



January 30, 2017

**VIA ELECTRONIC SUBMISSION SYSTEM**

Federal Election Commission  
Attn.: Mr. Neven F. Stipanovic  
Acting Assistant General Counsel  
Federal Election Commission  
999 E Street, N.W.  
Washington, D.C. 20463

**RE: Notice 2016-10: Rulemaking Petition: Implementing the Consolidated and Further Continuing Appropriations Act, 2015**

Dear Mr. Stipanovic:

The Center for Competitive Politics (“the Center”)<sup>1</sup> respectfully submits these comments in response to Notice 2016-10.<sup>2</sup> That notice concerns potential rulemaking to implement the Consolidated and Further Continuing Appropriations Act, 2015 (“Appropriations Act”).<sup>3</sup>

The Center generally urges the Commission to enact the Petition’s suggested amendments. In implementing the Appropriations Act, however, the Commission’s regulations should carefully conform to the Act’s language. Because that language is generally clear, and

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<sup>1</sup> The Center is a nonpartisan, nonprofit § 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels.

<sup>2</sup> 81 Fed. Reg. 69722 (Oct. 7, 2016).

<sup>3</sup> See Marc Erik Elias and Perkins Coie LLP Political Law Group, Petition for Rulemaking (Jan. 8, 2016), available at <http://sers.fec.gov/fosers/showpdf.htm?docid=351581> (Commencing Document at 705-21) (the “Petition” or “Pet.”).

because the Commission acts in an area of unusual constitutional sensitivity,<sup>4</sup> the Commission should decline to impose restrictions beyond those necessary to carry out Congress’s clear intent. Doing otherwise would not only impose unnecessary burdens upon core First Amendment activity, it would also invite legal challenges under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).<sup>5</sup>

### **A. Presidential nominating convention accounts**

The Appropriations Act authorized the creation of an account for expenses related to a presidential nominating convention:

(A) A separate, segregated account of a national committee of a political party (other than a national congressional campaign committee of a political party) which is used solely to defray expenses incurred with respect to a presidential nominating convention (including the payment of deposits) or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to defray such expenses, except that the aggregate amount of expenditures the national committee of a political party may make from such account may not exceed \$20,000,000 with respect to any single convention.<sup>6</sup>

The first bullet point of Section I.A.2 of the Petition asks that the Commission follow 11 C.F.R. § 9008.7(a) in defining permissible uses of convention accounts.<sup>7</sup> Because the statutory language here is broad—it defines the permissible scope of expenditure as those “with respect to” a convention—adopting the examples of permissible uses at 11 C.F.R. § 9008.7(a) is

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<sup>4</sup> The “Commission has as its sole purpose the regulation of core constitutionally protected activity—the behavior of individuals and groups only insofar as they act, speak and associate for political purposes.” *AFL-CIO v. FEC*, 333 F.3d 168, 170 (D.C. Cir. 2003) (internal quotation marks omitted).

<sup>5</sup> Two *ex parte* communications allege a state of lawless chaos in the absence of a rulemaking. See Robert E. Rutkowski, Letter Re: Adopt Regulations to Implement Restricted Political Party Accounts (May 31, 2016), available at <http://sers.fec.gov/fosers/showpdf.htm?docid=350857>; Paul S. Ryan and Fred Wertheimer, *Ex Parte* Communication Concerning Reg 2014-01 Outline of Draft NPRM Implementing Party Segregated Accounts (May 31, 2016), available at <http://sers.fec.gov/fosers/showpdf.htm?docid=350856>. While strongly worded, both letters engage in unfounded speculation, and neither provides the concrete evidence of wrongdoing required to support a restrictive interpretation of the Act.

<sup>6</sup> 52 U.S.C. § 30116(a)(9)(A).

<sup>7</sup> Pet. at 4.

reasonable. CCP notes, however, that the Commission should explicitly state that those examples are a non-exhaustive list.

The second bullet point of Section I.A.2 of the Petition asks, however, that the Commission “retain the prohibitions described in 11 C.F.R. § 9008.7(b) and to limit the use of funds in the new convention account accordingly.”<sup>8</sup> Subparts (2) and (3) of § 9008.7(b) prohibit uses nowhere contemplated, much less prohibited, in the new statute.<sup>9</sup> Furthermore, while the clear language of the statute requires that the account be used to defray convention expenses, the broad exclusion regarding candidates and delegates at subpart (1) is problematic in that it may exclude permissible activity.<sup>10</sup> These restrictions were appropriate in the context of public money authorized for a limited purpose, but pose a greater danger to First Amendment liberties when applied indiscriminately to funds from private donations.<sup>11</sup> To the extent additional guidance is necessary, the illustrative examples included at 11 C.F.R. § 9008.7(a) should suffice. In difficult cases, the parties may seek guidance under the Commission’s advisory opinion process.<sup>12</sup>

## **B. Party headquarters building**

The Appropriations Act authorized the creation of an account for headquarters building expenses:

(B) A separate, segregated account of a national committee of a political party (including a national congressional campaign committee of a political party) which is used solely to defray expenses incurred with respect to the construction, purchase, renovation, operation, and furnishing of one or more headquarters buildings of the party or to repay loans the proceeds of which were used to defray such expenses, or otherwise to restore funds used to

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<sup>8</sup> *Id.*

<sup>9</sup> These subparts prohibit the use of public funds to make any payments that would violate the law or to pay any penalties for violating FECA. *See* 11 C.F.R. § 9008.7(b)(2)–(3).

<sup>10</sup> Indeed, subpart (1) immediately supplements the exclusion with language permitting candidates and delegates to attend convention dinners, receptions, and the like.

<sup>11</sup> *See Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2328 (2013) (noting greater deference on First Amendment limitations attached to federal funding when those “conditions . . . define the limits of the government spending program—[that is,] specify the activities Congress wants to subsidize”).

<sup>12</sup> *See* 52 U.S.C. § 30108; *see also FEC v. NRA of Am.*, 254 F.3d 173, 185 (D.C. Cir. 2001).

defray such expenses (including expenses for obligations incurred during the 2-year period which ends on December 16, 2014).<sup>13</sup>

The second to last bullet point of Section I.B.2 of the Petition requests a provision limiting the use of a headquarters account: “The FEC should prohibit the use of funds in the headquarters account from being used for anything that is unrelated to the construction, purchase, renovation, operation and furnishing of a headquarters building, including the making of contributions or independent expenditures, or for influencing the election of a candidate for federal office.”<sup>14</sup>

In any limitation to the use of the building accounts, the Commission should adhere to the clear statutory language. In particular, there is no need to explicitly exclude use “for influencing the election of a candidate for federal office.” This is for two reasons. First, the term “influencing” is inherently vague, and the suggested regulatory language could provide ammunition for creative complaints that, while lacking merit, would nevertheless require an expensive defense. Second, where extra language adds nothing, the Commission should avoid further padding the already voluminous law governing political committees.<sup>15</sup>

### **C. Election recounts and other legal proceedings**

The Appropriations Act authorized the creation of an account for recount and legal expenses:

(C) A separate, segregated account of a national committee of a political party (including a national congressional campaign committee of a political party) which is used to defray expenses incurred with respect to the preparation for and the conduct of election recounts and contests and other legal proceedings.<sup>16</sup>

But the third to last bullet point of Section I.C.2 of the Petition asks for more: “Because funds in the recount and litigation account must be used for expenses associated with legal proceedings, the FEC should prohibit the use of funds in the recount and litigation account from being used for anything that is unrelated to legal proceedings.”<sup>17</sup> This strays too far from the statutory language, which contemplates expenses “with respect to” recounts, including preparatory work that may not be connected to ongoing litigation. The better course is to

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<sup>13</sup> 52 U.S.C. § 30116(a)(9)(B).

<sup>14</sup> Pet. at 10.

<sup>15</sup> *Citizens United v. FEC*, 558 U.S. 310, 324 (2010) (“Prolix laws chill speech . . .”).

<sup>16</sup> 52 U.S.C. § 30116(a)(9)(C).

<sup>17</sup> Pet. at 12.

succinctly track Congress’s language, without adding additional prohibitions unmentioned in the statutory text.

#### **D. Regulations on all new accounts**

The second to last bullet point of section I.D. of the Petition states that:

On February 13, 2015, the FEC issued guidance on how the national campaign committees should report contributions to and expenditures from the new segregated accounts. The FEC should amend its reporting regulations to reflect the principle that the national party committee must report contributions to and expenditures from their separate accounts on their regular reports.<sup>18</sup>

The Appropriations Act does not itself impose any reporting requirements. Nevertheless, where reports are required by statute elsewhere, sound policy and considerations of economy counsel in favor of reporting upon the same schedule—and, ideally, forms—already submitted by the national party committees.

#### **E. New regulations for convention committees**

##### **1. Prohibited uses**

The second bullet point of Section II repeats elements of an earlier request, that the Commission adopt the prohibitions of 11 C.F.R. § 9008.7:

The FEC should also adopt regulations that are consistent with Advisory Opinion 2014-12, which requires that convention committees use their funds for the same types of convention expenses that were permissible for publicly funded convention committees under 11 C.F.R. § 9008.7. This regulation on permissible and prohibited expenses for convention committees should also mirror the broader definition of permissible convention account expenses discussed above for convention accounts.<sup>19</sup>

Again, as discussed above, subparts (2) and (3) of 11 C.F.R. § 9008.7(b) would regulate more broadly than the statute permits.<sup>20</sup> While it is appropriate that the Commission provide illustrative examples of appropriate uses of convention funds, the prohibitions appropriate to

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<sup>18</sup> Pet. at 14 (footnote omitted).

<sup>19</sup> Pet. at 15.

<sup>20</sup> See *supra* n.9 and discussion, *supra* Section A.

public funds may not apply with similar force in the very different context of association protected by the First Amendment.

## 2. Reporting and other legal obligations

The Petition also addresses the reporting regime and other legal obligations for convention accounts:

As a national committee of a political party, convention committees are required to file monthly disclosure reports like any other national party committee under 11 C.F.R. § 104.5(c)(4). The FEC should adopt a regulation that explains that this reporting obligation applies to convention committees. The FEC may consider adding language that reflects that convention committees are subject to all other legal obligations applicable to national party committees specifically, and political committees generally.<sup>21</sup>

In addressing this request, the Commission should take care that the reporting burdens it adds do not unnecessarily chill constitutionally protected speech and association. In particular, given that the Appropriations Act does not itself impose any reporting requirements, any reporting requirements imposed as part of this rulemaking should be specifically required by statute. At most, the national committees should only report on the same schedule and to the same extent as for other contributions and expenditures. Already, under 11 C.F.R. § 100.5(b) and 100.5(e)(4), segregated funds and national party committees are classified as “political committees.” As such, the Commission’s existing regulations already require regular reporting for both segregated funds and national party committees.<sup>22</sup> But given that convention committees under the public financing program only filed reports quarterly and after the convention, the Commission should consider whether to put the new national party accounts on a similar reporting schedule.<sup>23</sup>

Furthermore, the requested amendment goes beyond reporting obligations, requesting that all legal obligations applicable to national party committees be imposed on convention committees. While this request makes intuitive sense, any rulemaking that simply imposed all those obligations, without analyzing each individually, may have unintended consequences.

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<sup>21</sup> Pet. at 15.

<sup>22</sup> See, e.g., 11 C.F.R. § 104.1(a) (requiring political committee reporting); 11 C.F.R. § 104.5(c)(4) (requiring national political party reporting). The interim guidance on national party committee accounts already requires the use of the same form as other national party reporting. See FEC News Releases, FEC Issues Interim Reporting Guidance for National Party Committee Accounts (Feb. 13, 2015), available at [http://www.fec.gov/press/press2015/news\\_releases/20150213release.shtml](http://www.fec.gov/press/press2015/news_releases/20150213release.shtml).

<sup>23</sup> See 11 C.F.R. § 9008.3(b)(2) (providing for quarterly reporting of convention committees).

Accordingly, the Center urges caution in adopting sweeping regulatory requirements in the absence of any express Congressional command.

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Thank you for considering these comments. The Center looks forward to working with the Commission to protect the First Amendment rights of Americans to participate in the political process and navigate the new statute set by Congress. In the event that the Commission chooses to take testimony at a public meeting, the Center requests the opportunity to provide testimony through a representative. Please do not hesitate to contact us should you have any questions about these comments.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to read "Allen Dickerson", written over a horizontal line.

Allen Dickerson  
Legal Director

Owen Yeates  
Staff Attorney