

AGENDA DOCUMENT NO. 11-74



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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December 14, 2011

MEMORANDUM

AGENDA ITEM

TO: The Commission *AN*

For the Meeting of 12-15-11

FROM: Anthony Herman
General Counsel

SUBMITTED LATE

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Cheryl A.F. Hemsley *CAF*
Attorney

Theodore M. Lutz *TML*
Attorney

SUBJECT: Draft Notice of Proposed Rulemaking for Independent Expenditure Reporting

Attached is a draft Notice of Proposed Rulemaking for Independent Expenditure Reporting. We have been asked that this draft be placed on the agenda for December 15, 2011.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 109

[Notice 2011–XX]

Independent Expenditure Reporting by Persons Other Than Political Committees

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: After considering comments received in response to its June 13, 2011 Notice of Availability, the Federal Election Commission has decided to initiate a rulemaking to consider changes to its rules regarding independent expenditure reporting by persons other than political committees. The Notice of Availability was published in response to a Petition for Rulemaking from Representative Christopher Van Hollen in light of the Supreme Court’s decision in Citizens United v. FEC. The Commission seeks comment on the current regulations, the proposed regulations offered by the Petitioner, and on possible alternative regulations. The Commission has made no final decision on the issues presented in this rulemaking.

DATES: Comments must be received on or before **[INSERT DATE]**. Reply comments must be limited to the issues raised in the initial comments and must be received on or before **[INSERT DATE]**. The Commission will hold a

1 hearing on these proposed rules and any modifications or
2 amendments thereto that may be proposed, and will
3 announce the date of the hearing at a later date. Anyone
4 wishing to testify at the hearing must file written comments
5 by the due date and must include a request to testify in the
6 written comments.

7 **ADDRESSES:** All comments must be in writing. Comments may be
8 submitted electronically via the Commission’s website at
9 <http://www.fec.gov/fosers/>. Commenters are encouraged to
10 submit comments electronically to ensure timely receipt
11 and consideration. Alternatively, comments may be
12 submitted in paper form. Paper comments must be sent to
13 the Federal Election Commission, Attn.: Robert M. Knop,
14 Assistant General Counsel, 999 E Street, NW.,
15 Washington, D.C. 20463. All comments must include the
16 full name and postal service address of a commenter, and
17 of each commenter if filed jointly, or they will not be
18 considered. The Commission will post comments on its
19 website at the conclusion of the comment period.

20 **FOR FURTHER**
21 **INFORMATION**
22 **CONTACT:**

Mr. Robert M. Knop, Assistant General Counsel, Ms.
23 Cheryl A.F. Hemsley, or Mr. Theodore Lutz, Attorneys,

1 999 E Street, NW., Washington, DC 20463, (202) 694-
2 1650 or (800) 424-9530.

3 **SUPPLEMENTARY**
4 **INFORMATION:**

5
6 The Federal Election Campaign Act of 1971¹ (the “Act” or “FECA”) and
7 Commission regulations require persons other than political committees who make
8 independent expenditures in excess of certain threshold amounts to report certain
9 information to the Commission. See 2 U.S.C. 434(c); 11 CFR 109.10.

10 On April 21, 2011, the Commission received a Petition for Rulemaking
11 (“Petition”) from Representative Christopher Van Hollen (the “Petitioner”) asking the
12 Commission to initiate a rulemaking to amend its regulations regarding the reporting of
13 independent expenditures by persons other than political committees. In response to the
14 Petition, the Commission published a Notice of Availability (“Notice”) seeking comment
15 on whether to initiate a rulemaking to consider such amendments. In light of the
16 comments received in response to the Notice, the Commission has determined that the
17 issues raised by both the commenters and Petitioner merit consideration.

18 The Commission is now seeking comments on proposed amendments to its
19 regulation at 11 CFR 109.10(e)(1) regarding the disclosure of persons who make
20 contributions to those persons, other than political committees, making independent
21 expenditures. The Commission emphasizes that it has not made any final decision on
22 whether or how to amend the existing rules on this subject, and invites comments on the
23 proposed rulemaking.

24

¹ Pub. L. No. 92-225, 86 Stat. 3 (1971); 2 U.S.C. 431 et seq.

1 **I. Background**

2 The Act defines the term “independent expenditure” as an expenditure by a
3 person that expressly advocates the election or defeat of a clearly identified candidate and
4 that is not made in concert or cooperation with or at the request or suggestion of the
5 candidate, the candidate’s authorized political committee, a political party committee, or
6 the agents of any of the foregoing. See 2 U.S.C. 431(17); see also 11 CFR 100.16.

7 Since FECA was enacted in 1972, persons other than political committees have
8 been required to report their expenditures, including information about other persons
9 from whom they received contributions.² The 1976 amendments to the Act added the
10 term “independent expenditure” to the section on reporting and elaborated on the
11 disclosure requirements for persons making such expenditures.³ These requirements
12 were amended and moved to their current location in the 1979 amendments to the Act
13 (“1979 Amendments”).⁴ In its current form, 2 U.S.C. 434(c) contains two provisions that
14 require persons other than political committees to disclose the identification of persons
15 from whom they received contributions. First, section 434(c)(1) requires persons other
16 than political committees who make independent expenditures exceeding \$250 during a
17 calendar year to report information required by 2 U.S.C. 434(b)(3)(A) “for all
18 contributions received by such person.” Section 434(b)(3)(A), in turn, requires disclosure
19 of the identification of each person other than a political committee who makes a
20 contribution to the person making the independent expenditure during the reporting

² Federal Election Campaign Act, Pub. L. No. 92-225, § 305, (1972) (Requiring every person who makes expenditures in excess of \$100 in a calendar year to report the same information as a political committee).

³ Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, sec. 104 (1976).

⁴ Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, sec. 104 (1980).

1 period, if the contributor’s total contributions exceed \$200 in a calendar year. Second,
2 Section 434(c)(2)(C) requires that such persons report “the identification of each person
3 who made a contribution in excess of \$200... for the purpose of furthering an
4 independent expenditure.”⁵

5 Following the passage of the 1979 Amendments, the Commission promulgated its
6 regulations, currently located at 11 CFR 109.10, which set forth the reporting
7 requirements for persons, other than political committees, who make independent
8 expenditures. Such persons are required to report “[t]he identification of each person
9 who made a contribution in excess of \$200 to the person filing [the] report, which
10 contribution was made for the purpose of furthering the reported independent
11 expenditure.” 11 CFR 109.10(e)(1)(vi).

12 **II. The Petition for Rulemaking**

13 On April 21, 2011, the Commission received a Petition for Rulemaking from
14 Representative Christopher Van Hollen.⁶ Petitioner asked the Commission to initiate a
15 rulemaking to amend its regulation regarding independent expenditure reporting by
16 persons other than political committees. Petitioner states that the Supreme Court’s
17 decision in Citizens United v. FEC, 130 S. Ct. 876 (2010), holding that corporations may
18 not be prohibited from using their treasury funds to make independent
19

⁵ The text of the statute does not specify how, if at all, this requirement interacts with the requirement in 2 U.S.C. 434(c)(1).

⁶ See Notice of Availability of Rulemaking Petition on Independent Expenditure Reporting, 75 FR 3600 (June 21, 2011).

1 expenditures,⁷ has “created a new universe of independent spenders who can raise and
2 spend contributions from other persons (including from corporate and labor
3 organizations) to finance their independent expenditures.”

4 Furthermore, the Petitioner argues that the regulation at current 11 CFR
5 109.10(e)(1)(vi) is “manifestly inconsistent with” the statutory language at 2 U.S.C.
6 434(c)(1) (referring to section 434(b)(3)(A)) and 434(c)(2)(C). The Petitioner also
7 asserts that the current regulation at 11 CFR 109.10(e)(1)(vi) impermissibly narrows the
8 scope of the disclosure required in the statute by requiring disclosure only of persons who
9 make contributions of a certain amount for the purpose of furthering “the reported”
10 independent expenditure, rather than for the purpose of furthering “an” independent
11 expenditure as specified in 2 U.S.C. 434(c)(2)(C). The Petitioner additionally argues
12 that, as a result of Citizens United, the ability of corporations and labor organizations to
13 make independent expenditures highlights the insufficiency of the current regulation
14 because, prior to that decision, “the bulk of independent spending was done by political
15 committees, including party committees, which are required to disclose all of their donors
16 of more than \$200 to the FEC, or by § 527 groups, which are required to disclose all of
17 their donors of more than \$200 to the IRS, or by individual spenders, for whom the donor
18 disclosure issue is largely inapplicable.” Petitioner also states that, “[a]fter Citizens
19 United, the Commission's existing regulation enables corporations or labor organizations
20 to use front groups with nondescript and unrevealing names to make independent

⁷ Although Citizens United did not directly address whether labor organizations also have a First Amendment right to use their general treasury funds to make independent expenditures, the Act and Commission regulations generally treat labor organizations in the same way as corporations. The Court’s decision suggests no basis under the First Amendment for treating labor organization communications differently than corporate communications.

1 expenditures and thereby to serve as vehicles to mask the identity of those who are the
2 true sources of funds for spending to influence the outcome of federal elections.”

3 Finally, the Petitioner argues that the regulations should be amended because,
4 under the current regulations, “the public record [citing figures from the 2010
5 Congressional election] reflects little or no disclosure of numerous contributors to non-
6 profit corporations that made substantial independent expenditures in the 2010
7 Congressional races.” Petitioner cites to statistics that indicate that, in the 2010 election
8 cycle, seven corporations made \$46.7 million in independent expenditures and did not
9 disclose a single contributor.

10 The Petitioner asks the Commission to amend 11 CFR 109.10(e)(1) by
11 renumbering current paragraph (e)(1)(vi) as (e)(1)(vii) and replacing it with language that
12 Petitioner asserts would effectuate the general reporting requirements at 2 U.S.C.
13 434(c)(2)(C) and 434(b)(3)(A). More specifically, the Petitioner asks that new paragraph
14 (e)(1)(vi) require that persons reporting independent expenditures disclose the
15 identification of each person who had made contributions to the person filing the report
16 aggregating in excess of \$200 in the calendar year, or in any lesser amount if the person
17 filing the report so elects. The Petitioner then proposes moving the current language at
18 11 CFR 109.10(e)(1)(vi) to a new paragraph (e)(1)(vii), and revising “the reported”
19 independent expenditures to “an” independent expenditure, to comport with the language
20 in 2 U.S.C. 434(c)(2)(C).

21 The Commission received four comments on the Petition. Two commenters
22 agreed that the issues raised by the Petition merit the initiation of a rulemaking, and two
23 commenters did not think that there was a need to reconsider the FEC’s current

1 regulations. The first two commenters also supported the substance of the Petition’s
2 proposed changes to the regulations, which the second two commenters opposed.

3 In light of the decision in Citizens United, the discrepancy between the statute and
4 the regulatory language, and the discussion in the Petition and the four comments, the
5 Commission has decided that the issues raised by the Petition merit further consideration.
6 Therefore, the Commission is seeking comment on the regulations governing
7 independent expenditure reporting by persons other than political committees.

8 **III. Proposed Revisions to 11 CFR 109.10(e)(1)**

9 The Commission requests comments on the proposed revisions to its regulation at
10 11 CFR 109.10(e)(1), as set forth below. Specifically, the Commission seeks comment
11 on whether either of the proposed revisions below, the addition of a new 11 CFR
12 109.10(e)(1)(vi) and the revision to renumbered 11 CFR 109.10(e)(1)(vii), are necessary
13 to effectuate the Act. If so, should the Commission adopt both proposals, or would one
14 of the two proposed changes to the Commission’s regulations be sufficient?

15 **A. Proposed New 11 CFR 109.10(e)(1)(vi)**

16 The Commission proposes adding new paragraph (e)(1)(vi) to require the
17 reporting of the name and address of all persons who made a contribution within the
18 reporting period, whose contributions within a calendar year aggregate in excess of \$200
19 to the person making the independent expenditure, regardless of the purpose of the
20 contribution. This proposed new paragraph would essentially adopt the Petitioner’s
21 proposal, with revision to the time frame referenced, to track the statutory provisions.
22 Current paragraph (e)(1)(v) would be renumbered paragraph (e)(1)(vi) to (e)(1)(vii) and
23 revised as discussed below.

1 Two commenters supported the adoption of the rules proposed in the Petition.
2 One agreed with the Petition in its entirety, and asked the Commission to alter its
3 regulations “so that the public is not disadvantaged in the upcoming 2012 elections” by a
4 lack of information about who is funding express advocacy of the election or defeat of
5 federal candidates. The second commenter agreeing with the Petition argued that the
6 Commission’s current regulations “frustrate[] the purpose and the intent” of Congress.
7 This commenter asserted that 2 U.S.C. 434(c)(1) and 434(c)(2)(C) “mandate the
8 identification of all contributors of more than \$200 to the entity making the independent
9 expenditures, whether or not those contributions are specifically earmarked for a
10 particular independent expenditure.”

11 Two other commenters opposed including the proposed language in the
12 regulations. One argued that the proposed rule would impose a scheme similar to the
13 registration and reporting requirements for political committees and could chill the
14 speech of those who would otherwise wish to make independent expenditures. The
15 second commenter said that persons other than political committees making independent
16 expenditures also undertake organizational activities other than those that “focus[]
17 primarily on political activities.” Therefore, the commenter stated that the requirement
18 should be based on an intent to assist a person with making independent expenditures,
19 rather than mandating disclosure of everyone who financially supports an organization.
20 This commenter argued that the Petitioner’s proposed revision would provide misleading
21 information to the public, disclosing everyone who provides funds to the person making
22 the independent expenditure, regardless of whether those funds were intended for, or
23 were used for, independent expenditures or for non-political activities. The commenter

1 also argued that the Petition was trying to accomplish what Congress would not do when
2 it failed to pass the DISCLOSE Act, which would have required covered organizations to
3 provide additional information in their reports of independent expenditures. See H.R.
4 5175, 111th Cong. § 211 (2010). The commenter stated that, because the DISCLOSE Act
5 was not enacted, “[i]t is inappropriate for a losing member of Congress to seek recourse
6 to an administrative agency where Congress chose not to act.”

7 The Commission seeks comments on several questions raised by the proposed
8 rule. First, does the statute permit or require more extensive reporting than the current
9 rules require? Is the proposed rule consistent with or required by the statute? Does the
10 text of the proposed rule make sufficiently clear that it is not intended to reach any
11 receipts that are not for the purpose of influencing Federal elections or are not in
12 connection with elections, and hence are not contributions under the Act? See 2 U.S.C.
13 431(8)(A); 11 CFR 100.51 – 100.56. Is the proposed rule within the authority granted to
14 the Commission to interpret FECA?

15 B. Proposed Changes to Current 11 CFR 109.10(e)(1)(vi) – Renumbered as
16 11 CFR 109.10(e)(1)(vii).

17 The Commission proposes amending and renumbering current paragraph
18 (e)(1)(vi) as (e)(1)(vii), to require persons who make independent expenditures to
19 disclose the names of all persons whose contributions aggregate to more than \$200 within
20 the reporting period, whose contributions are made for the purpose of furthering an
21 independent expenditure. This amendment would broaden the requirement in current
22 paragraph (e)(1)(vi), which requires disclosure of such contributions made for the
23 purpose of furthering the reported independent expenditure. The Petitioner proposed this

1 revision for the reasons discussed above. Again, two commenters agreed with the
2 Petition. The first agreed with the Petition in its entirety, noting that revising the
3 regulations would prevent the public from being disadvantaged in the 2012 elections.
4 The second commenter, agreeing with the Petitioner, asserted that current Commission
5 regulations “unduly narrow[]” the scope of disclosure by requiring disclosure of only
6 those persons who contribute “for the purpose of furthering the independent
7 expenditure,” as opposed to the statutory language of “furthering an independent
8 expenditure.” This commenter further argued that the statute “ensures transparency” and
9 that the information provided to the public regarding the source of funds for political
10 speech is obfuscated by the regulation.

11 Two other commenters disagreed with the Petition. The first asserted that in
12 developing the electioneering communications disclosure regulations at 11 CFR 104.20,
13 the Commission recognized “the chilling nature of expanded disclosure provisions.” This
14 commenter argued that the same concerns also exist in the context of independent
15 expenditures. The second commenter suggested that the current regulation takes into
16 account that persons making independent expenditures also engage in non-political
17 activities, and thus the rule prevents confusion by limiting disclosure to only those
18 persons who gave funds to support particular messages.

19 Do concerns that disclosure requirements unlawfully chill the exercise of First
20 Amendment rights remain given that the Supreme Court in Citizens United clearly stated
21 that disclosure requirements further important governmental interests, “impose no ceiling
22 on campaign activities,” and “do not prevent anyone from speaking?”⁸ Should the
23 regulation provide additional guidance as to when contributions would be considered to

⁸ 130 S. Ct. at 914. See also Doe v. Reed, 130 S. Ct. 2811 (2010).

1 be made for the purpose of furthering an independent expenditure, for example, when the
2 contributions are made in response to a solicitation indicating that is the purpose or when
3 the contributor indicates that is the purpose? Does a reporting requirement that is based
4 on contributor intent provide adequate notice to organizations subject to the reporting
5 obligation? If a contribution is made with the intent that it be used for a particular
6 independent expenditure, but the reporting organization chooses not to run the
7 independent expenditure, should reporting still be required? Should the regulation limit
8 the time period for which contributions received should be included in the report? To
9 what degree do the reporting requirements in proposed new 11 CFR 109.10(e)(1)(vi) and
10 (vii) overlap? To the extent that the proposed rules reflect the similarity between 2
11 U.S.C. 434(c)(1) and 434(c)(2)(C), how did Congress intend the two provisions to work
12 together? To what extent is the D.C. Circuit’s holding that the additional reporting
13 obligations applicable to political committees are “minimal” relevant to this rulemaking?
14 SpeechNow.org v. FEC, 599 F.3d 686, 697 (D.C. Cir. 2010). Also, is that Court’s
15 finding that “the public has an interest in knowing who is speaking about a candidate and
16 who is funding that speech, no matter whether the contributions were made towards
17 administrative expenses or independent expenditures,” id., relevant to this rulemaking?

18 **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

19 The Commission certifies that the attached proposed rules, if adopted, would not
20 have a significant economic impact on a substantial number of small entities. There are
21 two bases for this certification. First, there are few small entities that would be affected
22 by these proposed rules. The Commission’s proposed revisions may affect some for-
23 profit corporations, labor organizations, individuals, and some non-profit organizations.

1 Individuals and labor organizations are not “small entities” under 5 U.S.C. 601(6). Many
2 non-profit organizations that might use general treasury funds to make independent
3 expenditures are not “small organizations” under 5 U.S.C. 601(4) because they are not
4 financed by a small identifiable group of individuals, but rather rely on contributions
5 from a large number of individuals to fund operations and activities.

6 Second, the proposed rules would not have a significant economic impact on the
7 small entities affected by this rulemaking. While corporations and labor organizations
8 that use general treasury funds to make independent expenditures would incur some costs
9 in complying with the obligation to report independent expenditures, these costs would
10 not be very great and thus would not have a significant economic impact on the small
11 entities affected by this rulemaking. Further, the reporting requirements of qualified non-
12 profit corporations that make independent expenditures will not change or become more
13 burdensome because of this rulemaking. Therefore, the attached rule would not have a
14 significant economic impact on a substantial number of small entities.

15

1 **List of Subjects**

2 11 CFR Part 109

3 Elections, Reporting and recordkeeping requirements.

4

1 For the reasons set out in the preamble, the Federal Election Commission is
2 amending Subchapter A of Chapter 1 of Title 11 of the Code of Federal Regulations as
3 follows:

4 **PART 109– COORDINATED AND INDEPENDENT EXPENDITURES (2 U.S.C.**
5 **431(17), 441a(a) AND (d), AND PUB. L. 108-155 SEC. 214(c))**

6 1. The authority citation for part 109 would continue to read as follows:
7 Authority: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441a, 441d, Sec. 214(c) of Pub. L. 107-
8 155, 116 Stat. 81.

9 2. In section 109.10, revise and renumber paragraph (e)(1)(vi) as (e)(1)(vii)
10 and add new paragraph (e)(1)(vi) to read as follows:

11 **§ 109.10 How do political committees and other persons report independent**
12 **expenditures?**

13 * * * * *

14 (e) * * *

15 (1) * * *

16 (vi) The identification of each person who makes a contribution during
17 the reporting period to the person filing the report and whose
18 contributions to that person are in excess of \$200 within the
19 calendar year, or in any lesser amount if the person filing such
20 report should so elect, together with the date and the amount of any
21 such contribution; and

22 (vii) The identification of each person who made a contribution in
23 excess of \$200 to the person filing such report, which contribution

1 was made for the purpose of furthering ~~the reported~~ an independent
2 expenditure.

3 * * * * *

4 On behalf of the Commission,

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Cynthia L. Bauerly
Chair
Federal Election Commission

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DATED: _____

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BILLING CODE: 6715-01-P