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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

AGENDA ITEM

For Meeting of: 08-28-03

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Acting Associate General Counsel

Mai T. Dinh *MTD*
Acting Assistant General Counsel

Jonny Levin *JL* *MTD*
Senior Attorney

SUBJECT: Draft Notice of Proposed Rulemaking on Mailing Lists of Political Committees

Attached is the draft Notice of Proposed Rulemaking addressing issues related to the sale, rental and exchange of political committees' mailing lists.

Recommendation:

The Office of the General Counsel recommends that the Commission approve the attached NPRM for publication in the *Federal Register*.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 110, 113, 9004, and 9034**

3 **[Notice 2003 - >]**

4 **Mailing Lists of Political Committees**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Notice of Proposed Rulemaking.

7 **SUMMARY:** The Federal Election Commission requests comments on proposed
8 additions to its rules covering the sale, rental, and exchange of
9 political committee mailing lists. The proposed rules address when
10 the proceeds of a political committee's rental or sale of its mailing
11 list, or an exchange of its mailing list with another entity, would be
12 considered a contribution to that committee subject to the
13 limitations and prohibitions of the Federal Election Campaign Act
14 of 1971. The proposed rules also address the personal use by a
15 candidate of his or her authorized committee's mailing list.

16 Finally, the proposed rules address the sale or rental of a mailing
17 list by an authorized committee of a publicly funded presidential
18 candidate. The Commission has not made any final decisions on
19 any of the proposed revisions in this Notice. Further information is
20 provided in the supplementary information that follows.

21 **DATES:** Comments must be received on or before September 25, 2003. If
22 the Commission receives sufficient requests to testify, it will hold a
23 hearing on these proposed rules on October 1, 2003, at 9:30 a.m.

1 Commenters wishing to testify at the hearing must so indicate in
2 their written or electronic comments.

3 **ADDRESSES:**

4 All comments should be addressed to Ms. Mai T. Dinh, Acting
5 Assistant General Counsel, and must be submitted in either
6 electronic or written form. Electronic mail comments should be
7 sent to mailinglists@fec.gov and must include the full name,
8 electronic mail address and postal service address of the
9 commenter. Electronic mail comments that do not contain the full
10 name, electronic mail address and postal service address of the
11 commenter will not be considered. If the electronic mail
12 comments include an attachment, the attachment must be in the
13 Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed
14 comments should be sent to (202) 219-3923, with printed copy
15 follow-up to ensure legibility. Written comments and printed
16 copies of faxed comments should be sent to the Federal Election
17 Commission, 999 E Street, N.W., Washington, D.C. 20463.
18 Commenters are strongly encouraged to submit comments
19 electronically to ensure timely receipt and consideration. The
20 Commission will make every effort to post public comments on its
21 Web site within ten business days of the close of the comment
22 period. The hearing will be held in the Commission's ninth floor
meeting room, 999 E Street N.W., Washington, D.C.

1 **FOR FURTHER**
2 **INFORMATION**
3 **CONTACT:**

Ms. Mai T. Dinh, Acting Assistant General Counsel, or Mr.
Jonathan M. Levin, Senior Attorney, 999 E Street N.W.,
Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

6 **SUPPLEMENTARY**
7 **INFORMATION:**

One of the principal assets of many political committees is their
mailing list. Political committees develop their mailing lists to ensure a high response
rate from potential contributors. Several advisory opinions, audits, and enforcement
matters have presented a number of issues concerning the rental, sale, exchange,
disposition, and ownership of political committees' mailing lists.¹ Central to the analysis
of these issues is whether the proceeds from these transactions are contributions to the
political committees that are subject to the Federal Election Campaign Act of 1971, as
amended ("FECA" or "the Act"), 2 U.S.C. 431, et seq. The Commission is beginning
this rulemaking to adopt formally its historical approach to these issues, or to modify
those approaches as appropriate, and to provide candidates and political committees with
more comprehensive guidance on commercial transactions involving mailing lists.

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¹ See Advisory Opinions ("AO") 2003-16, 2002-14, 1988-12, 1982-41, 1981-53, and 1981-46; Matters Under Review ("MURs") 4382 and 4401 (Dole for President, Inc.), MUR 3371 (Americans United Committee), and MUR 1602 (Republican National Independent Expenditure Committee).

1 **I. Proposed addition of 11 CFR 110.21 Committee rental or sale of mailing lists**
2 **to others.**

3 **A. Background and overview**

4 The Act defines the term “contribution” to include “any gift, subscription, loan,
5 advance, or deposit of money or anything of value made by any person for the purpose of
6 influencing any election for Federal office.” 2 U.S.C. 431(8)(A)(i) (emphasis added); see
7 also 11 CFR 100.52(a). The term “anything of value” is defined in the regulations as “the
8 provision of any goods or services without charge or at a charge that is less than the usual
9 and normal charge for such goods or services.” 11 CFR 100.52(d)(1). The “usual and
10 normal charge” for goods is defined in 11 CFR 100.52(d)(2) as “the price of those goods
11 in the market from which they ordinarily would have been purchased at the time of the
12 contribution.” Under 11 CFR 100.52(d)(1), the provision of goods or services at less than
13 the usual and normal charge is an in-kind contribution in the amount of the difference
14 between the usual and normal charge and the amount charged the political committee.
15 The regulations also provide, however, that the entire amount paid as the purchase price
16 for a fundraising item sold by a political committee is a contribution. 11 CFR 100.53.

17 Proposed 11 CFR 110.21 would state when certain transactions involving the sale
18 or rental of a mailing list by a political committee are contributions to that committee and
19 when they are not. Proposed paragraph (a) would list the conditions that would need to
20 be satisfied for a mailing list rental payment to not be a contribution by the person leasing
21 the mailing list. Proposed paragraph (b) would incorporate similar conditions for the sale
22 of mailing lists. Proposed paragraph (c) would explain the ramifications of failing to
23 comply with proposed paragraphs (a) or (b). Reporting would be addressed in proposed

1 paragraph (d). Transactions between a candidate and his or her authorized committee
2 would be covered in proposed paragraph (e).

3 **B. 11 CFR 110.21(a) -- Rental of mailing list**

4 Proposed 11 CFR 110.21(a) would affirmatively allow political committees to
5 rent their mailing lists to other persons, including other political committees. Further, it
6 states that the rental payments would not be treated as contributions if certain conditions
7 pertaining to the rental charge and use of the mailing list are met. These conditions are
8 explained in detail below.

9 **1. Usual and normal charge**

10 One of the key factors used by the Commission in determining whether a sale or
11 rental of a mailing list results in a contribution is whether the amount paid is the usual
12 and normal charge for the mailing list. See AO 2002-14. The usual and normal charge
13 for a mailing list allows the Commission to determine whether the sale or rental of a
14 political committee's mailing list is a transaction for equal value.

15 A mailing list that is frequently rented on the open market is likely to be listed and
16 described in a catalogue such as the SRDS Direct Marketing List Source. For each of
17 thousands of lists, the catalogue states the number of names on the list, the price per
18 thousand names, the minimum number of names that must be ordered, fees for addressing
19 services, the amount of the commission, and credit policies. If a political committee does
20 not routinely rent out its mailing list, it might not be listed in such a catalogue. However,
21 even if a mailing list does not appear in a catalogue, a reasonable rental price might be
22 ascertainable so long as the valuator is aware of the significance of various factors in the
23 market (e.g., he or she knows how lists with comparable characteristics are valued, as

1 well as the pricing ranges for comparable lists). The price may depend upon such factors
2 as how recently the names were updated for accurate addresses, how responsive the
3 individuals on the mailing list have been to other similar solicitations (particularly recent
4 solicitations), the income level of the individuals, and the classification according to list
5 industry sector or other subject matter. The Commission seeks comments on the ways in
6 which mailing list rentals by political committees are similar and/or different from
7 mailing list rentals by non-political entities.

8 Proposed 11 CFR 110.21(a)(1) would make ascertaining the usual and normal
9 charge of a mailing list in advance one of the conditions that must be satisfied for the
10 rental proceeds not to be contributions. This proposed regulation would not, however,
11 define the factors that a committee should use to determine the usual and normal charge.
12 Without any further specificity, the definition of “usual and normal charge” at 11 CFR
13 100.52(d)(2) and 100.111(e)(2) would apply. The Commission seeks comment on
14 whether the rule in new 11 CFR 110.21 should specify the appropriate means for
15 determining the usual and normal charge of a mailing list, and if so, whether this should
16 be done by adding additional factors or in some other fashion. If the SRDS Direct
17 Marketing List Source is not dispositive on the fair market value of a mailing list, are
18 there other appropriate methodologies that can be used to determine the fair market value
19 of a political committee’s list that takes into account the unique nature of political
20 mailing lists?

21 The Commission also seeks comment on whether the political committee that
22 wishes to rent its mailing list should have the burden of establishing what the usual and
23 normal rental charge is and, if so, whether it should be required to do so prior to renting

1 the list. In the alternative, the Commission seeks comment on a proposed rule that would
2 not specify who has the burden of establishing what the usual and normal charge is or
3 when that charge must be established, but that would still require political committees to
4 rent their mailing lists at the usual and normal charge in order to avoid receiving
5 contributions from the lessees. In addition, should the Commission include a rule that
6 would specifically require political committees to maintain records that substantiate the
7 determination of the usual and normal charge?

8 Proposed paragraph (a)(1) would also address the other services (e.g., labels)
9 provided with the mailing list in the ordinary course of business because other services
10 appear to be priced separately. The Commission seeks comment on whether it is
11 necessary to enumerate such services in paragraph (a)(1), or whether to assume that the
12 usual and normal rental charge includes such services. Comment is also sought on
13 whether services other than labels should be specifically mentioned in considering the
14 usual and normal charge.

15 2. Rental at the usual and normal charge with commercially reasonable
16 contractual terms

17 Proposed paragraph (a)(2) of 11 CFR 110.21 would require that the mailing list
18 (or list portion) be rented at the usual and normal charge for the contracted use of the list
19 in a bona fide arm's length transaction with commercially reasonable contractual terms.
20 Proposed paragraph (a)(2) would also indicate that if there is not a bona fide arm's length
21 transaction, a rebuttable presumption would be raised that the exchange is not of equal
22 value.

1 The Commission has relied on several signposts for ensuring that an arrangement
2 between a political committee and another person constitutes a bona fide transaction,
3 rather than serving as a vehicle for making a contribution to the committee. One of the
4 most important of these signposts is whether the transaction represented a bargained-for
5 exchange negotiated at arm's length. For example, the list rentals at issue in AO 2002-14
6 were approved on the condition that the lists be "leased at the usual and normal charge in
7 a bona fide, arm's length transaction." The very concept of "fair market value," which is
8 virtually identical to the concept of "usual and normal charge" as defined in the
9 Commission's regulations, is defined by Black's Law Dictionary as "[t]he price that a
10 seller is willing to accept and a buyer is willing to pay on the open market and in an arm's
11 length transaction." BLACK'S LAW DICTIONARY 1549 (7th ed. 1999). The
12 Commission seeks comment on whether a lack of arm's length bargaining is more likely
13 to reflect an exchange of unequal value. Cf. Rybak v. Commissioner, 91 T.C. 524, 536-
14 37 (U.S. Tax Court 1988) (in tax law, where transactions are frequently examined for
15 whether they should be disregarded for lack of economic substance, "[t]he absence of
16 arm's length negotiations is a key indicator that a transaction lacks economic substance.")

17 To provide guidance on what constitutes commercially reasonable terms,
18 proposed paragraph (a)(2) of new 11 CFR 110.21 would list three factors, although other
19 factors could be considered as well. These factors are intended to ensure that the rental
20 agreement provides that the lessee uses the mailing list in a manner comparable to the use
21 in normal commercial transactions, thereby preventing transactions where the lessee
22 attempts to make a contribution in the guise of a rental payment.

1 Two factors, in proposed paragraphs (a)(2)(i) and (ii), would examine whether the
2 rental agreement permits use within a specified time only and, if so, whether this
3 specified time is a reasonable period of time. The inclusion of factors in proposed
4 paragraphs (a)(2)(i) and (ii) is intended to ensure that actual use would occur and that
5 delayed use would be based on reasonable business considerations, such as to avoid
6 competing with a political committee solicitation to the same group of persons. The
7 Commission seeks comment on whether it should define what is a “reasonable” period of
8 time and, if so, how it should do so.

9 The other factor, at proposed paragraph (a)(2)(iii), would focus on the number and
10 types of uses by the person leasing the mailing list to ensure that the rental agreement
11 represents a bona fide commercial transaction consistent with industry norms and not a
12 transaction used to provide something of value to the political committee. The use of the
13 phrases “usual and normal practice of the [list] industry” and “established procedures and
14 past practice” are consistent with the Commission’s regulations on extensions of credit in
15 the ordinary course of business. See 11 CFR 116.3(c). As to the number of uses under
16 proposed paragraph (a)(2)(iii), the Commission seeks comments as to whether providing
17 for more than one-time use would be commercially reasonable under industry practice.
18 Should the rules establish a rebuttable presumption that multiple uses are not
19 commercially reasonable?

20 The Commission seeks comment on the appropriateness of these factors and what
21 other factors, if any, should be included. The Commission also seeks comment on
22 whether the presence of a “bona fide arm’s length transaction” should be required under
23 the proposed rule, particularly if mailing lists are rented out at the usual and normal

1 charge pursuant to commercially reasonable terms. If the Commission does require the
2 presence of a "bona fide arm's length transaction," should the Commission conclude that
3 this requirement cannot be satisfied if committees of the same candidate, or party
4 committees of the same political party, rent mailing lists from each other, or if a
5 candidate's authorized committee rents a mailing list from an unauthorized committee
6 such as that candidate's leadership PAC?

7 In addition, should proposed 11 CFR 110.21(a)(2) include a factor that considers
8 whether a mailing list is developed over time by the political committee primarily for the
9 political committee's own use? Conversely, should the proposed rules state that revenue
10 generated from a mailing list that is owned by the political committee, but not developed
11 over time by it for its own use, is not a form of fundraising, and therefore not a
12 contribution? In AO 1991-34, the Commission stated that generally the use of a political
13 committee's asset to generate income through ongoing business or commercial ventures is
14 fundraising in another form. Consequently the proceeds from such ventures would be
15 contributions. However, this advisory opinion also reiterated the Commission's statement
16 in AO 1988-12 that if an asset such as a mailing list was developed by the political
17 committee primarily for its own use and not as a fundraising activity, then income
18 generated from that asset would not be contributions.

19 Lastly, while proposed paragraph (a)(4) would focus on the rental agreement, the
20 proposed rule does not include provisions that would examine the conduct of the person
21 leasing the mailing list once the rental has occurred, to verify that the person leasing the
22 mailing list in fact uses the mailing list in accordance with the agreement. The

1 Commission seeks comment on whether the proposed rules should include such a
2 provision.

3 C. 11 CFR 110.21(b) -- Committee sale of the mailing list

4 Proposed 11 CFR 110.21(b) would set forth the conditions under which the
5 proceeds from the sale of a political committee's mailing list would not be a contribution
6 by the purchaser to the political committee. Like proposed paragraph (a)(1), proposed
7 paragraph (b)(1) would require that the political committee ascertain in advance the usual
8 and normal charge for the sale of the mailing list. The political committee would also be
9 required to sell the mailing list at that price under proposed paragraph (b). As in the case
10 of charges for a list rental, the Commission seeks comment on whether the political
11 committee that wishes to sell its mailing list should have the burden of establishing what
12 the sale price is and, if so, whether it should be required to do so prior to selling the list.
13 In the alternative, the Commission seeks comment on a proposed rule that would not
14 specify who has the burden of establishing what the usual and normal charge is or when
15 that sales price must be established, but that would still require political committees to
16 sell their mailing lists at the usual and normal charge in order to avoid receiving
17 contributions from the purchasers.

18 Proposed paragraph (b) would also include the condition contained in proposed
19 paragraph (a)(2) that the sale agreement be a bona fide arm's length transaction on
20 commercially reasonable terms, including terms that address the use of the list by the
21 purchaser. The Commission again seeks comment on whether the presence of a "bona
22 fide arm's length transaction" should be a separate requirement under the rule. Comment
23 is also sought as to what factors are appropriate for determining the commercial

1 reasonability of the sale of a mailing list. For the reasons discussed above, there would
2 also be a rebuttable presumption that the exchange is not of equal value if the parties do
3 not engage in a bona fide arm's length transaction.

4 The Commission also seeks comment on whether it is usual and customary in the
5 commercial list marketplace for one entity to provide raw list data to another entity that
6 updates and enhances the data and where both entities consequently have access to the
7 list. If so, comment is sought as to whether such a transaction is a commercially
8 reasonable exchange of equal value that would not be an in-kind contribution.

9 The Commission understands that outright sales of lists are not common and that
10 the sale price of a usable list would be substantially greater than a rental price. This is
11 particularly true for political committees because they depend upon their mailing lists for
12 the solicitation of funds. In advisory opinions approving the sale (as opposed to rental) of
13 mailing lists, the Commission considered one situation involving a terminating
14 committee, and another situation involving a committee of a Federal officeholder that
15 was selling assets to his gubernatorial campaign committee. AOs 1989-4 and 1981-53.
16 In contrast to a terminating committee, an ongoing political committee's sale of a
17 valuable list in an arm's length transaction, for which it would normally be paid a price
18 much greater than the rental price, would be unusual. The Commission seeks comment
19 on whether its understandings as to the frequency of sales and the differences between
20 sales prices and rental charges are correct. More specifically, the Commission also seeks
21 comment as to the likelihood of, and the circumstances surrounding, an ongoing political
22 committee selling its mailing list (as opposed to updating its current lists).

1 Related to comments on actual ongoing practices with respect to mailing lists, the
2 Commission seeks comment on whether proposed 11 CFR 110.21(b) should contain a
3 condition that the political committee must be preparing to terminate because the sale of a
4 mailing list by an ongoing political committee is so unusual that it would be per se
5 commercially unreasonable. Should the Commission prohibit the sale of mailing lists
6 other than in certain limited circumstances on the basis that there is no readily
7 ascertainable market value for such lists? If not, what sources should the Commission
8 look to in order to determine an objective value for the sale of mailing lists?
9 Furthermore, if the Commission decides to adopt a rule that would limit the sale of a
10 political committee's mailing list to a specified period before it files a termination report,
11 should the Commission adopt exceptions to this special rule? For example, does a
12 purchaser of a political committee's mailing list make a contribution to that committee if
13 the list has not been updated recently and is of substantially depreciated value?

14 D. 11 CFR 110.21(c) -- Rental or Sale Proceeds

15 Under proposed 11 CFR 110.21(c)(1), a transaction that does not comply with the
16 conditions set forth in proposed paragraphs (a) or (b) would be fundraising, and thus
17 would be treated as an in-kind contribution to the political committee, subject to the
18 applicable limits and source prohibitions of the Act. The contribution amount would be
19 the entirety of the rental or sales proceeds (not just the difference between the usual and
20 normal charge and an amount paid that exceeds that charge). Treatment of the entire
21 payment for a mailing list as a contribution would be consistent with 11 CFR 100.53,
22 which states that "the entire amount paid as the purchase price for a fundraising item sold
23 by a political committee is a contribution." Nevertheless, the Commission seeks

1 comment on including in proposed paragraph (c)(1) the opposite approach of setting the
2 amount of the contribution as the amount paid that exceeds the usual and normal charge
3 for the sale of the mailing list.

4 While proposed 11 CFR 110.21(c)(1) would address sale or rental of mailing lists
5 at an amount that exceeds the usual and normal charge, proposed paragraph (c)(2) would
6 retain the current rule at 11 CFR 100.52 for situations where a political committee rents
7 or sells its mailing list at less than the usual or normal charge.

8 E. 11 CFR 110.21(d) - Reporting of proceeds

9 Proposed 11 CFR 110.21(d) would require that proceeds from the rental or sale of
10 a mailing list that complies with the provisions of proposed section 110.21 be reported as
11 "other receipts."

12 F. 11 CFR 110.21(e) -- Rental or sale to the candidate

13 Proposed 11 CFR 110.21(e) would state that a rental or sale of an authorized
14 committee's mailing list to the candidate who formed the committee would automatically
15 be a contribution by the candidate to the committee in the amount of the rental or
16 purchase price. This provision would recognize that a transaction between these two
17 parties is not at arm's length.

18 G. Other issues

19 1. Allocation of rental proceeds

20 The Commission notes that in some cases a political committee's mailing list may
21 be developed with non-Federal, as well as Federal funds, and that, under the proposed
22 rule, the entire amount received from the rental or sale of the list may be deposited in the
23 Federal account without being subject to the amount limitations and source prohibitions

1 of the Act. The Commission seeks comment on whether proposed 11 CFR 110.21
2 should specify that only some allocable portion of the rental proceeds, rather than all of
3 the rental proceeds, may be deposited and retained in the committee's Federal account,
4 and that the remainder should be deposited in the non-Federal account, provided that the
5 political committee is permitted to have a non-Federal account under 11 CFR 106.6,
6 106.7 or part 300.

7 One possible allocation rule is that the Federal account may only accept and use
8 the portion of the proceeds that reflects the Federal portion of the committee's cost in
9 developing the list. Another possibility is that the Federal account may only accept and
10 use the amounts corresponding to the Federal share of administrative expenses applicable
11 to the political committee under 11 CFR 106.6(c) or 106.7(d)(2). This approach
12 recognizes that the list's development may have been paid for as allocable administrative
13 expenses. If such splitting of the deposit of the rent proceeds is required, comment is also
14 sought on whether national party committees would be allowed to retain the entire
15 amount of proceeds from the rental of lists developed with mixed funds prior to the
16 effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-
17 155 (Mar. 27, 2002), in view of the fact that under BCRA they only have accounts with
18 Federal funds.

19 2. Scope of proposed mailing list rules

20 The proposed new rules in 11 CFR 110.21 would apply in the same manner to
21 both authorized and unauthorized committees, *i.e.*, party committees, multicandidate
22 committees, and other kinds of political committees. Nevertheless, the Commission

1 seeks comments as to whether there are material distinctions between different types of
2 political committees that should be reflected in the new mailing list provisions.

3 **II. Proposed 11 CFR 110.22 Committee exchange of mailing lists.**

4 **A. Background**

5 The Commission has, in its advisory opinions, addressed list exchanges by
6 political committees with other organizations and has concluded that where the exchange
7 is for equal value, a contribution is not made to the political committee. AOs 1982-41
8 and 1981-46; see also AOs 2003-16 and 2002-14. Such exchanges allow each
9 organization or political committee to seek new potential donors, and often allow each
10 organization to add the names of individuals from the other mailing list to its own list
11 where those individuals responded to that organization's solicitation. AO 1981-46 noted
12 variations of equal exchange that went beyond "a direct exchange of the same number of
13 names." In some cases, one organization may use fewer names more times, or the
14 exchange may involve different numbers of names where the names on one mailing list
15 may have a different market value than the names on the other list, or other variations
16 dependent upon the frequency of use or the value of the names.

17 **B. 11 CFR 110.22(a) -- Exchanges of equal value**

18 Proposed 11 CFR 110.22 would describe the conditions under which a political
19 committee may exchange its mailing list with another organization without receiving a
20 contribution, donation, or other reportable receipt. Proposed paragraph (a) would follow,
21 in some respects, the proposed rules on mailing list rental and sale regarding the period of
22 time and number of uses of the mailing list. It would treat the exchange as neither a
23 contribution nor a reportable receipt if: (1) the usual and normal charge for the mailing

1 list and the services ordinarily provided in the list exchange is ascertained in advance; (2)
2 the mailing lists involved in the exchange are of equal value, as discussed below; and (3)
3 the actual exchange is a bona fide arm's length transaction with commercially reasonable
4 terms. For the reasons discussed above, there would also be a rebuttable presumption that
5 the exchange is not of equal value if the parties do not engage in a bona fide arm's length
6 transaction. "Equal value" would be defined in proposed paragraph (a)(3)(i) in terms of
7 the usual and normal rental value of each organization's or political committee's mailing
8 list, or list portion being exchanged, as well as the agreed upon use by the organization,
9 and the services provided. Proposed paragraph (a)(3)(ii) would also address the timing of
10 the use of the exchanged lists, including delayed use if provided for in the agreement.

11 The Commission seeks comment on whether, and under what circumstances,
12 multiple uses of a mailing list would be commercially reasonable; when delayed use
13 would be reasonable; and whether the rule should address delayed use. Comment is also
14 sought on how to determine the usual and normal charge, and whether the proposed rule
15 should affirmatively mandate that the mailing lists be used in a manner consistent with
16 the list exchange agreement. The Commission also seeks comment on whether the
17 proposed rule should require that each party to the exchange establish the fair market
18 value of its own list in advance in order to avoid treating the transaction as entailing an
19 in-kind contribution. The Commission also seeks comment on whether the presence of a
20 "bona fide arm's length transaction" should be required, particularly if it has been
21 otherwise established that the exchange of the mailing lists is an exchange of equal value.
22 Moreover, can the requirement of a "bona fide arm's length transaction" be satisfied even
23 if campaign committees of the same candidate, or party committees of the same political

1 party, rent mailing lists from each other or if a candidate's authorized committee rents a
2 mailing list from an unauthorized committee such as a leadership PAC?

3 The Commission also seeks comment on whether the political committee's ability
4 to use the names on the other organization's mailing list to solicit contributions to the
5 Federal account is affected by whether funds from the committee's non-Federal account
6 were used to develop the committee list. (See the discussion above on allocation in
7 proposed 11 CFR 110.21.)

8 Another issue raised previously with respect to the sale of mailing lists may more
9 appropriately relate to the exchange of lists. Specifically, the Commission seeks
10 comment on whether it is usual and customary in the commercial list marketplace for one
11 entity to provide raw list data to another entity that updates and enhances the data and
12 where both entities consequently have access to the list. If so, comment is sought as to
13 whether such a transaction is a commercially reasonable exchange of equal value that
14 would not be treated as an in-kind contribution.

15 C. 11 CFR 110.22(b) -- Exchanges of unequal value

16 Proposed 11 CFR 110.22(b) would address an exchange of mailing lists that does
17 not comply with proposed paragraph (a). Where the value of the mailing list provided by
18 the other person exceeds the value of the political committee's mailing list, only the
19 excess amount is a contribution. This is in contrast to proposed 11 CFR 110.21(c), where
20 the entire amount is a contribution. Also, while proposed 11 CFR 110.21 would treat a
21 sale or rental of a mailing list at a charge that is greater than the usual or normal charge as
22 a fundraising activity that is subject to 11 CFR 100.53, proposed section 110.22(b) would
23 treat the exchange of mailing lists of unequal value as a good or service that is provided at

1 less than the usual and normal charge under 11 CFR 100.52(d)(1). Consequently, the
2 difference in value between the two mailing lists exchanged would be an in-kind
3 contribution. 11 CFR 100.52(d)(1). The Commission seeks comment on whether this
4 characterization of the exchange of mailing lists of unequal value as an in-kind
5 contribution is appropriate.

6

7 **III. Proposed 11 CFR 113.2(d) Conversion of committee's mailing list to personal**
8 **use.**

9 Both 2 U.S.C. 439a, and the Commission's regulations at 11 CFR part 113, bar
10 candidates and other persons from converting to personal use any contributions or
11 donations. This ban is not limited to monetary contributions. Consequently, the
12 Commission has interpreted the personal use ban to apply to assets of the principal or
13 authorized campaign committee, as well as the actual funds in the committee accounts.
14 See AOs 1994-20, 1990-11, 1984-50, and 1981-11; see also 11 CFR 102.3(a)(2) and
15 113.2(e)(1)(ii). These assets may have been purchased through the use of funds from
16 contributions or may have been donated to the authorized committee during the
17 campaign. One of the principal assets of a political committee is its mailing list because
18 it is vital to the committee's ability to solicit funds.

19 On some occasions, particularly after the end of his or her campaign, a candidate
20 may wish to market the mailing list for the rental of names to other organizations and may
21 wish to receive rental proceeds personally. These situations may raise questions as to
22 whether the candidate has a personal ownership interest in the list. The candidate's
23 receipt of proceeds from the rental or sale of the mailing list squarely presents the issue of

1 whether the restrictions of 2 U.S.C. 439a apply. Proposed 11 CFR 113.2(d) would
2 address this issue by explicitly banning the conversion to personal use of the mailing list
3 itself, such as by barring a candidate from retaining the proceeds of a mailing list rental or
4 sale. In the alternative, the Commission seeks comment on whether a candidate's receipt
5 of proceeds from the rental or sale of a mailing list, or portions thereof, could be
6 permissible under 2 U.S.C. 439a. If permissibility were based on a candidate's ownership
7 of a list or a share of the mailing list, how would the candidate obtain such ownership
8 interest? Could a candidate acquire personal ownership, through purchase or other
9 consideration, of a mailing list developed by his or her principal campaign committee? Is
10 such ownership interest assumed on some other basis? The Commission seeks comment
11 on whether the determination of ownership of the mailing list should be premised on who
12 or what entity (i.e., the candidate as opposed to the committee) incurred the costs for the
13 development or purchase of the list or the portion of the list being rented or sold.

14

15 **IV. Proposed 11 CFR 9004.9(d)(2)(i) and 9034.5(c)(2)(i) – Rental, sale, and**
16 **valuation of mailing lists by publicly financed campaigns.**

17 The proposed rules at 11 CFR 9004.9(d)(2)(i) and 9034.5(c)(2)(i) would include
18 the mailing lists of an authorized committee of publicly financed presidential candidates
19 as assets on the candidates' statements of net outstanding campaign obligations
20 ("NOCO") for the primaries and on the candidates' statements of net outstanding
21 qualified campaign expenses ("NOQCE") for the general election, under certain
22 circumstances. Thus, the proposed rules would recognize a presidential campaign
23 committee's use of its mailing list as an income producing asset and would provide that a

1 committee may only rent or sell the mailing list if the list is included as an asset in the
2 NOCO or NOQCE statements. However, the proposed rules at 11 CFR 9004.9(d)(2)(i)
3 and 9034.5(c)(2)(i) would not require the publicly funded committee to include the list as
4 an asset on the NOCO or NOQCE statements if it does not rent or sell the list.

5 Since 1976, the Commission has not required as a per se matter, the inclusion of a
6 mailing list as an asset in NOCO and NOQCE statements, even though a political
7 committee's mailing list is almost invariably one of the most important assets of a
8 political committee. Some presidential campaign committees have indeed rented their
9 lists, or portions thereof, to other political committees or organizations and therefore have
10 received proceeds, which may show up on a NOCO or NOQCE statement as cash.

11 The current rules list "capital assets" and "other assets" as types of assets listed on
12 the NOCO and NOQCE statements. Unlike "other assets," capital assets have special
13 valuation rules accounting for depreciation. A mailing list developed by a political
14 committee is usually a unique asset developed for the special needs of the committee, and
15 the proposed rules would add mailing lists as a special category of assets. The proposed
16 rules would not subject mailing lists to the depreciation rules for "capital assets." The
17 proposed rules at 11 CFR 9004.9(d)(3)(i) and 9034.5(c)(3)(i) explain that the list would
18 be considered an "other asset;" therefore, it would be valued at "fair market value"
19 without depreciation factored in. The proposed rules would give specific guidance as to
20 the fair market value of a mailing list (discussed below).

21 As indicated above, the proposed rules in 11 CFR 9004.9(d)(3)(ii) and
22 9034.5(c)(3)(ii) would specify that the mailing list may be rented or sold only if its fair
23 market value is listed on the NOCO and NOQCE statements. These proposed rules also

1 would require that any such rental or sale be in compliance with the conditions of the
2 proposed rule at 11 CFR 110.21, which describes when a committee may rent or sell a
3 mailing list to others without the proceeds becoming contributions. Transfer of a mailing
4 list from a candidate's primary committee to his or her general election committee would
5 not require the principal campaign committee to include a value for its mailing list on its
6 NOCO statement. The Commission also seeks comment on whether any other transfers
7 that are not sales or rentals should trigger the requirement to include a value for a mailing
8 list on the NOCO or NOQCE statements.

9 Finally, the proposed rules at 11 CFR 9004.9(d)(3)(iii) and 11 CFR
10 9034.5(c)(3)(iii) would explain how fair market value would be determined for purposes
11 of the NOCO and NOQCE statements. The proposed rule would allow the presidential
12 campaign committee renting or selling its list to have two choices. For primary
13 candidates, the list would be valued at either: (1) the usual and normal rental revenue that
14 the committee would receive if it rented the list to others over an 18 month period
15 beginning on the date of ineligibility ("DOI"); or (2) the usual and normal sale price at
16 DOI. For general election candidates, the list would be valued at either: (1) the usual and
17 normal rental revenue over the 12-month period beginning on the date of the general
18 election; or (2) the usual and normal sale price as of the date of the election.

19 Under these proposed rules, Presidential campaign committees would need to
20 estimate the usual and normal rental revenue. This in turn would involve estimates as to
21 how often the committee will rent out the mailing list over the applicable period, as well
22 as the rental value of the list (e.g., \$X per 1,000 names). The value may depend upon the
23 rental price of comparable mailing lists and, if comparability is not easily ascertainable,

1 such factors as how recently the names were updated for accurate addresses, how
2 responsive the individuals on the list have been to other similar solicitations (particularly
3 recent solicitations), the income level of the individuals on the list, and the classification
4 according to the list industry or other subject matter. (See the discussion above of
5 proposed 11 CFR 110.21(a)(1).) Estimates of the sale price would be based on similar
6 information. The Commission seeks comment on whether the presidential campaign
7 committee should have the burden of establishing the usual and normal rental value and,
8 if so, whether it must establish this value before the mailing list is rented. See the request
9 for comments with respect to proposed 11 CFR 110.21.

10 The proposed rules would provide for a limited time period for the measurement
11 of the rental revenue, i.e., the 18-month and 12-month periods. This recognizes that these
12 campaign committees are in the process of winding down their activities. The 18-month
13 and 12-month periods generally fall within the winding down periods and may very well
14 expire before the end of such periods. Please note that continued or frequent renting out
15 of the mailing list to raise funds beyond what is necessary to pay off debts would be
16 inconsistent with the winding down of campaign activities. The Commission seeks
17 comment on whether mailing list rentals or sales by presidential campaigns should be
18 limited by the amount necessary to pay off the authorized committee's debts.

19 In the case of either rental or sale, the NOCO and the NOQCE statement would be
20 adjusted subsequently by the actual rental or sale price for the mailing list, similar to the
21 practice of revising those statements to replace estimated winding down costs with actual
22 cost figures. In the case of list rental, the final NOCO or NOQCE statement (which will
23 most likely be filed after the expiration of the 18-month or one year period) would not

1 reflect the anticipated rental figure. Instead, the actual rental proceeds would replace the
2 estimated figure of the value of the mailing list. In the case of a sale, the estimated list
3 sale amount would be replaced with the actual sale proceeds.

4 The Commission seeks comment on whether the value of mailing lists should be
5 accounted for on the NOCO or NOQCE statements regardless of any subsequent use by
6 the authorized committee. In the alternative, should they not be recognized on NOCO
7 and NOQCE statements under any circumstances? The Commission also seeks
8 comments on the appropriateness of the methods proposed for determining fair market
9 value. Are the proposed 12-month and 18-month time periods for measuring rental value
10 too long? Would they encourage activity by presidential campaign committees that is not
11 consistent with winding down activities? In the alternative, should the time periods be
12 different for some other reason? Should presidential campaigns be permitted to rent or
13 sell their mailing lists regardless of whether such activity is related to winding down the
14 campaign?

15 The Commission also seeks comment on whether the use of the sale price as of
16 DOI is inappropriate if a list is not updated and is sold many months after DOI.
17 Comment is also sought on what other valuation method should be applied to mailing
18 lists for purposes of the NOCO and NOQCE statements.

19

20 **Certification of No Effect Pursuant to 5 U.S.C. § 605(b)**

21 **[Regulatory Flexibility Act]**

22 The attached proposed rules, if promulgated, would not have a significant
23 economic impact on a substantial number of small entities. The basis for this certification

1 is that few, if any, small entities would be affected by these proposals, which apply only
2 to Federal candidates, their campaign committees, party committees, and other political
3 committees. Federal candidates, their committees, and party committees are not small
4 entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or
5 small governmental jurisdictions. These rules are largely intended to adopt past
6 Commission practice by clarifying the application of various provisions of the Act and
7 presidential public financing statutes to mailing list transactions involving political
8 committees and Federal candidates. Because the proposed rules would not significantly
9 change current practice, those few proposals that might increase the cost of compliance
10 by small entities would not do so in such an amount as to cause a significant economic
11 impact.

12

13 **List of Subjects**

14

15 11 CFR Part 110

16 Campaign funds, political committees and parties.

17 11 CFR Part 113

18 Campaign funds.

19 11 CFR Part 9004

20 Campaign funds.

21 11 CFR Part 9034

22 Campaign funds, reporting and recordkeeping requirements.

1 For the reasons set out in the preamble, the Federal Election Commission
2 proposes to amend subchapters A, E, and F of chapter 1 of title 11 of the Code of Federal
3 Regulations as follows:

4 **PART 110 – CONTRIBUTION AND EXPENDITURE LIMITATIONS AND**
5 **PROHIBITIONS**

6 1. The authority citation for part 110 would continue to read as follows:

7 Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d, 438(a)(8), 441a, 441b, 441d,
8 441e, 441f, 441g, 441h and 441k.

9 2. Sections 110.21 and 110.22 would be added to read as follows:

10 **§ 110.21 Committee rental or sale of mailing lists to others.**

11 (a) Rental of mailing list. A political committee may rent a mailing list, or portions
12 of such list, that it owns to any other person. Rental payments are not contributions if:

13 (1) Prior to the rental, the political committee ascertains the usual and normal
14 rental charge for the mailing list (or the portion of the mailing list) rented,
15 and other services provided in the ordinary course of business of the rental
16 of such mailing lists (e.g., labels); and

17 (2) The mailing list or the portion of the list (along with the services provided
18 in the ordinary course of business) is rented at the usual and normal
19 charge, as defined in 11 CFR 100.52(d)(2), for the agreed upon use of the
20 mailing list, including the frequency and duration of the use, in a bona fide
21 arm's length transaction with commercially reasonable terms. If the
22 political committee and the person renting the list do not engage in a bona
23 fide arm's length transaction, there is a rebuttable presumption that the

1 exchange is not of equal value. To determine whether the terms of the
2 rental agreement are commercially reasonable, the Commission will
3 consider factors that include, but are not limited to:

4 (i) Whether the person leasing the mailing list is permitted to use the
5 list within a reasonable period of time only;

6 (ii) Whether any delayed use by the person leasing the mailing list,
7 provided for in the agreement, is based on reasonable business
8 considerations; and

9 (iii) Whether the agreed upon use by the person leasing the mailing list,
10 including the duration of the rental or number of uses, comports
11 with the usual and normal practice of the list industry and the
12 lessee's established procedures and past practice;

13 (b) Sale of mailing list. A political committee may sell a mailing list, or portions of a
14 mailing list, that it owns to any other person. Proceeds from the sale are not contributions
15 if prior to the sale, the political committee ascertains the usual and normal charge for the
16 sale of the mailing list, and sells the mailing list at the usual and normal charge, as
17 defined in 11 CFR 100.52(d)(2) in a bona fide arm's length transaction with
18 commercially reasonable terms. If the political committee and the person buying the list
19 do not engage in a bona fide arm's length transaction, there is a rebuttable presumption
20 that the exchange is not of equal value.

21 (c) Rental or sale proceeds as contributions.

22 (1) Except as provided in paragraph (c)(2) of this section, a sale or rental of a

1 mailing list that does not comply with the conditions set forth in
2 paragraphs (a) or (b) of this section is a fundraising item under 11 CFR
3 100.53 and all proceeds from such sale or rental are contributions from the
4 person buying or renting the mailing list to the political committee in their
5 full amount.

6 (2) For sale or rental of mailing lists at less than the usual and normal charge,
7 see 11 CFR 100.52.

8 (d) Reporting of proceeds. The proceeds from the rental or sale of a mailing list that
9 complies with the conditions set forth in paragraphs (a) or (b) of this section must be
10 reported as "other receipts."

11 (e) Rental or sale to the candidate. If a candidate rents or buys a mailing list from his
12 or her authorized committee, the amount paid by the candidate is a contribution to the
13 authorized committee.

14 **§ 110.22 Committee exchange of mailing lists.**

15 (a) Exchange of equal value. A political committee may exchange the use of a
16 mailing list or portions of a mailing list with another person for a specific period of time
17 or a specific number of uses. The exchange is not a contribution, donation, or other
18 reportable receipt to the political committee if:

19 (1) The political committee ascertains in advance the usual and normal charge
20 for the mailing lists, or the portions of the mailing lists, being exchanged
21 and other services provided in the ordinary course of business for the
22 exchange of the mailing lists (e.g., labels); and

1 (2) The exchange of the mailing lists is a bona fide arm's length transaction
2 with commercially reasonable terms that results in an exchange of equal
3 value between the political committee and the other person.

4 (3) An exchange of equal value takes place when:

5 (i) The usual and normal rental value for each mailing list, or portion
6 of the mailing list being exchanged, and the agreed upon use for
7 each mailing list, and the services provided in the ordinary course
8 of business are of equal value; and

9 (ii) The agreement between the political committee and the other
10 person provides that they each use the mailing list they receive
11 within a commercially reasonable period of time. If the agreement
12 provides for a future use by the political committee or the other
13 person, the delay in the use of the mailing list must be based upon
14 reasonable business considerations.

15 (b) Exchange of unequal value. An exchange of mailing lists that does not comply
16 with the conditions set forth in paragraph (a) of this section is a contribution to the extent
17 that the value provided by the other person exceeds the value provided by the political
18 committee.

19 **PART 113 – USE OF CAMPAIGN ACCOUNTS FOR NON-CAMPAIGN**

20 **PURPOSES (2 U.S.C. 439a)**

21 3. The authority citation for part 113 would continue to read as follows:

22 Authority: 2 U.S.C. 432(h), 438(a)(8), 439a, and 441a.

23 4. In section 113.2, paragraph (d) would be revised to read as follows:

1 § 113.2 Permissible non-campaign uses of funds (2 U.S.C. 439a).

2 * * * * *

3 (d) Conversion of committee's mailing list to personal use. The mailing list of a
4 principal campaign committee or authorized committee of a candidate, or any proceeds
5 from the rental or sale of any names on the mailing list, may not be converted to the
6 personal use of the candidate or any other person.

7 * * * * *

8 **PART 9004 – ENTITLEMENT OF ELIGIBLE CANDIDATES TO PAYMENTS;**
9 **USE OF PAYMENTS**

10 5. The authority citation for part 9004 would continue to read as follows:

11 Authority: 26 U.S.C. 9004 and 9009(b).

12 6. In section 9004.9, new paragraph (d)(3) would be added to read as follows:

13 **§ 9004.9 Net outstanding qualified campaign expenses**

14 * * * * *

15 (d) * * *

16 (3) Mailing lists.

17 (i) The term other asset, as defined in paragraph (d)(2) of this section
18 includes an authorized committee's mailing list if the mailing list is
19 sold or rented under paragraph 9d)(3)(ii) of this section.

20 (ii) An authorized committee may sell or rent its mailing list only if –

21 (A) The fair market value of the mailing list is included on the
22 candidate's statement of net outstanding qualified campaign
23 expenses; and

1 (B) The sale or rental of the mailing list complies with 11 CFR
2 110.21.

3 (iii) The fair market value of an authorized committee's mailing list is
4 either:

5 (A) The usual and normal rental revenue that the authorized
6 committee would receive if it rented the list to others over
7 the 12-month period beginning on the date of the general
8 election; or

9 (B) The usual and normal sale price for the list as of the date of
10 the general election.

11 * * * * *

12 **PART 9034 – ENTITLEMENTS**

13 7. The authority citation for part 9034 would continue to read as follows:

14 Authority: 26 U.S.C. 9034 and 9039(b).

15 8. In section 9034.5, new paragraph (c)(3) would be added to read as follows:

16 **§ 9034.5 Net Outstanding Campaign Obligations.**

17 * * * * *

18 (c) * * *

19 (3) Mailing lists.

20 (i) The term other asset, as defined in paragraph (c)(2) of this section
21 includes an authorized committee's mailing list if the mailing list is
22 sold or rented under paragraph (c)(3)(ii) of this section.

23 (ii) An authorized committee may sell or rent its mailing list only if –

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(A) The fair market value of the mailing list is included on the candidate's statement of net outstanding campaign obligations; and

(B) The sale or rental of the mailing list complies with 11 CFR 110.21.

(iii) The fair market value of an authorized committee's mailing list is either:

(A) The usual and normal rental revenue that the authorized committee would receive if it rented the list to others over the 18-month period beginning on the date of ineligibility;

or

(B) The usual and normal sale price for the list as of the date of ineligibility.

* * * * *

Ellen L. Weintraub
Chair
Federal Election Commission

DATED _____
BILLING CODE: 6715-01-U

