1776 K STREET NW
WASHINGTON, DC 20006
PHONE 202.719.7000
FAX 202.719.7049

7925 JONES BRANCH DRIVE
MCLEAN, VA 22102
PHONE 703.905.2800
FAX 703.905.2820

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Jan Witold Baran
202.719.7330
jbaran@wileyrein.com

VIA SERS.FEC.GOV AND FIRST CLASS MAIL

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

Re: Comments of the Center for Individual Freedom regarding the Rulemaking Petition: Contributions from Corporations and Other Organizations to Political Committees (Notice 2015-10)

Dear Commissioners:

The Center for Individual Freedom ("CFIF") by counsel submits these comments in response to the Federal Election Commission ("FEC" or "Commission") Notice of Availability of a Petition for Rulemaking. *See* 80 Fed. Reg. 45,115 (July 29, 2015).

The Notice of Availability seeks comments on a Petition for Rulemaking (the "Petition") received on May 14, 2015, from Make Your Laws PAC, Inc. and Make Your Laws Advocacy, Inc. (collectively "Petitioners"). At its core, the Petition asks the Commission to establish a new rule requiring that corporations and other organizations that contribute to independent-expenditure-only committees ("super PACs") do so through a separate segregated account subject to certain disclosure requirements.

CFIF objects to the Petition's proposed rule on two grounds. First, promulgating the rule would contradict the unambiguously expressed intent of Congress and thereby exceed the Commission's statutory authority. Second, the rule proposed in the Petition would not serve the purposes ostensibly advanced by the Petition and would burden core First Amendment speech. Accordingly, the Commission should not commence a rulemaking.

I. The Center for Individual Freedom

CFIF is a non-profit organization exempt from federal income taxes under section 501(c)(4) of the Internal Revenue Code. CFIF's mission is to protect and defend individual rights guaranteed by the U.S. Constitution. It seeks to focus public, legislative, and judicial attention on the rule of law as embodied in the federal and state constitutions. It also seeks to foster public discourse and to promote education

that reaffirms the imperatives of the U.S. Constitution and principles of economic liberty as they relate to contemporary conflicts. Its goals, principles, and activities are more fully described on its website, http://www.cfif.org.

CFIF engages in a wide variety of activities in pursuit of its mission. It conducts educational activities and engages in issue advocacy, including electioneering communications. CFIF zealously protects its right to engage in these and other politically-related activities. *See, e.g.*, *CFIF v. Scott*, 576 F. App'x 324 (5th Cir. 2014); *CFIF v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012); *CFIF v. Carmouche,* 449 F.3d 655 (5th Cir. 2006); La. Bd. of Ethics Adv. Op. 2014-1565 (Feb. 23, 2015); Ga. State Ethics Comm'n. Adv. Op. 2010-05 (Apr. 5, 2011).

II. The Petition for Rulemaking

The Petitioners ask the Commission to promulgate regulations to combat what they perceive as "contribution laundering" by incorporated 501(c) organizations. Under the First Amendment, super PACs may receive unlimited contributions from corporations for the purpose of making independent expenditures. Corporations—specifically 501(c)(4) organizations that Petitioners allege are the most common type of entity making contributions to super PACs—do not have FEC reporting obligations in connection with such contributions and do not have to publicly disclose their donors. Super PACs, for their part, are required to identify only the proximate source of a contribution—*i.e.*, the entity contributing directly to the super PAC. According to Petitioners, the result is "neither the FEC nor the public can determine the *original* source of" contributions to super PACs. Pet. at 2.

Petitioners maintain that "[t]his outcome plainly subverts the purpose of the [Federal Election Campaign Act ("FECA")] and the underlying assumptions of public disclosure relied upon" in recent judicial decisions. *Id.* Petitioners maintain that, although 501(c)(4) entities may make contributions to super PACs, they do not have the right to make "anonymous" contributions—*i.e.*, contributions made up of funds from their undisclosed donors—to these committees. To combat this perceived loophole, Petitioners ask that the Commission establish "a rule requiring that any person, other than a natural person, contributing an aggregate of more than $1,000 in any calendar year to any political committee, whether directly or indirectly, must do so from" a separate segregated fund subject to burdensome FEC reporting. *Id.* at 4. Petitioners maintain that, to be effective, "the regulation must

require disclosure of the *original* source of *all* election-related contributions and expenditures, traceable through *all* intermediary entities." *Id.* (footnotes omitted).

III. Comments

The Commission is without statutory authority to promulgate the proposed rule.[1] Against the backdrop of the FECA's longstanding limitation on requiring only disclosure of contributions made *for the purpose of furthering independent expenditures* and the FEC's accompanying regulation implementing that statutory provision, Congress has ratified this approach by not disturbing this legislative and regulatory limitation and by rejecting legislation to require broader disclosure. Congress has spoken unambiguously to the question at issue, and the Commission is without authority to enact the rule proposed in the Petition.

Even if the Commission had authority to alter its longstanding treatment of contributions made to entities engaged in independent expenditures, the proposed rule will not result in more meaningful disclosure and will burden core First Amendment speech. Therefore, the Commission should not proceed with the rulemaking.

A. Issuing the proposed rule would be contrary to congressional intent and violate the Administrative Procedure Act.

1. ***APA Review***. The Commission may not promulgate the proposed rule because it would exceed the Commission's authority by contravening clear congressional intent and, therefore, violate the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), (C).

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[1] The proposed rule also appears to be unconstitutional on its face. By its terms, the proposed rule would require that the separate account for making contributions to a political committee include funds from only two sources: other restricted accounts and natural persons. *See* Pet. at 4. It is undisputed that such a separate account can be subject to limitations if the account is used to make contributions to candidates or traditional political committees. *See* Stipulated Order and Consent Judgment, *Carey v. FEC*, No. 1:11-cv-00259 (D.D.C. Jan. 31, 2011). But, to the extent that the proposed rule maintains that personal or other so-called "hard money" funds are required to make contributions to super PACs, the rule would clearly run afoul of the First Amendment. *See SpeechNow.org v. FEC*, 599 F.3d 686, 695 (D.C. Cir. 2010) (holding that, because "the government has no anti-corruption interest in limiting contributions to an independent expenditure group," the FECA's contribution limits are unconstitutional as applied to contributions to super PACs); FEC Advisory Opinion 2010-09 (July 22, 2010).

To determine whether an agency's interpretation of a statute is permissible under the APA, courts assess the interpretation using the two-step framework established in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). At *Chevron* Step One, the court must determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43.

At Step One, courts "use 'traditional tools of statutory construction' to determine whether Congress has unambiguously expressed its intent," *Serono Labs., Inc., v. Shalala*, 158 F.3d 1313, 1319 (D.C. Cir. 1998) (citation omitted), including examination of the statute's legislative history, *see Am. Bankers Ass'n v. Nat'l Credit Union Admin.*, 271 F.3d 262, 267 (D.C. Cir. 2001); *Bell Atlantic Tel. Co. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

2. *Legislative Inaction as Congressional Intent*. In appropriate circumstances, legislative inaction can demonstrate congressional intent. One such circumstance is when Congress "acquiesces" to longstanding agency interpretations by failing to overturn those with which it disagrees. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.").

Congress may further demonstrate acceptance of existing agency interpretations by rejecting legislation that would alter the status quo. In *Bob Jones University v. United States*, 461 U.S. 574 (1983), the Supreme Court upheld an IRS interpretation of the charitable deduction allowance, in large part because of legislative inaction. The Court cautioned that application of this principle was appropriate only in certain circumstances, but two factors made it appropriate in *Bob Jones*: (1) the subject matter was one with which Congress was intimately familiar, and (2) Congress made many attempts to override the IRS interpretation, but did not succeed. *Id.* at 600–01. When Congress rejects legislation aimed at altering the status quo "repeatedly" over multiple sessions, courts must conclude that "Congress

as yet has had no intention" of changing the status quo. *Flood v. Kuhn*, 407 U.S. 258, 283 (1972).

The Supreme Court's decision in *FDA v. Brown & Williamson Tobacco Corp*, 529 U.S. 120 (2000), is also instructive. There, the Court reviewed both legislative action and inaction and concluded Congress had not given the FDA approval to regulate cigarettes. *Id.* at 144. In particular, the Court noted that the FDA had for decades denied that it had jurisdiction to regulate cigarettes and, over the course of several years, "Congress considered and rejected bills that would have granted the FDA such jurisdiction." *Id.* Against this backdrop of congressional approval of the status quo, the Court held that Congress had "effectively ratified" the existing regulatory regime, *id.*, and concluded its analysis at *Chevron* Step One, *id.* at 159–160.

3. ***The Proposed Rule*.** According to the Petition, the Commission must amend its existing regulations to provide "full and effective disclosure" in the wake of a series of court decisions that allegedly left the FEC regulations "riddled with loopholes." Pet. at 3. To accomplish this, Petitioners urge the Commission to strictly limit the source of corporations' contributions to super PACs to funds contained in a separate account. The corporation, in turn, would be required to disclose all those who contributed to the separate account, traceable through all intermediate entities. The corporation would have to identify all donors whose funds are deposited into the separate account, regardless of whether the donor had the purpose of supporting the corporation's super PAC contributions.

Issuing the proposed regulation would exceed the Commission's authority under the FECA and would fail at *Chevron* Step One. Congress has expressed its unambiguous intent that the FECA does not require the broad disclosure provisions contained in the proposed rule. The FECA clearly limits disclosure of contributions that fund independent expenditures to only those made "for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2)(C). Over the years, Congress has acquiesced to the Commission's longstanding implementing regulation that imposes the same purpose requirement as a predicate for disclosure. *See* 11 C.F.R. § 109.10(e)(1)(vi). Congress also repeatedly rejected the DISCLOSE ("Democracy is Strengthened by Casting Light on Spending in Elections") Act, which contained broad disclosure provisions materially indistinguishable from those

contemplated in the proposed rule. Imposing a rule that contravenes the unambiguous intent of Congress would not pass muster under *Chevron* Step One.

4. ***The FECA and its Legislative History***. Since 1979, the FECA has required entities that are not political committees and that make independent expenditures to identify those "person[s] who made a contribution in excess of $200 . . . for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2)(C). Since 1980, the FEC's implementing regulation has contained the same narrow purpose requirement. *See* 11 C.F.R. § 109.10(e)(1)(vi); 45 Fed. Reg. 15,080, 15,119 (Mar. 7, 1980). Throughout this time, these disclosure requirements applied to partnerships, unincorporated associations and other entities with the ability to concentrate funds from various sources and finance independent expenditures. When Congress overhauled the FECA through the Bipartisan Campaign Finance Reform Act ("BCRA") in 2002, it left this disclosure provision untouched.

Even in the wake of *Citizens United*, 558 U.S. 310 (2010), which enlarged the types of groups that may make or support independent expenditures, Congress has repeatedly considered, but rejected, legislation embodying broad disclosure provisions similar to that in the Petition's proposed rule. As explained, *supra* at 4, the proposed rule would require disclosure of all donors above a certain threshold and whose funds are used to make contributions to super PACs. During the 111th Congress, immediately after the Supreme Court issued *Citizens United*, Congress rejected just such a disclosure regime. The DISCLOSE Act (H.R. 5175; S. 3295; S. 3628), sponsored by Representative Chris Van Hollen, would have required an organization that contributes to super PACs or engages in any other independent expenditure activity to disclose all donors who contributed in excess of $600, regardless of whether they contributed for the purpose of furthering independent expenditures. DISCLOSE Act, § 211.

Although it passed the House of Representatives, the DISCLOSE Act twice failed to pass the Senate during the 111th Congress. Three largely similar versions of the DISCLOSE Act were introduced in the 112th Congress, yet failed to pass in either chamber. Representative Van Hollen again introduced the DISCLOSE Act during the 113th Congress to no avail. Finally, the legislation was proposed in the 114th Congress, but it has not advanced beyond introduction.

5. ***The Commission Lacks Authority to Issue the Proposed Rule.*** The FECA contains a narrow disclosure provision requiring disclosure of only those "person[s]

who made a contribution in excess of $200 . . . *for the purpose of furthering an independent expenditure*." 52 U.S.C. § 30104(c)(2)(C) (emphasis added). Where "the intent of Congress is clear," the agency must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Here, Congress addressed the issue of disclosure of contributions for independent expenditures by requiring the identities of only certain contributors to be disclosed. "Congress has directly spoken to the precise question at issue" and that should end the inquiry at *Chevron* Step One. The statute's plain language leaves no room for enlargement of the scope of compelled disclosure and the Petition cites no other FECA authority to justify such an approach. Because the disclosure rule contained in the Petition sweeps substantially more broadly than the FECA authorizes, the Commission is without authority to promulgate the proposed rule.

Congress's legislative inaction with respect to the disclosure requirements for entities engaged in independent expenditures—even when it overhauled the campaign finance laws in 2002—demonstrates congressional acquiescence to this statutory limit on disclosure and the FEC's implementing regulation. This congressional acquiescence forecloses the broader disclosure provision in the Petition's proposed rule. *See Associated Dog Clubs of New York State, Inc. v. Vilsack*, 75 F. Supp. 3d 83, 91 (D.D.C. 2014) ("When Congress reenacts a statute but does not modify an Agency's interpretation of a regulatory provision, it can be evidence that Congress has endorsed the interpretation.").

Further, Congress's affirmative rejection of the DISCLOSE Act, which would have provided for disclosure similar to that envisioned by the Petition, removes any doubt as to Congress's approval of the status quo. By "repeatedly" rejecting legislative proposals to change the status quo, *Flood*, 407 U.S. at 283, Congress "effectively ratified" the existing regulatory regime, *Brown & Williamson*, 529 U.S. at 144, and signified its intent that the FECA not contain such a broad disclosure regime.

The FECA's plain statutory language leaves no room for the Commission to require disclosure of contributors beyond those who made contributions "for the purpose of furthering an independent expenditure." The intent of Congress to limit disclosure in this manner is further manifested by congressional acquiescence to the Commission's implementing regulation and Congress's rejection of the DISCLOSE Act which would have amended the FECA to achieve the breadth of disclosure the Petition seeks. Because "the intent of Congress is clear," the agency "must give

effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. Promulgating the proposed rule would contravene congressional intent, and, therefore, it would not survive judicial review at *Chevron* Step One.

B. Even if the Commission had the authority to promulgate the proposed rule, the rule would not advance the Petition's professed desire for meaningful disclosure and would burden core First Amendment speech.

1. ***The Government's Interest in Compelled Disclosure.*** Disclosure laws are subject to intermediate scrutiny under the First Amendment, which means that the government must draw disclosure rules "in proportion to the interest served" and employ "means narrowly tailored to achieve the desired objective." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1456-57 (2014) (plurality opinion) (internal quotation marks and citations omitted). The government's interest in compelled disclosure is "based on . . . provid[ing] the electorate with information about the sources of election-related spending," *Citizens United*, 558 U.S. at 367 (internal quotation marks and citation omitted), which in turn is material only so far as it "helps voters to define more of the candidates' constituencies." *Buckley v. Valeo*, 424 U.S. 1, 81 (1976) (per curiam).

The FECA requires disclosure of persons who make contributions "for the purpose of furthering an independent expenditure." 52 U.S.C. § 30104(c)(2)(C); 11 C.F.R. § 109.10(e)(1)(vi). This standard is narrowly tailored to the government's interest in compelled disclosure. The Supreme Court has held that a disclosure rule that identifies those "contributors who . . . intended to influence elections . . . provides *precisely* the information necessary to monitor [a speaker's] independent spending activity and its receipt of contributions." *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 262 (emphasis added). In the Court's view, requiring disclosure of only those who contributed with the purpose of furthering independent expenditures fully meets "[t]he state interest in disclosure." *Id.*

2. ***Narrow Tailoring***. The proposed rule would require disclosure of a much broader array of contributions than those made for the purpose of furthering independent expenditures. At first blush, the provision of a separate account dedicated to financing independent expenditures seems narrowly tailored to the goal of identifying sources of contributions made for the purpose of furthering

independent expenditures. But if one considers how this would work in practice, it becomes apparent that the resulting level of disclosure is far broader.

The proposed rule would require an organization to disclose the identity of any donor to the organization's separate account, regardless of whether that donor contributed for the purpose of furthering independent expenditures. An organization that does not receive earmarked funds would be required to place general funds from other donors into the separate account in order to make a super PAC contribution. Because the proposed rule subjects all funds in the separate account to disclosure requirements—regardless of whether the funding sources intended to support the entity's political activities—the proposed rule would capture significantly more persons than those who contributed "for the purpose of furthering an independent expenditure." The resulting flood of data would not reliably identify those who support the entity's political activities and, therefore, would not aid voter decision-making.

The Commission has recognized this issue in the past and tailored its disclosure regulations appropriately. In its 2007 Explanation and Justification of regulations concerning reporting of contributions made for the purpose of furthering electioneering communications ("ECs"), the Commission stated:

> In the Commission's judgment, requiring disclosure of funds received only from those persons who donated specifically for the purpose of furthering ECs appropriately provides the public with information about those persons who actually support the message conveyed by the ECs without imposing on corporations and labor organizations the significant burden of disclosing the identities of the vast numbers of customers, investors, or members, who have provided funds for purposes entirely unrelated to the making of ECs.

72 Fed. Reg. 72,899, 72,911 (Dec. 26, 2007).

The same logic applies here. Because corporations and other entities will contribute to super PACs with funds other than those earmarked for independent expenditures, the proposed rule's disclosure provision will require disclosure of many contributors who provided funds for purposes unrelated to the entity's independent expenditure activities. Thus, the proposed rule would fail to provide meaningful disclosure of those who support an organization's political expenditures.

3. ***Burden on Core First Amendment Speech.*** Not only does the lack of narrow tailoring fail to further the Petition's stated policy goal of ensuring more meaningful disclosure, it also underscores the serious First Amendment issues implicated by the proposed rule. As explained above, disclosure laws must be drawn "in proportion to the interest served" and employ "means narrowly tailored to achieve the desired objective." *McCutcheon*, 134 S. Ct. at 1456-57 (internal quotation marks and citations omitted). Although the Court has spoken positively of the effects of well-crafted disclosure laws, *see id.* at 1459, the government's power is not unbounded in this area, *see Stop This Insanity Inc. Emp. Leadership Fund v. FEC*, 761 F.3d 10, 16 (D.C. Cir. 2014) ("Not every intrusion into the First Amendment can be justified by hoisting the standard of disclosure.") (citing *Buckley*, 424 U.S. at 64). To the extent that the proposed rule would require disclosure of substantially more contributors than necessary for the government to further its interest in providing the electorate with relevant information, the rule is unconstitutional.

Indeed, the mere possibility that the proposed rule would raise constitutional questions is enough for a court to strike it down. When a federal court assesses the constitutionality of a statute, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (opinion of Roberts, C.J.) (citation omitted). This rule of construction, the canon of avoidance, comes into play when a statute is ambiguous and a reasonable interpretation of the statute that would not implicate constitutional concerns is available. Often, a statutory ambiguity implicates both the avoidance canon and *Chevron* deference; in such circumstances, the canon of avoidance prevails. *See Rapanos v. United States*, 547 U.S. 715, 738 (2006) (holding that, even if the statutory provision at issue were ambiguous, "we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity"); *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) ("All manner of presumptions, substantive canons and clear-statement rules take precedence over conflicting agency views."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 316 (2000) ("Administrative agencies are not permitted to construe federal statutes in such a way as to raise serious constitutional questions . . . .").

An interpretation of the FECA to authorize the proposed rule's sweeping disclosure requirements would raise serious constitutional concerns. Because the FECA does

not clearly require such an interpretation—indeed, the FECA has not been interpreted this way since its inception—a reviewing court would avoid such a reading of the Act and enjoin the implementation of the proposed rule.

IV. Conclusion

Against a clear and long backdrop of limited disclosure of sources of funds used in furtherance of independent expenditures, Congress squarely rejected legislation on multiple occasions that would have imposed broader disclosure requirements. Based on this history, the Commission is without statutory authority to impose the broader disclosure requirements sought by the Petitioners. In any event, the proposed rule would fail to advance any government or public interest in providing meaningful disclosure to the electorate and would burden core First Amendment speech. For these reasons, the Commission should not initiate the rulemaking sought by the Petition.

Respectfully submitted,

Jan Witold Baran
Caleb P. Burns
Stephen J. Kenny

Counsel to the Center for Individual Freedom