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February 20, 2014

VIA ELECTRONIC MAIL

Commission Secretary  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

Re: Request for Comments on Disclosure of Independent Expenditures  
in Presidential Primaries

Dear Madam Secretary:

The undersigned submit these comments in their personal capacities and not on behalf of any client nor of the law firm. These comments are based upon our experience advising clients on compliance with the rules derived from FEC AO 2011-28 (Western Representation PAC) and the overall FEC disclosure regime. Based upon this experience, we strongly recommend the FEC adopt either version B of the three alternative drafts or a variation described below.

Independent-expenditure-only political committees (“Super PACs”) have not come about as a result of the measured give and take of the legislative process, nor the interpretive process of rulemaking that normally follows new legislation. Instead, they are a creation of judicial decisions that struck down portions of the law as well as FEC advisory opinions and procedural changes designed to approve of and regularize the conduct of these new entities. As a consequence, the agency like many involved in politics, has been “learning by doing” as everyone adapts in a piecemeal way to this new world.

One consequence of this is an advisory opinion, little noticed at the time and commented on by no one other than the requestor, created a requirement in the reporting regime for independent expenditures by Super PACs active in a presidential campaign during the primary period that has had unfortunate consequences. Put in its simplest form, this system required the Super PAC to report a nationwide independent expenditure, such as the purchase of a Facebook ad, as if the expenditure had been made on an allocated basis in each of the states that had not yet had a primary election, caucus, convention or other process to select a nominee. Thus, a \$100,000 Facebook ad that appeared nationally would be reported as a \$14,285.71 expenditure to influence the Hawaii primary, a \$14,285.71 expenditure to influence the Montana primary, a \$14,285.71 expenditure to influence the Connecticut primary and so on and so on.

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This reporting regime produced two anomalous results. The first was that expenditures were reported as being made to influence primary elections the Super PAC had no interest in influencing. A Super PAC that was trying to elect a candidate—President Barack Obama, for example—by eroding support for the candidate’s likely opponent in the general election—Mitt Romney, for example—would report the expenditure as being made to influence multiple state primary elections, irrespective of whether those elections were truly in play, and even if the purpose of the ad was to influence voting in the general election. Consequently the Super PAC’s FEC reports would provide readers with a false impression of the nature of the spending. Put more simply, while the Super PAC tried to influence the general election, its reports would show it spending money to influence often irrelevant primary elections. As the primary season progresses, the number of states the Super PAC must allocate to shrinks to a smaller and smaller number of uncontested races, and the sums reported as being spent in each state grows and grows under this system.

Second, it produced a cumbersome as well as inaccurate 48-hour report, as the press and advocacy groups had to recombine the spending in each of the allocated states to see what the total expenditure was. While the Super PAC would file a more accurate expenditure report periodically (either monthly or quarterly), the goal of 24- and 48-hour reports is to provide timely and accurate information to voters about spending. Further, if the independent expenditure was small enough or the number of primaries yet to be held large enough, the Super PAC might fall below the \$10,000 reporting threshold in some states, and consequently, a sum reflecting the portion of the nationwide expenditure allocated to sub-\$10,000 states would not appear on the 48-hour report. Thus, when the press and other interested parties add up all the per-state spending, the sum sometimes falls below the actual expenditure.

There are several better alternatives. The Commission could allow a Super PAC seeking to influence a general election during the period before the convention to report the expenditure as being made to influence the general election. This would accurately reflect the purpose of the expenditure. Nor is it odd or unexpected that Super PACs would spend to influence the general election months or years before a party convention. It has been decades since a party’s nominee was unclear going into the convention and it could be many years before we see it again. Consequently, we should expect extensive general election spending prior to the conventions and it would be more accurate if Super PACs were allowed to report their spending as such.

However, we are aware that some may fear this would be a tool of circumvention, and if so, draft version B is the superior choice of the three alternative drafts presented. Draft B would provide for the Super PAC to identify that the expenditure was for a primary, use the first day of the supported or opposed candidate’s nominating convention as the date of the primary election for the purposes of determining whether and when it has reached the applicable thresholds for 24- and 48-hour reports, and use memo text entries to clarify that the independent expenditure was a “nationwide expenditures.” This improves the system greatly for those preparing and

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reading the reports, though it will still inaccurately attribute spending to an election the Super PAC is not trying to influence.

We appreciate the Commission's attention to this matter. While this may seem a small, obscure and technical issue today, in the spring of 2016, the Commission's efforts to use the lessons of the last cycle to improve disclosure in the next cycle will be appreciated by those preparing as well as those reading the reports.

Sincerely,

A handwritten signature in blue ink, appearing to read "R. Lenhard", with a stylized flourish at the end.

Robert D. Lenhard

A handwritten signature in blue ink, appearing to read "D. Lawlor", with a stylized flourish at the end.

Derek Lawlor