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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 22-10-A
AGENDA ITEM
For the meeting of March 24, 2022

March 1, 2022

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
Acting General Counsel

Neven F. Stipanovic *NFS*
Associate General Counsel

Robert Knop *RMK*
Assistant General Counsel

Heather Filemyr
Attorney *HF*

Subject: REG 2015-04 (Citizens United II) - Draft Notice of Disposition

Attached is a proposed draft Notice of Disposition for the subject matter. We request that this draft be placed on a 48-hour tally vote ending on March 4, 2022 at 4:00 pm.

Attachment

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FEDERAL ELECTION COMMISSION

11 CFR Parts 104, 109, 110, and 114

[NOTICE 2022-XX]

**Independent Spending by Corporations, Labor Organizations, Foreign Nationals,
and Certain Political Committees (Citizens United)**

AGENCY: Federal Election Commission.

ACTION: Notice of Disposition of Petitions for Rulemaking.

SUMMARY: The Commission announces its disposition of two Petitions for Rulemaking filed on June 19 and June 22, 2015. The Petitions asked the Commission to revise existing regulations and issue new regulations concerning: (1) disclosure of certain financing information regarding independent expenditures and electioneering communications, (2) election-related spending by foreign nationals; (3) solicitations of corporate and labor organization employees and members; and (4) the independence of expenditures made by independent-expenditure-only political committees and accounts. Because there were not four affirmative votes in support of the Petitions, the Commission is not initiating a rulemaking.

DATES: [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Ms. Heather Filemyr, Attorney, 1050 First Street, NE, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On June 19, 2015, the Federal Election Commission received a Petition for Rulemaking from Make Your Laws PAC, Inc. and Make Your Laws Advocacy, Inc. On June 22, 2015, the Commission received a Petition

1 for Rulemaking from Craig Holman and Public Citizen. Both Petitions asked the
2 Commission to revise existing regulations and issue new regulations in four areas in
3 response to the Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S. 310
4 (2010), which held that the Federal Election Campaign Act’s, 52 U.S.C. 30101–45 (the
5 “Act”), ban on corporate independent campaign-related spending was unconstitutional.¹

6 The first area of regulations the Petitions asked the Commission to revise are
7 those that implement the Act’s requirement that every person who makes an
8 electioneering communication aggregating in excess of \$10,000 in a calendar year and
9 every person (other than a political committee) that makes independent expenditures in
10 excess of \$250 with respect to a given election in a calendar year report certain
11 information to the Commission. 52 U.S.C. 30104(c)(1) and (2), (f); 11 CFR 104.20(b)
12 and (c), 109.10(b), (e). The Petitions asked the Commission to “[e]nsure full public
13 disclosure of corporate and labor organization independent spending” by “requir[ing] that
14 outside spending groups disclose their donors.”

15 Second, the Act and Commission regulations prohibit foreign nationals from
16 “directly or indirectly” making contributions, expenditures, and electioneering
17 communications. 52 U.S.C. 30121(a); 11 CFR 110.20. The Petitions asked the

¹ As the Commission explained in its initial rulemaking addressing the *Citizens United* decision, although the Court did not directly address whether labor organizations, like corporations, also have a First Amendment right to use their general treasury funds for independent expenditures and electioneering communications, the Act and Commission regulations generally treat labor organizations similarly to corporations. See Final Rules on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 FR 62,797, 62,798 n.3 (October 21, 2014) (citing 52 U.S.C. 30118; 11 CFR part 114; and Advisory Opinion 2010-11 (Commonsense Ten) at n.3.) The Commission further explained that the Court in *Citizens United*, when addressing corporations, often referred to labor organizations and provided no basis for treating labor organization communications differently than corporate communications under the First Amendment. *Id.* (citing *Citizens United*, 558 U.S. at 318, 343). Therefore, the Commission concluded that the changes to its regulations necessitated by the *Citizens United* decision should apply equally to both corporations and labor organizations. *Id.*

1 Commission to “[c]larify that the prohibition on foreign national campaign-related
2 spending restricts such spending by U.S. corporations owned or controlled by a foreign
3 national.”

4 Third, Commission regulations prohibit corporations and labor organizations from
5 “[u]sing coercion . . . to urge any individual to make a contribution or engage in
6 fundraising activities on behalf of a candidate or political committee,” 11 CFR
7 114.2(f)(2)(iv), and restrict how corporations and labor organizations may solicit
8 contributions to their separate segregated funds from employees and members. 11 CFR
9 114.5(a)(2)-(5); *see also* 52 U.S.C. 30118(b)(3). The Petitions asked the Commission to
10 “[c]larify that corporations and labor organizations are prohibited from coercing their
11 employees and members into providing financial or other support for the corporation’s or
12 labor organization’s independent political activities.”

13 Fourth, the Petitions asked the Commission to “[e]nsure that the expenditures
14 made by” independent-expenditure-only political committees and accounts, *see, e.g.,*
15 *SpeechNow.org v. FEC*, 599 F.3d. 686 (D.C. Cir. 2010), “are truly independent of federal
16 candidates.”

17 In response to the Petitions, the Commission published a Notice of Availability
18 (“NOA”) on July 29, 2015 to ask for public comment on the Petitions. 80 FR 45,116
19 (July 29, 2015). The Commission received approximately 11,759 comments from 11,769
20 commenters on the NOA. *See* Minutes of An Open Meeting of the Federal Election
21 Commission, December 17, 2015 (approved February 11, 2016) at 8.² Of the comments
22 received, 11,414 commenters supported the Petitions. *Id.* Those commenters supporting

² https://www.fec.gov/resources/updates/agendas/2016/mtgdoc_16-04-a.pdf.

1 the Petitions stated, among other reasons, that the new and revised regulations were
2 necessary to provide adequate disclosure to the public and to clarify legal requirements
3 applicable to corporations, labor organizations, and foreign nationals following Supreme
4 Court's decision in *Citizens United*. Other commenters opposed the Petitions. Concerns
5 expressed by those commenters included that revised regulations would be unnecessary,
6 exceed the Commission's statutory authority, and impermissibly burden free speech
7 rights under the First Amendment.

8 After considering the comments received, the Commission voted on a motion to
9 initiate a rulemaking to adopt the regulations proposed by the Petitioners. *See*
10 Certification of Commission Vote, December 17, 2015.³ Three Commissioners voted to
11 initiate a rulemaking based on the Petitions, and three Commissioners voted against
12 initiating a rulemaking. *Id.* Among other reasons for supporting a rulemaking,
13 Commissioners who voted in favor of the motion stated that the Commission should open
14 a rulemaking to address significant issues that have arisen following the *Citizens United*
15 decision and that Commission's coordination rules, created prior to the existence of super
16 PACs, are outdated. *See* Minutes of An Open Meeting of the Federal Election
17 Commission, December 17, 2015 (approved February 11, 2016) at 7.⁴ Commissioners
18 who voted against the motion reasoned that Congress had considered but not adopted
19 legislative changes following the *Citizen United* decision and expressed the view that the
20 Commission should not act where Congress had failed to do so. Audio Recording of
21 Discussion on Rulemaking Petition: Independent Spending by Corporations, Labor

³ <https://sers.fec.gov/fosers/showpdf.htm?docid=346628>.

⁴ https://www.fec.gov/resources/updates/agendas/2016/mtgdoc_16-04-a.pdf.

1 Organizations, Foreign Nationals, and Certain Political Committees (Citizens United)
2 (Dec. 17, 2015).⁵ These Commissioners also stated that coordination by super PACs was
3 adequately addressed by the Commission’s existing regulations. *Id.*

4 The Act requires an affirmative vote of at least four Commissioners to take any
5 action to amend a regulation. *See* 52 U.S.C. 30106(c) and 30107(a)(8). Accordingly, the
6 Commission is not initiating a rulemaking at this time. *Id.*; *see also* Definition of
7 “Express Advocacy,” Notice of Disposition of Petition for Rulemaking, 64 FR 27,478
8 (May 20, 1999) (denying a petition to initiate a rulemaking because it did not garner the
9 affirmative vote of four Commissioners).

10 Because the motion to initiate a rulemaking to adopt the regulations proposed by
11 the Petitioners did not receive the required affirmative vote of four or more
12 Commissioners, the Commission is notifying the public that it is not initiating a new
13 rulemaking in response to the Petitions.

14 Copies of the comments, the NOA, and the Petitions for Rulemaking are available
15 on the Commission’s website, <http://www.fec.gov/fosers/> (REG 2015-04 Independent

⁵ <https://www.fec.gov/updates/december-17-2015-open-meeting>.

DRAFT

1 Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political
2 Committees (Citizens United) (2015)).

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4 Dated: March XX, 2022.

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6 On behalf of the Commission,

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10 **Allen J. Dickerson,**

11 *Chairman,*

12 *Federal Election Commission.*

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14 BILLING CODE: 6715-01-P