UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRIS VAN HOLLEN, Plaintiff, v. FEDERAL ELECTION COMMISSION, et al., Defendants.	Civ. No. 1:11-cv-00766 (ABJ) REPLY

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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September 23, 2011

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In its opening brief, the Federal Election Commission ("Commission" or "FEC") showed that its electioneering communication disclosure regulation reasonably fills a gap in the Federal Election Campaign Act ("FECA" or "Act"), 2 U.S.C. §§ 431-57, that was exacerbated by *FEC v. Wisconsin Right to Life, Inc*., 551 U.S. 449 (2007) ("*WRTL*"), which held that corporations have a constitutional right to finance communications previously prohibited by the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) ("BCRA"). After careful consideration of an extensive rulemaking record, the Commission chose a middle course that balances the importance of electioneering disclosure with First Amendment concerns. Thus, the regulation at 11 C.F.R. § 104.20(c)(9) both reasonably interprets the statute and obeys the constitutional holding in *WRTL*. The Commission is entitled to summary judgment under the highly deferential standard of review applicable to this challenge under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551-706 and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Plaintiff Chris Van Hollen argues that the Commission cannot rely on the statute's ambiguity because the 2007 rulemaking did not expressly point to that ambiguity, but this Court's *Chevron* step one analysis cannot be constrained by an agency's rulemaking commentary; in any event, the Commission made clear in both the 2007 rulemaking and its 2003 predecessor that it viewed the statute as ambiguous. Plaintiff also argues that the statute is not ambiguous, but when BCRA was enacted the disclosure rules at issue did not even apply to the vast majority of corporations or to any labor unions: those entities were barred from using their general treasury funds to make electioneering communications. Moreover, the statutory terms at issue (*e.g.*, "contributors") are plainly susceptible to multiple interpretations. And despite plaintiff's claim that the FEC had no basis to consider in its rulemaking the burden on the

millions of newly-regulated entities to which the disclosure requirements would soon apply, the rulemaking record provides ample grounds to support the agency's conclusion that requiring these entities to report all their sources of funds would be unduly burdensome.

I. THE COMMISSION IS NOT FORECLOSED FROM ARGUING THAT THE STATUTE IS AMBIGUOUS

As the Commission explained in its opening brief, this Court reviews the regulation at issue in this case using *Chevron's* two-step framework. (*See* Defendant Federal Election Commission's Memorandum of Points and Authorities in Support of Its Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment ("FEC Br.") at 18-20 (Doc. # 24).) The first step asks whether Congress's intent was "unambiguously expressed." *Chevron*, 467 U.S. at 843. An agency has the authority to promulgate a regulation when the statute is ambiguous, or if the statute has a "gap left, implicitly or explicitly, by Congress." *Id.* at 844.

In response to the Commission's showing that the statute is ambiguous (FEC Br. at 18-28), plaintiff claims that the Commission is foreclosed from even making this argument because, according to Van Hollen, the Commission failed to specifically rely on that ambiguity during the rulemaking in 2007. (*See* Reply to Defendant FEC's Opposition to Plaintiff's Motion for Summary Judgment and Opposition to Defendant FEC's Cross-Motion for Summary Judgment ("Pl's Reply") at 1-2 (Doc. # 24) (citing Final Rule and Explanation and Justification on Electioneering Communications, 11 C.F.R. Part 104, 114, 72 Fed. Reg. 72,899 (Dec. 26, 2007) ("2007 E&J").) Van Hollen accuses the Commission of impermissible "post hoc rationalizations" (Pl's Reply at 2), but this cramped, formalistic argument is legally and factually incorrect.

A. An Agency Is Never Foreclosed from Asserting Statutory Ambiguity During *Chevron's* Step One Analysis

Van Hollen's "post hoc rationalization" argument must fail because it is the Court, not the administrative agency, that determines whether statutory language is ambiguous. *See Chevron*, 467 U.S. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction"); *Vill. of Barrington, Ill. v. Surface Transp. Bd.*, 636 F.3d 650, 659 (D.C. Cir. 2011) ("At this first step of the *Chevron* analysis we 'employ[ ] traditional tools of statutory construction,' … to determine whether Congress has 'unambiguously foreclosed the agency's statutory interpretation.'" (quoting *Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 35 (D.C. Cir. 2009) (internal citation and quotation marks omitted)).

Van Hollen's argument relies on *SEC v. Chenery Corp.*, which held that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." 318 U.S. 80, 87 (1943). But "the *Chenery* principle does not apply to agency justifications or positions put forward under the first step of the *Chevron* analysis." *Bank of America, N.A. v. F.D.I.C.*, 244 F.3d 1309, 1319-20 (11th Cir. 2001) (surveying cases and finding that no circuit addressing the issue had held that the *Chenery* principle applied to pure statutory interpretation like the *Chevron* step one analysis);[1] *see also Arkansas AFL-CIO v. F.C.C.*, 11 F.3d 1430, 1440 (8th Cir. 1993); *Railway Labor Executives' Ass'n v. I.C.C.*, 784 F.2d 959, 969 (9th Cir. 1986); *North Carolina Comm'n of Indian Affairs v. U.S. Dep't of Labor*, 725

[1] *Bank of America* cites a single decision, from the D.C. Circuit, in which the *Chenery* principle was applied at *Chevron* step one. *See Bank of America, N.A.*, 244 F.3d at 1320-21 (citing *Business Roundtable v. SEC*, 905 F.2d 406, 407 (D.C. Cir. 1990)). *Business Roundtable* was unique, however, because the agency had promulgated a regulation under the authority of one statute, but then argued in litigation that it had that authority based on a completely different statute. *Business Roundtable*, 905 F.2d at 417. This case involves a single statute and bears no resemblance to *Business Roundtable*, and no other court appears to have applied *Chenery* to a *Chevron* step one analysis.

F.2d 238, 240 (4th Cir. 1984). Indeed, even when an agency indicates during its rulemaking that a statute is unambiguous, it is not prevented from taking the opposite position during litigation. *Bank of America, N.A.*, 244 F.3d at 1318-19.

In aiding courts in their determination of whether a statute is ambiguous, an agency's position during a rulemaking is simply irrelevant. The *Chenery* rule has two related purposes. One "purpose of *Chenery* is to insure that courts do not trespass on agency discretion." *United Video, Inc. v. F.C.C.*, 890 F.2d 1173, 1190 (D.C. Cir. 1989); *see also Chenery*, 318 U.S. at 88 ("[A]n appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."). The other purpose is to prevent an agency from initially using faulty criteria, then later defending on different criteria, thereby shielding its original reasoning from public scrutiny. *United Video*, 890 F.2d at 1190 ("*Chenery* also serves to insure that administrative determinations are 'made with relevant criteria in mind and in a proper procedural manner.'" (quoting *Massachusetts Trustees v. United States*, 377 U.S. 235, 248 (1964)). The post hoc rationalization doctrine is irrelevant to the first of these purposes because it has nothing to do with judicial respect for an agency's exercise of the discretion within its realm of expertise. Likewise, the post hoc doctrine is irrelevant to the second *Chenery* purpose when the question at hand is the quintessentially judicial task of deciding whether statutory language is ambiguous rather than whether an administrative agency has properly applied the law and weighed the relevant evidence. In sum, the rule against post hoc rationalization has no application to the Commission's arguments about why the relevant BCRA provision is ambiguous.

B. The Commission Made Clear in Its Rulemakings That It Viewed the Relevant Statutory Language as Ambiguous

Even if the Commission's statements at the administrative level regarding the statute's ambiguity were relevant to what it could argue here at *Chevron* step one, the underlying

rulemakings indicate the Commission's view that 2 U.S.C. § 434(f) is ambiguous. The Commission stated in the 2007 E&J for 11 C.F.R. § 104.20(c)(9) that "Congress did not expressly address the consequences for the reporting provisions in the event of a successful as applied challenge to the funding restrictions. Thus, the Commission cannot conclude that Congress has spoken to this issue." 72 Fed. Reg. at 72,901. The Commission considered multiple alternative regulations and contemplated which alternative was "more consistent with Congressional intent." *Id.* Commenters supported various alternatives to fill the gap, underlining the ambiguity. *Id.* at 72900-01 (discussing the "divided" comments received in support of each proposed alternative and the commenters' differing views on preferred policies and the Commission's authority). Had the Commission believed that Congress had unambiguously spoken to the precise issue in 2 U.S.C. § 434(f)(2), none of that would have been necessary.

Furthermore, in its original 2003 rulemaking prior to *WRTL*, the Commission had addressed the ambiguity in the terms "contributors" and "contributed" in section 434(f)(2) and noted that BCRA neither used nor amended the term "contribution" as it had been defined in FECA. *See* FEC Br. at 19-20; *see also* 68 Fed. Reg. 404, 413 (Jan. 3, 2003). To avoid confusion, the original regulations were drafted using the terms "donor" and "donated" rather than "contributor" and "contributed." *Id.* When the Commission revised its regulations in 2007, it continued to use the terms "donor" and "donated" in 11 C.F.R. § 104.20(c), making evident that it had not changed its position about whether the statute is ambiguous.[2] In any event, addressing this matter in the 2003 predecessor rule alone suffices to rebut plaintiff's post hoc

[2] *See also* Gold, AFL-CIO, Hearing Comments (Administrative Record ("AR") Tab 35, VH0645) ("The Commission in its reporting regulations appropriately corrected that terminology [in the statute] to donors who donated funds because we are not talking about contributions within the meaning of the [A]ct."); 2007 E&J, 72 Fed. Reg. at 72,911.

argument. *See Arch Chemicals, Inc. v. U.S.*, 64 Fed. Cl. 380, 387 (2005) (permitting as part of administrative record a report from a previous related proceeding since that could not contain a post hoc rationalization); *see also Gatewood v. Outlaw*, 560 F.3d 843, 847 (8th Cir.), *cert denied*, 130 S. Ct. 490 (2009) (court can consider prior interim rules, program statements, and litigation positions "to discern the reasons for the agency's final rule"); *Handley v. Chapman*, 587 F.3d 273, 282 (5th Cir. 2009), *cert. denied*, 131 S. Ct. 71 (2010) ("The agency's path may be readily discerned from its prior interim rules, Program Statements, and consistent litigation position. These factors are not the sort of post hoc rationalizations of appellate counsel that *Burlington* forbids us to consider.") (citation omitted)); *Gardner v. Grandolsky*, 585 F.3d 786, 792 (3d Cir. 2009) (same); *Licon v. Ledezma*, 638 F.3d 1303, 1310 (10th Cir. 2011) (same).

Van Hollen relies on *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 213 (1988), in arguing that the FEC is merely adopting a "convenient litigating position" by pointing out the statutory ambiguity (Pl's Reply at 2), but the situation here is like the one the Supreme Court distinguished in *Bowen*: In view of the Commission's clear position in the 2003 and 2007 rulemakings, the agency's litigation position is "wholly" supported "by regulations, rulings, or administrative practice," and it is based on the position that "the agency itself has articulated." *Bowen*, 488 U.S. at 212. Thus, although the Commission in 2007 did not literally say, "the statute is ambiguous," the Commission's E&Js clearly demonstrate that interpretation.

II. BCRA DOES NOT SPEAK DIRECTLY TO THE APPROPRIATE DISCLOSURE FOR CORPORATIONS AND LABOR ORGANIZATIONS ENGAGED IN ELECTIONEERING COMMUNICATIONS

To prevail under *Chevron* step one, Van Hollen "must do more than offer a reasonable or, even the best, interpretation; [he] must show that the statute *unambiguously* forecloses the [Commission's] interpretation." *Vill. of Barrington*, 636 F.3d at 661. But as the Commission

has shown (FEC Br. at 18-19), the statute could not have "foreclose[d]" the Commission's regulation governing disclosure of electioneering communications by corporations and labor organizations because, at the time the statute was passed, those groups were prohibited from using their general treasury fund to engage in electioneering communications. Van Hollen tries to explain how Congress could have directly spoken to an issue that BCRA did not even contemplate, but each of his arguments is flawed.

A. Congress Could Not Have Both Prohibited an Activity and Yet Spoken Directly to the Question of How It Should Be Reported

Van Hollen first argues (Pl's Reply at 3-4) that it is irrelevant whether Congress appreciated the full scope of what it was doing when it passed the statute, because it is the plain language of the statute that controls, even if Congress did not envision how the statute would be applied. Van Hollen relies primarily on *Pa. Department of Corrections v. Yeskey*, 524 U.S. 206 (1998), in which the Supreme Court contemplated whether state prisons should be considered "public entit[ies]" and therefore covered by the Americans with Disabilities Act of 1990. *Yeskey*, 524 U.S. at 208. The Court determined that the plain language of the statute encompassed state prisons because it included "any department, agency, special purpose district or other instrumentality of a State or States or local government." *Id.* at 210 (quoting 42 U.S.C. § 12131(1)(B)). Van Hollen claims that *Yeskey* stands for the proposition that if statutory language is unambiguous, it is "irrelevant" whether Congress anticipated how the statute would be applied. (Pl's Opp. at 3-4 (quoting *Yeskey*, 524 U.S. at 212).) Van Hollen also cites *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007), for the same proposition.

In both of these cases, however, the Court would have had to hold that Congress did not mean what it said in order to reach the opposite conclusion. *Cf. Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996) (clear statutory language is only avoidable by showing that

Congress "did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it."). But here, that is clearly not the case. Because Congress *prohibited* virtually all corporations and labor organizations from engaging in electioneering communications in the first place, it did not intend the disclosure requirements to apply to such groups. (*See* FEC Br. at 23-26.) *See also Hayden v. Pataki*, 449 F.3d 305, 324 n.21 (2d Cir. 2006) (holding that *Yeskey* was "easily distinguishable" because, while there was no evidence in *Yeskey* that "Congress had meant to exempt prisons," "there is a significant amount of evidence that Congress did not intend the [law to cover the subject matter in *Hayden*], and, at the very least, was convinced it had not done so."). Moreover, *Yeskey* did not confront a situation in which a court decision drastically altered the scope of a statute by legalizing what Congress had specifically made unlawful. To the contrary, *Yeskey* noted that the statute's statement of findings and purpose suggested that state prisons were intended to be covered. *Yeskey*, 524 U.S. at 211-12. And *Massachusetts v. EPA* is inapposite because it concerned whether Congress had permitted EPA to regulate a certain type of activity when its grant of authority used "broad language"; this case concerns whether Congress *required* an agency to regulate certain activity in a certain way, even though the statute Congress passed altogether prohibited the underlying activity.

Finally, Van Hollen (Pl's Reply at 4) assumes that if Congress had intended corporations and unions to make electioneering communications at all, the *type* of disclosure they would be required to make would be identical to the kind of disclosure required of other groups. But these are distinct issues, and plaintiff offers no reliable evidence that Congress would have subjected corporations and unions to the same reporting requirements had they been allowed to use their general treasury funds to make electioneering communications in the first place. As the

Commission explained, FECA and BCRA have different reporting requirements for different entities and campaign activities. (*See* FEC Br. at 27.) The gap in the statute regarding disclosure for corporations and unions that make electioneering communications became much more pronounced after *WRTL*, and it is the Commission's role, not Van Hollen's, to fill it.

B. Van Hollen Effectively Concedes That Interpreting the Statutory Term "Contributor" Is an Exercise in Line Drawing

Van Hollen argues at length (Pl's Reply at 7-9) that the term "contributors" in 2 U.S.C. § 434(f)(2) is not ambiguous and therefore that the *Chevron* analysis should end at step one. But plaintiff also acknowledges that not everyone who gives money to a corporation should be deemed a "contributor." According to Van Hollen, if money is given for investment purposes, in connection with a sale, or as payment for a loan, it need not be disclosed, but if money is given to pay dues, for example, it should be disclosed. (*See* Plaintiff's Motion for Summary Judgment ("Pl.'s Br.") at 30-32 (Doc # 20).) However, none of these lines exist in the purportedly unambiguous statute; rather, they are lines Van Hollen has drawn to define "contributor" in a manner that he deems reasonable. Van Hollen's disagreement seems to be less about whether the Commission has the authority to interpret who constitutes a "contributor" than it is about whether Van Hollen would prefer a different interpretation.

Van Hollen also concedes (Pl's Reply at 9) that the FECA definition of "contribution" (2 U.S.C. § 431(8)) cannot be transferred wholesale to section 434(f)'s use of the terms "contributors" or "contributed"; yet he refuses to acknowledge that the shared root of these words creates ambiguity. As the Commission pointed out in both the 2003 E&J and its opening brief (FEC Br. at 19-20), Congress's use of these related, but ultimately distinct, terms indeed creates confusion, which the agency resolved by interpreting them differently in the different statutory provisions. To minimize the statutory ambiguity and confusion, the Commission chose

to use the terms "donor" and "donated" in its regulation under review. Although Van Hollen would prefer disclosure regarding a different subset of donors to corporations and unions that make electioneering communications, the fact that he offers the Court his own proposed line drawing implicitly concedes that the statute has left a gap — for the Commission — to fill.

C. Congress Applied the Electioneering Communication Disclosure Requirements to a Very Limited Number of Corporations, and to No Labor Unions

Van Hollen argues that Congress contemplated disclosure for corporations when it passed BCRA, both because some corporations were allowed to engage in electioneering communications and because an inoperative portion of the law would have allowed some other corporate electioneering. (Pl's Reply at 5-6.) Van Hollen describes these as a "broad array of corporations," but in fact they represent only a tiny fraction of the corporations in the United States and have characteristics that are quite distinct from the vast majority of corporations. And it is undisputed that Congress never intended the electioneering communication disclosure requirements to apply to any labor organizations at all.

BCRA as enacted permitted only a relatively tiny number of corporations to make electioneering communications with their general treasury funds. In 2008, there were more than 5.9 million businesses in the United States. *See* Statistics of U.S. Businesses, http://www2.census.gov/econ/susb/data/2008/us_state_totals_2008.xls. The vast majority of these are small, for-profit entities. *See* Charities & Other Tax-Exempt Organizations Statistics, http://www.irs.gov/pub/irs-soi/08eo03.xls ("IRS 990 Statistics") (fewer than 200,000 non-profit corporations filed a Form 990 in 2008); http://www.irs.gov/pub/irs-soi/08eo04.xls (IRS 990-EZ Statistics) (fewer than 250,000 non-profit corporations filed a Form 990-EZ in 2008). In addition, there are dozens of labor unions representing more than 14 million American workers.

See Bureau of Labor Statistics, News Release, http://www.bls.gov/news.release/pdf/union2.pdf (Jan. 21, 2011) (stating that there are 14.7 union members); Unions of the AFL-CIO, http://www.aflcio.org/aboutus/unions (listing 64 unions affiliated with the AFL-CIO). In 2002, Congress understood that only a small number of ideological corporations could use their general funds to finance electioneering communications, *i.e.*, those formed for the sole purpose of promoting political ideas, that did not engage in business activities, and that did not accept contributions from for-profit corporations or unions. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263-64 (1986) ("*MCFL*") (holding that such corporations have a constitutional right to make independent expenditures); *McConnell v. FEC*, 540 U.S. 93, 209-12 (2003) (construing BCRA's electioneering communication requirements not to apply to *MCFL* corporations). Indeed, FEC disclosure reports reflect that only 113 entities that have made independent expenditures since 1994 have indicated that they were *MCFL* corporations.[3]

Van Hollen claims that the Snowe-Jeffords provision of BCRA indicates that Congress envisioned corporations beyond those described in *MCFL* that might have been permitted to engage in electioneering communications. (*See* Pl's Reply at 6.) But as the FEC explained, Congress's intent cannot be gleaned by looking at that provision because it was *inoperative* from the moment BCRA became law. (*See* FEC Br. at 23-26.) Furthermore, Snowe-Jeffords itself would have applied only to a relatively small number of corporations because it would have permitted only those corporations registered with the IRS as section 501(c)(4) or 527 organizations to engage in electioneering communications. Fewer than 30,000 organizations filed their required reports to the IRS indicating section 501(c)(4) status in 2008. *See* IRS 990

[3] *See* FEC Disclosure Reports, www.fec.gov/finance/disclosure/adv-search.shtml (query for "INDEPENDENT EXPENDITURE (PERSON OR GROUP, NOT A COMMITTEE)" provides links to images of FEC Form 5 filings; the form asks all filers: "Is the filer a qualified nonprofit corporation?").

Statistics (9,316 501(c)(4) corporations filed a Form 990 in 2008); IRS 990-EZ Statistics (19,819 501(c)(4) corporations filed a Form 990-EZ). Although not all section 527 organizations must file IRS forms in any given year, only 5,268 of them filed IRS forms indicating 527 status in 2010. *See* Political Organization Disclosure, http://forms.irs.gov/politicalOrgsSearch/search/gotoAdvanced8871Search.action (5,268 results for "Popular Search" of "All organizations with any Form posted during the previous year").

Thus, even if the Snowe-Jeffords provision had ever become operative, the overwhelming majority of corporations, including *all* for-profit corporations and most non-profit corporations, as well as *all* labor unions, would have been barred from taking advantage of it. Congress did not, in fact, contemplate electioneering communication disclosure for a "broad array" of corporations.

In sum, the Commission's interpretation of the application of the electioneering communication disclosure requirements in light of the statutory ambiguity is a clear example of an agency filling a "gap left, implicitly or explicitly, by Congress." *Chevron*, 467 U.S. at 843. Because Congress has not spoken directly to the issue in this case, the regulation at 11 C.F.R. § 104.20(c)(9) passes step one of the *Chevron* inquiry.

III. THE COMMISSION'S REGULATION GOVERNING ELECTIONEERING COMMUNICATION DISCLOSURE BY CORPORATIONS AND UNIONS IS A REASONABLE INTERPRETATION OF THE STATUTE

Under *Chevron* step two, the Court must uphold a regulation if it is "reasonable," even if there are other reasonable interpretations of the statute. *FEC v. Nat'l Rifle Ass'n of Am.*, 254 F.3d 173, 187 (D.C. Cir. 2001). As the Commission explained (FEC Br. at 28-42), the regulation at issue in this case reasonably balances the importance of providing significant electioneering communication disclosure with the potentially serious burdens on First Amendment interests in

this context. Van Hollen argues that the regulation is unreasonable because he believes it provides inadequate disclosure and could provide more information with minimal additional burden, but his claims amount to an effort to substitute his judgment for that of the Commission, which is entitled to substantial deference in making such determinations. (*See* FEC Br. at 13-18.)

A. The Commission Reasonably Relied Upon Rulemaking Evidence of the Burdens Associated with Disclosure by Corporations and Unions

As the Commission explained (FEC Br. at 29-36), the agency promulgated the regulation at 11 C.F.R. § 104.20(c)(9), which requires disclosure of "donations made for the purpose of furthering electioneering communications," in part because of the "inordinate amount of effort" that would be required for corporations and labor organizations to disclose all persons that provided funds in a year that totaled $1,000 or more. *See* 2007 E&J, 72 Fed. Reg. at 72,913. Van Hollen argues that this reasoning was both "irrational and unsupported by evidence in the administrative record" (Pl's Reply at 12), but each of these arguments is incorrect.

The Commission's decision to adopt the standard in 11 C.F.R. § 104.20(c)(9) was a rational middle course between competing alternatives. (*See* FEC Br. at 28-32.) Van Hollen asserts that it was irrational for the Commission to suggest that the word "contributor" could include "persons who make investments, loans, and purchases," and that without that "bizarre assumption," there does not appear to be a significant burden. (Pl's Reply at 12.) However, a review of dictionary definitions of "contributor" shows that the Commission's understanding of the word's potentially broader meaning is not only rational, but common. For example, definitions for the word include:

1. "a person or thing that provides money to help pay for something, or support something." Oxford Advanced Learners Dictionary.

http://www.oxfordadvancedlearnersdictionary.com/dictionary/contributor (visited Sept. 10, 2011);

2. "a person who gives something, especially money, in order to provide or achieve something together with other people." Cambridge Advanced Learner's Dictionary. http://dictionary.cambridge.org/dictionary/british/contributor (visited Sept. 10, 2011);

3. "almoner, almsgiver, assignor, benefactor, bestower, donator, donor, granter, grantor, investor, patron, philanthropist, presenter, supplier, supporter, testator, vouchsafer." The Free Dictionary. http://legal-dictionary.thefreedictionary.com/contributor (visited Sept. 10, 2011).

Plaintiff has found other dictionary definitions to support his contention that "a 'contributor' is one who gives money without expectation of service or property or legal right in return" (Pl's Br. at 20), but the definitions above show that the word is subject to broader interpretations, and in any event it is not clear that plaintiff's definition is as reasonable or as simple to administer as he suggests. The "expectation" of receiving something in return is not always apparent, and some transfers may result from a mix of gratuitous and other intentions. Furthermore, individuals may make gratuitous transfers to corporations and unions for reasons that have nothing to do with support for electioneering. Conversely, an individual who gives money in exchange for goods or services may very well support the electioneering message (for example, an individual who purchases 100 logo T-shirts for $2,000). Moreover, it is not clear whether Van Hollen's definition would include union dues, because union members often receive the right to certain services that have value, such as legal representation, and yet they may also support a union's electioneering communications. As discussed *supra* Part II.B, the determination about what constitutes a "contributor" involves line drawing, and the Commission's choice is what merits deference.

Van Hollen also criticizes the Commission for failing to undertake a sufficiently rigorous investigation of how burdensome his preferred broader regulation would be, claiming that the

Commission should have provided "information, data, or estimates" and/or "concrete examples of the supposed burden." (Pl's Reply at 13.) But plaintiff offers no authority showing that the APA requires an agency to conduct a lengthy study or to engage an expert every time it promulgates a regulation, or that common sense propositions require empirical evidence. *Cf. Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1166 (D.C. Cir. 1979) ("Congress is under no requirement to hold an evidentiary hearing prior to its adoption of legislation, and 'Congress need not make that requirement when it delegates the task to an administrative agency.'") (quoting *Bowles v. Willingham*, 321 U.S. 503, 519 (1944) (citation omitted)).

In any event, the Commission received many comments and heard testimony from many knowledgeable witnesses regarding the potential effects on the nation's millions of corporations and unions. Van Hollen criticizes the Commission for relying on the testimony of commenters who are potentially affected by the proposed rule. (Pl's Reply at 13.)[4] However, the APA itself requires that the public have an opportunity to comment on an agency's proposed rules, 5 U.S.C. § 553(c), and an agency that does not take public comments seriously may risk violating the

[4] Van Hollen argues that "[n]ot one of the 25 comments the FEC received, however, was submitted by a for-profit corporation that has business revenue, customers, and investors" (Pl's Reply at 13), but this is very misleading. The Commission received comments from trade organizations that represent millions of for-profit entities, as well as some of the major labor unions in the nation. *See, e.g.*, Comments of the Chamber of Commerce of the United States of America (AR Tab 15, VH0270, 275), stating that it represents "three million businesses … of all sizes and industries."; Comments of American Association of Advertising Agencies, American Advertising Federation, and Association of National Advertisers (AR Tab 11, VH0230, 233), each of which represent hundreds of businesses and agencies; Comments of National Association of Realtors (AR Tab 22, VH0375, 377), stating that its purpose is to "advance the interests of its members by improving the legal climate in which the members conduct their businesses"; Joint Comments of AFL-CIO, AFSCME, NEA and SEIU (AR Tab 29, VH0452).

Van Hollen also argues that the Commission should have taken into account that corporations could alleviate their burden by establishing a segregated electioneering account pursuant to 2 U.S.C. § 434(f)(2)(E) and only disclosing individual contributors to that account. (Pl's Reply at 12.) As the FEC has pointed out, however, that option is not sufficient to relieve the burden on corporations which receive funds from non-individuals, such as other corporations. (FEC Br. at 36 n.13.)

APA. "[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (citing *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393-394 (D.C. Cir. 1973) (footnote omitted). And no one is likely to have greater expertise regarding the potential burdens of the regulation than the organizations (and their representatives) most directly affected by the proposed rule. Moreover, "[f]rom a functional standpoint, we see no difference between assertions of fact and expert opinion tendered by the public . . . and that generated internally in an agency: each may be biased, inaccurate, or incomplete failings which adversary comment may illuminate." *Id.* at 55. Thus, it was not only permissible but *required* that the Commission seriously consider the evidence submitted by the many unions, corporate trade associations, independent groups, political party committees, and others regarding the potential effects of the regulation.

Commenters in the rulemaking identified problems, particularly for non-profit groups, with a rule requiring separate fundraising or multiple reporting agendas. "On a practical level [the Commission's proposed disclosure requirement] leaves a nonprofit with two bad choices: either disclose donors for the entire organization, or have the difficult job of separate fundraising for the [separate bank account]." Comments of Guinane, OMB Watch (AR Tab 23, VH0386). "Nonprofits struggle to maintain complex organizational structures that allow … administering 501(c)(3) and 501(c)(4) corporations, a federal PAC, one or more state PACs, and a committee registered in each state where the organization seeks to influence a ballot measure. … Understanding what activities may be supported by each member of this nonprofit 'family' can be a challenge for staff, who are not typically legal experts. The burden of complying with different reporting regimes, each with its own set of definitions and particular quirks, would be

hard to understate. . . . Organizations would have to choose between establishing yet another bank account to be separately administered, or intruding on their donors' privacy." Hearing Comments of Kingsley, Attorney for non-profit groups (AR Tab 30, VH0477-79).

Van Hollen did not participate in the 2007 rulemaking, and the BCRA sponsors with whom he allies himself said nothing about burden in their submission to the Commission. *See* Comments by McCain, Feingold, Snowe, and Shays (AR Tab 21, VH0368-74). In sum, the evidence regarding burden on the regulated community was essentially unrebutted before the Commission, and it was entirely reasonable for the Commission to rely upon it.

B. The Reasonableness of the Regulation Challenged Here Can Only Be Judged Based Upon the Information Available to the Commission at the Time the Regulation Was Promulgated

As the Commission explained (FEC Br. at 32-33), 11 C.F.R. § 104.20(c)(9) requires the disclosure of critical information about electioneering communications, including the entity making the communication and how much was spent. Van Hollen argues (Pl's Reply at 11) that the regulation is unreasonable because it does not require corporations and labor unions to disclose all sources of funds that are ultimately used to finance electioneering communications — regardless of why the money was given to the organization. But Van Hollen's argument relies almost exclusively on information about post-2007 disclosure that was unavailable to the Commission at the time it promulgated the regulation, and this information cannot be used to judge whether the FEC acted reasonably at that time. (*See* FEC Br. at 38-41.) In particular, the Commission could not have foreseen that years later the Supreme Court would greatly broaden the scope of permissible electioneering financing by corporations and labor organizations in *Citizens United v. FEC*, 588 U.S. __, 130 S. Ct. 876 (2010).

To justify his reliance on post-decisional material, Van Hollen again cites *Esch v. Yeutter*, 876 F.2d 976 (D.C. Cir. 1989) (*see* Pl's Reply at 11 n.1), but he fails to respond to the Commission's four-part showing (FEC Br. at 40) that *Esch* is inapposite here. Plaintiff reasserts that the Commission failed to take into account all factors relevant to its decision, but as we explained (*id.*) this overly broad reading of *Esch* would create an exception so broad that it would swallow the rule barring post-decisional evidence. Under Van Hollen's apparent view, *Esch* would require the Commission to do the impossible: consider material in 2007 that did not exist until 2010 or 2011. Van Hollen also does not counter the Commission's extensive showing that courts refuse to consider such post-decisional material to challenge the correctness of an agency's decision. (*See* FEC Br. at 41.) Nor does Van Hollen respond to the Commission's demonstration (*id*.) that the proper recourse in a situation of changed circumstances is a petition for a new rulemaking, not the invalidation of a properly promulgated regulation. *See Reytblatt v. NRC*, 105 F.3d 715, 723 (D.C. Cir. 1997).

C. The Court Should Consider Congress's Refusal to Pass the DISCLOSE Act in Evaluating Whether the Commission's Interpretation of the Statute Was Reasonable

This Court can and should take into account the failure of Representative Van Hollen and his co-sponsors to overturn the challenged regulation legislatively. The DISCLOSE Act, H.R. 5175 (2010) and S. 3295 (2010), which was introduced in both the House and Senate in 2010, would have required corporations that make electioneering communications from general treasury funds to disclose all their donors, without respect to purpose. (*See* FEC Br. at 37-38.) The failure of this legislation (and the fact that it has not even been introduced in the current session of Congress) suggests tacit approval of the regulation by Congress. Van Hollen argues (Pl's Reply at 16) that, because the DISCLOSE Act was a "broad and comprehensive" piece of

legislation rather than one that merely sought to overturn this regulation, its failure should not be construed as congressional approval of the regulation. But disclosure of corporate and union contributors was a major part of the bill; indeed, it was identified as the "most important" part by some members of Congress. 156 Cong. Rec. S3632 (daily ed. May 12, 2010) (statement of Sen. Bennet) ("The most important provisions in the DISCLOSE Act concern increased transparency in our political process. … requiring corporations, labor unions and a number of tax exempt organizations to report all donors who have given $1,000 or more to the organization in a 12-month period … ."); 156 Cong. Rec. H4798 (daily ed. June 24, 2010) (statement of Rep. Nadler) ("This bill takes several critical steps to reclaim our elections. The most important one is that it would require disclosure by corporations and labor unions of donors providing money for political purposes in certain circumstances … ."). Plaintiff does not dispute that one major purpose of DISCLOSE was to overturn the regulation challenged in this case. Thus, Congress's refusal to overturn 11 C.F.R. § 104.20(c)(9) is evidence that the regulation is consistent with congressional intent.

IV. REMAND TO THE COMMISSION, NOT VACATUR, IS THE APPROPRIATE REMEDY IF THE COURT HOLDS THAT THE REGULATION IS CONTRARY TO LAW

As the Commission explained, if the Court were to determine that 11 C.F.R. § 104.20(c)(9) is unlawful, the appropriate remedy would be a remand to the Commission rather than vacatur. (*See* FEC Br. at 43-45.) The Commission showed that the unusual and potentially disruptive remedy of vacatur is inappropriate here under the standards identified in *Allied-Signal, Inc. v. NRC*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). The general rule when courts review agency decision-making is, "except in rare circumstances," to give the agency an opportunity to fix any problems on its own. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

Van Hollen argues that vacatur would be appropriate because "the agency's regulation is inconsistent with the unambiguous terms of [the] statute." (Pl's Reply at 17.) But that would be true every time a regulation fails at *Chevron* step one, yet vacatur is not the normal remedy in such cases. *See, e.g.*, *Shays v. FEC*, 337 F. Supp. 2d 28, 128 (D.D.C. 2004) (*Chevron* step one loss with no vacatur). Moreover, if the Court were to rule against the Commission at *Chevron* step two, vacatur would be inappropriate because there is a "non-trivial likelihood" that the Commission could justify the regulation on remand. *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002). The cases on which plaintiff relies (Pl's Reply at 17) concern the appropriateness of vacatur where an agency cannot justify a rule through further explanation or record development, but many of plaintiff's complaints about the regulation challenged here, at least under *Chevron* step two, are about alleged defects in the FEC's support for its rule.

Van Hollen also asserts that invalidating the regulation would not result in inadequate guidance to corporations and labor organizations because they "need only abide by the plain text of the statute" (Pl's Reply at 18), but he greatly understates the potential difficulties in the course he urges. As discussed *supra* Part II.B, the statute does not define who a "contributor" is, and that determination requires line drawing. With the 2012 elections fast approaching, corporations and labor organizations should have the benefit of more detailed guidance during any period of uncertainty in which the Commission would be considering a new regulation. And Van Hollen's suggestion (Pl's Reply at 17-18) that in the event of vacatur corporations and unions could avoid the burdens of disclosure by simply setting up a separate bank account ignores the problems with that option discussed *supra* p. 15 n.4.

In arguing for the Court to vacate the Commission's regulation and retain jurisdiction over the case, Van Hollen wrongly claims (Pl's Reply at 18) that the Commission has not acted

in a timely fashion in implementing other BCRA regulations and responding to court decisions. But of the six-year period plaintiff identifies, less than two years were occupied by the Commission undertaking rulemaking proceedings in response to court decisions, and that relatively short time involved rulemakings regarding more than 20 regulations. It is thus misleading to suggest that the agency's diligent response to the massive reform legislation of BCRA and the lawsuits challenging these complex rules can be considered dilatory. The Commission promulgated its initial BCRA regulations under a highly expedited schedule, defended its regulations against multiple judicial challenges, and when necessary, promulgated new regulations, following APA procedural requirements and court decisions.

Following BCRA's passage in March 2002, the Commission engaged in an unprecedented 20-plus expedited rulemaking projects in order to meet BCRA's mandate to pass Title I regulations within 90 days of enactment and Title II regulations within 270 days. *See* Section 402(c) of BCRA. *See also*, *e.g*., E&J, 67 Fed. Reg. 49,064 (July 29, 2002); E&J, 68 Fed. Reg. 404 (Jan. 3, 2003). In October 2002, then-Congressmen Chris Shays and Martin Meehan filed suit against the FEC, challenging 23 regulations (though they later withdrew challenges to three). *See Shays*, 337 F. Supp. 2d at 54 n.22. The district court's initial stay of proceedings was not lifted until the final decision in *McConnell* in December 2003, and nine months later, in September 2004, the court issued its decision upholding some of the Commission's regulations but invalidating 15 regulations and remanding those to the agency. *Id*. The Commission appealed the decision as to five regulations, but immediately began, and then timely completed, new rulemaking proceedings on the others. In September 2005, the D.C. Circuit affirmed the district court's decision as to the last five contested regulations. *Shays v. FEC* ("*Shays I*"), 414 F.3d 76 (D.C. Cir. 2005). The Commission added these regulations to its ongoing rulemaking

docket and concluded the last of these complex proceedings in June 2006, less than one year after the D.C. Circuit decision.

In July 2006, the month after the Commission issued its final E&J on the *Shays I* regulations, Shays filed another suit challenging five of the Commission's revised regulations. *Shays v. FEC*, 508 F. Supp. 2d 10 (D.D.C. 2007). A little over a year later, in September 2007, the court invalidated four of the regulations and remanded them to the Commission. *Id.* In June 2008, the D.C. Circuit reversed the district court's decision invalidating one regulation, affirmed the district court's decision invalidating three others, and invalidated a regulation that the district court had upheld. *Shays v. FEC* ("*Shays III*"), 528 F.3d 914 (D.C. Cir. 2008).

The instant case involves only one regulation. In light of the Commission's timely efforts to issue new explanations and rules in the complex BCRA rulemakings (and associated *Shays* litigation), plaintiff's suggestion that the Commission's past conduct would justify vacatur or retention of jurisdiction should be rejected. Van Hollen has presented no evidence that the Commission will act in any but a timely way to respond to whatever order the Court may issue. Indeed, the district court saw no need for such extraordinary remedies in *Shays I* or *Shays III*.[5]

[5] In *Shays I*, the district court rejected plaintiffs' requests for an injunction, expedited rulemaking, Commission reports to the court at intervals, and retention of jurisdiction. The court explained that "[u]nder settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *See Shays*, 337 F. Supp. 2d at 130. "Accordingly, it is up to the agency to determine how to proceed next — not for the Court to decide or monitor." *Id.* (internal quotations marks and citations omitted). Similarly, the district court in *Shays III* — acting in September 2007, with full awareness of the Commission's handling of the remanded *Shays I* regulations — denied plaintiffs' request for an injunction, expedited rulemaking, and retention of jurisdiction, quoting the similar denial in *Shays I*. *See Shays*, 508 F. Supp. 2d at 70-71.

Accordingly, if the Court were to rule against the Commission on the merits, it should remand the regulation to the Commission for further proceedings, not impose the extraordinary and potentially disruptive remedies of vacatur or retained jurisdiction.

CONCLUSION

Because 11 C.F.R. § 104.20(c)(9) is not contrary to law, the Court should grant summary judgment to the Commission and deny plaintiff's motion for relief.

Respectfully submitted,

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September 23, 2011