CLC
ADVANCING DEMOCRACY THROUGH LAW

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Federal Election Commission
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Office of General Counsel
1050 First Street NE
Washington, DC 20463

Petition for Rulemaking to Amend 11 C.F.R. § 104.3 to Clarify that Political Committees Must Disclose Receipts and Disbursements of Exchanged Lists

Dear Ms. Stevenson,

The Federal Election Campaign Act (FECA) requires political committees to file publicly available reports disclosing all of the committees' receipts and disbursements. There are no exceptions. Yet a series of Federal Election Commission (FEC) advisory opinions have erroneously and unlawfully construed FECA and FEC regulations as exempting from these statutory disclosure requirements the receipt and disbursement of valuable lists that committees exchange with each other.

Pursuant to 11 C.F.R. § 200.2, Campaign Legal Center (CLC) hereby petitions the FEC to conduct a rulemaking to amend 11 C.F.R. § 104.3 to clarify that the receipt or disbursement of a mailing list or other valuable information is subject to the reporting requirements in section 104.3. In particular, the Commission should clarify that even if a list is not subject to disclosure as a "contribution" or "expenditure," *e.g.*, if it is received or disbursed as part of an equal-value exchange, it must nevertheless be reported as "other receipts" under 11 C.F.R. § 104.3(a)(2)(viii), or "other disbursements" under 11 C.F.R. § 104.3(b)(ix).

Background

Congress required in FECA that political committees report all of their receipts and disbursements. 52 U.S.C. § 30104(a). Although FECA identifies certain specific categories of receipts and disbursements that must be disclosed, including contributions, expenditures, and transfers from and to other political committees, *id.* § 301014(b)(2), (4), the statute also broadly requires disclosure of "other forms of receipts," *id.* § 30104(b)(2)(J), and "any other disbursements," *id.* § 30104(b)(4)(G), (b)(4)(H)(v). FECA further requires political committees to disclose "the total amount[s] of *all* receipts" and "*all* disbursements." *Id.* § 30104(b)(2), (b)(4) (emphases added).

These comprehensive disclosure requirements ensure that the public has access to information about who is providing monetary and other support to political committees and the sources, amounts, and recipients of political committees' spending. In other words, they ensure "that the voters are fully informed about the person or group who is speaking." *Citizens United v. FEC*, 558 U.S. 310, 368 (2010). They also provide law enforcement officers, journalists, and watchdog groups with information necessary to determine whether committees are complying with other campaign finance law requirements, such contribution limits and source restrictions. *See* 52 U.S.C. §§ 30116, 30118, 30119, 30121.

The Commission has implemented these broad disclosure requirements in its regulations, which similarly require political committees to report not only contributions, expenditures, and other specified categories of receipts and disbursements, but also, more generally, "other receipts" and "other disbursements." 11 C.F.R. § 104.3(a)(2)(viii), (b)(ix).

FEC regulations explicitly identify membership lists and mailing lists as examples of "goods or services" that may qualify as in-kind contributions or expenditures. *See* 11 C.F.R. §§ 100.52(d)(1) (contribution definition), 100.111(e)(1) (expenditure definition). "The Commission has long recognized that a political committee's mailing lists are assets that have value and that are frequently sold, rented, or exchanged in a market." Advisory Opinion 2011-02 (Brown). FEC regulations thus make clear that such lists, when received for free or at a discount, must be reported as a contribution, and when provided for free or at a discount, must be reported as an expenditure. *See, e.g.*, Advisory Opinion 1981-46 (Dellums) (explaining that a mailing list or contributor list provided for less than the usual and normal charge is a contribution).

When a membership list is received or provided as part of a purported equal-value list exchange, the list may not be reportable as a contribution or an expenditure, but it is still plainly a receipt or a disbursement subject to the broader reporting requirements in FECA and FEC regulations for other receipts and other disbursements. 11 C.F.R. § 104.3(a)(2)(viii), (b)(ix). *See, e.g.*, Advisory Opinion 1978-

32 (Talmadge) (emphasizing that "all receipts and disbursements of [a political] [c]ommittee, whether or not they qualify as 'contributions' or 'expenditures' are subject to disclosure under the Act" (citing former 2 U.S.C. § 434(b) (now 52 U.S.C. § 30104(b)); Advisory Opinion 2000-03 (American Society of Anesthesiologists) (explaining that PAC's disbursements that fall within the exception to the statutory definition of "expenditure" "should be reported as 'other disbursements'").

The List-Swap Nondisclosure Invention

Despite Congress's unambiguous command that political committees report all of their receipts and disbursements, the Commission has issued a series of advisory opinions that improperly narrow the scope of committees' statutory disclosure obligations through a made-up disclosure exemption for lists that are received or disbursed as part of a purported equal-value exchange. In Advisory Opinion 1982-41 (Dellums), for example, the Commission concluded that an exchange of equally valued contributor lists would not result in a contribution or expenditure "and the transaction would not be reportable under [FECA]." *See also* Advisory Opinion 2002-14 (Libertarian National Committee) (concluding that "exchanges of equal value . . . are non-reportable events under the Act" because no "contribution, donation, or transfer of funds or any other thing of value" takes place); Advisory Opinion 1981-46 (Dellums) (same).

The Commission's uncited interpretation of the statute and regulations in those advisory opinions is contrary to the plain text of the law, which requires disclosure of "all receipts" and "all disbursements," not merely contributions, expenditures, or transfers. Disclosure of list-swap transactions between political committees provides the public with information about the sources and recipients of valuable voter information exchanged between committees, and it also enables identification and enforcement of violations of other campaign finance rules. Without disclosure of membership list swapping, the public and FEC cannot independently assess whether the exchanged lists are, in fact, of equal value, or whether, instead, the exchange resulted in a contribution, expenditure, or both. The FEC's invented list-swap exception thus not only undermines congressionally mandated transparency, it also enables committees to avoid other campaign finance requirements by declaring exchanged lists as equally valued and then using the disclosure exemption to prevent the Commission or anyone else from "gathering the data necessary" to question the committee's self-interested value assessment and consider whether the exchange resulted in any other violations. *See Buckley v. Valeo*, 424 U.S. 1, 67-68 (1976) (per curiam).

Committees have already used the list-swap disclosure exception to hide large transactions and impede inquiries into whether those transactions resulted in contributions or expenditures. Most notably, in 2013, the super PAC Ready for Hillary used six-figure and corporate contributions to create a valuable list of supporters of Hillary Clinton with the admitted purpose of "mak[ing] the contact

list available to the presidential campaign if Clinton ultimately ran for office."[1] After Clinton announced her candidacy in April 2015, the PAC transferred the list — which it reportedly spent upwards of $15 million to develop and which contained information for as many as four million supporters — to another super PAC, WOMEN VOTE!, and promptly shut down.[2] WOMEN VOTE!, in turn, provided the list to the Clinton campaign as part of a list swap arrangement.[3]

An administrative complaint filed with the Commission alleged, *inter alia*, that the series of list swaps resulted in an excessive in-kind contribution to Clinton's campaign committee.[4] In response, the Clinton campaign declared, without providing any documentation or explanation, that the swapped lists "had an equal market value" and invoked the FEC's advisory opinions concluding that equal-value exchanges are "non-events for campaign finance purposes — they are not reportable."[5] As the Commission's Office of General Counsel explained in its First General Counsel's Report, neither the Clinton campaign committee nor the Ready For Hillary super PAC, which changed its name to "Ready PAC," provided any details regarding the values of the exchanged lists beyond declaring that they were exchanged "'pursuant to written agreements that ensured both entities received equal value.'"[6] That report also identified outstanding questions about whether the list exchange was the *bona fide*, arms-length transaction that the committees claimed it was, and whether the lists were in fact of equal value.[7]

The FEC ultimately deadlocked on the matter at the reason-to-believe stage, and the public may never know the details regarding the value of the list that was received by the Clinton campaign in 2015, because the committees took advantage of the list-swap disclosure exception and failed to report any receipts or disbursements reflecting the transactions.[8]

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[1] Lee E. Goodman, Statement of Reasons Regarding MUR 6775, at 1-2 (Ready for Hillary PAC) (Mar. 29, 2016); *see* Samir Sheth, Note, *Super PACs, Personal Data, and Campaign Finance Loopholes*, 105 VIRGINIA. L. REV. 655, 696 (2019).

[2] First General Counsel's Report, at 24, MUR 6932 (Hillary for America) (Aug. 21, 2015).

[3] *Id.* at 23-26; *see* Sheth, *supra* note 3, at 697-98.

[4] First General Counsel's Report, *supra* note 4, at 23-25.

[5] Response to Suppl. Compl., MUR 6932 (Hillary for America) (Aug. 3, 2015).

[6] First General Counsel's Report, *supra* note 4, at 24.

[7] *Id.* at 24-25; *see also* Sheth, *supra* note 3, at 697 & nn. 252, 253 (citing Clinton campaign emails released by Wikileaks estimating the value of the older list that had been owned by Clinton's 2008 campaign at approximately $2.55 million, and calculating that the list ultimately disbursed to the campaign could have been worth as much as $6.53 million).

[8] Sheth, *supra* note 3, at 698-99 (explaining that WOMEN VOTE!'s FEC filings do not reveal any receipts from or disbursements to Hillary for America reflecting the list transaction).

Request for Rulemaking

FECA requires political committees to disclose all of their receipts and disbursements, including but not limited to "contributions" and "expenditures." 52 U.S.C. § 30104(a). As the Commission has repeatedly noted in a wide variety of contexts, a committee's receipt or disbursement of a list of supporters or other valuable data is a receipt or disbursement.

Accordingly, we respectfully request that the Commission amend 11 C.F.R. § 104.3 to clarify that a political committee's receipt or disbursement of a membership or other valuable list must be reported, even when the list was received or disbursed as part of a purported equal-value list swap. For example, the Commission could provide such clarification by identifying such transactions as an additional category of "other receipts" subject to disclosure under 11 C.F.R. §§ 104.3(a)(2)(viii) and 104.3(a)(3)(x), and an additional category of disbursements subject to disclosure under 11 C.F.R. §§ 104.3(b)(1)(ix) and 104.3(b)(2)(vi).

CLC requests that the Commission publish a Notice of Availability of this petition in the Federal Register, *see* 11 C.F.R. § 200.3(a)(1), and initiate a rulemaking to consider promulgating the proposed regulation set forth above. *See id.* § 200.4(a).

Respectfully submitted,

/s/ Adav Noti

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