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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AGENDA DOCUMENT NO. 22-17-A
AGENDA ITEM
For meeting of May 26, 2022

MEMORANDUM

TO: The Commission

FROM: Sean J. Cooksey *Sean J. Cooksey*
Commissioner

DATE: May 19, 2022

RE: Proposed Interim Final Rule Repealing Candidate Loan Repayment Regulations

Attached is a proposed Interim Final Rule that implements the Supreme Court's decision in *Federal Election Commission v. Ted Cruz for Senate* by removing regulatory restrictions on authorized committees' repayment of candidates' personal loans to the committees. Pursuant to Directive 17, I request that this draft be placed on the agenda for May 26, 2022.

Attachment

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

16 **SUPPLEMENTARY INFORMATION:**

17 **Background**

18 On May 16, 2022, the Supreme Court of the United States ruled in *Federal Election*
19 *Commission v. Ted Cruz for Senate* that section 304 of the Bipartisan Campaign Reform Act of
20 2002 violates the Free Speech Clause of the First Amendment of the United States Constitution.
21 596 U.S. ___, ___ (2022) (slip op., at 22). The Supreme Court’s ruling affirmed the same
22 holding of the U.S. District Court for the District of Columbia. *Ted Cruz for Senate v. Federal*

1 *Election Commission*, 542 F. Supp. 3d 1 (D.D.C. 2021). The Commission now proposes to
2 remove the regulations implementing this unconstitutional statute.

3 The Commission is taking this action without advance notice and comment because it
4 falls under the “good cause” exception of the Administrative Procedure Act (“APA”), 5
5 U.S.C. 553(b)(B). The revisions set forth herein are necessary to conform the Commission’s
6 regulations to the Supreme Court’s holding that the statutory restrictions on authorized
7 committees’ repayment of candidate personal loans are unconstitutional. *Ted Cruz for Senate*,
8 596 U.S. at ___ (slip op., at 22). Because this action does not involve any Commission discretion
9 or policy judgments, notice and comment are unnecessary. 5 U.S.C 553(b)(B), (d)(3). A pre-
10 publication notice and comment period would also be contrary to the public interest because the
11 2022 election campaigns for federal office are ongoing, and so the delay that would result in
12 such a notice and comment period might cause confusion among federal candidates and the
13 public as to the enforceability of the regulations addressed below. *Id.*

14 For the same reasons, these revisions fall within the “good cause” exception to the APA’s
15 delayed effective date provision and the requirements of the Congressional Review Act. 5 U.S.C.
16 553(d)(3), 808(2). Moreover, because this interim final rule is exempt from the APA’s notice and
17 comment procedure under 5 U.S. C. 553(b), the Commission is not required to conduct a
18 regulatory flexibility analysis under 5 U.S.C. 603 or 604. *See* 5 U.S.C. 601(a), 604(a). Nor is the
19 Commission required to submit these revisions for congressional review under the Federal
20 Election Campaign Act of 1971 (“FECA”). *See* 52 U.S.C. 30111(d)(1), (4) (providing for
21 congressional review when Commission “prescribe[s]” a “rule of law”). Accordingly, these
22 revisions are effective upon publication in the Federal Register.

1 **Explanation and Justification**

2 FECA provides two methods for the funding of federal campaigns. First, funding may
3 come from individual contributions to the campaign, which are subject to a per-election limits.
4 See 52 U.S.C. 30116(a)(1)(A) (placing limits on contributions from individuals to candidates and
5 their authorized political committees). Second, candidates may self-finance their campaigns,
6 with no limits on the amount a candidate may contribute to his or her campaign committee. 11
7 CFR 110.10; see also *Buckley v. Valeo*, 424 U.S. 1, 51–54 (1976) (holding that restriction on
8 candidate’s personal expenditures is unconstitutional).

9 At the same time, however, section 304 of the Bipartisan Campaign Reform Act of 2002
10 (“BCRA”) places limits on candidates’ ability to finance their campaigns through personal loans.
11 Under that statutory provision, a candidate’s authorized committee may repay all of a candidate’s
12 personal loans with contributions made before or on the date of the election, but may repay only
13 up to \$250,000 of a candidate’s pre-election loans with post-election contributions. 52 U.S.C.
14 30116(j). Under the Commission’s implementing regulations, for personal loan amounts that in
15 the aggregate exceed \$250,000, a campaign “[m]ay repay the entire amount of the personal loans
16 using contributions” made before or on the date of the election, 11 CFR 116.1(b)(2), but “it must
17 do so within 20 days of the election,” 11 CFR 116.11(b)(1); (c)(1). If using post-election
18 contributions, a campaign may repay only up to \$250,000 of the personal loans. 11 CFR
19 116.11(b)(2); 11 CFR 116.12.

20 On May 16, 2022, the Supreme Court of the United States ruled that section 304 of
21 BCRA violates the Free Speech Clause of the First Amendment of the United States
22 Constitution. The Supreme Court’s ruling affirmed the same holding of the U.S. District Court
23 for the District of Columbia. *Ted Cruz for Senate v. Federal Election Commission*, 542 F. Supp.

1 3d 1 (D.D.C. 2021). Accordingly, the Commission is removing the regulations implementing this
2 unconstitutional statutory provision.

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

5 Section 110.1(b)(3)(i) provides that contributions to a campaign for a particular election
6 after the election has taken place may be made only to the extent that the contribution does not
7 exceed a committee’s net debts outstanding from such election. 11 CFR 110.1(b)(3)(i). The
8 following paragraph (ii) further provides how net debts outstanding shall be determined, and it
9 states that an authorized committee must reduce its calculated net debts by any outstanding
10 candidate personal loan amounts more than \$250,000. 11 CFR 110.1(b)(3)(ii)(C). The regulation
11 that reduces the calculation of net debts based on candidate personal loans exceeding \$250,000
12 was issued as a conforming edit to the regulations, 11 CFR 116.11 and 116.12 (see below), that
13 implemented the statutory limitation on an authorized committee’s repayment of candidate
14 personal loans exceeding that amount. Increased Contribution and Coordinated Party
15 Expenditure Limits for Candidates Opposing Self-Financed Candidates, 68 FR 3970, 3973 (Jan.
16 27, 2003). The Commission is removing 11 CFR 110.1(b)(3)(ii)(C) and making technical edits to
17 11 CFR 110.1(b)(3)(ii)(A) and (B).

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

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

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

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

5 **List of Subjects:**

6 *11 CFR Part 110*

7 Contribution and expenditure limitations and prohibitions.

8 *11 CFR Part 116*

9 Debts owed by candidates and political committees.

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 **§ 110.1 [Amended]**

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

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

12 4. Remove § 110.1(b)(3)(ii)(C).

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

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

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

16 6. Remove § 116.11.

17 7. Remove § 116.12.

18 Dated: [INSERT DATE, 2022].

19 On behalf of the Commission

20
21 **Allen J. Dickerson,**

22
23 *Chairman,*

24
25 *Federal Election Commission.*

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BILLING CODE: 6715-01-P