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

AGENDA DOCUMENT NO. 23-11-A  
AGENDA ITEM

For meeting of May 18, 2023

TO: The Commission  
The Office of the Commission Secretary

FROM: Shana M. Broussard *SMB*  
Commissioner

Allen J. Dickerson *AD*  
Commissioner

DATE: May 10, 2023

RE: Interim Final Rule Amending 11 C.F.R. § 110.4(b)(1)(iii)

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The Federal Election Campaign Act of 1971, as amended, prohibits “mak[ing] a contribution in the name of another.” 52 U.S.C. § 30122. The Commission’s regulations implementing this provision state that a person may not “knowingly help or assist any person making a contribution in the name of another.” 11 C.F.R. § 110.4(b)(1)(iii).

On April 6, 2018, the United States District Court for the District of Utah declared that regulatory provision unlawful and ordered it to be stricken from the Code of Federal Regulations. *Fed. Election Comm’n v. Swallow*, 304 F. Supp. 3d 1113 (D. Utah 2018); *Fed. Election Comm’n v. Swallow*, No. 2:15-CV-00439 (D. Utah Sept. 20, 2018) (Westlaw) (order granting partial final judgment). The Commission declined to appeal that decision and has yet to conform to the court’s order. Accordingly, we propose the enclosed Interim Final Rule to remove 11 C.F.R. § 110.4(b)(1)(iii) and renumber paragraph (b)(1)(iv) as (b)(1)(iii).

We ask that the Chair place this matter on the Commission’s agenda for the Open Meeting of May 18, 2023.

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR PART 110**

3 **[Notice 2023-XX]**

4 **Contributions in the Name of Another**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Interim Final Rule.

7 **SUMMARY:** The Commission is removing the regulatory prohibition on knowingly helping or  
8 assisting any person in making a contribution in the name of another. The Commission is taking  
9 this action to implement the order of the United States District Court in *FEC v. Swallow*, which  
10 enjoined the Commission from enforcing the provision and ordered the Commission to strike it  
11 from the Code of Federal Regulations. The Commission is accepting comments on this revision  
12 to its regulations and any comments received may be addressed in a subsequent rulemaking  
13 document.

14 **DATES:** The effective date is [INSERT DATE WE ESTIMATE TO BE AT LEAST 30  
15 LEGISLATIVE DAYS AFTER PUBLICATION]. Comments must be received on or before  
16 [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL  
17 REGISTER].

18 **FOR FURTHER INFORMATION CONTACT:** Ms. Amy L. Rothstein, Assistant General  
19 Counsel, or Ms. Cheryl A. Hemsley, Attorney, (202) 694-1650 or (800) 424-9530.

20 **ADDRESSES:** All comments must be in writing. Commenters are encouraged to submit  
21 comments electronically via the Commission's website at <http://sers.fec.gov/fosers>, reference  
22 REG 2018-06, to ensure timely receipt and consideration. Alternatively, comments may be

1 submitted in paper form addressed to the Federal Election Commission, Attn.: Amy L. Rothstein,  
2 Assistant General Counsel, 1050 First Street, NE, Washington, DC 20463.

3 Each commenter must provide, at a minimum, the commenter’s first name, last name,  
4 city, and state. All properly submitted comments, including attachments, will become part of the  
5 public record, and the Commission will make comments available for public viewing on the  
6 Commission’s website and in the Commission’s Public Records Office. Accordingly,  
7 commenters should not provide in their comments any information that they do not wish to make  
8 public, such as a home street address, personal email address, date of birth, phone number, social  
9 security number, or driver’s license number, or any information that is restricted from disclosure,  
10 such as trade secrets or commercial or financial information that is privileged or confidential.

11 **SUPPLEMENTARY INFORMATION:**

12 The Federal Election Campaign Act, 52 U.S.C. §§ 30101-30145 (“FECA”), states that  
13 “no person shall make a contribution in the name of another person or knowingly permit his  
14 name to be used to effect such a contribution, and no person shall knowingly accept a  
15 contribution made by one person in the name of another person.” 52 U.S.C. § 30122. The  
16 Commission has implemented this provision at 11 CFR § 110.4, which states that no person may  
17 “knowingly help or assist any person in making a contribution in the name of another.” 11 CFR  
18 § 110.4(b)(1)(iii).

19 On April 6, 2018, the United States District Court for the District of Utah issued a  
20 memorandum decision and order holding that the Commission’s regulation at 11 CFR  
21 110.4(b)(1)(iii) was invalid, enjoining the Commission from enforcing that provision, and

1 ordering the Commission to strike the provision from the Code of Federal Regulations.<sup>1</sup> *FEC v.*  
2 *Swallow (Swallow I)*, 304 F. Supp. 3d 1113 (D. Utah 2018); *FEC v. Swallow (Swallow II)*, No.  
3 2:15-CV-00439 (D. Utah Sept. 20, 2018) (Westlaw) (order granting partial final judgment). To  
4 conform its regulation to the court orders in *Swallow I* and *II*, the Commission is removing 11  
5 CFR § 110.4(b)(1)(iii) and renumbering paragraph (b)(1)(iv) as (b)(1)(iii). The Commission is  
6 accepting comments on this revision and any comments received may be addressed in a  
7 subsequent rulemaking document.

8 The Commission is taking this action without advance notice and comment because it  
9 falls under the “good cause” exception of the Administrative Procedure Act (“APA”), 5 U.S.C.  
10 § 553(b)(B). The revisions are necessary to conform the Commission’s regulations to the court’s  
11 orders. Because this action does not involve any Commission discretion or policy judgments,  
12 notice and comment are unnecessary. 5 U.S.C. § 553(b)(B), (d)(3).

13 For the same reasons, these revisions fall within the “good cause” exception to the APA’s  
14 delayed effective date provision and the requirements of the Congressional Review Act.  
15 5 U.S.C. §§ 553(d)(3), 808(2). Moreover, because this interim final rule is exempt from the  
16 APA’s notice and comment procedure under 5 U.S.C. § 553(b), the Commission is not required  
17 to conduct a regulatory flexibility analysis under 5 U.S.C. § 603 or § 604. *See* 5 U.S.C.  
18 §§ 601(2), 604(a). Nor is the Commission required to submit these revisions for congressional  
19 review under FECA. *See* 52 U.S.C. § 30111(d)(1), (4) (providing for congressional review when

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<sup>1</sup> After adverse decisions, agencies are permitted in certain circumstances to maintain the invalidated interpretation of the statute or regulation in later matters that will come before courts in other jurisdictions. *See, e.g., Indep. Petroleum Ass’n v. Babbitt*, 92 F.3d 1248, 1261 (D.C. Cir. 1996). Agencies may only decline to accord court rulings nation-wide effect, however, as part of a search for eventual rulings from different Courts of Appeals and the Supreme Court. *See, e.g., Va. Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379, 393-394 (4th Cir. 2001) (overturning nationwide injunction against Commission to permit development of the law). In declining to appeal to the Court of Appeals, the Commission chose not to take this path in this case. *See Indep. Petroleum Ass’n*, 92 F.3d at 1261.

1 Commission “prescribe[s]” a “rule of law”). Accordingly, these revisions are effective upon  
2 publication in the Federal Register.

3 11 CFR Part 110

4 Campaign funds, Political committees and parties.

5

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 1. Authority: 52 U.S.C. §§ 30101(8), 30101(9), 30102(c)(2), 30104(i)(3), 30111(a)(8), 30116,  
6 30118, 30120, 30121, 30122, 30123, 30124, and 36 U.S.C. § 510.

7 2. Amend § 110.4 by removing paragraph (b)(1)(iii) and redesignating paragraph (b)(1)(iv) as  
8 paragraph (b)(1)(iii).

9

10 Dated: [May XX, 2023].

11 On behalf of the Commission,

12 **Dara S. Lindenbaum,**

13 *Chair,*

14 *Federal Election Commission.*

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16 BILLING CODE: 6715-01-P