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January 14, 2015

Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: REG 2014-01: Proposed Rulemaking in Response to *McCutcheon v. FEC*
(addressing disclosure, earmarking, affiliation, and joint fundraising committees)

Dear Ms. Rothstein:

Demos is a national, non-partisan public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. Demos' lawyers, researchers, and advocates have extensive legal and policy expertise on money in politics. These comments are submitted in response to the Commission's Notice 2014-12, an advance notice of proposed rulemaking (ANPRM). We appreciate the opportunity to comment on whether the Commission should modify its regulations in light of the Supreme Court's ruling in *McCutcheon v. FEC*, which weakened our democracy by invalidating the aggregate contribution limits in federal elections.[1]

Notwithstanding the misguidedness of its ultimate holding in *McCutcheon*, the Court acknowledged that the Commission can play an important role in both preventing circumvention of the remaining contribution limits and ensuring that campaign-finance disclosure is robust enough to provide citizens with sufficient information to evaluate political messages.[2] The ANPRM recognizes that, in *McCutcheon*, the Court "identified mechanisms that could be implemented or amended to prevent circumvention of the base limits." We recommend that the

[1] *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014); *see also* Liz Kennedy & Seth Katsuya Endo, *The World According To, and After, McCutcheon v. FEC, and Why it Matters*, __ VAL. U. L. REV. __ (forthcoming) (discussing the likely undemocratic effects of *McCutcheon*), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510940.
[2] *Id.* at 1445-48, 1458-60.

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Commission revise its rules addressing donor disclosure, earmarking, affiliation, and joint fundraising, and specifically consider how its rules addressing donor disclosure, earmarking, affiliation of political committees, and joint fundraising have failed to effectuate constitutionally appropriate congressionally mandated goals for regulating political spending in the real word.

The Commission's current rules are ineffective at achieving the goals of donor disclosure and anti-circumvention.

We use the term "real world" deliberately to flag just how much the Court got wrong in *McCutcheon* regarding the current state of play for money in politics. One of the Court's primary missteps was its overestimation of the extent to which the current disclosure regime provides sufficient information to voters.[3] In the 2014 midterm elections, the rise of dark money spending—that is, expenditures by groups that do not disclose their donors—grew to unprecedented levels, likely topping $200 million.[4] This almost triples the amount of similar spending in the 2010 election.[5]

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[3] *See id.* at 1460 ("With modern technology, disclosure now offers a particularly effective means of arming the voting public with information.").

[4] *See, e.g.*, Russ Choma, *Money Won on Tuesday, But Rules of the Game Changed*, CENTER FOR RESPONSIVE POLITICS (Nov. 5, 2014) (estimating the figure at $219 million), http://www.opensecrets.org/news/2014/11/money-won-on-tuesday-but-rules-of-the-game-changed; Wesleyan Media Project, *Ad Spending Tops $1 Billion* (Oct. 29, 2014) (finding that media spending this year topped $1 billion and about 40% of these advertisements were purchased by dark money groups), http://mediaproject.wesleyan.edu/releases/ad-spending-tops-1-billion; Palmer Gibbs & Peter Olsen-Phillips, *Campaign Intelligence: Election 2014 by the numbers*, SUNLIGHT FOUNDATION (Nov. 3, 2014) (estimating at least $145 million in dark-money spending), http://sunlightfoundation.com/blog/2014/11/03/campaign-intelligence-election-2014-by-the-numbers; Paul Blumenthal, *Dark Money Concentrates In Small Number of Pivotal 2014 Races*, HUFFINGTON POST (Oct. 15, 2014) (estimating $190 million in dark-money spending), http://www.huffingtonpost.com/2014/10/15/dark-money-2014_n_5991978.html; Robert Maguire, *Dark Money Hits $100 Million With Help from Single-Candidate Groups*, CENTER FOR RESPONSIVE POLITICS (Oct. 9, 2014), https://www.opensecrets.org/news/2014/10/dark-money-hits-100-million-with-help-from-single-candidate-groups.

[5] *See* Maguire, *supra* note 4.

Similarly, the Court offhandedly dismissed the likelihood that political actors would form joint fundraising committees to collect huge checks from individual donors.[6] But, less than a year removed from the decision, such committees already have been formed, allowing wealthy donors to contribute almost $200,000 with just one check.[7]

Sophisticated political operators have evaded the spirit of the anti-circumvention laws through other means as well. The rise of single-candidate Super PACs is an example.[8] When a donor contributes to a single-candidate Super PAC, the donor clearly has a reasonable expectation that a significant portion of the contribution will be used to support the specific candidate. Likewise, when Super PACs are run by personnel who have strong affiliations with particular candidates (e.g., former employees, family members), they are not truly independent.[9]

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[6] *McCutcheon*, 134 S. Ct. at 1455 (asserting that "experience and common sense" foreclose the sorts of joint-fundraising committee scenarios envisioned by the district court); *see also* Paul Blumenthal, *Justice Alito's 'Wild Hypotheticals' Claim In McCutcheon v. FEC Misses The Mark*, HUFFINGTON POST (Oct. 8, 2013), http://www.huffingtonpost.com/2013/10/08/mccutcheon-v-fec-alito_n_4065441.html.

[7] Byron Tau, *GOP launches new big money effort*, POLITICO (Aug. 15, 2014), http://www.politico.com/story/2014/08/republicans-targeted-state-victory-fundraising-109724.html; *see also* Paul Blumenthal, *Democrats, Republicans Take Advantage Of New Big-Money Rules*, HUFFINGTON POST (Oct. 16, 2015), http://www.huffingtonpost.com/2014/10/16/mccutcheon-2014-super-joint-committee_n_6000500.html.

[8] *See, e.g.*, Matea Gold & Tom Hamburger, *Must-have accessory for House candidates in 2014: The personalized super PAC*, WASH. POST (Jul. 18, 2014), http://www.washingtonpost.com/politics/one-candidate-super-pac-now-a-must-have-to-count-especially-in-lesser-house-races/2014/07/17/aaa2fcd6-0dcd-11e4-8c9a-923ecc0c7d23_story.html.

[9] *See* Fredreka Schouten & Christopher Schnaars, *Some candidates' super PACs are a family affair: Is a super PAC independent when it's funded and run by your Mom and Dad?*, USA TODAY (Jul, 18, 2014), http://www.usatoday.com/story/news/nation/2014/07/18/relatives-fund-candidate-super-pacs-rothblatt/12824361; DANIEL P. TOKAJI & RENATA E. B. STRAUSE, THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS (2014) (describing growth of "buddy PAC" spending), http://moritzlaw.osu.edu/thenewsoftmoney/wp-content/uploads/sites/57/2014/06/the-new-soft-money-WEB.pdf.

More generally, the Commission must recognize that political operators are flouting another of the main principles animating the Court's jurisprudence—that is, the actual independence of "independent" expenditures. For example, in the 2014 elections, the GOP used Twitter to communicate strategic information with allies and Mitch McConnell released b-role footage of himself to be used by his supporters.[10]

To put it plainly, the Roberts Court's faith in the potential ability of the Commission to enact new provisions and to enforce existing regulations regarding earmarking and affiliated PACS to prevent circumvention has not been borne out by experience. [11] And, recognizing that the Court has so fundamentally misunderstood money in politics issues and the functionality of the infrastructure meant to address them, the public has developed a strong appetite for accountability and structural change.[12] The Commission should heed this call to strengthen and enforce its rules.

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[10] *See, e.g.*, Chris Moody, *How the GOP used Twitter to stretch election laws*, CNN (Nov. 17, 2014), http://www.cnn.com/2014/11/17/politics/twitter-republicans-outside-groups/index.html; Lee Fang, *How Mitch McConnell Is Bending Every Last Campaign Finance Rule: Post–Citizens United, candidates aren't supposed to coordinate with "outside" spending groups—but even that minimal restriction isn't being enforced*, THE NATION (Oct. 21, 2014), http://www.thenation.com/article/184313/how-mitch-mcconnell-bending-every-last-campaign-finance-rule; PUBLIC CITIZEN, SUPERCONNECTED 2014: GROWING TREND OF UNREGULATED ELECTIONEERING GROUPS SERVING CANDIDATES AND PARTIES FURTHER DISPROVES SUPREME COURT'S ASSUMPTION THAT SUCH GROUPS ARE 'INDEPENDENT' (2014), http://www.citizen.org/documents/super-connected-2014-citizens-united-outside-groups-report.pdf; Chisun Lee, Brent Ferguson, & David Earley, *After Citizens United: The Story in the States*, BRENNAN CENTER FOR JUSTICE (2014), http://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf.

[11] *See In re: Crossroads Grassroots Policy Strategies*, MUR 6396 (Dec. 30, 2014) (supplemental statement of reasons of Commissioner Steven T. Walther), http://eqs.fec.gov/eqsdocsMUR/14044364941.pdf.

[12] *See, e.g.*, Ariel Edwards-Levy, *Most Americans Support Giving Congress More Power To Limit Campaign Spending*, HUFFINGTON POST (Nov. 13, 2014), http://www.huffingtonpost.com/2014/11/13/campaign-finance-poll_n_6153630.html?1415910964.

The Commission should revise its regulations pertaining to disclosure so they effectuate congressional intent and the Supreme Court's belief that an effective disclosure regime exists.

When a political advertisement runs, the public is entitled to know who actually funded it, regardless of to whether it is an electioneering communication or an express advocacy independent expenditure. The Supreme Court has repeatedly affirmed the constitutionality of requiring transparency for the true source of money in politics. The government has an important interest in "provid[ing] the electorate with information about the sources of election-related spending" since "[t]ransparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[13] Requiring disclosure of the actual funders behind political spending also enables "citizens [to] see whether elected officials are 'in the pocket' of so-called moneyed interests.'"[14] But the Commission's regulations frustrate this goal by permitting individuals to hide behind front groups that are not currently being required to disclose their funders, in contravention of the law and the Supreme Court's assumption that "modern technology" means "disclosure now offers a particularly effective means of arming the voting public with information."[15]

In 11 C.F.R. § 104.20(c)(9), the Commission adopted an approach to disclosure that conflicts with federal law by preventing the necessary flow of information to the public about individuals and groups who fund certain electioneering communications. The Commission's regulation requires disclosure of "the name and address of each person who made a donation aggregating $1,000 or more to the corporation or labor organization [that has made electioneering expenditures of more than $10,000], aggregating since the first day of the preceding calendar year, *which was made for the purpose of furthering electioneering communications*."[16] In other words, if a contributor does not explicitly state that his or her donation to a corporation or labor organization was intended to fund those sorts of advertisements, the Commission does not require the public disclosure of the individuals who actually paid for the advertisements.

The Commission's approach impermissibly narrows the disclosure requirements promulgated in the Bipartisan Campaign Reform Act, which required the disclosure of

[13] *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371 (2010).
[14] *Id.* at 370-371 (citations omitted).
[15] *McCutcheon*, 134 S. Ct. at 1460.
[16] 11 C.F.R. § 104.20(c)(9) (emphasis added).

information regarding *all* contributors who gave $1,000 or more to such groups, regardless as to whether the donations were made with the express purpose of furthering electioneering communications.[17] And, as a federal district court has commented, the Commission's rule functionally creates an "easily exploited loophole that allows the true sponsors of advertisements to hide behind dubious and misleading names."[18]

Similarly, 11 C.F.R. § 109.10(e)(1)(vi) creates a similarly problematic limitation on the disclosure of the true source of funds used for independent expenditures.[19] The Commission's regulation requires disclosure of "each person who made a contribution in excess of $200 to the person filing such report, *which contribution was made for the purpose of furthering the reported independent expenditure*."[20] But 2 U.S.C. § 30104(c)(1) requires every person (other than a political committee) who makes independent expenditures over $250 in a calendar year to disclose certain information, including identifying any person (other than a political committee) "who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year…."[21] The regulation's addition of a purpose requirement is in conflict with the statute, which does not include one.

Moreover, even 2 U.S.C. § 30104(c) (2)(C), which requires the "identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure,"[22] is more disclosure-friendly than the regulation. By its use of the definite article within the term "the reported independent expenditure," 11 C.F.R. § 109.10(e)(1)(vi) seems to require disclosure only when the contribution was made for the purpose of furthering a specific reported independent expenditure.[23] This is inconsistent with the use of the indefinite article within the statute.[24]

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[17] 52 U.S.C. § 30104(f)(2)(E)–(F) (2012) (requiring "the names and addresses of all contributors who contributed an aggregate amount of $1,000 or more to that account during the period beginning on the first day of the preceding calendar year and ending on the disclosure date").
[18] *Van Hollen v. Fed. Election Comm'n*, No. CV 11-0766 (ABJ), 2014 WL 6657240, at *2 (D.D.C. Nov. 25, 2014).
[19] 11 C.F.R. § 109.10(e)(1)(vi).
[20] *Id.*
[21] 2 U.S.C. § 30104(c)(1), (b)(3)(A).
[22] 2 U.S.C. § 30104(c)(2)(C).
[23] 11 C.F.R. § 109.10(e)(1)(vi).
[24] 2 U.S.C. § 30104(c)(2)(C).

In sum, the Commission's regulations discussed above conflict with the statute and its purpose—to keep the public informed about the true sources of political spending —by creating additional limitations. The Commission should revise 11 C.F.R. § 104.20(c)(9) and 11 C.F.R. § 109.10(e)(1)(vi) to conform with the Bipartisan Campaign Reform Act's mandate of broad disclosure and the Supreme Court's expressed, yet incorrect, assumption that effective disclosure is providing voters with the information they need and deserve.

The Commission should commit to preventing the circumvention of existing contribution limits by revising its regulations regarding earmarking, affiliation, coordination, and joint fundraising.

Federal law limits the amount of money that can be spent in coordination with candidates because coordinated expenditures are treated as (capped) contributions to the candidates.[25] Coordinated expenditures are treated this way because they are difficult to distinguish from in-kind contributions where candidates effectively control such outlays just as they direct their own campaign funds. And, accordingly, restrictions on coordinated expenditures are a key component to preventing the circumvention of contribution limits. The Commission has adopted regulations designed to address this.[26] But the anti-coordination rules are inadequate to cover the type of sophisticated maneuvering that occurs. For example, the Commission has determined that federal candidates may be featured guests at fundraisers at which unlimited contributions are solicited.[27] Additionally, the existing rules have not been adequately enforced, even when the coordination is clear.[28]

The Court's decision in *McCutcheon v FEC* rested on the assumption that the aggregate contribution limits were not necessary to prevent circumvention of base contribution limits

[25] *See* 52 U.S.C.A. § 30116.
[26] *See, e.g.*, 11 C.F.R. § 109.21.
[27] *See Majority PAC and House Majority PAC*, FEC Advisory Op. No. 2011-12, 2011 WL 2662413, at *1 (June 30, 2011).
[28] *See, e.g., Campaign Legal Center v. Special Operations for America*, MUR No. __ (filed Mar. 5, 2014) (alleging coordination between a congressional candidate and a purportedly independent-expenditure committee that appeared to distribute campaign materials made by the candidate that were not otherwise publicly available for use by independent groups), *available at* http://www.campaignlegalcenter.org/images/CLC_D21_Complaint_Against_SOFA_Zinke_for_Congress_Signed__File_Stamped_3_5_14.pdf; *see also* TOKAJI & STRAUSE, *supra* note 9.

because effective anti-circumvention measures would be enforced. "Various earmarking and antiproliferation rules"[29] would prevent a donor who had contributed the maximum amount to a candidate from channeling more money to these candidates. Specifically, the Court cited 11 CFR § 110.1(h)(1), § 102.14(a), and § 110.1(h)(2) to support its assertions that "the donor may not contribute to the most obvious PACs: those that support only [a specific candidate]…Nor may the donor contribute to the slightly less obvious PACs that he knows will route 'a substantial portion of his contribution to [that candidate]."[30] The Court rejected the government's arguments, which had been adopted by the lower court, on their understanding that "[t]hese scenarios…are either illegal under current campaign finance laws or divorced from reality."[31]

The Commission's regulations state that all contributions made on behalf of or to a candidate are treated as contributions from the donor to the candidate if they are "in any way earmarked or otherwise directed to the candidate through an intermediary or conduit."[32] And the Commission's regulations prohibit a donor from contributing both to a candidate's committee and to one that the contributor knows will use a substantial portion to contribute to the same candidate or *expend funds on the candidate's behalf*, specifically identifying single-candidate committees.[33] However, the ANPRM states that the Commission's practice is that "funds are considered to be 'earmarked' only when there is 'clear documented evidence of acts by donors that resulted in their funds being used' as contributions."[34] The Commission's requirement of an express agreement before enforcing the existing earmarking regulations is manifestly in opposition to the Supreme Court's assertion that "[e]ven [an] 'implicit[]' agreement would trigger the earmarking provision" and its rejection of the government's arguments which "could not succeed" without assuming that political committees "would engage in a transparent violation of the earmarking rules (and that they would not be caught if they did.)"[35]

The Commission should enforce its earmarking rules, and treat contributions to single-candidate PACs as contributions to the candidate because these donors must have the reasonable expectation that their money is going to support the particular candidate.[36] Further, we support

[29] *McCutcheon*, 134 S. Ct. at 1453.
[30] *Id.* at 1458.
[31] *Id.* at 1456.
[32] 11 C.F.R. § 110.6.
[33] 11 C.F.R. § 110.1(h).
[34] Advance Notice of Proposed Rulemaking (ANPR), 79 Fed. Reg. 62362 (Oct. 17, 2014).
[35] *McCutcheon*, 134 S. Ct. at 1455.
[36] *See, e.g.*, Gold & Hamburger, *supra* note 8.

establishing a minimum number of candidates that a PAC meaningfully supports in order to prevent evasion of the candidate contribution limits through only nominally multi-candidate PACs.

Similarly, the Commission's regulations treat all contributions made or received by affiliated committees as having been made to a single committee for the purposes of contribution limits.[37] This aligns with the Federal Election Campaign Act (FECA), which provides that "all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person…, or by any group of such persons, shall be considered to have been made by a single political committee."[38] The Court relied on these affiliation rules in *McCutcheon*, claiming that they would prevent "donors from creating or controlling multiple affiliated political committees."[39]

The Commission considers circumstantial factors when determining affiliation, including such criteria as "[w]hether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship between the sponsoring organizations or committees."[40] The Commission asks whether it should revisit its affiliation factors[41] to ensure they are "adequate to prevent circumvention of the base contribution limits"[42] The Commission should revisit its affiliation factors, and specifically consider whether affiliated personnel (e.g., former employees, family members) are running Super PACs when determining whether such PACs are affiliated with candidates' committees, because those associations strongly suggest that the Super PACs are not truly independent.[43] Further, the Commission should repeal the rule that, notwithstanding other indicia of affiliation "no authorized committee shall be deemed affiliated with any entity that is not an authorized committee"[44] since this creates an easily exploited loophole.

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[37] 11 C.F.R. § 110.3 ("all contributions made or received by more than one affiliated committee…shall be considered to be made or received by a single political committee.").
[38] 52 U.S.C. § 30116(a)(5).
[39] *McCutcheon*, 134 S. Ct. at 1446-47.
[40] 11 C.F.R. § 110.3.
[41] 11 C.F.R. § 100.5(g)(4); see also 11 C.F.R. § 110.3(a)(3)(ii).
[42] ANPRM, 79 Fed. Reg. at 62363.
[43] *See* Schouten & Schnaars, *supra* note 9; TOKAJI & STRAUSE, *supra* note 9.
[44] 11 C.F.R. § 100.5(g)(5).

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Finally, while the Court in *McCutcheon* dismissed the circumvention threat posed by joint fundraising committees, the Court invited further protections to prevent the evasion of contribution limits through the use of joint fundraising committees. One might "simply limit the size of joint fundraising committees", and adopt "targeted restrictions on transfers among candidates and political committees."[45] Currently the Commission permits candidates to form joint fundraising committees with parties and other organizations.[46] But the governing federal statute only permits non-presidential candidates to "designate a political committee established solely for the purpose of joint fundraising by such candidates as an authorized committee.[47] At the least, the Commission should revise 11 C.F.R. § 102.17 to conform to the statute.

We thank you again for the opportunity to comment in this proceeding and urge you to take the recommended actions to prevent the circumvention of contribution limits and ensure effective disclosure to safeguard the democratic rights of every citizen in our democracy.

Sincerely,

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Seth Endo
Legal Fellow, Demos

[45] *McCutcheon*, 134 S. Ct. at 1458, 1459.
[46] *See* 11 C.F.R. § 102.17(a)(1)(i).
[47] *See* 52 U.S.C.A. § 30102(e)(3)(A).