



FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 22-41-A1
AGENDA ITEM
For meeting of August 31, 2022
SUBMITTED LATE

MEMORANDUM

TO: The Commission

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

Neven F. Stipanovic *NFS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Joseph Wenzinger *JPW*
Attorney

SUBJECT: REG 2022-03 (Draft Interim Final Rule for Candidate Loan Repayment)

Attached is a draft Interim Final Rule for Candidate Loan Repayment. This draft was requested by one or more Commissioners to be made blue today and placed on the August 31, 2022 Open Meeting.

Attachment

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1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 110 and 116**

3 **[NOTICE 2022-__]**

4 **Repayment of Candidate Loans**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Interim Final Rule.

7 **SUMMARY:** The Federal Election Commission (“Commission”) is removing regulatory
8 restrictions on authorized committees’ repayment of candidate personal loans. The Commission
9 is taking this action in light of the Supreme Court’s recent decision in *Federal Election*
10 *Commission v. Ted Cruz for Senate*, which held that the statutory provision implemented by
11 those regulations is unconstitutional. The Commission is accepting comments on these revisions
12 to its regulations.

13 **DATES:** This final rule is subject to Congressional review. 52 U.S.C. 30111(d). The effective
14 date is [insert date after 30 legislative days in both chambers of Congress have passed].

15 Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF
16 PUBLICATION IN THE *FEDERAL REGISTER*].

17 **ADDRESSES:** All comments must be in writing. Commenters are encouraged to submit
18 comments electronically via the Commission’s website at <https://sers.fec.gov/fosers/>, reference
19 REG 2022-03. Alternatively, commenters may submit comments in paper form, addressed to the
20 Federal Election Commission, Attn.: Mr. Robert M. Knop, Assistant General Counsel, 1050
21 First Street NE, Washington, DC 20463.

22 Each commenter must provide, at a minimum, his or her first name, last name, city, and
23 state. All properly submitted comments, including attachments, will become part of the public

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1 record, and the Commission will make comments available for public viewing on the
2 Commission’s website and in the Commission’s Public Records Office. Accordingly,
3 commenters should not provide in their comments any information that they do not wish to make
4 public, such as a home street address, personal email address, date of birth, phone number, social
5 security number, or driver’s license number, or any information that is restricted from disclosure,
6 such as trade secrets or commercial or financial information that is privileged or confidential.

7 **FOR FURTHER INFORMATION CONTACT:** Mr. Robert M. Knop, Assistant General
8 Counsel, or Mr. Joseph P. Wenzinger, Attorney, 1050 First Street NE, Washington, DC 20463,
9 (202) 694-1650 or (800) 424-9530.

10 **SUPPLEMENTARY INFORMATION:**

11 **Background**

12 On May 16, 2022, the Supreme Court of the United States ruled in *Federal Election*
13 *Commission v. Ted Cruz for Senate* that section 304 of the Bipartisan Campaign Reform Act of
14 2002 (“BCRA”) violates the Free Speech Clause of the First Amendment of the United States
15 Constitution. 142 S.Ct. 1638 (2022). The Supreme Court’s ruling affirmed the same holding of
16 the U.S. District Court for the District of Columbia. *Ted Cruz for Senate v. Federal Election*
17 *Commission*, 542 F. Supp. 3d 1 (D.D.C. 2021). The Commission is now removing the
18 regulations implementing this unconstitutional statute.

19 The Commission is taking this action without advance notice and comment because it
20 falls under the “good cause” exception of the Administrative Procedure Act (“APA”), 5
21 U.S.C. 553(b)(B). The revisions set forth herein are necessary to conform the Commission’s
22 regulations to the Supreme Court’s holding that the statutory restrictions on authorized
23 committees’ repayment of candidate personal loans are unconstitutional. *Ted Cruz for Senate*,

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1 142 S.Ct. at 1656. Because this action does not involve any Commission discretion or policy
2 judgments, notice and comment are unnecessary. 5 U.S.C. 553(b)(B), (d)(3). A pre-publication
3 notice and comment period would also be contrary to the public interest because the 2022
4 election campaigns for federal office are ongoing, and so the delay that would result in such a
5 notice and comment period might cause confusion among federal candidates and the public as to
6 the enforceability of the regulations addressed below. *Id.*

7 Moreover, because this interim final rule is exempt from the APA’s notice and comment
8 procedure under 5 U.S.C. 553(b), the Commission is not required to conduct a regulatory
9 flexibility analysis under 5 U.S.C. 603 or 604. *See* 5 U.S.C. 601(a), 604(a).

10 **Transmission of Final Rules to Congress**

11 Before final promulgation of any rules or regulations to carry out the provisions of the
12 Federal Election Campaign Act (“the Act”), the Commission transmits the rules or regulations to
13 the Speaker of the House of Representatives and the President of the Senate for a thirty-
14 legislative-day review period. 52 U.S.C. 30111(d). The effective date of this final rule is [insert
15 date after 30 legislative days in both chambers of Congress have passed].

16 **Explanation and Justification**

17 The Act provides two methods for the funding of federal campaigns. First, funding may
18 come from individual contributions to the campaign, which are subject to a per-election limits.
19 *See* 52 U.S.C. 30116(a)(1)(A) (placing limits on contributions from individuals to candidates and
20 their authorized political committees). Second, candidates may self-finance their campaigns,
21 with no limits on the amount a candidate may contribute to his or her campaign committee. 11

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1 CFR 110.10; *see also Buckley v. Valeo*, 424 U.S. 1, 51–54 (1976) (holding that restriction on
2 candidate’s personal expenditures is unconstitutional).

3 At the same time, however, section 304 of BCRA places limits on candidates’ ability to
4 finance their campaigns through personal loans. Under that statutory provision, a candidate’s
5 authorized committee may repay all of a candidate’s personal loans with contributions made
6 before or on the date of the election, but may repay only up to \$250,000 of a candidate’s pre-
7 election loans with post-election contributions. 52 U.S.C. 30116(j). Under the Commission’s
8 implementing regulations, for personal loan amounts that in the aggregate exceed \$250,000, a
9 campaign “[m]ay repay the entire amount of the personal loans using contributions” made before
10 or on the date of the election, 11 CFR 116.1(b)(2), but “it must do so within 20 days of the
11 election,” 11 CFR 116.11(b)(1); (c)(1). If using post-election contributions, a campaign may
12 repay only up to \$250,000 of the personal loans. 11 CFR 116.11(b)(2); 11 CFR 116.12.

13 On May 16, 2022, the Supreme Court of the United States ruled that section 304 of
14 BCRA violates the Free Speech Clause of the First Amendment of the United States
15 Constitution. The Supreme Court’s ruling affirmed the same holding of the U.S. District Court
16 for the District of Columbia. *Ted Cruz for Senate v. Federal Election Commission*, 542 F. Supp.
17 3d 1 (D.D.C. 2021). Accordingly, the Commission is removing the regulations implementing
18 this unconstitutional statutory provision.

19 **I. Deletion of 11 CFR 110.1(b)(3)(ii)(C) – Contributions by persons other than**
20 **multicandidate political committees (52 U.S.C. 30116(a)(1))**

21 Section 110.1(b)(3)(i) provides that contributions to a campaign for a particular election
22 after the election has taken place may be made only to the extent that the contribution does not
23 exceed a committee’s net debts outstanding from such election. 11 CFR 110.1(b)(3)(i). The

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1 following paragraph (ii) further provides how net debts outstanding shall be determined, and it
2 states that an authorized committee must reduce its calculated net debts by any outstanding
3 candidate personal loan amounts more than \$250,000. 11 CFR 110.1(b)(3)(ii)(C). The
4 regulation that reduces the calculation of net debts based on candidate personal loans exceeding
5 \$250,000 was issued as a conforming edit to the regulations, 11 CFR 116.11 and 116.12 (*see*
6 below), that implemented the statutory limitation on an authorized committee's repayment of
7 candidate personal loans exceeding that amount. Increased Contribution and Coordinated Party
8 Expenditure Limits for Candidates Opposing Self-Financed Candidates, 68 FR 3970, 3973 (Jan.
9 27, 2003). The Commission is removing 11 CFR 110.1(b)(3)(ii)(C) and making technical edits
10 to 11 CFR 110.1(b)(3)(ii)(A) and (B).

11 **II. Deletion of 11 CFR 116.11 – Restriction on an authorized committee's**
12 **repayment of personal loans exceeding \$250,000 made by the candidate to**
13 **the authorized committee.**

14 Section 116.11 implements section 304 of BCRA and provides for relevant limitations on
15 the repayment of candidate personal loans aggregating in excess of \$250,000 by an authorized
16 committee. 11 CFR 116.11. The Commission is removing section 116.11 in its entirety.

17 **III. Deletion of 11 CFR 116.12 – Repayment of candidate loans of \$250,000 or less.**

18 Section 116.12 provides that a campaign committee is authorized to repay a candidate's
19 personal loans less than \$250,000 with contributions made before, on, or after the date of the
20 election. 11 CFR 116.2. The Commission is removing section 116.12 in its entirety.

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1 **List of Subjects:**

2 *11 CFR Part 110*

3 Contribution and expenditure limitations and prohibitions.

4 *11 CFR Part 116*

5 Debts owed by candidates and political committees.

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1 For the reasons set out in the preamble, the Federal Election Commission amends 11
2 CFR chapter I as follows:

3 **PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND**
4 **PROHIBITIONS**

5
6 1. The authority citation for part 110 continues to read as follows:

7 Authority: 52 U.S.C. 30101(8), 30101(9), 30102(c)(2) and (g), 30104(i)(3), 30111(a)(8), 30116,
8 30118, 30120, 30121, 30122, 30123, 30124, 36 U.S.C. 510.

9 **§ 110.1 [Amended]**

10 2. Amend § 110.1(b)(3)(ii)(A) by adding “and” following, in the final clause, “fair market
11 value;”.

12 3. Amend § 110.1(b)(3)(ii)(B) by removing “; and” and adding, in its place, “.”.

13 4. Remove § 110.1(b)(3)(ii)(C).

14 * * * * *

15 **PART 116—DEBTS OWED BY CANDIDATES AND POLITICAL COMMITTEES**

16 5. The authority citation for part 116 continues to read as follows:

17 Authority: 52 U.S.C. 30103(d), 30104(b)(8), 30111(a)(8), 30116, 30118, 30141.

18 **§ 116.11 [Removed]**

19 6. Remove § 116.11.

20 **§ 116.12 [Removed]**

21 7. Remove § 116.12.

22 Dated: [INSERT DATE, 2022].

23 On behalf of the Commission

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Allen J. Dickerson,

Chairman,

Federal Election Commission.

BILLING CODE: 6715-01-P