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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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April 24, 2013

AGENDA ITEM

MEMORANDUM

For Meeting of 4-25-13

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel *by [signature]*
Adav Noti *AN*
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Assistant General Counsel
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SUBMITTED LATE

SUBJECT: Draft Advance Notice of Proposed Rulemaking on Technological Modernization

Attached is a draft Advance Notice of Proposed Rulemaking on Technological Modernization. We request that this draft be placed on the agenda for April 25, 2013.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Chapter 1

[Notice 2013 - __]

Technological Modernization

AGENCY: Federal Election Commission.

ACTION: Advance Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission requests comments on whether to begin a rulemaking to revise its regulations in 11 CFR chapter 1 to address contributions and expenditures made by electronic means, such as by credit card, debit card, Internet-based payment processing, and text messaging; to eliminate or update references to outdated technologies; and similar issues. The Commission intends to review the comments received as it decides what revisions, if any, it will propose making to its rules.

DATES: Comments must be received on or before [insert date 30 days after date of publication in the Federal Register]. The Commission will determine at a later date whether to hold a public hearing on this Notice. If a hearing is to be held, the Commission will publish a notice in the Federal Register announcing the date and time of the hearing.

ADDRESSES: All comments must be in writing. Comments may be submitted electronically via the Commission's website at <http://www.fec.gov/fosers>, reference REG 2013-01. Commenters are encouraged to submit comments electronically to ensure timely receipt and consideration. Alternatively, comments may be submitted in paper form. Paper comments must be sent to the Federal Election Commission, Attn.: Amy L. Rothstein, Assistant General Counsel, 999 E Street, NW., Washington, DC 20463. All

1 comments must include the full name and postal service address of a commenter, and of
2 each commenter if filed jointly, or they will not be considered. The Commission will
3 post comments on its Web site at the conclusion of the comment period.

4 **FOR FURTHER**
5 **INFORMATION**

6 **CONTACT:** Ms. Amy L. Rothstein, Assistant General Counsel, or Ms. Jessica
7 Selinkoff, Attorney, 999 E Street NW., Washington, DC 20463, (202) 694-1650 or (800)
8 424-9530.

9 **SUPPLEMENTARY**

10 **INFORMATION:** The Federal Election Commission is publishing this Advance
11 Notice of Proposed Rulemaking to obtain comments on whether to revise its regulations
12 at 11 CFR chapter 1 to address electronic transactions. Specifically, the Commission is
13 considering whether to update its regulations to reflect electronic transactions, such as
14 those made by debit cards, credit cards, gift cards, Internet-based payment processing,
15 and online banking.¹ Such a rulemaking could address the receipt, deposit, accounting,
16 recordkeeping, reporting, redesignation, and reattribution of electronic transactions, as
17 well as matching funds, conduit activity, and contributions by text message. The
18 Commission is also considering whether to revise its regulations by eliminating or
19 updating references to outmoded technologies such as telegrams and fax machines.

20 As a general matter, the Commission seeks to ensure that the regulated
21 community is able to take advantage of evolving technological innovations, while
22 ensuring that the use of the technology is consistent with the Federal Election Campaign
23 Act, 2 U.S.C. 431 et seq., as amended, (“the Act”) as well as the Presidential Election

¹ See Rulemaking Priorities for 2012, Agenda Doc. 12-40 (May 24, 2012),
http://www.fec.gov/agenda/2012/mtgdoc_1240.pdf.

1 Campaign Fund Act, 26 U.S.C. 9001 et seq., and the Presidential Primary Matching
2 Payment Account Act, 26 U.S.C. 9031 et seq. (collectively, “Chapters 95 and 96 of Title
3 26”). More specifically, here the Commission invites comments on whether and how it
4 should update its regulations to take into account electronic transactions in a manner that
5 provides sufficient guidance to the regulated community while reducing the need for
6 serial revisions to reflect new and emerging technologies. Should regulations identify
7 specific, approved means of engaging in electronic transactions? Or should regulations
8 provide only general standards or criteria? Would the latter approach increase the risk of
9 corruption, abuse, or circumvention of the Act, or Chapters 95 and 96 of Title 26, that
10 may not be present with a bright-line rule that is less technologically flexible?

11 1. Updating Outmoded Regulations

12 The Commission is considering whether it should update its regulations to reflect
13 recent technological advances. For example, certain regulations refer to technologies that
14 are obsolete or seldom used today, such as a “telegram” (11 CFR 104.6(c)(1));
15 “typewriters” (11 CFR 114.9(d)); and a “carbon copy” of a check (11 CFR
16 102.9(b)(2)(iii)). Other regulations refer to technologies now used only in limited
17 circumstances, such as microfilm, facsimiles and computer tape. See, e.g., 11 CFR 105.5
18 (microfilm copies provided by the Secretary of the Senate), 108.6 (microfilm or facsimile
19 copies maintained by State officers). How should the Commission consider addressing
20 these references to seldom used or obsolete technologies? What other, similar
21 technological references in 11 CFR chapter 1 should the Commission consider updating
22 or addressing in a rulemaking?

1 Several regulations refer to “writing,” “signature,” and “printing” requirements.
2 The Commission is considering whether it should revisit these requirements to address
3 electronic documents and records. For example, Commission regulations provide a
4 means for a contributor to redesignate a contribution in “a writing, signed by the
5 contributor.” 11 CFR 110.1(b), 110.2(b); see also 11 CFR 110.1(f) (designations),
6 110.1(k) (joint contributions and reattributions). Other regulations require documents to
7 be “signed” before being filed with the Commission, without explicitly providing for the
8 possibility of electronic signatures. See, e.g., 11 CFR 111.4 (submission of complaints),
9 111.23 (designation of counsel), 300.37(d) (certifications by certain tax-exempt
10 organizations). And some regulations apply to “printed” documents and communications
11 without expressly addressing whether an electronic communication or an attachment to
12 an electronic message, such as a portable document file or “PDF,” is “printed.” See, e.g.,
13 11 CFR 104.7 (“best efforts”), 110.11(c)(2) (disclaimers for printed communications).
14 The Commission invites comments on whether and, if so, how it should consider
15 updating these provisions.

16 Previously, the Commission concluded that a particular method of obtaining
17 redesignations of contributions through a combination of electronic and traditional means
18 met the written signature requirements in the redesignation provisions at 11 CFR
19 110.1(b)(5) and 110.2(b)(5), because that method “provides a level of assurance as to the
20 contributor’s identity and intent comparable to that of a written signature.”² At the same
21 time, the Commission encouraged the use of innovations in technology to effectuate
22 electronic redesignations and stated that it would consider, on a case-by-case basis, other

² See Interpretive Rule Regarding Electronic Contributor Redesignations, 76 FR 16233 (Mar. 23, 2011), available at http://www.fec.gov/law/cfr/ej_compilation/2011/notice_2011-02.pdf.

1 methods of electronic redesignation.³ If the Commission decides to revise the
2 redesignation regulations to include electronic redesignations, what other methods should
3 it consider? How should the Commission revise the redesignation rules and other
4 regulations that require “writings” or signatures in order to minimize the need for serial
5 revisions to adapt to new and emerging technologies?

6 The Commission is also considering whether to revise regulations that require
7 certain communications to be mailed or hand-delivered to the Commission without
8 providing for the possibility of electronic transmission. See, e.g., 11 CFR 1.3 (Privacy
9 Act requests), 112.1(e) (advisory opinion requests). Should the Commission update these
10 regulations in light of current technology? If so, how?

11 2. Providing for Electronic Contributions and Transactions

12 The Act, Chapters 95 and 96 of Title 26, and Commission regulations generally
13 refer to contributions by cash or check and to disbursements by check or draft without
14 taking into account electronic transactions. Yet, according to the most recent triennial
15 study conducted by the Federal Reserve System, payments by check have been
16 decreasing and the “number of noncash payments in the United States . . . increased at a
17 compound annual rate of 4.6 percent” from 2006 to 2009.⁴ Electronic payments – that is,
18 payments made by debit cards; credit cards; automated clearinghouses; and prepaid debit,
19 credit, banking, and gift cards – “collectively exceed three-quarters of all noncash
20 payments” in the United States.⁵

³ Id.

⁴ Federal Reserve System, 2010 Federal Reserve Payments Study: Noncash Payment Trends in the United States: 2006-2009 4 (Apr. 5, 2011), available at www.frbservices.org/files/communications/pdf/press/2010_payments_study.pdf.

⁵ Id.

1 Consistent with this trend, people increasingly use electronic means to contribute
2 to political committees. A series of studies by the Pew Research Center of the 2006,
3 2008, and 2010 elections shows that the number of Internet users who make online
4 contributions to candidates is increasing.⁶ And among adults who donated to presidential
5 candidates in the 2012 election, 50 percent donated online or via email.⁷ As of
6 September 2012 – only a few months after the Commission had approved the use of text
7 messaging to make contributions – ten percent of those who made contributions in the
8 presidential race did so by “text message from a cell phone or cell phone app.”⁸

9 a. General Industry Practice

10 In light of these trends, the Commission is considering whether and how to revise
11 its regulations to address electronic contributions and other transactions. As a
12 preliminary matter, the Commission seeks information on general industry practice. How
13 are commercial and consumer electronic transactions conducted generally? What are the
14 industry standards, practices, and safeguards? How do vendors and third-party payment
15 processors, such as PayPal, verify the payer’s identity and attribute payments made by
16 credit card? What types and forms of information are typically collected and maintained?
17 What are the standard practices of third-party payment processors, such as PayPal or

⁶ See, e.g., Aaron Smith, Pew Internet and American Life Project, The Internet and Campaign 2010 21 (Mar. 17, 2011), available at <http://www.pewinternet.org/~media/Files/Reports/2011/Internet%20and%20Campaign%202010.pdf> (finding that online contributions increased from three percent in the 2006 mid-term elections to four percent in 2010); Aaron Smith, Pew Internet and American Life Project, The Internet’s Role in Campaign 2008 38-39 (Apr. 15, 2009), available at http://www.pewinternet.org/~media/Files/Reports/2009/The_Internets_Role_in_Campaign_2008.pdf (showing that nine percent made online contributions).

⁷ Aaron Smith & Maeve Duggan, Pew Internet and American Life Project, Presidential Campaign Donations in the Digital Age (Oct. 25, 2012), available at http://www.pewinternet.org/~media/Files/Reports/2012/PIP_State_of_the_2012_race_donations.pdf (finding further that 67 percent donated in person, over the telephone, or through the mail).

⁸ Id.

1 Square? What are the intermediate steps in processing electronic transactions? Do
2 vendors or third-party payment processors typically process multiple recipients' funds
3 through merchant accounts? What are the general timeframes for each step of these
4 electronic processes? What are typical accounting practices with regard to merchant
5 accounts? How do these practices differ, if at all, for prepaid debit, credit, banking and
6 gift card transactions? How might practices change in light of emerging technologies?
7 Are there other forms of electronic payment – such as by electronic wallet or swipe,⁹ P2P
8 (or person to person) platform,¹⁰ mobile app, or Twitter hashtag¹¹ – that the Commission
9 should consider if it decides to revise its rules?

10 b. Political Committee Practice

11 The Commission also seeks information on how political committees receive
12 electronic contributions. Do political committees' practices differ from general
13 commercial industry standards and practices? If so, how do they differ? Are political
14 committees' practices comparable to those of nonprofit organizations that receive
15 electronic donations at the Federal, State, or local level? What legal or practical
16 considerations or constraints drive any such differences? What role, if any, should
17 commercial industry standards and practices play in the Commission's consideration of
18 requirements for electronic contributions received by political committees?

⁹ See, e.g., Tara Siegel Bernard & Claire Cain Miller, Swiping Is the Easy Part, N.Y. Times, Mar. 24, 2011, at B1, available at http://www.nytimes.com/2011/03/24/technology/24wallet.html?_r=0.

¹⁰ See, e.g., Fed. Fin. Inst. Examination Council, Online Person-to-person (P2P), Account-to-Account Payments and Electronic Cash, IT Examination HandBook InfoBase, [http://ithandbook.ffiec.gov/it-booklets/retail-payment-systems/payment-instruments.-clearing,-and-settlement/card-based-electronic-payments/online-person-to-person-\(p2p\).-account-to-account-\(a2a\)-payments-and-electronic-cash.aspx](http://ithandbook.ffiec.gov/it-booklets/retail-payment-systems/payment-instruments.-clearing,-and-settlement/card-based-electronic-payments/online-person-to-person-(p2p).-account-to-account-(a2a)-payments-and-electronic-cash.aspx) (last visited Feb. 26, 2013).

¹¹ See, e.g., Heather Kelly, Twitter and Amex to Let You Pay with a Hashtag, CNN (Feb. 12, 2013), <http://www.cnn.com/2013/02/11/tech/social-media/twitter-hashtag-purchases>; see also <https://chirpify.com> (social media purchase platform).

1 The Commission also seeks information on recordkeeping practices for electronic
2 transactions. Commission regulations require political committees to maintain records of
3 contributions and disbursements in ways that do not explicitly account for electronic
4 transactions. See, e.g., 11 CFR 102.9(a)(4) (requiring a “photocopy of each check or
5 written instrument or a digital image of each check or written instrument”), 102.9(b)(2)
6 (requiring records such as cancelled checks, receipts, and carbon copies for
7 disbursements over \$200). Although the Commission has interpreted its recordkeeping
8 regulations in the context of electronic transactions,¹² should the Commission revise these
9 regulations to address expressly recordkeeping requirements for electronic transactions,
10 such as, for example, requiring political committees that receive credit card contributions
11 to maintain records with cardholders’ names and credit card numbers? See, e.g., 11 CFR
12 9034.2(b) (requirements for credit card contributions eligible for matching funds).
13 Would this requirement be consistent with current industry practices? Would it need to
14 be updated periodically to reflect changing technology? What should the recordkeeping
15 requirements be for contributions made by prepaid debit, credit, banking and gift cards?
16 Should the regulations take a less specific approach, like that in 11 CFR 104.14(b), which
17 requires records to “provide in sufficient detail the necessary information and data from
18 which the filed reports and statements may be verified, explained, clarified, and checked
19 for accuracy and completeness”? Alternatively, are the current rules flexible enough to
20 account for electronic recordkeeping practices without being revised?

¹² See Advisory Opinion 1995-09 (NewtWatch) (approving a proposal to maintain records supporting electronic fund transfers); Advisory Opinion 1993-04 (Cox); Advisory Opinion 1994-40 (Alliance for American Leadership); see also Federal Election Commission, Campaign Guide: Congressional Candidates and Committees 75-76 (Aug. 2011), available at <http://www.fec.gov/pdf/candgui.pdf> (describing recordkeeping for credit card disbursements).

1 Other recordkeeping considerations that arise in the context of electronic
2 transactions relate to the use of merchant accounts. The Act and Commission regulations
3 require all receipts to be deposited into a political committee’s campaign depository
4 account within ten days of receipt. 2 USC 432(h)(1); 11 CFR 103.3(a); see also 11 CFR
5 102.2(a)(1)(vi) (disclosure of campaign depositories). Although the Commission has
6 previously opined on the treatment of merchant accounts in specific factual situations,¹³
7 the Commission seeks information on the current uses of merchant accounts by political
8 committees. Do contributions to political committees made via credit card or other
9 electronic means customarily pass through a merchant account before being deposited by
10 the committees in their campaign depositories? Should merchant accounts themselves be
11 considered campaign depositories? Why or why not? How can an electronic
12 contribution that is processed through a merchant account containing funds designated
13 for multiple recipients be traced for recordkeeping, disclosure and audit purposes in a
14 manner that provides assurances comparable to a “paper trail”?¹⁴

15 In several recent advisory opinions, the Commission has addressed electronic
16 contributions to political committees that are processed by incorporated commercial
17 vendors or payment processors. In some of these opinions, the Commission concluded
18 that the transaction was permissible under 11 CFR 110.6, which prohibits corporations
19 from acting as conduits or intermediaries, because the corporation was acting as a vendor

¹³ See, e.g., Advisory Opinion 1999-22 (Aristotle Publishing) (concluding that political committees receiving credit card contributions through merchant account should disclose that account as a campaign depository).

¹⁴ See, e.g., Advisory Opinion 1993-04 (Cox), n. 2 (discussing recordkeeping and “paper trails”); Advisory Opinion 1999-22 (Aristotle Publishing) (approving a vendor’s use of a single merchant ID to process contributions subsequently forwarded to multiple political committees).

1 to the political committee recipient.¹⁵ In other advisory opinions, the Commission
2 concluded that the transaction was permissible because the corporations were providing
3 services to the contributors.¹⁶ Most recently, the Commission explained that some
4 contributions made through electronic payment processors were not subject to 11 CFR
5 110.6 because they were not contributions to an intermediary earmarked for a
6 candidate.¹⁷ Should the Commission consider revising its regulations at 11 CFR 110.6 to
7 address electronic contributions processed by incorporated commercial vendors and
8 payment processors? If so, what approach should the regulations take? Should the
9 regulations also address how to treat fees paid to commercial vendors and payment
10 processors to process electronic contributions?

11 Other regulations that do not expressly address electronic contributions also have
12 been interpreted by the Commission to apply to electronic transactions. In Advisory
13 Opinion 1990-04 (American Veterinary Medical Association), for example, the
14 Commission approved credit card transactions under 11 CFR 102.6, which addresses
15 combined payments of contributions and dues by check. The Commission also has
16 construed 11 CFR 102.8, which applies when a contribution is received, and 11 CFR
17 110.1(b)(6) and 110.2(b)(6), which describe when a contribution is made, in the context
18 of electronic contributions.¹⁸ Should the Commission revise these regulations to address

¹⁵ Advisory Opinion 2007-04 (Atlatl); Advisory Opinion 2004-19 (DollarVote); see also Advisory Opinion 2012-09 (Points for Politics).

¹⁶ Advisory Opinion 2011-06 (Democracy Engine); Advisory Opinion 2006-08 (Brooks); see also Advisory Opinion 2011-19 (GivingSphere).

¹⁷ Advisory Opinion 2012-22 (skimmerhat); but see Advisory Opinion Request 2012-08 (Repledge) (no advisory opinion issued).

¹⁸ Advisory Opinion 2012-35 (Global Transaction Services Group, Inc.); Advisory Opinion 2008-08 (Zucker); see also Advisory Opinion 2012-26 (Cooper for Congress, ArmourMedia, Inc., and m-Qube, Inc.); Advisory Opinion 2012-09 (Points for Politics); Federal Election Commission, Campaign Guide: Congressional Candidates and Committees 23, 74 (Aug. 2011), available at <http://www.fec.gov/pdf/candgui.pdf> (describing when a credit card contribution is “received”).

1 electronic contributions expressly? If so, should the regulations take the same approach
2 as those taken previously? If not, why not, and what approach should they take instead?

3 Recently, the Commission approved the use of text messaging to process
4 contributions in a series of advisory opinions.¹⁹ Should the Commission amend its
5 regulations to address contributions made by text message? If so, should the regulations
6 take the same approach as the advisory opinions? Should any revised regulations also
7 address issues that were not addressed in the advisory opinions, such as how political
8 committees should report the receipt of contributions made by text message? What
9 related issues should the Commission address?

10 The Commission is also considering whether and, if so, how to revise the paper-
11 oriented definitions of “money” and determinations of “disbursement” in its regulations.
12 For example, the regulatory definition of “contribution” defines “money” as “currency
13 . . . , checks, money orders, or any other negotiable instruments payable on demand.”
14 11 CFR 100.52(c); see also 11 CFR 100.111(d) (similarly defining “money” in the
15 definition of “expenditure”), 102.10 (requiring disbursements to be made by check or
16 “similar draft” drawn on accounts established at the committee’s campaign depository).
17 In several advisory opinions, the Commission has interpreted the term “similar draft” to
18 include electronic disbursements.²⁰ Should the Commission revise its regulations to
19 provide expressly that contributions, expenditures, and disbursements include funds

¹⁹ See Advisory Opinion 2012-17 (Red Blue T LLC, ArmourMedia, Inc., and m-Qube, Inc.); Advisory Opinion 2012-26 (Cooper for Congress, ArmourMedia, Inc., and m-Qube, Inc.); Advisory Opinion 2012-28 (CTIA – The Wireless Association); Advisory Opinion 2012-30 (Revolution Messaging, LLC); Advisory Opinion 2012-31 (AT&T Inc.).

²⁰ See, e.g., Advisory Opinion 1993-04 (Cox) (approving a “computer driven billpayer service” that included the disbursement of funds by electronic transfer); Advisory Opinion 1982-25 (Sigmund) (concluding that a wire transfer qualifies as a “similar draft”).

1 transferred electronically? Should any revised regulations take the same approach as the
2 advisory opinions? If not, why not, and what approach should they take instead?

3 Finally, the Commission is considering whether to revise its regulations that
4 expressly apply only to cash contributions so that they also expressly apply to certain
5 electronic contributions. For example, cash contributions in excess of \$100 are
6 prohibited. 11 CFR 110.4. The Commission seeks comments on whether prepaid debit,
7 credit, banking, and gift cards are functionally the same as cash. If so, should the
8 regulation be revised to prohibit contributions in excess of \$100 made by prepaid debit,
9 credit, banking, and gift cards? If not, why not?

10 c. Rulemaking vs. Other Guidance

11 The Commission seeks comments on whether a rulemaking is the best way for it
12 to address questions raised by the receipt of electronic contributions, and the making of
13 electronic disbursements, by political committees. As noted above, the Commission to
14 date has provided guidance on electronic transactions largely through advisory opinions,
15 interpretive rules, and campaign guides. Are these the best ways for the Commission to
16 provide guidance on the subject in light of rapidly evolving technologies, or would rules
17 on the subject also be helpful? How should the Commission craft regulations in order to
18 minimize the need for serial revisions in the face of new and emerging technologies?
19 Given the speed at which technology has been advancing, the Commission welcomes
20 comments suggesting general regulatory criteria or standards that are flexible and
21 adaptable enough to apply to new or emerging technology or business arrangements.

22 3. Other Electronic Modernization Issues

23 The Commission welcomes comments, including any pertinent data, concerning

1 any electronic modernization issues that are not addressed in this notice and that relate to
2 the Commission's administration of the Act or Chapters 95 and 96 of Title 26.

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On behalf of the Commission,

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7

Ellen L. Weintraub

8

Chair

9

Federal Election Commission

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11 DATED: _____

12 BILLING CODE: 6715-01-P