UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, *et al.*,	)	
Plaintiffs,	)	Civ. No. 16-259 (BAH)
v.	)	
FEDERAL ELECTION COMMISSION,	)	PARTIAL MOTION TO DISMISS
Defendant.	)	

FEDERAL ELECTION COMMISSION'S PARTIAL MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(1), the Federal Election Commission ("Commission" or "FEC") hereby moves for an order dismissing Claim Two of plaintiffs' complaint, challenge the lawfulness of 11 C.F.R. § 109.10(e)(1)(vi) pursuant to the Administrative Procedure Act, 5 U.S.C. § 706. Plaintiffs' challenge to that regulation regarding disclosure of certain information related to independent expenditures under the Federal Election Campaign Act ("FECA") is barred by the six-year statute of limitations at 28 U.S.C. § 2401(a). A supporting memorandum and a proposed order accompany this motion.[1]

[1] The Federal Election Commission (Commission) has historically voted by a majority vote (pursuant to 52 U.S.C. §§ 30106(c) and 30107(a)(6)) to authorize an appearance by the Office of General Counsel (OGC) on behalf of the Commission in a suit commenced pursuant to 52 U.S.C. § 30109(a)(8). There are, however, two general categories of cases that may come before a court in which there are insufficient votes to pursue a matter arising from an administrative complaint. In the first category of cases, litigation is commenced against the Commission after it does not approve a recommendation by OGC to find "reason to believe" that a violation of the FECA or of its regulations occurred, and the file was consequently closed. 52 U.S.C. § 30109(a)(8). In the second category of cases, the litigation is commenced against the Commission after OGC recommends dismissing the matter, and the Commission closes the file after three or more Commissioners approve OGC's recommendation or there are otherwise three or fewer Commissioners voting to find reason to believe. In both instances, the reason for the

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inaction of the Commission is that there were not four or more Commissioners' votes to find "reason to believe" regarding the allegations in the administrative complaint.

Judicial review of the FEC dismissal of an administrative complaint requires the Court to examine the agency's reasoning as expressed by Commissioners or, in some circumstances, by OGC. *See Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1134 (D.C. Cir. 1987). In the first category of cases described above, the court must be supplied with a "statement of reasons" of those Commissioners who voted against, or abstained from voting for, the OGC recommendation, who the court has called the "controlling group." *Id.*; *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("[W]hen the Commission deadlocks 3-3 and so dismisses a complaint, that dismissal, like any other, is judicially reviewable under Section [30109(a)(8)] . . . . [T]o make judicial review a meaningful exercise, the three Commissioners who voted to dismiss must provide a statement of their reasons for so voting. Since those Commissioners constitute a controlling group for purposes of the decision, their rationale necessarily states the agency's reasons for acting as it did."); *Common Cause v. FEC*, 655 F. Supp. 619 (D.D.C. 1986), *rev'd on other grounds*, 842 F.2d 436 (D.C. Cir. 1988).

In the second category of cases described above, any member or members of the group of Commissioners who approve OGC's dismissal recommendation may issue their own statement(s) of reasons to provide the basis for his or her action. If one or more members who supported dismissal do not file a statement containing the basis of his or her action, the rationale provided in OGC's report shall be among those considered by the Court. *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 38 & n.19 (1981) (staff report may provide a basis for the Commission's action). Although the views of the Commissioners who voted to pursue enforcement are not defended by OGC, their statements of reasons are made part of the administrative record as long as they are filed by the time the record is certified, and when filed shall be available for the Court's consideration.

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FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS PARTIAL MOTION TO DISMISS

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Citizens for Responsibility and Ethics in Washington ("CREW") and Nicholas Mezlak challenge the Federal Election Commission's ("Commission" or "FEC") dismissal of their administrative complaint alleging that Crossroads Grassroots Policy Strategies ("Crossroads GPS") and several individuals violated the Federal Election Campaign Act ("FECA" or "Act") and an FEC implementing regulation governing disclosure about contributors to entities making independent expenditures. Those causes of action, Claims One and Three of plaintiffs' complaint, were timely filed in this Court pursuant to a judicial-review provision of FECA, 52 U.S.C. § 30109(a)(8). But plaintiffs' complaint also makes a claim for relief under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706, asking the Court to declare that the *regulation itself*, 11 C.F.R. § 109.10(e)(1)(vi), is invalid. (Compl. for Injunctive and Declaratory Relief ("Compl.") ¶¶ 117-24, Requested Relief ¶ 3 (Doc. No. 1)). That regulation has been in place for more than 30 years. Plaintiffs' challenge to it is consequently barred by the APA's six-year statute of limitations for challenging agency regulations at 28 U.S.C. § 2401(a) and the Court lacks jurisdiction to consider plaintiffs' Claim Two. That claim must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1).

I. BACKGROUND

A. The Parties

The FEC is a six-member independent agency of the United States government with exclusive jurisdiction to administer, interpret, and civilly enforce FECA. *See generally* 52 U.S.C. §§ 30106, 30107. Congress authorized the Commission to "formulate policy" with respect to FECA, *id.* § 30106(b)(1); "to make, amend, and repeal such rules . . . as are necessary to carry out the provisions of [FECA]," *id.* §§ 30107(a)(8), 30111(a)(8); and to investigate possible violations of the Act, *id.* § 30109(a)(1)-(2). The Commission has exclusive jurisdiction

to initiate civil enforcement actions for violations of the Act in the United States district courts. *Id.* §§ 30106(b)(1), 30109(a)(6).

Plaintiff CREW "is a non-profit, non-partisan corporation organized under Section 501(c)(3) of the Internal Revenue Code." (Compl. ¶ 7.) CREW states that it "monitors the activities of those who run for federal office as well as those groups financially supporting candidates for office or advocating for or against their election" and "files complaints with the FEC when it discovers violations of the FECA." (*Id.* ¶¶ 10-11.) Plaintiff Nicholas Mezlak states that he is "a citizen of the United States and a resident of the state of Ohio." (*Id.* ¶ 17.)

B. Promulgation of 11 C.F.R. § 109.10(e)(1)(vi)

In 1980, Congress amended FECA to provide, among other things, that persons other than political committees who spend funds over a certain threshold to make independent expenditures must file reports that include "the identification of each person who made a contribution in excess of $200 to the person filing such statement which was made for the purpose of furthering an independent expenditure." *See* Pub. L. No. 96-187, 93 Stat 1339 (Jan. 8, 1980) (amending provision then codified at 2 U.S.C. § 434(c)(2) (now 52 U.S.C. § 30104(c)(2))). The Commission accordingly amended its disclosure regulation, then located at 11 C.F.R. § 109.2, to "incorporate the changes set forth" in the statute. FEC, Amendments to Federal Election Campaign Act of 1971, 45 Fed. Reg. 15080, 15087 (Mar. 7, 1980). The regulation requires identification of "each person who made a contribution in excess of $200 to the person filing such report, which contribution was made for the purpose of furthering the

reported independent expenditure." *See* 11 C.F.R. § 109.10(e)(1)(vi). Over the past 36 years, there has been no change to that requirement.[1]

C. CREW's Administrative Complaint and Proceedings Before the FEC

FECA permits any person to file an administrative complaint with the Commission alleging a violation of the Act. 52 U.S.C. § 30109(a)(1); *see also* 11 C.F.R. § 111.4. On November 14, 2012, plaintiff CREW and two individuals filed an administrative complaint against Crossroads GPS and associated individuals alleging that Crossroads GPS had unlawfully failed to disclose its contributors in violation of 52 U.S.C. § 30104 and 11 C.F.R. § 109.10. (Compl. ¶ 55.) The administrative complaint was later supplemented to substitute plaintiff Nicholas Mezlak for one of the individual administrative complainants. (*Id.* ¶ 63.) Crossroads GPS and the other respondents responded to the administrative complaint on January 17, 2013. (*Id.* ¶ 56.)

FECA requires that, after reviewing an administrative complaint and any responses filed by the respondents, the Commission is to consider whether there is "reason to believe" that FECA has been violated. 52 U.S.C. § 30109(a)(2). If at least four of the FEC's six Commissioners vote to find such reason to believe, the Commission may investigate the alleged violation; otherwise, the Commission dismisses the administrative complaint. *Id.* §§ 30106(c), 30109(a)(2). In this case, the Commission's Office of General Counsel provided the Commission with a First General Counsel's Report that recommended a finding of "no reason to believe" for violations alleged in the administrative complaint and recommended that the

[1] In 2003, the regulation was moved from section 109.2 to section 109.10 and a portion of the regulation plaintiffs do not challenge regarding when and how reports should be filed was slightly modified. *See* FEC, Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404, 416 (Jan. 3, 2003).

Commission exercise its prosecutorial discretion to dismiss an arguably additional question presented. (Compl. ¶ 68.) The Commission voted on November 17, 2015, and was evenly split three-to-three on whether to find reason to believe that Crossroads GPS violated the law. (*Id.* ¶ 70.) As a result of that split vote, the Commission closed the file on the matter. (*Id.* ¶ 71.)

D. Plaintiffs' Court Complaint

FECA provides administrative complainants with a mechanism for judicial review if the Commission determines that no violation has occurred or decides to dismiss the administrative complaint for some other reason. *See* 52 U.S.C. § 30109(a)(8)(A) (detailing the procedure for seeking judicial review of an administrative dismissal and the scope of such review). That judicial review is also available for FEC dismissals resulting from three-to-three votes. *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992) ("*NRSC*") ("[A split vote] dismissal, like any other, is judicially reviewable under [§ 30109(a)(8)]." (citation omitted)). Plaintiffs brought this lawsuit in part pursuant to section 30109(a)(8)(A), contending that the Commission's handling of their administrative complaint was arbitrary, capricious, an abuse of discretion, and contrary to law. (*See* Compl. ¶¶ 110-16, 125-31.) Claims One and Three of plaintiffs' complaint seek relief that genuinely relates to the agency's dismissal of plaintiffs' administrative complaint without opening an investigation.

In addition to the claims under section 30109(a)(8)(A), plaintiffs' suit "further challenges a regulation promulgated by the FEC" (Compl. ¶ 1) and asks the Court to "[d]eclare that 11 C.F.R. § 109.10(e)(1)(vi) is contrary to law, arbitrary and capricious, and invalid" (Compl. Requested Relief ¶ 3). The challenge to the agency's regulation is brought pursuant to the APA. (*See id.* ¶ 1 (citing 5 U.S.C. § 706(2)); *id.* ¶ 124 (citing 5 U.S.C. § 706).) In particular,

Claim Two of plaintiffs' complaint is directed at the lawfulness of the regulation. (*See, e.g.*, *id.* ¶ 119 ("the regulation is inconsistent with the plain language of the statute."); *id.* ¶ 120 ("The FEC provided no explanation for drafting 11 C.F.R. § 109.10(e)(1)(vi) in a way that conflicts with 52 U.S.C. § 30104(c)(2)."); *id.* ¶ 121 ("Because 11 C.F.R. § 109.10(e)(1)(vi) imposes a reporting obligation that conflicts with the one imposed by statute under the FECA, 11 C.F.R. § 109.10(e)(1)(vi) is unlawful and invalid."); *id.* ¶ 123 ("Because 11 C.F.R. § 109.10(e)(1)(vi) is without force and conflicts with the FECA, the OGC's reliance on the standards imposed by that statute are arbitrary, capricious, an abuse of discretion, and contrary to law."); *id.* ¶ 124 ("Plaintiffs are therefore entitled to relief in the form of a declaratory order that . . . 11 C.F.R. § 109.10(e)(1)(vi) is unlawful and invalid.").)

II. ARGUMENT

A. Standard of Review

A motion for partial dismissal under Rule 12(b)(1) "presents a threshold challenge to a court's jurisdiction." *Ctr. for Biological Diversity v. Jackson*, 815 F. Supp. 2d 85, 89-90 (D.D.C. 2011) (citing *Haase v. Sessions,* 835 F.2d 902, 906 (D.C. Cir. 1987)). Plaintiffs bear the burden of establishing courts have jurisdiction where a defendant has moved to dismiss for lack of subject matter jurisdiction. *See Lujan v. Defs. of Wildlife,* 504 U.S. 555, 561 (1992). In evaluating the motion, courts accept as true the factual allegations in the complaint and all factual inferences favorable to plaintiffs. *See Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 164 (1993); *Barr v. Clinton,* 370 F.3d 1196, 1199 (D.C. Cir. 2004). However, courts give plaintiffs' factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than a Rule 12(b)(6) motion, because subject matter jurisdiction focuses on a court's power to hear the claim. *See Macharia v. United States,* 334 F.3d 61, 64 (D.C. Cir. 2003). A claim must be dismissed "when the allegations in a complaint,

however true, could not raise a claim of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007)).

B. The Court Lacks Jurisdiction to Declare 11 C.F.R. § 109.10(e)(1)(vi) Contrary to Law Because Plaintiffs' Challenge Is Untimely

The text of the regulation plaintiffs challenge was promulgated 36 years ago. But the statute of limitations applicable to an APA challenge to a regulation is six years. Where an agency regulation was promulgated at a time outside the limitations period, the regulation can generally be challenged only by filing a petition with the agency to change the regulation and, if the agency declines, challenging the agency's decision not to act on the petition for rulemaking. Here, plaintiffs have not filed a petition with the FEC for a rulemaking to change the long-standing regulation they seek to invalidate, and they may not rely upon a rulemaking petition filed by someone else. Plaintiffs cannot use FECA's provision for judicial review of agency enforcement proceedings to circumvent the statute of limitations that bars their regulatory challenge.

1. Plaintiffs' Challenge to 11 C.F.R. § 109.10(e)(1)(vi) Is Barred Because It Has Been More Than Six Years Since the Regulation Was Issued

Plaintiffs' APA claim is time-barred. FECA does not specify the appropriate statute of limitations to challenge a regulation promulgated by the Commission. Unless a different deadline is identified by statute, a challenge to an agency's regulation constitutes a "civil action commenced against the United States." 28 U.S.C. § 2401(a); *P & V Enters. v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1023 (D.C. Cir. 2008) (considering challenge to rulemaking as pursuant to 28 U.S.C. § 2401(a)). As a result, any such claim "shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a); *Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442, 445 (D.C. Cir. 1994) (applying six-

year statute of limitations contained in 28 U.S.C. § 2401 to challenge of agency action). This statute of limitations is not merely a claim processing rule, but is jurisdictional and therefore forecloses any time-barred claims. *See Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 218 (D.C. Cir. 2013) ("The court lacks subject matter jurisdiction to hear a claim barred by section 2401(a)."); *Spannaus v. U.S. Dep't of Justice*, 824 F.2d 52, 55 (D.C. Cir. 1987) ("§ 2401(a) is a jurisdictional condition attached to the government's waiver of sovereign immunity, and as such must be strictly construed.").

The regulation plaintiffs challenge, 11 C.F.R. § 109.10(e)(1)(vi), was promulgated by the FEC in 1980. (*See supra* p. 2.) Because plaintiffs' challenge to the regulation was filed outside the six-year statute of limitations, this Court has no jurisdiction to consider it.

2. Plaintiffs Have Not Petitioned for Rulemaking or Participated in Any Intervening FEC Rulemaking Action

Regulations promulgated more than six years ago are not, of course, forever insulated from judicial review. The "method of obtaining judicial review of agency regulations once the limitations period has run is to petition the agency for amendment or rescission of the regulations and then to appeal the agency's decision." *NLRB Union v. FLRA*, 834 F.2d 191, 196 (D.C. Cir. 1987); *Prof'l Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1217-18, n. 2 (D.C. Cir. 1983) ("This court has scrutinized regulations immune from direct review by reviewing the denial of a subsequent rulemaking petition which challenged the regulation on demonstrable grounds of *substantive* invalidity.") (internal quotation marks and citation omitted).

Plaintiffs in this case have not petitioned the FEC to amend 11 C.F.R. § 109.10(e)(1)(vi). In 2011, Congressman Chris Van Hollen did file a petition for rulemaking with the Commission to revise and amend 11 C.F.R. § 109.10(e)(1)(vi). *See* Petition for Rulemaking to Revise and Amend Regulations Relating to Disclosure of Independent Expenditures (Apr. 21, 2011),

http://sers.fec.gov/fosers/showpdf.htm?docid=61143. That petition argued that the "regulation is manifestly inconsistent with the statute." *Id.* ¶ 6. In response to Congressman Van Hollen's petition, the Commission issued a Notice of Availability and received four comments from the public. *See* FEC, Rulemaking Petition: Independent Expenditure Reporting, 76 Fed. Reg. 36000 (June 21, 2011); Comments of Citizens United (Aug. 22, 2011), http://sers.fec.gov/fosers/showpdf.htm?docid=87886; Comments of Brennan Center for Justice (Aug. 22, 2011), http://sers.fec.gov/fosers/showpdf.htm?docid=87887; Comments of Benjamin Kerensa (July 21, 2011), http://sers.fec.gov/fosers/showpdf.htm?docid=87889; Comments of Center for Competitive Politics (Aug. 22, 2011), http://sers.fec.gov/fosers/showpdf.htm?docid=87888. In December 2011, the Commission split three-to-three on whether to issue a Notice of Proposed Rulemaking on Van Hollen's petition, and therefore no rulemaking was initiated. *See* Certification (Dec. 16, 2011), http://sers.fec.gov/fosers/showpdf.htm?docid=114906. Congressman Van Hollen did not challenge the Commission's handling of his petition for rulemaking in court.

Neither CREW nor Mr. Mezlak was a party to Congressman Van Hollen's petition, nor did either comment on the Notice of Availability. And even if plaintiffs in this case were to amend their complaint now to challenge the FEC's denial of Van Hollen's petition in 2011, the Court would still lack jurisdiction to hear their claim. Judicial review under the APA is limited to those parties that are "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." *See* 5 U.S.C. § 702. The D.C. Circuit has "consistently interpreted the phrase 'party aggrieved' to require as a general matter that petitioners be parties to any proceedings before the agency preliminary to issuance of its order." *Jones v. Bd. of Governors of Fed. Reserve Sys.*, 79 F.3d 1168, 1170-71 (D.C. Cir. 1996) (quoting *Simmons v. ICC*, 716 F.2d

40, 42 (D.C. Cir. 1983)). Plaintiffs were not parties to the Van Hollen petition, nor did they comment or play any other role in the rulemaking proceeding, so they cannot base any claim to jurisdiction for their APA claim here on Van Hollen's petition.

In some instances, futility may excuse a failure to exhaust administrative procedures, but that is an extremely high standard that plaintiffs cannot meet in this case. The "futility exception" to exhaustion is "quite restricted" and "limited to situations 'when resort to administrative remedies [would be] 'clearly useless.'" *Tesoro Ref. and Mktg. Co. v. FERC*, 552 F.3d 868, 874 (D.C. Cir. 2009) (quoting *Commc'ns Workers of Am. v. Am. Tel. & Tel. Co*, 40 F.3d 426, 432 (D.C. Cir. 1994) (other citations omitted)). Futility must be certain:

> In *Communications Workers of America*, we refused a futility exception when ERISA plan administrators had 'consistently interpreted the' relevant text 'to deny . . . claims.' * * * As we said there, '[e]ven if one were to concede that an unfavorable decision . . . was *highly likely*, that does not satisfy our strict futility standard requiring a *certainty* of an adverse decision."

Tesoro, 552 F.3d at 874 (citing *Commc'n Workers*, 40 F.3d at 432, 433); *see also Cont'l Air Lines, Inc. v. Dep't of Transp.*, 843 F.2d 1444, 1456 (D.C. Cir. 1988) (denying futility argument because "the agency might, had the point been raised, [have] taken such possibilities into account in the interpretive process"); *Wash. Ass'n for Television and Children v. FCC*, 712 F.2d 677, 682 n. 9 (D.C. Cir. 1983) ("Futility should not lightly be presumed."); *Midwater Trawlers Coop. v. Mosbacher*, 727 F. Supp. 12, 16 (D.D.C. 1989) (rejecting futility argument because a statement by the Secretary of Commerce indicating his views "does not indicate that the Secretary would reject a formal petition").

In this case, there is no "concrete indication" that petitioning the Commission for a rulemaking would be futile. *Action for Children's Television v. FCC*, 564 F.2d 458, 469 (D.C. Cir. 1977) (requiring "concrete indication that reconsideration would have been futile"). The

denial of Congressman Van Hollen's petition for rulemaking was more than four years ago in 2011 and it is not obvious that a similar petition today would have the same result. Indeed, two of the agency's current six Commissioners were not even members of the Commission at the time of the 2011 vote. *See* FEC, *FEC Welcomes New Commissioners, Elects Vice Chairman and Approves Advisory Opinion* (Oct. 31, 2013) http://www.fec.gov/press/press2013/news_releases/20131031release.shtml. And Commissioners could potentially conclude the legal and factual landscape has changed since Congressman Van Hollen's petition was denied, as with any rulemaking proposal after five intervening years. *See Tesoro Ref. & Mktg. Co.*, 552 F.3d at 874 (rejecting futility argument based in part on four-year-old agency ruling that had addressed a "similar, but not identical, issue" because some current arguments "could not have [been] made" at the time).

3. Section 30109(a)(8) Provides Jurisdiction to Challenge FEC Enforcement Decisions and Cannot Be Used As an End Run Around the APA Procedures for Challenging a Regulation

Plaintiffs cannot utilize FECA's judicial review procedures to circumvent the statute of limitations imposed by the APA. Indeed, the power of a court reviewing the dismissal of an administrative complaint pursuant to 52 U.S.C. § 30109(a)(8)(A) "is limited." *Common Cause v. FEC*, 842 F.2d 436, 448 (D.C. Cir. 1988). The reviewing court may only (a) declare that the Commission's dismissal was "contrary to law" and (b) order the Commission to "conform with" the court's declaration within 30 days. 52 U.S.C. § 30109(a)(8)(C). A judicial order to "conform with" a contrary-to-law declaration cannot mandate a different outcome on remand; the Commission remains free to reach the same outcome based on a different rationale. *FEC v. Akins*, 524 U.S. 11, 25 (1998) (explaining that even where a reviewing court finds that an FEC administrative dismissal was contrary to law, the Commission "(like a new jury after a mistrial)

might later, in the exercise of its lawful discretion, reach the same result for a different reason" (citing *SEC v. Chenery Corp.*, 318 U.S. 80 (1943))); *Akins v. FEC*, 146 F.3d 1049, 1050 (D.C. Cir. 1998) ("A holding that the FEC's decision was invalid would leave the FEC free to reach the same decision on another ground." (citation omitted)); *see, e.g.*, *La Botz v. FEC*, 889 F. Supp. 2d 51, 63 n.6 (D.D.C. 2012) (clarifying that a judicial determination that an FEC dismissal of an administrative complaint was contrary to law does not mean "that the FEC is required to reach a different conclusion on remand" and suggesting the "possib[ility]" that "the [dismissal] . . . could have been justified entirely by the FEC's prosecutorial discretion, which is 'considerable'" (citation omitted)).

If CREW wishes to challenge the validity of 11 C.F.R. § 109.10(e)(1)(vi), the agency must first be permitted to address that challenge and CREW must file a petition for rulemaking with the FEC first. Only if the Commission were to deny such a petition would CREW have exhausted its administrative remedies and obtained the ability to pursue such a challenge.

Claim Two of plaintiffs' complaint is a challenge to an FEC regulation. Although it makes reference to the administrative process that resulted in the dismissal of CREW's administrative complaint, it primarily argues that 11 C.F.R. § 109.10(e)(1)(vi) is unlawful and that the Court should strike it down. (*See* supra pp. 4-5.) Because such a challenge is time-barred by the APA, the Court should dismiss Claim Two in its entirety. Plaintiffs impermissibly attempt to embed a regulatory challenge within a section 30109(a)(8)(A) claim. Their request for declaratory relief regarding the regulation goes beyond the permitted relief for challenges to FEC administrative dismissals, explained above. (Compl. ¶ 124, Requested Relief ¶ 3.) Allowing the procedural shortcut in plaintiffs' complaint would circumvent the statute of limitations Congress provided for suits against the United States. 28 U.S.C. § 2401(a). For the

purposes of this litigation, the Court should simply examine whether the Commission properly applied the regulation in addressing plaintiffs' first and third claims, and not consider whether the regulation is valid.

III. CONCLUSION

For all the foregoing reasons, the Court should dismiss Claim Two of plaintiffs' complaint, which challenges the lawfulness of 11 C.F.R. § 109.10(e)(1)(vi) pursuant to the Administrative Procedure Act, 5 U.S.C. § 706.

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