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FEDERAL ELECTION COMMISSION
1050 FIRST STREET, N.E.
WASHINGTON, D.C. 20463

AGENDA DOCUMENT NO. 22-19-A1
AGENDA ITEM
For meeting of June 8, 2022
SUBMITTED LATE

TO: The Commission
The Office of the Commission Secretary

FROM: Allen Dickerson *AD*
Chairman

Shana M. Broussard *SMB*
Commissioner

DATE: June 7, 2022

RE: Interim Final Rule Removing 11 C.F.R. § 109.10(e)(1)(vi) - Revised

We ask that the enclosed draft Interim Final Rule, which would remove 11 C.F.R. § 109.10(e)(1)(vi) to conform with the decision in *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 316 F.Supp.3d 349, 423 (D.D.C. 2018), *aff'd* by *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm'n*, 971 F.3d 340, 356 (D.C. Cir. 2020), be placed on the Commission's agenda for the Open Meeting of June 8, 2022.

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FEDERAL ELECTION COMMISSION

11 CFR Part 109

[Notice 2022-__]

Reporting Independent Expenditures

AGENCY: Federal Election Commission.

ACTION: Interim Final Rule.

SUMMARY: The Federal Election Commission is removing a regulation requiring that certain persons making independent expenditures disclose on their reports the identification of each person who made a contribution over \$200 to the persons filing such reports “for the purpose of furthering the reported independent expenditure.” The Commission is taking this action to comply with the decision of the United States Court of Appeals for the District of Columbia Circuit, which affirmed a district court decision holding that the disclosure regulation was invalid. The Commission is accepting comments on this revision to its regulation and any comments received may be addressed in a subsequent rulemaking document. Further information is provided in the supplementary information that follows.

DATES: The interim final rule is effective on [date after 30 legislative days have passed]. Comments must be received on or before [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: All comments must be in writing. Commenters are encouraged to submit comments electronically via the Commission’s website at <https://sers.fec.gov/fosers/>, reference REG 2020-05. Alternatively, commenters may

1 submit comments in paper form, addressed to the Federal Election Commission, Attn.:
2 Mr. Robert M. Knop, Assistant General Counsel, 1050 First Street NE, Washington, DC
3 20463.

4 Each commenter must provide, at a minimum, his or her first name, last name,
5 city, and state. All properly submitted comments, including attachments, will become
6 part of the public record, and the Commission will make comments available for public
7 viewing on the Commission's website and in the Commission's Public Records Office.

8 Accordingly, commenters should not provide in their comments any information that they
9 do not wish to make public, such as a home street address, personal email address, date of
10 birth, phone number, social security number, or driver's license number, or any
11 information that is restricted from disclosure, such as trade secrets or commercial or
12 financial information that is privileged or confidential.

13 **FOR FURTHER INFORMATION CONTACT:** Mr. Robert M. Knop, Assistant
14 General Counsel, or Ms. Joanna S. Waldstreicher, Attorney, 1050 First Street NE,
15 Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

16 **SUPPLEMENTARY INFORMATION:** The Federal Election Campaign Act (the
17 "Act") provides that any person that is not a political committee and that makes
18 independent expenditures aggregating in excess of \$250 per calendar year must file a
19 statement containing certain information about the funds they received and spent,
20 including identifying each person (other than a political committee) whose contributions
21 to the person filing such statement aggregated in excess of \$200 within the calendar year,
22 together with the date and amount of such contribution. 52 U.S.C. 30104(c)(1); *see also*
23 52 U.S.C. 30104(b)(3)(A). The Act also provides that the statement must identify "each

1 person who made a contribution in excess of \$200 to the person filing such statement
2 which was made for the purpose of furthering an independent expenditure.” 52 U.S.C.
3 30104(c)(2)(C).

4 To implement these and other independent expenditure reporting provisions of the
5 Act, the Commission promulgated the regulation at 11 CFR 109.10, requiring that
6 “[e]very person that is not a political committee and that makes independent expenditures
7 aggregating in excess of \$250 with respect to a given election in a calendar year shall file
8 a verified statement or report . . .” including certain information about the expenditures
9 and “[t]he identification of each person who made a contribution in excess of \$200 to the
10 person filing such report, which contribution was made for the purpose of furthering the
11 reported independent expenditure.” 11 CFR 109.10(b), (e)(1)(vi).

12 On Aug. 3, 2018, the United States District Court for the District of Columbia
13 Circuit held that the regulation at 11 CFR 109.10(e)(1)(vi) is invalid because it conflicts
14 with the terms of the statute, which “mandate significantly more disclosure than that
15 required by the challenged regulation.” *CREW v. FEC*, 316 F. Supp. 3d 349, 410 (D.D.C.
16 2018). The district court held that 52 U.S.C. 30104(c)(1) “plainly requires broader
17 disclosure than just those donors making contributions for the purposes of funding the
18 independent expenditures made by the reporting entity.” *Id.* at 389. The district court
19 further held that the regulation “substantially narrows subsection (c)(2)” of the statute, *id.*
20 at 394, and that “the challenged regulation’s substitution of ‘the reported’ for ‘an’ is not
21 in accord with the statutory text.” *Id.* at 406. The district court therefore vacated the
22 regulation, effective September 17, 2018. Order, *CREW v. FEC*, No. 16-259 (Aug. 3,

1 2018) at 2.¹ Shortly after the vacatur of the regulation became effective, the Commission
2 issued guidance on how persons other than political committees should report their
3 independent expenditures following the court’s decision, available at:
4 [https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-
5 crew-v-fec-316-f-supp-3d-349-ddc-2018/](https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/).

6 On August 21, 2020, the U.S. Court of Appeals for the District of Columbia
7 Circuit affirmed the district court’s decision. *CREW v. FEC*, 971 F.3d 340 (D.C. Cir
8 2020). The D.C. Circuit found that 11 CFR 109.10 “disregards [52 U.S.C. 30104](c)(1)’s
9 requirement that IE makers disclose each donation from contributors who give more than
10 \$200” *Id.* at 350-51. It also found that the regulation “impermissibly narrows [52
11 U.S.C. 30104](c)(2)(C)’s requirement that contributors be identified if their donations are
12 ‘made for the purpose of furthering *an* independent expenditure” by requiring disclosure
13 only of donations linked to a particular independent expenditure. *Id.* at 351. The court
14 concluded that, because the statute “establishes a broader disclosure mandate than the
15 [Commission’s] Rule ostensibly implementing it, the Rule is invalid.” *Id.* at 356.

16 Commissioners have previously made efforts to reach consensus on revising the
17 regulatory description of the reporting requirements, but were unable to find agreement
18 by the required four affirmative votes.

19 In order to conform with the court opinion, the Commission is now striking 11
20 CFR 109.10(e)(1)(vi). The Commission is adding a note to 11 C.F.R. § 109.10(e)(1)

¹ The court stayed its vacatur of the rule for 45 days from the date of the order.

1 citing to the District Court and Court of Appeals decisions relating to this matter stating
2 that the statutory provision at 52 U.S.C. § 30104(c) remains in force.

3 The Commission is issuing this rule as an interim final rule. This interim final
4 rule will take effect thirty legislative days after its transmittal to Congress. *See* 52 U.S.C.
5 30111(d). The Commission welcomes public comment on this interim final rule and may
6 address any comments received in a later rulemaking.

7 The Administrative Procedure Act (“APA”) requires an agency promulgating
8 regulations to publish a notice of a proposed rulemaking in the Federal Register.
9 5 U.S.C. 553(b). The notice requirement does not apply, however, “when the agency for
10 good cause finds (and incorporates the finding and a brief statement of reasons therefor in
11 the rules issued) that notice and public procedure thereon are impracticable, unnecessary,
12 or contrary to the public interest.” 5 U.S.C. 553(b)(B). According to the APA’s
13 legislative history, a situation is “impracticable” when “the due and required execution of
14 the agency functions would be unavoidably prevented by its undertaking public rule-
15 making proceedings.” *See Administrative Procedure Act: Legislative History*, S. Doc.
16 No. 248 79-258 (1946); *see also Attorney General’s Manual on the Administrative*
17 *Procedure Act* 15 (1947). “‘Unnecessary’ means unnecessary so far as the public is
18 concerned, as would be the case if a minor or merely technical amendment in which the
19 public is not particularly interested were involved.” *Id.* “Contrary to the public interest”
20 connotes a situation in which the interest of the public would be defeated by any
21 requirement of advance notice. *Id.*

22 The notice to remove 11 CFR 109.10(e)(1)(vi) is unnecessary because that
23 regulatory provision that has already been invalidated by a federal court and cannot be

1 enforced. 5 U.S.C. 553(b)(B). Removing this provision from the regulations does not
2 involve any exercise of discretion by the Commission. Moreover, because this provision
3 is already unenforceable, the Commission's action will not affect the rights or interests of
4 any person or entity, nor could the public notice and comment period benefit the
5 Commission in this rulemaking.

6 In addition, a notice and comment period may be contrary to the public interest.
7 The Commission notes that the 2022 elections for federal office are scheduled to take
8 place on November 8, 2022. Although, as noted above, the Commission previously
9 issued guidance on reporting requirements to the regulated community, the fundamental
10 part of that guidance should be reflected in the Commission's regulation as soon as
11 possible before the general election.

12 In addition, because this interim final rule is exempt from the notice and comment
13 procedure under 5 U.S.C. 553(b), the Commission is not required to conduct a regulatory
14 flexibility analysis under 5 U.S.C. 603 and 604 (Regulatory Flexibility Act). *See* 5
15 U.S.C. 601(2) and 604(a).

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1 **List of Subjects**

2 11 CFR Part 109

3 Coordinated and Independent Expenditures.

4

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1 For the reasons set out in the preamble, the Commission is amending Subchapter A of
2 Chapter I of Title 11 of the Code of Federal Regulations as follows:

3 **PART 109 – COORDINATED AND INDEPENDENT EXPENDITURES (52 U.S.C.**
4 **30101(17), 30116(a) AND (d), AND PUB. L. 107-155 SEC. 214(C))**

5 1. The authority citation for part 109 continues to read as follows:

6 Authority: 52 U.S.C. 30101(17), 30104(c), 30111(a)(8), 30116, 30120; Sec.
7 214(c), Pub. L. 107-155, 116 Stat. 81.

8 § 109.10

9 2. Section 109.10 is amended by removing and reserving paragraph (e)(1)(vi) and by
10 adding a note to read as follows:

11 **§ 109.10 How do political committees and other persons report independent**
12 **expenditures?**

13 * * * * *

14 (e) * * *

15 (1) * * *

16 Note to § 109.10(e)(1): On August 3, 2018, the United States District Court for the
17 District of Columbia vacated 11 C.F.R. § 109.10(e)(1)(vi). CREW v. FEC, 316
18 F.Supp.3d 349 (Aug. 3, 2018), aff'd, 971 F.3d 340 (D.C. Cir. 2020). Section 30104(c) of
19 title 52 of the U.S. Code and the remaining provisions of 11 C.F.R. § 109.10 remain in
20 force.

21 * * * * *

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23 Dated: June __, 2022

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DRAFT

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For Deliberation Only

1 On behalf of the Commission,
2
3
4 **Allen J. Dickerson,**
5 *Chairman,*
6 *Federal Election Commission.*
7 BILLING CODE: 6715-01-P