JAMES MADISON CENTER FOR FREE SPEECH

GENERAL COUNSEL
James Bopp, Jr., Esq.

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Submitted Electronically (http://sers.fec.gov/fosers/ REG 2021-02))
Federal Election Commission
Attn: Mr. Robert M. Knop, Assistant General Counsel
Ms. Joanna S. Waldstreicher, Attorney
Office of General Counsel
1050 First Street, NE
Washington, DC 20463

Re: REG 2021-02 (Notice of Availability of Rulemaking Petition Regarding Subvendor Reporting; Notice 2021-11; 148 Fed. Reg. 42753)

Dear Mr. Knop and Ms. Waldstreicher:

These comments are submitted by the James Madison Center for Free Speech ("Madison Center") in response to the Commission's Notification of Availability ("Notification") of a Petition for Rulemaking ("Petition") filed by the Campaign Legal Center ("CLC") and the Center on Science & Technology Policy at Duke University ("CSTP"). The Petition seeks to amend regulations at 11 CFR 104.3(b) (political-committee reporting), 109.10(e) (independent-expenditure reporting), and 104.20(c) (electioneering-communication reporting) to require reporters under these provisions to itemize certain payments by vendors to subvendors.

The Madison Center supports a full rulemaking and the general concept of subvendor reporting, but with limits and cautions. The focus should be on improving reporting by *overt political actors*—i.e., *political committees*, including political-party committees, candidate committees, and political-action committees ("PACs"). Non-political-committee speakers who simply make independent expenditures and electioneering communications should not suffer additional burdens given their stronger interests in privacy and unburdened speech. Issue-advocacy organizations in particular must not suffer added burdens given the vital role of, and strong First Amendment protection for, issue advocacy. The rulemaking should address two problems:

1. failure to disclose ultimate payees who should be disclosed and
2. failure to provide adequate purpose descriptions for payments.

The Madison Center's position is summarized here and a fuller explanation will be provided in comments and testimony in a full rulemaking.

Background

The required reporting at issue is set out in the Petition (Pet. 2-3) and the Notification (148 Fed. Reg. at 42753). Essentially, cited regulations implement statutory requirements of the Federal Election Campaign Act requiring reporting of payments by political committees and by those doing independent expenditures and electioneering communications. Payments over $200 (aggre-

OFFICE OF GENERAL COUNSEL ● 1 SOUTH SIXTH STREET, TERRE HAUTE, IN 47807-3510 ● (812) 232-2434 VOICE ● (812) 235-3685 FAX
WWW.JAMESMADISONCENTER.ORG ● news@JamesMadisonCenter.org

gated in specified periods) must be reported, along with the recipient's name and address and the purpose.

The first focus of the Petition involves ultimate payees who should be disclosed but are not being disclosed. Petitioners cite Advisory Opinion 1983-25 (Mondale), which allowed a committee to not report payments by a subvendor if such payments were pursuant to a contract with a vendor for services. Pet. 3. Other limits on subvendor nonreporting have been asserted, e.g., the requirement that there be an arms-length relationship between reporter and subvendor, that subvendor services be related to the contract with the vendor, and that the arrangement not be a mere conduit to ultimate recipients. Pet. 3-4. Subsequent political committees naturally have relied on AO 1983-25 in their own practices. This focus on which payees must be disclosed requires attention and clarification in the rulemaking.

A second focus of the Petition involves failure to provide adequate "purpose" descriptions for payments to payees, which requirement is imposed by FECA and CFR provisions at issue and included in the Petition's focus on the public's interest in knowing, inter alia, "'how [political campaign money] is spent.'" Pet. 2 (citing *Buckley v. Valeo*, 424 U.S. 1, 66 (1976)). Petitioners note that "'[p]urpose is defined as 'a brief statement of description of why the disbursement is made.'" Pet. 2 (citing 11 CFR 104.3(b)(3)(i)(A), (b)(4)(i)(A)). In its *Statement of Policy: "Purpose of Disbursement" Entries for Filings With the Commission*, 72 Fed. Reg. 887 (Jan. 9, 2007), the Commission stated that "[t]he 'purpose of disbursement' entry, when considered along with the identity of the disbursement recipient, must be sufficiently specific to make the purpose of the disbursement clear." *Id.* As a general rule, the Commission said, "filers should consider the following question: 'Could a person not associated with the committee easily discern why the disbursement was made when reading the name of the recipient and the purpose?'" *Id.* at 888. The Statement provided lists of "adequate" and "inadequate" purpose descriptions for various types of vendors, clearly requiring considerable specificity as to the description. *Id.* The lists are now posted at https://www.fec.gov/help-candidates-and-committees/purposes-disbursements/. For example, simply listing "consulting" is inadequate, but providing the consulting type can be adequate because adequate examples include "campaign consulting" and "research consulting." *Id.* "Legal services" and "legal consulting" are listed as adequate purpose descriptions, but these plainly refer to the *practice of law* because (i) *other* "adequate" labels are provided for such things as "campaign consulting," "political strategy consulting," "research consulting," and "strategy consulting" and (ii) non-legal "advocacy," "consulting," "consulting non-FEA," "political consulting," and the like are listed as "inadequate" purpose descriptions. *Id.* This focus on adequate "purpose" descriptions in reports requires attention and clarification in the rulemaking.

Proposal

CLC and CSTP complain of over-reliance on what they call the "subvendor reporting loophole," reciting perceived problems. As the solution, they propose adding a new paragraph 104.3(b)(5) as follows:

> "(5)(i) Any person reporting expenditures or disbursements under this section[1] must report expenditures or disbursements made by an agent or independent contractor, including any

[1] As "this section" refers to only section 3 of part 104 of title 11, it governs only political committees (and certain voluntary reporters). *Compare* 11 CFR 104.3(a) *with* 104.1(a)-(b).

> vendor or subvendor, on behalf of or for the benefit of the reporting person.
>
> (ii) An agent or contractor, including a vendor or subvendor, who makes an expenditure or disbursement on behalf of or for the benefit of a reporting committee or person that is required to be reported under this section shall promptly make known to the reporting committee or person all the information required for reporting the expenditure or disbursement."

Pet. 6-7. And they add: "Similar language could be added to sections 109.10(e)(1) (independent expenditures) and 104.20(c) (electioneering communications)." Pet. 7. So though AO 1983-25 was about subvendors, the proposal targets not just reporting as to vendors and subvendors fitting the specific AO 1983-25 scenario but also as to agents and independent contractors, so long as the expenditures or disbursements are "on behalf of or for the benefit of" the reporter.

This proposal doesn't address the adequacy of purpose descriptions for payments to payees.

Comments

The Madison Center believes the focus in the requested rulemaking should be on improving reporting by *overt political actors*—i.e., *political committees*, including political-party committees, candidate committees, and PACs—as to (i) *who* is disclosed and (ii) *why* they were paid.

CLC and CSTP cite MUR 7748 (Donald J. Trump for President, Inc.) as an example in support of their Petition. Pet. 4 n.14.[2] But if, as the Petition represents, (i) "political committees and other persons have routinely relied on the reporting loophole created by Advisory Opinion 1983-25 to avoid itemizing the ultimate payees of millions of dollars in disbursements or payments" and (ii)"[i]n the 2020 election cycle alone, at least 571 political committees routed over half of their overall spending to a single vendor," Pet. 3, then it was not particularly remarkable if the Trump committees did what many were doing and had long done.[3]

But the actions of two *other* political committees readily illustrate the problems the Madison Center sees as requiring an appropriate rulemaking. Those two are the Democratic National Committee ("DNC") and Hillary for America ("HFA").[4]

The recent Indictment of former Perkins Coie partner[5] Michael A. Sussmann by Special

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[2] The closed-MUR search system at https://www.fec.gov/legal-resources/enforcement/ shows "[n]o results" for a MUR 7748, but CLC says it complained against Trump committees. *See* https://campaignlegal.org/document/complaint-against-donald-j-trump-president-and-trump-make-america-great-again-committee; https://campaignlegal.org/sites/default/files/2020-07/07-27-20%20Trump%20AMMC%20%28final%29.pdf (complaint). Presumably, this is MUR 7748.

[3] Note that the recited evidence involves political actors, not non-political-committee entities that merely make independent expenditures and electioneering communications.

[4] HFA was Hillary Rodham Clinton's principal candidate campaign committee for her presidential campaign for the 2016 election. HFA, Statement of Organization (original filed April 13, 2015), https://docquery.fec.gov/pdf/528/15031411528/15031411528.pdf.

[5] Sussmann reportedly recently resigned after the Indictment. Debra Cassens Weiss, *Perkins Coie partner resigns from firm after he is charged by special counsel*, ABA Journal (Sep. 17, 2021), https://www.abajournal.com/news/article/perkins-coie-partner-resigns-from-firm-after-he-

Counsel John H. Durham[6] provides specific evidence of the problems with purpose descriptions that should be dealt with in this rulemaking.[7] The Indictment dealt with the actions precipitating media reports "that U.S. government authorities had received and were investigating allegations concerning a purported secret channel of communications between the Trump Organization, owned by Donald J. Trump, and a particular Russian ban ('Russian Bank-1')." Indictment ¶ 1. According to numerous news reports and court evidence that need not be documented at length for present purposes, the bank was Alfa Bank and the allegations were developed by Fusion GPS personnel and taken by Sussmann to the FBI. *See, e.g.*, Rowan Scarborough, *Hillary Clinton operatives pushed now-debunked Trump-Alfa server conspiracy, testimony reveals*, AP News (January 23, 2019), https://apnews.com/article/cd2da448a9db6af11d8c10e9c3f3495b. *See also, e.g.*, Andrew C. McCarthy, *The Real Story in Durham's Indictment of Democratic Lawyer Michael Sussmann*, Nat'l Rev. (Sep. 16, 2021), https://www.nationalreview.com/2021/09/the-real-story-in-durhams-indictment-of-democratic-lawyer-michael-sussmann/ (identifying entities behind the pseudonyms); Jonathon Turley, *Clinton lawyer's indictment reveals 'bag of tricks,'* The Hill (Sep. 18, 2021), https://thehill.com/opinion/judiciary/572861-clinton-lawyers-indictment-reveals-bag-of-tricks. The Indictment charges Sussmann with making a false statement to the FBI by communicating the Russian-bank allegations to the FBI while "stat[ing] falsely that he was not acting on behalf of any client," Indictment ¶ 18, when in fact he was billing related time on his time sheets to HFA, Indictment ¶¶ 29-30, and he "testified under oath before Congress in 2017 that he, in fact, conveyed the Russian Bank-1 allegations to the FBI general counsel 'on behalf of my client,'" Indictment ¶ 31. Specifically, he said "[n]o" when asked if, when he met with the FBI General Counsel (and another), he was doing so "**on [his] own volition**," and said "[y]es" when asked (1) **did your client direct you** to have those conversations [including with the FBI General Counsel]?" and (2) "**your client also was witting** of you going to [redacted] in February to disclose the information that individual had provided you?" Indictment. ¶ 44 (bold emphasis in original). Sussmann described the purpose of that work as "work and communications regarding confidential project." Indictment ¶ 29. Other purpose descriptions from billing records to HFA are provided. *See, e.g.*, Indictment ¶¶ 19-20.[8] But no such detail is present in HFA reports to the FEC. For example, the HFA 2016 year-end report (Itemized Disbursements) lists two payments

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is-charged-by-special-counsel/. The Indictment calls Perkins Coie ""Law Firm-1," ¶ 3, and former Perkins Coie partner Marc Elias "Campaign Lawyer-1," ¶ 10, but Elias's role as HFA's general counsel is well known and was formerly listed on Perkins Coie's website, *see* https://web.archive.org/web/20210901132514/https://www.perkinscoie.com/en/professionals/marc-e-elias.html.

[6] Available at https://www.justice.gov/sco/press-release/file/1433511/download.

[7] The Indictment calls HFA "the Hillary Clinton Presidential Campaign" and "the Clinton Campaign," Indictment ¶ 4, and says Sussmann billed HFA "by its official corporate name, 'HFACC, Inc.,'" Indictment ¶ 20.

[8] For example: "**SUSSMANN** and [Marc Elias] met with personnel from [Fusion GPS] in [Marc Elias's] office. **SUSSMANN** billed his time in this meeting to [HFA] under the general category 'General Political Advice' with the billing description 'meeting with [Marc Elias], others regarding [] confidential project.'" Indictment ¶ 20(a).

to Perkins Coie for "legal services," which presumably includes Sussmann's September 19, 2016 meeting with the FBI general counsel to peddle the Trump-Alfa conspiracy narrative, Indictment ¶¶ 27-29, but that is an inadequate, inaccurate description for anything related to generating and spreading the Trump-Alfa-server-conspiracy narrative, which is not the practice of law. So the Indictment reveals serious problems with political committees not properly reporting the purpose of their disbursements by those acting on their behalf.

The Madison Center doesn't believe that payment-purpose descriptions need be at the level of detail required for a law-firm's invoice to a client, but they should provide sufficient detail as to the specific activity involved. For example, "opposition research" is not "legal research" and should not be listed as such, though of course lawyers may be hired to do opposition research. Nor should opposition research be swept into "legal services." The level of specificity required for adequate purpose disclosure should be addressed in this rulemaking with input requested and clarity provided in the final rule and explanation and justification.

The involvement of Perkins Coie, DNC, and HFA in the infamous Steele dossier provides another illustration of the failure to provide proper purpose descriptions as well as the failure to disclose payee agents and independent contractors, including vendors and subvendors, acting on behalf of or for the benefit of the reporting entity. In that related activity, HFA and DNC paid Perkins Coie for "legal services" that were really about generating and spreading Trump-Russia conspiracy theories (debunked in the Mueller Report). Here, not only was there a failure to adequately, accurately disclose the purpose, but subvendors, agents, and independent contractors acting "on behalf of or for the benefit of" these political committees were concealed and not reported as recipients of HFA and DNC disbursements. As reported, Perkins Coie contracted with Fusion GPS to do opposition research on Donald Trump, which in turn subcontracted Obis Business Intelligence, for which Orbis co-founder Christopher Steele prepared the dossier. But the Madison Center has not found these entities listed as payees in DNC and HFA reports.

CLC filed a complaint against DNC and HFA regarding the dossier, noting that "On October 24, *The Washington Post*[9] revealed that the DNC and [HFA] paid opposition research firm Fusion GPS to dig into Trump's Russia ties, but routed the money through the law firm Perkins Coie and described the purpose as "legal services" on their FEC reports rather than research. By law, campaign and party committees must disclose the reason money is spent and its recipient." CLC, *Hillary for America, DNC Failed to Disclose Legally Required Information about Funding of Trump-Russia Dossier* (Oct. 25, 2017), https://campaignlegal.org/press-releases/hillary-america-dnc-failed-disclose-legally-required-information-about-funding-trump. CLC provided the complaint: https://campaignlegal.org/document/fec-complaint-hillary-america-dnc-failure-disclose.[10] For present purposes, the CLC Complaint alleges that

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[9] CLC linked the article at https://www.washingtonpost.com/world/national-security/clinton-campaign-dnc-paid-for-research-that-led-to-russia-dossier/2017/10/24/226fabf0-b8e4-11e7-a908-a3470754bbb9_story.html?hpid=hp_hp-top-table-main_dossier-630pm%3Ahomepage%2Fstory&utm_term=.e5549bbb2df2.

[10] The closed-MUR search system at https://www.fec.gov/legal-resources/enforcement/ shows no results for "Hillary for America" for any matter under review initiated on October 25, 2017, so apparently the MUR is not closed despite a 2017 filing.

> the DNC and Hillary for America reported dozens of payments totaling millions of dollars to the law firm Perkins Coie with the purpose described as "Legal Services" or "Legal and Compliance Consulting," when in reality, at least some of those payments were earmarked for the firm Fusion GPS, with the purpose of conducting opposition research on Donald Trump. By failing to file accurate reports, the DNC and Hillary for America undermined the vital public information role that reporting is intended to serve.

CLC Compl. ¶ 2. Per CLC: "According to reports filed with the Commission, Clinton's campaign committee reported 37 payments to Perkins Coie over the 2016 election cycle totaling $5,631,421. The purpose for each disbursement was reported as 'Legal Services.'" CLC Compl. ¶ 8. And CLC added:

> The DNC reported 345 payments to Perkins Coie over the 2016 election cycle totaling $6,726,407 for a variety of purposes: $6,466,711 for "Legal and Compliance Consulting," $99,925 for "Administrative Fees," $22,213 for "Travel," $49,136 for "Data Services Subscription," among others. The DNC also reported one $66,500 payment to Perkins Coie on August 16, 2016 for "research consulting."

CLC Compl. ¶ 9 (citing DNC Services Corp./Dem. Nat'l Committee, Amended September 2016 Monthly Report, FEC Form 3X (filed May 26, 2016) at 4241 http://docquery.fec.gov/pdf/699/201706019055168699/201706019055168699.pdf). This also reveals serious problems with political committees not properly reporting the purpose of their disbursements by those acting on their behalf.

Of course, hiring a law firm to do opposition research isn't illegal, but it is illegal to not comply with reporting requirements by not disclosing recipients of political committee disbursements and payment purpose. To the extent some might perceive confusion on that issue, the language proposed in the rulemaking Petition would make it clear. And the use of lawyers to do opposition research is no bar to the required reporting. On this point, sworn testimony of Marc Elias is instructive regarding Steele dossier activity. *See Interview of: Marc Elias Before the H. Perm. Select Comm. on Intel.* (Dec. 13, 2017), https://docs.house.gov/meetings/IG/IG00/CPRT-116-IG00-D041.pdf ("Elias Tr."). Elias was represented by two counsel, one being Kathryn H. Ruemmler, who advised Elias on matters of attorney-client and work-product privilege because, as Ruemmler put it, the matters under discussion were "in connection with work that he did on behalf of clients." Elias Tr. 6-7. She noted initially that DNC and HFA "have not waived the [attorney-client] privilege with respect to Mr. Elias's testimony today." *Id.* at 7. The testimony transcript is enlightening about how Elias came to hire Fusion GPS and other details behind the Steele dossier, but for present purposes Elias was able to disclose the purpose for which he paid Fusion GPS, which was opposition research and not "legal services," and amounts paid. *Id.* at 20-25. Nothing about hiring a law firm prevents the disclosure the present proposal requires.

Moreover, Elias's Interview provides another insight into efforts to conceal payees and amounts paid. In questioning by Rep. Trey Gowdy as to why Elias hired Fusion GPS to do opposition research when other entities could have done that and he had never used tiny Fusion GPS for that before, Elias said "I was evaluating the best way to provide services for my clients and came to the conclusion that they were – that they could help me with that." *Id.* at 15. Regarding these "services," he said "I hire consultants – you can call them opposition research firms – I hire consultants to provide legal services for clients not infrequently. And I usually am trying to solve

a problem or trying to understand something that they bring expertise to." *Id.* at 20. When Gowdy noted that Elias had used the term "legal services, which has a pretty specific meaning," Elias responded that "they weren't providing legal services," *id.*, and clarified, "[w]hat I intended to say . . . is that I was providing legal services for the campaign. For me to provide those services I needed expertise and access to information, public record." *Id.* at 21. And later he described the opposition-research firm Fusion GPS thus: "So in order for me to be able to adequately understand that scope [of Trump's "volume of litigation] and be able to digest that and help make legal judgments that would be relevant to my client, I thought it would be helpful to have a consultant." *Id.* at 22. What the foregoing reveals is that though the opposition research firm was doing work on behalf of and for the benefit of DNC and HFA, who were reimbursing Perkins Coie for Fusion GPS's work, Elias was deeming opposition researchers as there to help *him* make legal judgments and not to provide DNC and HFA with opposition research to use against Trump. That seems to provide insight into a purported reason for not disclosing this payee on FEC reports. The rulemaking should make clear that political parties may not fail to report opposition researchers operating on their behalf and for their benefit based on their lawyer's assertion that the work is for his or her benefit in providing legal services.

Finally, as noted in the introduction, the Madison Center believes that the language proposed in the Petition should be restricted to political committees, i.e., entities "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 253 n.6 (1986). Those who meet the major-purpose test are overt political actors, so requiring the extra disclosure for them is appropriate (with special attention given to the difficulties of reporting things like payments for digital advertising). By becoming political committees, such entities lose some of the protection for privacy and against greater burdens on their speech and association connected with more burdensome disclosure. But entities that are not such overt political actors have not assumed the major-purpose or candidate-control role and so have not assumed the greater burdens and loss of privacy that attend becoming a political committee. This applies especially to issue-advocacy entities, given the special constitutional protection for issue advocacy, including not being heavily burdened. *Buckley*, 424 U.S. at 38-48.

The Madison Center intends to expand on these comments if a full rulemaking is instituted, but the foregoing suffices to show why such a rulemaking should be done and its scope.

Sincerely,

James Madison Center for Free Speech

/s/ *James Bopp, Jr.*

James Bopp, Jr
Richard E. Coleson