. 4 Statement at 2-3 (providing statistics for 2004 through 2010).

[6] *See McConnell v. FEC*, 540 U.S. 93, 128 (2003).

[7] *See* 130 S. Ct. at 876; Advisory Opinion 2010-11 (Commonsense Ten) at n.3.

[8] 130 S. Ct. at 916. My view that the regulation does not comport with this teaching should not come as a surprise to anyone. I will not repeat everything I have said on this subject in the past, but incorporate by reference all of my previous statements. *See*, *e.g.*, Oct. 4 Statement (particularly pages 3-4); Statement of Vice Chair Weintraub and Commissioner Bauerly Regarding the Commission's Decision Not to Appeal the Decision in *Van Hollen v. FEC*, Apr. 27, 2012, *available at* http://www.fec.gov/members/statements/ELW_CLB_statement_on_VH_appeal.pdf; Statement of Vice Chair Ellen L. Weintraub on the Commission's March 7, 2012 Hearing, Mar. 7, 2012, *available at* http://www.fec.gov/members/weintraub/statements/ELW_3.7.12_Statement.pdf; Statement of Commissioner Ellen L. Weintraub on the Notices of Proposed Rulemaking to Address *Citizens United*, Dec. 16, 2011, *available at* http://www.fec.gov/members/weintraub/statements/ELW_CU_Statement_12-16-11.pdf; Statement of Chair Cynthia L. Bauerly and Commissioner Ellen L. Weintraub, Jan. 20, 2011, *available at* http://www.fec.gov/members/statements/DEMCommissionersCNPRMStatement1-20-11.pdf.

[9] 130 S. Ct. at 898; *see also* Oct. 4 Statement at 4.

[10] *See* June 17 Statement at 3-4. I have repeatedly voted to place both options on the table for public comment – in October 2012, June 2011 and January 2011 – but to no avail.

approach would be the mandated or even preferred option, since it would enshrine a view of the law that appears to undermine the Act's pro-disclosure objectives and runs counter to the Supreme Court's robust support for disclosure. Petitioner's approach is equivalent to taking a car with a broken engine, repainting it, and declaring it ready to drive. This rule does not need a cosmetic fix; it requires a major overhaul. I cannot support anything less.