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Re: Notice 2008-13: Rulemaking on Agency Procedures

Dear Commissioners:

Our organizations have a longstanding interest in campaign finance issues. We are writing with regard to the FEC's pending consideration of changes to agency policies and procedures. *See* "Agency Procedures," Notice 2008-13, 73 Fed. Reg. 74494 (Dec. 8, 2008); *see also* "Agency Procedures," Notice 2009-2, 74 Fed. Reg. 4197 (Jan. 23, 2009).

The organizations include Democracy 21, the Campaign Legal Center, the Brennan Center for Justice at NYU School of Law, Common Cause, the League of Women Voters, Public Citizen and U.S. PIRG.

In the comments and testimony submitted to the agency in the course of this rulemaking, it has been remarked by some that reform organizations, such as ours, which are often active in FEC proceedings, have not participated in this matter.

We are not writing to submit comments in this rulemaking.

Instead, we are writing to explain why we have chosen not to participate in this proceeding and why we believe the rulemaking on "agency procedures" will not address

the fundamental problems that over the years have crippled the agency and led to its failure to properly carry out its statutory responsibilities.

We also believe that, given the apparent lack of interest by three of the six FEC Commissioners in enforcing the campaign finance laws – enough votes to block any enforcement action – a rulemaking focused on “agency procedures” in enforcement actions makes little sense.

As a threshold matter, we find the timing and priority given to this rulemaking indefensible, in light of other rulemaking obligations the Commission has failed to fulfill.

For example, we are deeply concerned about the continuing failure of the FEC to have adopted a lawful “coordination” regulation, almost seven years after the requirement for the agency to do so was enacted in the Bipartisan Campaign Reform Act of 2002 (BCRA).

In September 2007 the federal district court in Washington, D.C. invalidated as contrary to law the Commission’s deeply flawed rules on coordination issued to implement BCRA – rules which are essential to the proper functioning of the law.

This district court action in 2007 followed the court’s invalidation in 2004, as contrary to law, of the first version of the FEC’s post-BCRA coordination regulation.

In its 2007 decision, as it had in its 2004 decision, the district court remanded back to the Commission the coordination regulation, as well as other important regulations promulgated to implement BCRA that were also struck down by the court, “for further action consistent with this opinion.” *Shays v. FEC*, 508 F. Supp. 2d 10, 71 (D.D.C. 2007) (*Shays III*). The court said that “it assumes that, on remand, the Commission will act promptly, in light of the impending 2008 election.” *Id.*

That was seventeen months ago.

Instead of fixing the regulations, however, the Commission appealed the district court decision. The FEC lost its appeal in the D.C. Circuit Court of Appeals, as it had when it appealed the district court ruling in 2004 striking down the first FEC coordination regulation.

In affirming the district court’s ruling, the D.C. Circuit said in June 2008 that the illegal (but still existing) coordination rule “not only makes it eminently possible for soft money to be used in connection with federal elections, but also provides a clear roadmap for doing so, directly frustrating BCRA’s purpose.” *Shays v. FEC*, 528 F.3d 914, 927 (D.C. Cir. 2008) (internal quotation omitted).

That was eight months ago.

One might reasonably have thought that fixing the coordination regulation, and the other BCRA regulations invalidated by the courts in *Shays III*, would have commanded the Commission's urgent attention, especially since BCRA was enacted in 2002.

Yet, as far as we are aware, the Commission has done nothing to replace the defective coordination regulation and the other BCRA regulations invalidated in *Shays III*, and instead has chosen to consider this "agency procedures" rulemaking on a fast-track basis and moved it to the head of the line.

The effort to obtain an FEC coordination regulation that complies with the campaign finance laws has now been going on for more than six years, over three federal election cycles, and has involved two district court decisions and two court of appeals decisions, each of which rejected as contrary to law the FEC's coordination regulations. Yet the FEC still has failed to adopt a lawful coordination regulation to govern federal elections.

In another matter, the pending FEC rulemaking on "hybrid" ads has languished on the Commission's docket since a public hearing was held in July 2007, leaving unaddressed by the FEC an area of significant abuse where clarification of the rules is plainly required.

In this light, the Commission's decision to advance and expedite the pending "agency procedures" rulemaking is difficult to justify.

We have not participated in this rulemaking on agency procedures because it cannot and does not address the fundamental problems that plague the FEC – problems that require changes to be made by Congress in the structure and powers of the agency, and changes to be made by the President in the appointment process for nominating FEC Commissioners.

These problems have often left the FEC largely dysfunctional.

This does not mean, however, that the FEC cannot and should not be doing a better job of enforcing the campaign finance laws under existing circumstances. Operating within the framework of the agency's powers, Commissioners are obligated to faithfully administer and enforce the laws as enacted by Congress and construed by the courts – regardless of whether you agree or disagree with the laws or the court decisions construing them.

The topics for this rulemaking, as set forth by the agency, and certainly the majority of the comments submitted, largely concern the treatment of respondents in agency enforcement proceedings.

This is more than a little ironic since recent actions by three of the six FEC Commissioners – Vice Chairman Petersen, Commissioner McGahn, and Commissioner

Hunter – indicate not only sharp ideological disagreements with the campaign finance laws, but also a distinct lack of interest in enforcing them.

To illustrate the point, one need look no further than the outcome in MUR 5541 (The November Fund), in which these three Commissioners voted to reject a conciliation agreement that was negotiated by the professional staff of the agency, based on past precedents of the agency, and that was agreed to and signed by the respondent in the case.

The Statement of Reasons issued by the three Commissioners goes so far as to reject the construction of “electioneering communication” set forth in Chief Justice Roberts’ controlling Supreme Court opinion in *FEC v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007). *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Carolyn C. Hunter and Donald F. McGahn in MUR 5541 (Jan. 23, 2008) at 6 n. 22 (“[W]hat Justice Alito anticipated could happen – that the standard set forth in the Chief Justice’s opinion may not prove to be sufficiently clear and could, without the reversal of the holding in *McConnell*, impermissibly chill political speech – apparently has happened.”).

When there are three Commissioners who have little apparent interest in enforcing the laws – indeed, who support reversal of the Supreme Court’s opinion in the *McConnell* case – and who also are able to block enforcement of the laws by the FEC, there seems to be little point to a rulemaking about how to improve the rights of respondents in enforcement cases.

In fact, most of the comments made in the rulemaking – submitted by members of the FEC defense bar – urge the agency to expand the “due process” rights of respondents by, for instance, providing additional opportunities for defense counsel to appear in person before the Commission during the course of enforcement proceedings, or creating an expanded motions practice to permit respondents to file motions to dismiss complaints, or motions for reconsideration of, *e.g.*, reason-to-believe findings.

While fair due process rights for respondents involved in enforcement actions are essential, the Commission should be extremely wary of taking unnecessary new steps that would make an already slow and cumbersome enforcement process even more so. Many of the proposals discussed in the current rulemaking would tend to make the status quo worse by slowing the existing enforcement process even further.

Under current procedures, for example, it is not uncommon for the FEC to take three or four years to resolve complaints. Creating unnecessary new procedures that would slow the disposition of enforcement matters even further would not serve the public interest.

The call by the defense bar for additional procedural protections does serve to highlight one of the key structural problems with the agency – the fact that the FEC was not given the powers to make its own adjudicatory decisions about violations of law and impose its own penalties – powers that many other agencies have.

Rather, the FEC was set up with procedures that allow the agency only to investigate whether there is “probable cause” that a violation has occurred, and, if so, to try to enter into a conciliation agreement with the respondent. If the FEC finds “probable cause” but cannot obtain a conciliation agreement, the agency must start all over again, often years later, and initiate a lawsuit against the respondent in which a federal court determines whether a violation has occurred and if so, has the authority to impose sanctions.

The types of due process rights that the defense bar advocates for respondents may be appropriate for an agency that can exercise its own adjudicatory authority. But there is little reason to provide respondents with such rights where the FEC has no such adjudicatory power.

This problem of lack of appropriate powers was discussed at length in a 2002 report on the FEC issued by a 14-member bipartisan task force of campaign finance and law enforcement experts. The report, *No Bark, No Bite, No Point*,¹ issued by Democracy 21, notes that the Commission was structured by Congress to have weak powers:

The Commission is constrained by its lack of powers and authority. The Commission was established as the only agency with civil jurisdiction over matters arising under the federal campaign finance laws, but the agency can do little on its own to actually enforce the law. At no point in the lengthy enforcement process ... does the agency have power to find that a violation has occurred – it is only given options of finding “reason to believe” and “probable cause to believe.”

Additionally, through the process of conciliation, the Commission can attempt to negotiate civil penalties and settle matters under review, but it cannot adjudicate complaints or require sanctions for violations....

The single power that the Commission wields is the power to file a civil suit against a respondent in court. Other than the ability to impose fines for minor reporting violations, this is the Commission’s only authority for formal action on an alleged violation. Yet this authority can only be exercised after the exhaustive internal enforcement process has run its course and conciliation has failed, and is only an *initiation* of another process of research, briefs, presenting arguments and seeking action. Litigation adds years to the already-lengthy enforcement process....²

¹ The report is available online at: <http://www.democracy21.org/vertical/Sites/{3D66FAFE-2697-446F-BB39-85FBBBA57812}/uploads/{B4BE5C24-65EA-4910-974C-759644EC0901}.pdf>.

² Task Force Report at 52.

The structural flaws in the Commission's enforcement authority are a statutory problem that must be fixed by legislation. That is why we have supported legislation to replace the FEC with a new agency to administer and enforce the campaign finance laws, one that will have its own power to adjudicate violations of law and impose appropriate sanctions, subject to judicial review. *See* H.R. 421, "The Federal Election Administration Act of 2007" (110th Cong., 1st Sess.).

This legislation would at the same time provide adjudicatory-type procedural rights to respondents, and the opportunity for hearings before impartial administrative law judges (ALJs). In such ALJ proceedings, respondents typically have significant procedural rights to develop evidence, examine witnesses, and present oral and written arguments.

We similarly believe the process for the nomination of Commissioners to the FEC by the President must be changed. A central cause of the agency's problems over the years has been its process for appointing Commissioners, which in practical application allows the congressional leadership of both parties, in conjunction with the national party committees, to name the FEC Commissioners, and thereby to choose their own regulators.

In reality, the President has become little more than a pass-through, receiving the names provided by congressional leaders and party officials, and passing them on to the Senate as nominees for confirmation as FEC Commissioners.

The result of this process has too often been the appointment of Commissioners who adhere to a very truncated view of the law, either as a matter of ideology or personal constitutional interpretation, or who are responsive to partisan interests in the administration and enforcement of the law.

That is why we will urge President Obama to establish a system by which an advisory group made up of distinguished Democrats, Republicans and independents or members of other political parties, would provide him (and future Presidents) with a list of potential nominees for each FEC appointment, from which he would select a nominee. This would change the longstanding practice of having FEC nominees chosen by congressional leaders and party officials.

And that is why we will urge President Obama to exercise his appointment authority, at the earliest opportunity, to nominate FEC Commissioners under this new process that have a demonstrated commitment to effective, non-partisan administration and enforcement of the campaign finance laws.

The path to solving the larger problems with the FEC does not lie in a rulemaking about how to craft procedural protections for respondents in enforcement matters. It requires fundamental changes in the structure and powers of the FEC, and in the process for selecting Commissioners to serve on the agency.

It is essential for the nation to have an enforcement agency committed to properly interpreting and effectively enforcing the nation's campaign finance laws, as written by Congress and as interpreted by the courts. In order to accomplish this goal, we will work with the Obama Administration and Congress to establish a new approach for nominating Commissioners to the agency and to achieve fundamental statutory reforms of the FEC.

Sincerely,

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