

AGENDA DOCUMENT NO. 16-43-A

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2016 SEP 14 PM 5:21

FEDERAL ELECTION COMMISSION

11 CFR Chapter 1

[Notice 2016-XX]

Technological Modernization

AGENDA ITEM

For Meeting of 9-15-16

SUBMITTED LATE

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission requests comment on proposed changes to its regulations in 11 CFR chapter 1 to address contributions and expenditures that are made by electronic means, such as through internet-based payment processors or text messaging; to eliminate and update references to outdated technologies; and to address similar issues. The Commission has not made any final decisions about the issues and proposals presented in this rulemaking.

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. Anyone wishing to testify at such a hearing must file timely written comments and must include in the written comments a request to testify. 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. Commenters are encouraged to submit comments electronically via the Commission's website at <http://www.fec.gov/fosers>, reference REG 2013-01, or by email to [address]@fec.gov. Alternatively, commenters may submit comments in paper form, addressed to the Federal Election Commission, Attn.: Neven F. Stipanovic, Acting Assistant General Counsel, 999 E Street, NW., Washington, DC 20463.

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

9 **FOR FURTHER INFORMATION CONTACT:** Mr. Neven F. Stipanovic, Acting Assistant
10 General Counsel, or Ms. Jessica Selinkoff, Attorney, 999 E Street NW., Washington, DC 20463,
11 (202) 694-1650 or (800) 424-9530.

12 **SUPPLEMENTARY INFORMATION:** The Federal Election Commission is proposing to
13 revise its regulations at 11 CFR chapter 1 to address electronic transactions, such as
14 contributions made using credit cards, by text messages, or through internet-based payment
15 processors. The Commission is also proposing regulatory revisions to facilitate electronic
16 accounting, recordkeeping, reporting, and redesignation by political committees. Additionally,
17 as a retrospective assessment of Commission regulations,¹ the proposed revisions would
18 eliminate or update references to outmoded technologies and would enable interested parties to
19 communicate electronically with the Commission for certain purposes.

20 A. Rulemaking History

¹ See generally, Jeffrey S. Lubbers, A Guide to Federal Agency Rulemaking 355-361 (5th ed. 2012) (summarizing “lookback” efforts designed to update or remove outdated or ineffective regulations); Adoption of Recommendations, 79 FR 75114, 75114-17 (Dec. 17, 2014) (Administrative Conference of the United States framework for agencies’ retrospective reviews of their regulations); Special Committee to Review the Government in the Sunshine Act, 60 FR 43108, 43109-10 (Aug. 18, 1995) (recognizing agencies’ “need to review regulations already adopted to ensure that they remain current, effective and appropriate”).

1

2 On May 2, 2013, the Commission published in the Federal Register an Advance Notice of
3 Proposed Rulemaking (“ANPRM”).² In the ANPRM, the Commission solicited comment on
4 topics such as whether and how it should revise its regulations to reflect technological advances,
5 whether industry standards in processing electronic transactions would be relevant to any such
6 revisions, and how political committees and other persons engage in electronic transactions and
7 recordkeeping.

8 The Commission received three substantive comments in response to the ANPRM.³ Two
9 commenters stated that the Commission should update its regulations by replacing technology-
10 specific references with broader criteria that are less likely to grow stale as technology develops.
11 One commenter suggested that the Commission could continue its current practice of using
12 advisory opinions to address specific technologies. The commenters also provided comments
13 regarding specific regulations, as discussed in more detail below.

14 After reviewing these comments and engaging in additional deliberation, the Commission
15 is now proposing the changes described in this notice. The Commission seeks comment on these
16 proposals.

17 B. The Growing Use of Electronic Transactions, Records, and Communications

18 Electronic financial transactions are commonplace. According to the most recent
19 triennial study conducted by the Federal Reserve System, “payments have become increasingly
20 card-based,” “fewer checks enter the banking system as paper at all,” and the “number of
21 noncash payments in the United States increased at a compound annual rate . . . of 4.4 percent”

² Technological Modernization, 78 FR 25635 (May 2, 2013).

³ The Internal Revenue Service also submitted comments indicating that it sees no conflict between this rulemaking and the Internal Revenue Code or Treasury regulations. See 52 U.S.C. 30111(f).

1 from 2009 to 2012.⁴ Payments using prepaid cards increased at the fastest rate (15.8%) among
2 payment types between 2009 and 2012.⁵ In 2009, electronic payments — whether made by card
3 (such as debit, credit, or prepaid) or through automated clearinghouses — “collectively
4 exceed[ed] three-quarters of all noncash payments” in the United States.⁶ And electronic
5 financial transactions are occurring not only through desktop computers or credit card networks,
6 but from consumers’ smartphones as well. A recent study of smartphone use showed that 64%
7 of American adults own smartphones and that 57% of these people have used their smartphones
8 in the past year for online banking.⁷ Among 18-29 year old smartphone owners, about 70% have
9 used smartphones in the past year for online banking.⁸

10 Consistent with general payment trends, people are increasingly using cards and
11 electronic methods to contribute to political committees. A series of studies by the Pew
12 Research Center of the internet and elections from 2006 to 2012 shows that online political
13 contributions have become more common since 2008 (although most contributions are still made
14 in person, over the phone, or by mail).⁹ Among adults who donated to presidential candidates in

⁴ Fed. Reserve Sys., 2013 Federal Reserve Payments Study: Recent and Long-Term Payment Trends in the United States: 2003-2012, at 6-8 (2013) (“2013 Study”), available at frbservices.org/files/communications/pdf/research/2013_payments_study_summary.pdf. The 2013 Study notes that “the growth in the number of [credit, debit, and prepaid] card payments was driven by the replacement of both cash and checks.” *Id.* at 10. Moreover, even as more checks are being processed electronically, the total number of checks paid in 2012 was “less than half the number of checks that were paid in 2003,” for a total of only 15% of all payments in 2012. *Id.* at 8, 12.

⁵ *Id.* at 8.

⁶ Fed. Reserve Sys., 2010 Federal Reserve Payments Study: Noncash Payment Trends in the United States: 2006-2009, at 4 (2011), available at frbservices.org/files/communications/pdf/press/2010_payments_study.pdf (showing similar trends from 2006-2009).

⁷ Aaron Smith & Dan Page, Pew Research Ctr., U.S. Smartphone Use in 2015, at 2, 5 (2015), available at pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf.

⁸ *Id.* at 5-6.

⁹ Aaron Smith, Pew Internet and Am. Life Project, Civic Engagement in the Digital Age 24 (2013), available at pewinternet.org/files/old-media/Files/Reports/2013/PIP_CivicEngagementintheDigitalAge.pdf (finding that, of

1 the 2012 election, 50% donated “online or via email.”¹⁰ As of September 2012 — only a few
2 months after the Commission had approved the use of text messaging to make contributions —
3 ten percent of those who made contributions to presidential candidates did so by “text message
4 from a cell phone or cell phone app.”¹¹

5 Coinciding with the increased use of electronic payments is the regular use of electronic
6 records, including transactional records, and electronic communications. A Government
7 Accounting Office report on the U.S. Postal Service in 2013 found that the postal service faces
8 significant decreases in mail volume — the volume of first-class mail has declined 33 percent
9 since 2001 and the volume of standard mail (primarily advertising) has declined 23 percent since
10 2007 — “as online communication and e-commerce expand.”¹² The report noted that “many

16% of Americans who had made political contribution in 2012, 23% had done so only over internet, while 60% had done so only offline); see also Aaron Smith, Pew Internet and Am. Life Project, The Internet and Campaign 2010, at 21 (2011), available at pewinternet.org/~media/Files/Reports/2011/Internet%20and%20Campaign%202010.pdf (finding that online contributions increased from three percent in 2006 mid-term elections to four percent in 2010); Aaron Smith, Pew Internet and Am. Life Project, The Internet’s Role in Campaign 2008, at 38-39 (2009), available at pewinternet.org/~media/Files/Reports/2009/The_Internets_Role_in_Campaign_2008.pdf (showing that nine percent made online contributions).

¹⁰ Aaron Smith & Maeve Duggan, Pew Internet and Am. Life Project, Presidential Campaign Donations in the Digital Age 2 (2012), available at pewinternet.org/~media/Files/Reports/2012/PIP_State_of_the_2012_race_donations.pdf (finding that 67% contributed in person, over telephone, or through mail); see also Henry Barbour et al., Republican Nat’l Comm., Growth & Opportunity Project 58 (2013), available at http://goproject.gop.com/rnc_growth_opportunity_book_2013.pdf (noting that, in 2012, “email raised more than twice the percentage of total funds it raised in 2008”).

¹¹ Smith & Duggan, supra, at 2.

¹² See U.S. Gov’t Accountability Office, GAO-13-562-T, U.S. Postal Service: Urgent Action Needed to Achieve Financial Sustainability 2-3 (2013), available at gao.gov/assets/660/653841.pdf. But see Lisa Rein, Federal Government Still Depends Heavily on Snail Mail, Wash. Post, June 5, 2011, http://www.washingtonpost.com/politics/federal-government-still-depends-heavily-on-snail-mail/2011/06/05/AGIA8hJH_story.html (describing increase in government use of first-class mail); Henry Barbour et al., Republican Nat’l Comm., Growth & Opportunity Project 59 (2013) (noting continuing relevance of direct mail in political fundraising as it “raised twice as much as the web” for Republican Party in 2012 presidential election).

1 businesses and consumers have moved to electronic payments over the past decade in lieu of
2 using the mail to pay bills,” with fewer than 50 percent of all bills paid by paper mail in 2010.¹³

3 The public is moving from paper to electronic methods in terms of obtaining government
4 information as well. A recent study showed that 40% of smartphone owners had looked up
5 government services or information from their phones in the last year.¹⁴ At the same time, the
6 federal government has also been transitioning to electronic records management. A 2011
7 Presidential Memorandum directed towards records management reform noted that “[d]ecades of
8 technological advances have transformed agency operations, creating challenges and
9 opportunities for agency records management. Greater reliance on electronic communication
10 and systems has radically increased the volume and diversity of information that agencies must
11 manage.”¹⁵ Indeed, a bipartisan congressional group noted last year that the “acceptance of
12 electronic documents has become a cornerstone of Internet commerce and is vital to our
13 country’s economy” and urged federal government adoption of tools, such as electronic
14 signatures, which “have reduced paper burdens for consumers and streamlined business
15 operations throughout the United States, providing remarkable consumer gains in terms of
16 convenience, ease of use, transaction speed and reduced costs.”¹⁶

¹³ See U.S. Gov’t Accountability Office, GAO-13-562-T, U.S. Postal Service: Urgent Action Needed to Achieve Financial Sustainability 3 (2013) (attributing decrease in paper mail to increase in “competition from electronic alternatives”).

¹⁴ Aaron Smith & Dan Page, Pew Research Ctr., U.S. Smartphone Use in 2015, at 5 (2015), available at pewinternet.org/files/2015/03/PI_Smartphones_0401151.pdf.

¹⁵ Presidential Memorandum, Managing Government Records, 76 FR 75423 (Dec. 1, 2011); see also Office of Mgmt. & Budget and Nat’l Archives and Records Admin., M-12-18, Managing Government Records Directive (2012), available at whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-18.pdf (setting goals and steps for federal agencies to eliminate paper and use electronic recordkeeping).

¹⁶ Julian Hattem, Lawmakers Want More E-signatures, The Hill, July 14, 2014, <http://www.thehill.com/policy/technology/212170-lawmakers-want-more-e-signatures>.

1 In recent years, the Commission has recognized this trend towards electronic records and
2 communication by establishing nonregulatory procedures for the public to electronically submit
3 Freedom of Information Act (“FOIA”) requests, comments on rulemakings, and comments on
4 draft advisory opinions.¹⁷

5 The statutes that the Commission is charged with implementing — the Presidential
6 Election Campaign Fund Act, 26 U.S.C. 9001-13, and the Presidential Primary Matching
7 Payment Account Act, 26 U.S.C. 9031-42 (collectively, the “Funding Acts”), and the Federal
8 Election Campaign Act, 52 U.S.C. 30101-46 (“FECA”) — largely predate this technological
9 evolution, as do many of the Commission’s regulations. For example, these statutes and
10 regulations generally contemplate contributions and disbursements being made only by cash,
11 check, or “draft,” without taking into account electronic transactions, records, or
12 communications. Thus, to implement FECA and the Funding Acts in a manner that accounts for
13 the increased use of and reliance on newer technologies, the Commission is considering updates
14 to its regulations, as described below.

15 C. Proposed General Definitions

16 Many of the Commission’s current regulations do not account for technological
17 developments in the creation, maintenance, and submission of electronic documentation,
18 particularly in the context of electronic transactions. The Commission therefore proposes to
19 revise its regulations to encompass electronic documents and transactions. Specifically, the
20 Commission proposes to add new general definitions to 11 CFR part 100 — for the terms
21 “record,” “written, writing, and a writing,” and “signature and signed” — and to revise the

¹⁷ See, e.g., FEC, Freedom of Information Act, www.fec.gov/press/foia.shtml#search=FOIA (last visited Aug. 3, 2015); FEC, Procedures Regarding Draft Advisory Opinions, www.fec.gov/law/draftaos.shtml (last visited Aug. 3, 2015); FEC, Submit Comments on Ongoing Rulemakings, sers.fec.gov/fosers.

1 existing definition of “file, filed, and filing” at 11 CFR 100.19. The Commission intends each of
2 these definitions to apply to all regulations implementing FECA and the Funding Acts in 11 CFR
3 chapter 1, subchapters A-F (parts 100-300 and 9000-42).¹⁸ These new and revised definitions
4 are designed to be broad enough to encompass both traditional (paper) and electronic documents
5 and flexible enough to remain relevant as new forms of electronic documentation emerge in the
6 future.

7 1. New Definition of “Record” — Proposed 11 CFR 100.34

8 FECA requires each political committee to “keep an account of” its contributions and
9 disbursements and to maintain and preserve certain records.¹⁹ The Funding Acts similarly
10 require that certain records be kept, and furnished to the Commission on request.²⁰ The
11 Commission’s regulations implementing these requirements refer to “record(s)” almost 150
12 times, but few such references that include definitions or specific examples refer to electronic
13 documentation.²¹ The Commission has therefore received numerous requests for guidance
14 regarding how its recordkeeping provisions apply to electronic records.²²

¹⁸ See 11 CFR 9001.1 (applying definitions in part 100 to public finance regulations unless expressly stated otherwise), 9031.1 (same). The proposed part 100 definitions would not apply to the administrative regulations in parts 1-8 (such as those implementing the Privacy Act or FOIA), which generally have their own definition sections because they implement different statutes than the regulations in the remainder of 11 CFR chapter 1.

¹⁹ See 52 U.S.C. 30102(c), (d), (h)(2), (i); see also 52 U.S.C. 30104(i)(8)(A)(ii) (including in definition of “bundled contribution” contributions received and credited through “records,” among other methods).

²⁰ See 26 U.S.C. 9003(a)(2), 9012(d)(1)(B), 9033(a)(2), 9042(c)(1)(B); see also 26 U.S.C. 9009(b) (authorizing Commission to require keeping and submission of records), 9039(b) (same).

²¹ See, e.g., 11 CFR 102.9(b)(2) (requiring records such as canceled checks, receipts, and carbon copies for disbursements over \$200), 102.9(d) (addressing best efforts to obtain “receipts, invoices, and cancelled checks”); but see 11 CFR 102.9(a)(4) (requiring photocopy of each check or written instrument or digital image of each check or written instrument), 104.22(a)(6)(ii)(A) (defining “record” for lobbyist bundling purposes to include electronic records).

²² See, e.g., Advisory Opinion 1995-09 (NewtWatch) (approving proposal to maintain records supporting electronic fund transfers); Advisory Opinion 1993-04 (Christopher Cox Congressional Committee); Advisory Opinion 1994-40 (Alliance for American Leadership); see also FEC, Campaign Guide: Congressional Candidates

1 The Commission now proposes to add a general definition of “record” at 11 CFR 100.34
2 that would expressly include both paper and electronic records. Proposed 11 CFR 100.34 has
3 two components.

4 First, paragraph 100.34(a) would define “record” broadly, as “information that is
5 inscribed on a tangible medium or that is stored in an electronic or other medium from which the
6 information can be retrieved and reviewed in visual or aural form.” The definition draws on
7 several sources that describe a variety of paper and electronic records. These sources include
8 Black’s Law Dictionary,²³ the Federal Rules of Evidence,²⁴ Federal Rules of Civil Procedure,²⁵
9 the Electronic Signatures in Global National Commerce Act (also known as the E-Sign Act),²⁶
10 and the Uniform Electronic Transactions Act (“UETA”).²⁷ The proposed definition uses the

and Committees 76 (2014), [available at www.fec.gov/pdf/candgui.pdf](http://www.fec.gov/pdf/candgui.pdf) (describing recordkeeping for credit card disbursements).

²³ See Black’s Law Dictionary 1387 (9th ed. 2009) (“record” is “[i]nformation that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form” (citing UCC 2A-102(a)(34))).

²⁴ See Fed. R. Evid. 101(b)(4) (“record” includes “a memorandum, report, or data compilation”), 1001(b) (“‘recording’ consists of letters, words, numbers, or their equivalent recorded in any manner”), 1001(d) (“original” recording is “recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, ‘original’ means any printout — or other output readable by sight — if it accurately reflects the information.”).

²⁵ See Fed. R. Civ. P. 34(a)(1)(A) (party may serve discovery of “any designated documents or electronically stored information — including writings, drawings, graphics, charts, photographs, sound recordings, images, and other data or data compilation — stored in any medium from which information can be obtained directly or, if necessary, after translation by the responding party into a reasonably usable form”).

²⁶ See 15 U.S.C. 7006(9) (“record” is “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form”), 7006(4) (“electronic record” is record “created, generated, sent, communicated, received, or stored by electronic means”).

²⁷ See Uniform Electronic Transactions Act 2(7) (1999) (“electronic record” is “a record created, generated, sent, communicated, received, or stored by electronic means”), 2(13) (“record” is “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form”); see also id. at 2(5) (“‘electronic’ means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities”). The UETA is a model law developed by the National Conference of Commissioners on Uniform State Laws. It has been adopted in 47 states and the District of Columbia. See Electronic Transactions Act, Nat’l Conference of Comm’rs on Unif. State Laws www.uniformlaws.org/Act.aspx?title=Electronic%20Transactions%20Act (last visited Aug. 3, 2015).

1 term “information” (as do the Black’s Law Dictionary, E-Sign Act, and UETA definitions of
2 “record”) rather than more specific examples of the forms in which information may be
3 presented (such as memoranda, reports, and other examples used in the Federal Rules of
4 Evidence and Federal Rules of Civil Procedure definitions of “record”). By proposing to use this
5 broader term, the Commission intends the definition to be flexible enough to encompass any new
6 forms of memorializing information that may arise as new documentation technologies emerge.

7 Similarly, the Commission intends the definition of “record” to be flexible with respect to
8 the media in which information may be memorialized. Thus, the Commission proposes to
9 include in the definition information that is “inscribed on a tangible medium” or “stored in an
10 electronic or other medium.” Similar language is used in the Black’s Law Dictionary, E-Sign
11 Act, UETA, and Federal Rules of Civil Procedure definitions of “record.” By including
12 information stored in electronic “or other” media, the Commission intends the definition of
13 “record” to be broad and flexible enough to address any new forms of media on which
14 information may be stored as technology develops.

15 The Commission proposes to require any information stored on “electronic or other”
16 (non-tangible) media to be retrievable and reviewable in visual or aural form. Most of the source
17 definitions noted above similarly require information to be both retrievable and perceivable.
18 The Commission proposes to require information to be retrievable in “visual or aural” form so
19 that the Commission can review the record and, when appropriate, make it available to the
20 public. In essence, therefore, the Commission intends the definition to enable any person to
21 comply with the Commission’s recordkeeping regulations through the use of tangible or
22 intangible media, so long as the information stored in such records can be retrieved and
23 reviewed.

1 The Commission seeks comment on the proposed definition of “record.” Is it too narrow
2 or too broad? Would the proposed definition benefit from providing specific examples of
3 “records”? If so, what examples should the Commission add?

4 Second, proposed 11 CFR 100.34(b) requires any person who provides an electronic (or
5 otherwise non-tangible) record to the Commission to provide the equipment and software needed
6 to retrieve and review the record, upon request by, and at no cost to, the Commission. The
7 proposed regulation specifies that the Commission may request such equipment and software
8 when the Commission is unable to review the record using the Commission’s existing equipment
9 and software. A comparable requirement currently appears in 11 CFR 102.9(a)(4)(ii) for
10 political committees that maintain digital images of checks or written instruments for
11 contributions exceeding \$50 and in 11 CFR 9036.2(b)(1)(vi) for publicly funded candidates
12 submitting certain digital images. If the Commission adopts proposed section 100.34(b), it
13 would remove the separate requirements in 11 CFR 102.9(a)(4)(ii) and 9036.2(b)(1)(vi).²⁸

14 In conjunction with the proposed definition, the Commission proposes to make
15 conforming amendments to a number of regulations.

16 First, the Commission proposes to make conforming changes by replacing references to
17 “copy,” “journal,” “document,” or “documentation” with references to “record” in the following
18 provisions: 11 CFR 100.82(e)(1)(i) (recordkeeping for bank loans), 100.82(e)(2)(ii) (same),
19 100.93(j)(1)-(3) (recordkeeping requirement for travel by aircraft and other conveyances),
20 100.142(e)(1)(i) (recordkeeping for bank loans), 100.142(e)(2)(ii) (same), 102.9(b)(2)(i)(B) and

²⁸ The Commission does not propose to remove or amend general requirements in the Funding Act regulations that political committees and other persons provide documentation (including user guides, technical manuals, formats, and layouts) and personnel, as necessary, to explain the capabilities of software produced to the Commission. See, e.g., 11 CFR 9003.1(b)(4), 9003.6(c), 9033.1(b)(5), 9033.12(c). These more extensive requirements remain necessary in the context of the mandatory audits of committees that receive public funds.

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1 (b)(2)(ii) (recordkeeping for disbursements), 102.9(f) (recordkeeping requirements for
2 designations, redesignations, attributions, and dates of contributions), 102.11 (written journal of
3 disbursements from petty cash funds), 104.10(a)(4) (recordkeeping requirement in support of
4 allocation), 104.10(b)(5) (same), 104.14(b)(4)(iv)-(v) (recordkeeping requirement for loan
5 repayments), 104.17(a)(4) (recordkeeping requirement in support of allocation), 104.17(b)(4)
6 (same), 106.2(a)(1) (same), 106.2(b)(2)(ii) (same), 106.2(b)(2)(v) (same), 110.1(l)(1)
7 (recordkeeping for designations of contributions), 110.1(l)(4)(i) (recordkeeping for date
8 contribution made, redesignation, and reattribution), 110.1(l)(6) (same), 111.4(d)(4)
9 (enforcement complaints), 111.12(a)-(b) (subpoenas duces tecum in the enforcement process),²⁹
10 111.15(c) (agreements regarding production of documents), 111.35(e) (submissions challenging
11 administrative fines), 111.36(b)-(e) (same), 114.8(d)(2) and (3) (trade association solicitation
12 approvals), 9003.1(b)(2)-(5) (conditions for public funding eligibility), 9003.5(b)(1)(ii)(A)-(B),
13 (b)(1)(iii)-(iv), (b)(4), and (c) (recordkeeping for disbursements), 9003.6(c) (production of
14 computer information), 9004.7(b)(5)(iv)-(v) (recordkeeping for payments for accommodations
15 and travel), 9004.9(d)(1)(i) and (e) (determining assets of publicly funded committees),
16 9007.1(b)(1)(iv) and (c)(2) (audits of publicly funded committees), 9033.1(b)(2)-(6) (conditions
17 for public funding eligibility), 9033.2(c) (matching fund submissions), 9033.11(b)(1)(ii)(A)-(B),
18 (b)(1)(iii)-(iv), (b)(4), and (c) (recordkeeping for disbursements), 9033.12(c) (production of
19 computer information), 9034.2(c)(1)(iii) (recordkeeping for attribution of contributions),
20 9034.5(c)(1) and (d) (reporting debts), 9034.7(b)(5)(iv)-(v) (same), 9034.8(b)(4) (joint
21 fundraising recordkeeping), 9035.1(c)(3) (publicly funded committee expenditure limitation

²⁹ The proposed revisions to 11 CFR 111.12(a), 111.12(b), and 111.15(c) would render these provisions consistent with the equivalent provisions of the Federal Rules of Civil Procedure, which were amended in 2006 to explicitly include “electronically stored information” within the scope of material subject to document requests and subpoenas. See Fed. R. Civ. P. 34(a)(1)(A), 45(a)(1)(A)(iii).

1 compliance) 9036.1(b)(3), (4), and (7) (matching fund submissions), 9036.2(b)(1)(vi)-(vii)
2 (same), 9036.3(b), (b)(4), and (d) (same), 9036.4(b)(4) (same), 9036.5(c)(1) (matching fund
3 resubmissions), 9038.1(b)(1)(iv) and (c)(2) (audits of publicly funded committees), 9038.2(b)(3)
4 (matching fund repayments), 9039.2(a)(3) and (b) (continuing review of publicly funded
5 committees), and 9039.3(b)(2)(vi) (subpoenas). The Commission proposes to refer to the
6 defined term “record” in these provisions to increase consistency in the regulatory terminology.
7 Moreover, by changing these provisions’ references from “copy,” “document,” and “journal” to
8 “record,” the Commission intends to avoid the implication that these provisions are intended to
9 refer only to paper materials or to mean something other than what is meant by “record.” The
10 Commission seeks comment on whether these proposed conforming amendments will enhance
11 the clarity of the amended regulations. In addition, are there other Commission regulations that
12 should be revised to incorporate the defined term “record” in lieu of another term?³⁰

13 Second, the Commission proposes to replace the regulatory requirements that a
14 committee receiving a check or other written instrument designated for a specific election must
15 retain “a full-size photocopy of the check or written instrument.” 11 CFR 110.1(l)(1), (4)(ii); see
16 also 11 CFR 9036.1(b)(5), (6) (referring to records that include “full-size photocopy” of
17 contribution checks). Recognizing that such records may reasonably be retained in forms other
18 than “a full-size photocopy,” the Commission proposes to amend 11 CFR 110.1(l)(1) and (4)(ii)
19 and 9036.1(b)(5) and (6) to require maintenance or submission, as appropriate, of a “record” that
20 contains a complete image of that instrument. Are there other Commission regulations that

³⁰ The Commission is also proposing to replace the term “document” in certain regulations with “writing,” as discussed below. The Commission is not proposing to revise the terms “copy,” “documentation,” and “document” when they are used as terms of art or as verbs or when they intentionally refer to paper. See, e.g., 11 CFR 100.134(e)(1)-(3) (“organizational documents” of membership organizations), 102.9(b)(2) (specifying how disbursements “shall be documented”), 4.1(j) (including “paper copy” in definition of “duplication” under FOIA).

1 similarly incorporate unnecessarily narrow record formats and should be expanded to include
2 electronic records?

3 The Commission does not propose to revise the references to “full-size photocopies” in
4 11 CFR 9036.1(b)(3) because that section already provides two procedures for submission of
5 records: one for paper records and another for digital records. The Commission welcomes
6 comment on whether it should simplify section 9036.1(b)(3) to provide only one procedure
7 applicable to all records.

8 Finally, the Commission proposes to make conforming revisions to two provisions that
9 describe the administrative record in public finance matters. The Commission proposes to add
10 “records” to the lists of materials that comprise the administrative record for final determinations
11 in sections 9007.7(a) and 9038.7(a).

12 What additional conforming amendments should the Commission make in conjunction
13 with the proposed definition of “record”? For example, the Commission defines “records” for
14 purposes of the lobbyist bundling rule in 11 CFR 104.22(a)(6)(ii)(A) as “written evidence
15 (including writings, charts, computer files, tables, spreadsheets, databases, or other data or data
16 compilations stored in any medium from which information can be obtained) that the reporting
17 committee or candidate involved attributes to a lobbyist/registrant.” Should the Commission
18 amend this or other provisions in light of the proposed definition of “record”?

19 2. New Definitions of “Writing” and “Written” — Proposed 11 CFR 100.35

20 FECA requires certain reports, statements, and other materials to be “written” or “in
21 writing.”³¹ The Funding Acts have similar “writing” and “written” requirements.³² In the

³¹ See, e.g., 52 U.S.C. 30101(8)(B)(vii)(II) (instrument for loans), 30101(9)(A)(ii) (contract to make expenditure), 30102(e)(1) (designation of committee), 30103(d)(1) (termination statement), 30104(a)(6)(A) (48-hour notice), 30108(a) (advisory opinion requests and advisory opinions), 30109(a)(1) (enforcement complaints),

1 Commission’s regulations, the terms “written” and “writing” (or forms of these words) appear
2 more than 200 times, usually without definition or example.³³ The Commission has, however,
3 interpreted at least one of these regulations to encompass certain categories of electronic
4 documents.³⁴

5 To clarify that “written” material or material “in writing” can be either tangible or
6 electronic, the Commission is proposing to add a new general definition at 11 CFR 100.35.³⁵
7 The proposed definition would essentially replicate Rule 1001(a) of the Federal Rules of
8 Evidence by defining the terms “written,” “in writing,” and “a writing” to mean “consisting of
9 letters, words, numbers, or their equivalent set down in any medium or form, including paper,
10 email or other electronic message, computer file, or digital storage device.”³⁶ In this proposed
11 definition, the Commission intends “writing” and “written” to be broad enough to encompass not
12 only letters and words, but also their equivalent — such as images or graphics (e.g., emojis) used

30109(a)(12)(A) (confidentiality waiver), 30118(b)(4)(B) (semiannual solicitations); see also 52 U.S.C. 30107(a)(1) (Commission authority to require reports), 30124(a) (fraudulent misrepresentation).

³² See, e.g., 26 U.S.C. 9002(1) (authorization of committee), 9003(a) (agreement for eligibility for payment), 9032(1) (authorization of committee), 9032(9) (person authorized to incur expense), 9033(a) (agreement for eligibility for payment), 9034(a) (written instrument as contribution); see also 26 U.S.C. 9009(b) (Commission’s authority to require the keeping and submission of records), 9039(b) (same).

³³ See, e.g., 11 CFR 102.7(c) (treasurer’s authorization), 109.33(a) (assignments), 110.1(b) (redesignation of contribution), 9003.3(a)(1)(i)(C) (designations to GELAC), 9007.2(c) (disputing determinations).

³⁴ See, e.g., Electronic Contributor Redesignations, 76 FR 16233 (Mar. 23, 2011) (noting internet-based redesignation method that Commission found to be “in writing and be signed by the contributor” as required by 11 CFR 110.1(b)(5) and 110.2(b)(5)).

³⁵ Some Commission regulations that require a document to be “in writing” or “written” also require the document to be signed. The Commission is proposing a new definition of “signed,” below.

³⁶ See Fed. R. Evid. 1001(a) (“‘writing’ consists of letters, words, numbers, or their equivalent set down in any form”). The Federal Rules of Evidence separately clarify that “a reference to any kind of written material or any other medium includes electronically stored information.” Fed. R. Evid. 101(b)(6).

1 in lieu of text — that may arise as new forms of electronic writing emerge in the future.³⁷ As in
2 the definition of “record,” the Commission proposes that “writing” may be set down in any
3 medium or form, including electronic. The examples in the proposed definition are drawn from
4 examples in the Black’s Law Dictionary definition of “writing” and include those media that the
5 Commission believes are most likely to be used by political committees. However, the examples
6 are intended to be illustrative and not an exhaustive list.

7 The Commission seeks comment on the proposed definition. Is the definition broad
8 enough to encompass writings in various media, while also specific enough to provide
9 meaningful guidance? Is any part of the definition unnecessary or potentially problematic? Are
10 the examples of “medi[a] and form[s]” helpful? Would the proposed definition benefit from
11 different or additional examples? Should the Commission specifically require that a writing be
12 reviewable³⁸ and/or reproducible,³⁹ or would that requirement be adequately encompassed by the
13 proposed definition of “record,” as discussed above?

14 In conjunction with the proposed definition, the Commission proposes to make
15 conforming changes to a number of regulations, as described below.

16 First, the Commission proposes to amend three regulations that refer to “electronic mail”
17 as a “written method” of notification by which a political committee may notify a contributor

³⁷ See Elahe Izadi, The Word of the Year Is Not Actually a Word. It’s this Emoji: [heart emoji], Wash. Post, Dec. 29, 2014, <http://www.washingtonpost.com/news/the-intersect/wp/2014/12/29/the-word-of-the-year-is-not-actually-a-word-its-this-emoji> (noting that 2014’s annual survey resulted in graphic symbol as most frequently used English “word” on internet).

³⁸ See Black’s Law Dictionary 1748 (9th ed. 2009) (defining “writing” as any “intentional recording of words that may be viewed or heard with or without mechanical aids. This includes hard-copy documents, electronic documents on computer media, audio and videotapes, e-mails, and any other media on which words can be recorded.”).

³⁹ See 15 U.S.C. 7001(e) (providing that if statute or regulation requires certain records to “be in writing, the legal effect, validity, or enforceability of an electronic record of such . . . record may be denied if such electronic record is not in a form that is capable of being retained and accurately reproduced for later reference”).

1 that the committee has redesignated or reattributed a contribution. See 11 CFR
2 110.1(b)(5)(ii)(B)(6) (notification of redesignation), 110.1(b)(5)(ii)(C)(7) (same),
3 110.1(k)(3)(ii)(B)(3) (notification of reattribution). These references to “electronic mail” will be
4 redundant if the Commission adopts the proposed new definition of “written.” Furthermore, the
5 continued inclusion of these references might cause confusion regarding whether other
6 Commission regulations that address “written” material without specifically mentioning
7 “electronic mail” implicitly exclude e-mail. To avoid such redundancy and confusion, the
8 Commission proposes to remove these three references to electronic mail.

9 Second, the Commission proposes to make conforming changes regarding notifications,
10 reports, and other communications that, under existing regulations, must be made by “letter.” In
11 light of the proposed broad definition of “writing,” and to avoid an implication that the
12 communications described in those provisions must be on paper, the Commission proposes to
13 replace each reference to “letter” with “writing” in the following provisions: 11 CFR 100.3(a)(3)
14 (candidate disavowal), 110.6(c)(1)(v) (conduit reporting), 111.9(a)-(b) (Commission notification
15 of reason to believe finding), 111.17(a)-(b) (Commission notification of probable cause finding),
16 111.18(d) (respondent notification of desire to negotiate conciliation), 111.37(a)-(b)
17 (Commission notification of administrative fine determination), 111.40(a) (same), 116.8(b)
18 (creditor notification of intent to forgive debt), 9003.1(a)(1) (candidate agreement to comply
19 with public funding conditions), 9032.2(d) (candidate disavowal), 9033.1(b)(8) (submission of
20 information changes by publicly funded candidates), and 9033.5(a)(2) (publicly funded candidate
21 notice of inactivity).

22 Similarly, the Commission proposes to revise several references to “letters” or “mailings”
23 by replacing them with references to the type of information contained therein, such as

1 “certification,” “report,” “notice,” or “agreement.” For example, 11 CFR 9003.2(d) currently
2 states: “Major party candidates shall submit the certifications required under 11 CFR 9003.2 in a
3 letter which shall be signed and submitted within 14 days after receiving the party’s nomination
4 for election,” and the provision makes several additional references to “such letter.” The
5 Commission proposes to revise section 9003.2(d) to read: “Major party candidates shall sign and
6 submit the certifications required under 11 CFR 9003.2 within 14 days after receiving the party’s
7 nomination for election,” and to replace further references to “such letter” with the phrase “such
8 certification.” The Commission proposes to similarly replace each reference to “letter” in the
9 following provisions: 11 CFR 110.6(c)(1)(ii) (conduit reporting), 111.6(a) (response to
10 complaint in enforcement action), 111.23(a)-(b) (respondent notification of legal representation),
11 114.8 (trade association’s solicitation), 116.8(b) (creditor notification of intent to forgive debt),
12 200.3(a)(2) (Commission solicitation of comments from Commissioner of Internal Revenue on
13 rulemaking petition), 200.3(a)(3) (Commission notification to rulemaking petitioner), 200.4(b)
14 (same), 201.3(b)(1) (candidate submissions under public funding rules), 201.3(b)(2)(i)
15 (Commission notifications under public funding rules), 9003.1(a)(2) (candidate agreement to
16 comply with public funding conditions), 9033.1(a)(1) (candidate agreement to comply with
17 public funding conditions), and 9033.2(a)(1) (publicly funded candidate certification).

18 The Commission is also proposing to revise some uses of “letter” in regulations to which
19 the proposed definition of “writing” would not apply. See supra note 18. Specifically, the
20 Commission proposes the following revisions to its public disclosure and Rehabilitation Act
21 regulations: (1) replace “Letter requests” with “Requests” in 11 CFR 5.4(a)(5) (describing types
22 of public disclosure records); (2) replace the reference to “a letter containing” certain
23 Rehabilitation Act notifications with a requirement for the notifications to be “in writing.” 11

1 CFR 6.170(g); and (3) conform section 6.170(h) to the forgoing change by replacing that
2 section’s reference to “the letter” required by section 6.170(g) with “the notification.”

3 Third, the Commission is proposing to replace the terms “written document” and “written
4 documentation” with “writing” in 11 CFR 100.29(b)(6)(ii)(A) and 9034.2(c)(1)(i).

5 Finally, the Commission proposes conforming changes to account for the fact that the
6 new general definition of “written” may create confusion when applied to the use of that term in
7 11 CFR 300.64(c)(3). Section 300.64(c)(3) provides that certain “written” material must satisfy
8 the disclaimer requirements of 11 CFR 110.11(c)(2). Section 110.11, however, sets forth
9 requirements such as font size and display type — requirements that, both on their face and
10 under the explicit terms of the regulation, apply only to “printed” material.⁴⁰ See 11 CFR
11 110.11(c)(2). Thus, to avoid suggesting that the proposed new definition of “written” would
12 alter the substantive application of section 300.64, the Commission proposes to conform that
13 section to section 110.11 by replacing the word “written” with “printed” in paragraphs (ii) and
14 (iii) of section 300.64(c)(3) and removing the word “written” from paragraph (v) of section
15 300.64(c)(3).

16 The Commission seeks comment on the conforming changes proposed above.⁴¹ Should
17 the Commission make additional conforming amendments if it adopts the new definition?

⁴⁰ Most issues concerning the disclaimer requirements for electronic communications, such as the treatment of electronic materials as “printed,” are outside the scope of this rulemaking. They may be addressed in a separate rulemaking. See Internet Communication Disclaimers, 76 FR 63567 (Oct. 13, 2011); see also footnote 106, below.

⁴¹ The Commission is not proposing to make conforming changes to the regulations regarding publicly funded nominating conventions, 11 CFR part 9008, because these regulations may be the subject of a separate rulemaking. See Press Release, FEC Issues Interim Reporting Guidance for National Party Committee Accounts, (Feb. 13, 2015), http://www.fec.gov/press/press2015/news_releases/20150213release.shtml; see also Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, 128 Stat. 2130, 2772 (2014) (amending FECA with respect to national party convention funding); Gabriella Miller Kids First Research Act, Pub. L. No. 113-94, 128 Stat. 1085 (2014) (amending Funding Acts with respect to national party convention funding).

1 The Commission also seeks comment on whether any existing regulatory references to
2 “written,” “in writing,” or “a writing” should be excluded from the proposed new definition. For
3 example, several Commission regulations use the term “written instrument” to mean a check,
4 money order, or negotiable instrument. The Commission believes that “written instrument” is
5 generally understood to be a term of art, such that it would not be affected by a new definition of
6 “written,” but should the new definition of “written” nonetheless expressly exclude the term
7 “written instrument”?⁴² Are there other uses of “written” in the Commission’s regulations that
8 should be excluded or defined separately from the proposed new general definition?

9 3. New Definition of “Signature” and “Electronic Signature” — Proposed 11
10 CFR 100.36

11 FECA and the Funding Acts require certain documents to be signed,⁴³ sworn, notarized,
12 submitted under oath, or certified under penalty of perjury.⁴⁴ In Commission regulations, the
13 terms “sign,” “signed,” and “signature” (and variants thereof) appear more than 50 times. Only
14 some of these references provide for electronic signatures,⁴⁵ although the Commission has
15 interpreted at least one of the regulations that does not so provide to nonetheless allow certain

⁴² See 11 CFR 102.9(a)(4)(i)-(ii), 104.8(d)(1), 110.1(k)(3)(ii)(B)(1), 110.1(l)(1), 110.1(l)(4)(ii), 110.6(c)(1)(v), 110.20(a)(5)(iii), 9034.2(a)(1), 9034.2(a)(4), 9034.2(b), 9034.2(c), 9034.3(c), 9034.9(c)(7)(iv), 9036.1(b)(3), 9036.2(b)(1)(vi), 9036.3(b)(1)-(3), 9036.3(c)(3), 9036.5(c)(1).

⁴³ See 52 U.S.C. 30109(a)(1) (enforcement complaints), 30109(a)(4)(B)(ii) (conciliation agreements); see also 52 U.S.C. 30104(a)(1) (reports), 30104(a)(11)(C) (requiring Commission to provide method other than signature for verification of electronically filed reports), 30104(d)(3) (same).

⁴⁴ See 52 U.S.C. 30104(b)(6)(B)(iii) (independent expenditure reports), 30104(c)(2)(B) (same), 30104(f)(2) (electioneering communication reports), 52 U.S.C 30107(a)(1) (reports and answers), 30109(a)(1) (enforcement complaints), 26 U.S.C. 9003(b)-(c) (payment eligibility), 9004(d) (personal fund expenditures); see also 52 U.S.C. 30104(a)(11)(C) (requiring Commission to provide a method for perjury certifications for electronically filed reports), 30104(d)(3) (same).

⁴⁵ See, e.g., 11 CFR 104.18(g) (providing for electronic signatures for reports), 111.4(b)(2) (complaints), 111.23(a) (designation of counsel), 300.37(d) (certifications by certain tax-exempt organizations), 9034.2(c) (allowing for alternative signatures for contributors over the internet).

1 electronic signatures.⁴⁶ Similarly, only some of the Commission regulations requiring
2 certification under penalty of perjury provide for electronic certifications.⁴⁷

3 To clarify that the regulatory signature requirements may generally be met electronically,
4 the Commission is proposing to add a general definition of “signature” at 11 CFR 100.36. The
5 proposed definition contains three paragraphs.

6 Proposed paragraph (a) defines “signature” as “an individual’s name or mark on a writing
7 or record that identifies the individual and authenticates the writing or record.” This definition
8 draws on legal and other dictionary definitions of “signature.”⁴⁸ It also incorporates the terms
9 “writing” and “record,” as opposed to the source dictionaries’ use of the term “document,” to be
10 consistent with the new definitions of those terms in proposed 11 CFR 100.34 and 11 CFR
11 100.35, discussed above. Unlike at least one source definition,⁴⁹ the definition of “signature”
12 proposed here does not incorporate a subjective “intent” element, *i.e.*, a requirement that a
13 signature be affixed by the signer with a certain intention; rather, the Commission proposes an

⁴⁶ See, e.g., *Electronic Contributor Redesignations*, 76 FR 16233; see also *Advisory Opinion 2013-12* (Service Employees International Union COPE) at 3-4 (discussing Commission’s history of approving “authorizations in a form other than the traditional written signature, where the use of technology would not compromise the intent of the [FECA] or Commission regulations”).

⁴⁷ Compare 11 CFR 104.4(d)(2) (electronic certification under penalty of perjury for reporting), 104.18(g) (same), and 109.10(e)(2)(ii) (same), with 11 CFR 111.4(b)-(c) (notarization requirement for complaints), and 111.11 (sworn answers). See also 11 CFR 100.93(a)(3)(iv)(A) (aircraft operator certificated by Federal Aviation Administration or foreign authority), 100.93(g)(3) (certification from aircraft service provider), 102.2(a)(3) (certification by committee of multicandidate committee criteria), 104.3(b)(3)(vii)(B) (committee’s certification, under penalty of perjury, in independent expenditure report), 104.3(d)(1)(v) (certification from lending institution concerning loans to political committee), 300.11(d) (signed written certification by 501(c) organization), 300.37(d) (same).

⁴⁸ See *Black’s Law Dictionary* 1507 (9th ed. 2009) (defining “signature” as any “name, mark, or writing used with the intention of authenticating a document” (citing U.C.C. 1-201(37) and 3-401(b) and *Restatement (Second) of Contracts* 134 (1979))); *Signature Definition*, *Oxford English Dictionary Online*, <http://www.oed.com/view/entry/179546> (subscription required) (last visited Aug. 27, 2014) (“A person’s name written (esp. in a distinctive way) so as to authenticate a document, authorize a transaction, or identify oneself as the writer or sender of a letter. Also: a distinctive mark or cross serving this purpose.”); *Random House Dictionary of the English Language, Unabridged* 1779 (2nd ed. 1987) (defining “signature” as “a person’s name, or a mark representing it, as signed personally or by a deputy, as in subscribing a letter or other document”).

⁴⁹ See *Black’s Law Dictionary* 1507 (9th ed. 2009).

1 objective definition with which compliance can be initially determined on the face of the signed
2 writing or record. The Commission seeks comment on this proposed definition of “signature.”

3 Proposed paragraph 100.36(a) also provides that, unless otherwise specified, the
4 definition of “signature” includes an “electronic signature.” Paragraph (b) of proposed 11 CFR
5 100.36 in turn defines an “electronic signature” as “an electronic word, image, symbol, or
6 process that an individual attaches to or associates with a writing or record to identify the
7 individual and authenticate the writing or record.” This definition is drawn from several sources,
8 including Black’s Law Dictionary,⁵⁰ the E-Sign Act,⁵¹ UETA,⁵² and the Commission’s
9 interpretive rule concerning electronic redesignations of contributions.⁵³ Proposed paragraph
10 100.36(b) follows all of the source definitions of “electronic signature” in using the terms
11 “symbol” and “process,” as well as in requiring that the electronic signature be attached to or
12 associated with a writing or record. The Commission also proposes to include “word” and
13 “image” as methods of electronic signature, based on the examples in Black’s Law Dictionary, to
14 make clear that a writing or record can be signed by these means (such as by inserting a digital
15 image of a person’s handwritten signature). And as with proposed paragraph 100.36(a),
16 proposed paragraph 100.36(b) incorporates the terms “writing” and “record” to be consistent
17 with the new definitions in proposed 11 CFR 100.34 and 11 CFR 100.35. The Commission thus

⁵⁰ This dictionary defines an “electronic signature” as an “electronic symbol, sound, or process that is either attached to or logically associated with a document (such as a contract or other record) and executed or adopted by a person with the intent to sign the document.” Black’s Law Dictionary 1507 (9th ed. 2009). The dictionary provides as examples “a typed name at the end of an email, a digital image of a handwritten signature, and the click of an ‘I accept’ button on an e-commerce site.” *Id.* at 1508.

⁵¹ See 15 U.S.C. 7006(5) (defining “electronic signature” as “an electronic sound, symbol, or process, attached to or logically associated with a ... record and executed or adopted by a person with the intent to sign the record”).

⁵² See UETA 2(8) (defining “electronic signature” as “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record”).

⁵³ See Electronic Contributor Redesignations, 76 FR 16233.

1 intends the proposed definition to be flexible enough to encompass forms that electronic
2 signatures may take as new technologies emerge.

3 The proposed definition intentionally differs from the source definitions in certain
4 respects. For example, the proposed definition does not include “sound” as a form of electronic
5 signature because the Commission’s current and anticipated reporting technologies would not
6 enable it to receive and make public audio signatures. Further, the Commission does not propose
7 to distinguish between an “electronic signature” and a “digital signature.” Black’s Law
8 Dictionary defines the latter as having a heightened level of security, integrity, and authenticity
9 compared to an electronic signature,⁵⁴ but because the Commission utilizes other methods to
10 ensure a heightened level of authenticity when required (such as notarization requirements, as
11 discussed below), the Commission does not believe that the proposed definition of “signature”
12 should differentiate between digital and electronic signatures.

13 Proposed paragraph (b) lists as examples of electronic signatures “a digital image of a
14 handwritten signature” and “a secure, digital code attached to an electronically transmitted
15 message that uniquely identifies and authenticates the sender.” These examples are drawn from
16 the definition of “digital signature” and examples of “electronic signature” in Black’s Law
17 Dictionary; the Commission believes them to be the forms of electronic signature most likely to
18 be used by political committees. However, the examples are intended to be illustrative only and
19 not an exhaustive list. Are these examples helpful? Should other examples be included in the
20 regulation?

⁵⁴ See Black’s Law Dictionary at 1507-08 (9th ed. 2009) (defining “digital signature” as “secure, digital code attached to an electronically transmitted message that uniquely identifies and authenticates the sender” and stating that “electronic signature does not suggest or require the use of encryption, authentication, or identification measures”).

1 As noted above, the proposed regulation would provide that electronic signatures are
2 valid signatures “unless otherwise specified.” This language is intended to provide the
3 Commission with flexibility to require more specific forms of electronic signatures, or even to
4 prohibit electronic signatures, in certain circumstances. The Commission believes that
5 preserving such flexibility is important because, as new technologies develop, some forms of
6 electronic signatures may arise that are unreliable or otherwise not suitable for authenticating
7 records. Are there Commission regulations for which the Commission should now require more
8 specific forms of electronic signature in order to safeguard the integrity and authenticity of the
9 signature?

10 In light of the proposed new definition of “signature,” the Commission also proposes
11 conforming changes to regulations that currently have more specific signature requirements. For
12 example, 11 CFR 104.4(d) and 109.10(e)(2) currently specify that an independent expenditure
13 report must be verified by one of two methods: by “handwritten signature” on reports filed on
14 paper, or by “typing the treasurer’s name” on reports filed by electronic mail. The Commission
15 proposes to revise these provisions to allow electronically filed independent expenditure reports
16 to be verified by “electronic signature” (which might include, but would not be limited to, typing
17 the treasurer’s name on the reports). The Commission also proposes to revise the electronic
18 signature requirement at 11 CFR 9034.2(c), which defines “signature” for matchable presidential
19 primary election payments made by credit or debit card, and to make other changes to that
20 section as described further below. See infra Section (E)(3).

21 Paragraph (c) of proposed 11 CFR 100.36 provides that a “writing or record may be
22 sworn, made under oath, or otherwise certified or verified under penalty of perjury by electronic
23 signature.” This proposal tracks the corresponding provision of the E-Sign Act, which provides

1 that a legal requirement for a signature to be “acknowledged, verified, or made under oath” is
2 “satisfied if the electronic signature of the person authorized to perform those acts . . . is attached
3 to or logically associated with the signature or record.” 15 U.S.C. 7001(g).⁵⁵ The Commission
4 seeks comment on whether this proposal provides sufficient safeguards of integrity and
5 authenticity for material that must be sworn or otherwise verified. Should the Commission
6 require additional safeguards? For example, in a recent interpretive rule, the Commission noted
7 that a political committee could check a contributor’s electronic authorization against existing
8 committee records to assure “the contributor’s identity and intent comparable to that of a written
9 signature.”⁵⁶ Should all electronic oaths and certifications require some form of external
10 verifiability (such as by reference to existing committee records as contemplated in the
11 interpretive rule)? If so, how?

12 Finally, proposed paragraph (c) also states that “[a] writing or record may be notarized
13 electronically pursuant to applicable State law.” A number of states currently allow for
14 electronic notarization.⁵⁷ Is there any reason why the Commission should not accept documents
15 notarized electronically pursuant to state law?

⁵⁵ See also UETA sec. 11 (providing that notarization, acknowledgment, verification, or oath requirement is “satisfied if the electronic signature of the person authorized to perform those acts . . . is attached to or logically associated with the signature or record”).

⁵⁶ See Electronic Contributor Redesignations, 76 FR at 16233.

⁵⁷ The National Association of Secretaries of State issued a study in 2011 that examined electronic notarization as used in 16 states. See Nat’l Assoc. of Secs. of State, Issues and Trends in State Notary Regulation: NASS Report on State Notarization Policies and Practice 10-11 (2011); see also E-Notarization in the U.S., Notary Public Administrators (2014), http://www.npa-section.com/images/eNotarization_Map_6-14.pdf (showing 22 states offering e-notarization or with e-notarization law in 2014); Lisa Prevost, The E-Notary Public Is Slow to Catch On, N.Y. Times, May 22, 2015, <http://www.nytimes.com/2015/05/24/realestate/the-e-notary-public-is-slow-to-catch-on.html> (discussing remote electronic notarization).

1 4. Revised Definition of “File, Filed, or Filing” — Proposed 11 CFR 100.19(g)

2 The Commission proposes to revise the definition of “file, filed, or filing” at 11 CFR
3 100.19 so that interested parties can more easily communicate electronically with the
4 Commission. The Commission also proposes to make conforming amendments throughout 11
5 CFR chapter 1.

6 Section 100.19 currently defines “file, filed or filing” to include certain forms of
7 electronic submission, but only in the context of documents that must be filed with the
8 Commission or the Secretary of the Senate under 11 CFR parts 101, 102, 104, 105, 107, 108, and
9 109. As such, the current rule addresses the filing of reports and statements only regarding
10 independent expenditures, electioneering communications, and the organization, contributions,
11 and disbursements of political committees. But, as described in more detail below, the
12 Commission’s regulations also require or provide for the submission of numerous other
13 documents to the Commission. Many of these current regulations regarding sending documents
14 to the Commission specifically include the Commission’s mailing address (999 E Street, NW.,
15 Washington, DC 20463).⁵⁸ As such, the regulations suggest that the submissions must be made
16 physically (such as by mail or hand-delivery), rather than electronically.

17 To provide the Commission with greater flexibility to accept documents electronically,
18 the Commission proposes to add new paragraph (g) to 11 CFR 100.19. Under new paragraph
19 (g), a document other than those already covered by paragraphs (a) through (f) may be filed with
20 the Commission “in person or by mail, including priority mail or express mail, or overnight
21 delivery service, [at the Commission’s street address], or by any alternative means, including
22 electronic, that the Commission may prescribe.” The Commission intends to use this proposed

⁵⁸ See, e.g., 11 CFR 1.3(b) (Privacy Act requests), 111.4(a) (complaints), 111.15(a) (motions to quash or modify subpoena), 112.1(e) (advisory opinion requests), 112.3(d) (comments on advisory opinion requests).

1 change to adopt such procedures for receiving electronic submissions — such as through online
2 forms⁵⁹ or email⁶⁰ — as the Commission determines to be appropriate for the various categories
3 of affected documents.

4 The Commission also proposes to revise the introductory paragraph of 11 CFR 100.19 to
5 explicitly note the scope of new paragraph (g). This proposed change is not intended to have any
6 effect on the existing rules with respect to documents governed by paragraphs (a) through (f).

7 Similarly, the Commission proposes to make conforming amendments by replacing the
8 Commission’s street address in a number of regulations that refer to submissions to the
9 Commission — or to a particular Commission officer, such as the Chief FOIA Officer — with
10 references to “filing” and section 100.19(g), as appropriate, and by removing the Commission’s
11 street address from the definition of “Commission.”⁶¹ These regulations are 11 CFR 1.3(b)
12 (Privacy Act requests), 1.4(a) (same), 2.2(a) (Sunshine Act), 4.5(a)(4)(i) (FOIA requests),
13 4.5(a)(4)(iv) (same), 4.7(b)(1) (same), 4.8(c) (FOIA appeals), 11 CFR 5.5(a) (Public Disclosure
14 records requests), 5.5(c) (public disclosure requests via FOIA), 6.103(b) (Rehabilitation Act),
15 6.170(d)(3) (Rehabilitation Act complaints), 6.170(i) (Rehabilitation Act appeals), 7.2(a)
16 (standards of conduct), 100.9 (definition of “Commission”), 102.2(a)(1) (statements of
17 organization), 111.4(a) (enforcement complaints), 111.15(a) (motions to quash or modify
18 subpoena), 111.16(c) (probable cause briefs), 112.1(e) (advisory opinion requests), 112.3(d)

⁵⁹ See, e.g., FEC, Searchable Electronic Rulemaking System – Basic Search, sers.fec.gov/fosers (web portal for commenting on rulemakings).

⁶⁰ See, e.g., FEC, Procedures Regarding Draft Advisory Opinions, www.fec.gov/law/draftaos.shtml (last visited Aug. 14, 2015) (establishing email address for comments on draft advisory opinions).

⁶¹ Because the definitions in part 100 of the Commission’s regulations generally do not apply to parts 1-8 of the regulations, the proposed references to “filing” in parts 1-8 would explicitly incorporate by reference new 11 CFR 100.19(g).

1 (advisory opinion comments), 200.2(b)(5) (petitions for rulemaking), 9002.3 (definition of
2 “Commission”), and 9032.3 (same).

3 For the same reasons, the Commission also proposes to amend other regulatory
4 requirements relating to communications by mail:

- 5 • Sections 4.5(a)(4)(i) and 4.8(b) currently require that certain information be
6 included “on the envelope” in which a FOIA request or appeal is sent to the
7 Commission. As revised, these regulations would state that such information
8 must be clearly indicated on the “envelope or subject line, or in a similarly
9 prominent location” of the communication.
- 10 • Section 112.4(g) currently provides that an advisory opinion must be “sent by
11 mail, or personally delivered” by the Commission to the person who requested it.
12 As revised, the provision would require only that the advisory opinion “be
13 provided” by the Commission to the requestor, so as to encompass electronic
14 transmission of the advisory opinion.
- 15 • Section 102.6(c)(2) currently provides that a solicitation of contributions to a
16 separate segregated fund may be included “in” a bill for membership dues.
17 Because such bills are now sometimes delivered electronically, rather than in
18 paper form, the Commission proposes to change “in” to “with.” The substantive
19 requirements for soliciting contributions to a separate segregated fund would not
20 change.⁶²

⁶² The twice-annual solicitation of employees outside of the restricted class may be conducted only by mail sent to the employee’s residence. *See* 52 U.S.C. 30118(b)(4)(B); 11 CFR 114.6(c). Thus, the proposed change to 11 CFR 102.6(c)(2), which would allow for solicitations by means other than mail, would not apply to these twice-yearly solicitations.

- 1 • In section 114.1(g), which provides a non-exhaustive list of the manner in which a
2 solicitation may be made, the Commission proposes to add “emails” to the
3 existing list of “mailings, oral requests . . . , and hand distribution of pamphlets”
4 to recognize that solicitations may be made electronically.⁶³
- 5 • In section 116.9(a)(2), which describes what constitutes a political committee’s
6 reasonable diligence in attempting to locate a creditor, the Commission proposes
7 to add email as a valid means of attempting to contact the creditor.
- 8 • Sections 9003.1(b)(7) and 9033.1(b)(8) currently require submission of the “name
9 and mailing address” of the person entitled to receive public fund payments on
10 behalf of a candidate. The Commission proposes to require the person’s email
11 address, as well.

12 To allow for electronic filing, notice, and service of documents and records in the
13 Commission’s enforcement process, the Commission proposes several revisions to part 111 of its
14 regulations. First, the Commission proposes to remove or limit requirements to file multiple
15 copies of documents where multiple copies are no longer necessary. In 11 CFR 111.4(a), the
16 Commission proposes to clarify that the requirement for a complainant to file three copies of a
17 complaint applies to non-electronic filings only. In 11 CFR 111.15(a) and 111.16(c), the
18 Commission proposes to delete the provisions that state that a respondent “should . . . if
19 possible” file multiple copies of a motion or brief.

20 Second, the Commission proposes to revise the following regulations that currently refer
21 to “enclos[ing]” a copy of a document: 11 CFR 111.5(a) (notification to respondent of
22 complaint), 111.5(b) (same), and 111.16(b) (notification to respondent of probable cause

⁶³ The Commission does not propose to add an electronic reference to the non-exhaustive list at 11 CFR 114.1(f) of the manner in which a solicited contribution may be received because the list already includes payroll deduction, which may be accomplished electronically.

1 recommendation). As revised, the regulations would provide that the Commission shall
2 “provide” a copy of the relevant document.

3 Third, the Commission proposes to revise 11 CFR 111.13(c) and (d), which govern the
4 service of subpoenas, orders, and notifications, to add explicit electronic service options. The
5 regulations currently allow for service by a number of means, including by mail, in person, and
6 “by any other method whereby actual notice is given.” The Commission proposes to revise this
7 last clause to read “by any other method, including electronically, whereby actual notice is
8 given.”⁶⁴

9 Finally, at 11 CFR 111.23(a)(1), the Commission proposes to add “email address” to the
10 list of information about respondent’s counsel that must be provided to the Commission.

11 The Commission intends all of these proposed revisions to simplify and modernize the
12 process by which it interacts with respondents and complainants during the enforcement process
13 by providing options for electronic communications. Would these proposed revisions increase
14 efficiency as intended? Would they create any additional burdens?

15 What other regulations would be implicated by the proposed revision to the definition of
16 “file, filed or filing” at 11 CFR 100.19? Should the Commission consider revising additional
17 regulations to provide explicitly for electronic communications or for “filing” pursuant to the
18 proposed definition?

19 D. Electronic Contributions

20 The Commission is proposing to revise its regulations to address electronic contributions.
21 These revisions fall into three general categories that correspond to three stages in the electronic

⁶⁴ The Commission does not propose to make any corresponding changes to 11 CFR 111.2(c) — which adds three days to each service period under part 111 for “any paper” served “by mail” — because electronic submissions are essentially immediate and therefore do not require extensions to account for delivery time.

1 flow of funds from a contributor to a political committee: (1) when the contributor authorizes
2 the transaction; (2) when the entity processing the payment (the “payment processor”)⁶⁵ transfers
3 the contribution to the recipient political committee; and (3) when the recipient political
4 committee deposits the funds into its campaign depository. The Commission seeks comment on
5 the proposed changes, especially in light of the standards and practices that vendors and payment
6 processors use to process payments made by check, credit card, debit card, prepaid card, and
7 other payment methods. The Commission is also seeking comment addressing the proposed
8 rules in light of the methods by which vendors and payment processors verify a payor’s identity,
9 attribute payments, and collect, maintain, and transmit transaction records.⁶⁶ The Commission is
10 particularly interested in the perspectives of operators and users of established and emerging
11 electronic payment platforms — such as PayPal, Venmo, BitPay, Square, and other electronic
12 wallet, swipe P2P, mobile app, and social media payment platforms — as to the operation of
13 these proposed rules on those platforms.⁶⁷ The Commission also seeks comment on the
14 proposed rules in light of how these practices and standards might change as new technologies
15 emerge.

⁶⁵ Payment processors include, for example, such entities as First Data, PayPal, BitPay, m-Qube, and other commercial entities that process and transmit traditional, online, or text-message payments in the ordinary course of business.

⁶⁶ See, e.g., Online Person-to-person (P2P), Account-to-Account Payments and Electronic Cash, Fed. Fin. Inst. Examination Council, [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 Aug. 14, 2015).

⁶⁷ See, e.g., Vinu Goel, Facebook Announces a Payments Feature for Its Messenger App, N.Y. Times, Mar. 17, 2015, nytimes.com/2015/03/18/technology/facebook-announces-a-payments-feature-for-its-messenger-app.html; Mike Isaac, As Apple Pay Arrives, Witnessing the Next Step in Money, Maybe, N.Y. Times, Oct. 20, 2014, nytimes.com/2014/10/21/technology/as-apple-pay-arrives-witnessing-the-next-step-in-money-maybe.html; Vinu Goel, Twitter Begins Testing a “Buy” Button for Instant Purchases by Its Users, N.Y. Times, Sept. 8, 2014, nytimes.com/2014/09/09/technology/twitter-begins-testing-buy-button-for-posts.html; Heather Kelly, Twitter and Amex to Let You Pay with a Hashtag, CNN (Feb. 12, 2013), cnn.com/2013/02/11/tech/social-media/twitter-hashtag-purchases; see also chirpify.com; but see Brian X. Chen, Few Consumers Are Buying Promise of Mobile Wallets, N.Y. Times, Apr. 27, 2014, nytimes.com/2014/04/28/technology/few-consumers-are-buying-promise-of-mobile-wallets.html (describing growth of mobile payment platforms as well as obstacles to wide public use).

1 above-referenced advisory opinions by providing that a contribution made in an electronic
2 transaction “is considered to be made when the contributor authorizes the transaction.” Does this
3 description provide sufficient guidance? Should the regulations provide examples of specific
4 types of “electronic transactions,” such as the physical presentation of a debit card; the entry of a
5 credit or prepaid card number in an online form, in person, or by telephone; the transfer of a
6 bitcoin; or the sending of a text message? Are such examples necessary to distinguish between
7 electronic and non-electronic transactions? Would examples tied to specific technologies be
8 limiting or risk becoming rapidly obsolete? The Commission is not proposing to specify how the
9 new regulation would apply to electronic payments made long after they are authorized, such as
10 those pursuant to recurring monthly payment authorizations.⁶⁹ Should the revised regulation
11 address this scenario?

12 Like the existing regulations regarding when a contribution is “made,” the regulations
13 concerning when a contribution is “received” focus on possession. The regulations provide that
14 the “date of receipt” of a contribution is the date a person “obtains possession of the
15 contribution.” 11 CFR 102.8(a); see also 11 CFR 102.8(b)(2) (same description of “receipt”).⁷⁰

16 In the context of credit card contributions, the Commission has stated that a contribution
17 is received when the contributor’s authorization to charge the credit card is received. “Inasmuch
18 as such authorizations may be presented to [the recipient’s] bank in order to credit [the

⁶⁹ For example, Advisory Opinion 1991-01 (Deloitte & Touche PAC) concerned a political committee’s proposal to obtain contributors’ credit card authorizations several months before charging their credit cards for contributions. The Commission concluded that, “[i]n view of the contributor’s ability to revoke the authorization” during this time period, each contributor would be deemed to relinquish control over a contribution, and thus to make the contribution, when the credit card was charged, rather than when the authorization occurred. Advisory Opinion 1991-01 (Deloitte & Touche PAC) at 4.

⁷⁰ See also 11 CFR 102.17(c)(3)(iii) (providing that political committee receives contribution through joint fundraising committee on date contribution is received by committee’s joint fundraising representative), 9034.8(c)(4)(iii) (same).

1 recipient's] account, the receipt of such an authorization is the equivalent of the receipt of a
2 check that may be deposited and, thus, the date this occurs is the date upon which [the recipient]
3 obtains possession of the contribution.” Advisory Opinion 1990-04 (American Veterinary
4 Medical Association PAC) at 2-3.⁷¹ Because a commercial payment processor or the recipient
5 political committee may receive the contributor's authorization before obtaining actual
6 possession of the contributor's funds, the Commission proposes to revise 11 CFR 102.8(a) and
7 (b)(2) to explicitly provide that the date of receipt is the date that a person either obtains
8 possession of a contribution “or, for a contribution made in an electronic transaction in which the
9 receipt of authorization precedes the receipt of funds, obtains the contributor's authorization of
10 the transaction.” Does this proposed language provide sufficient guidance? Should it include
11 specific examples to show when a contribution is received in different types of electronic
12 transactions, such as when a debit card is physically presented, a credit card number is entered in
13 an online form or given over the telephone, or a text message is sent?

14 2. Commercial Payment Processors: Revisions to the Conduit and Forwarding
15 Rules

16 Many contributions are first received not by the ultimate recipient political committees,
17 but by commercial entities that process the payments. In several recent advisory opinions, the
18 Commission has addressed the application of its regulations to the receipt of contributions via
19 commercial entities that process contributions electronically — including entities that process

⁷¹ See also Advisory Opinion 2012-35 (Global Transaction Services Group) (determining that contributions made by credit or debit card are received as of date credit or debit card holder authorizes card to be charged with contribution); Advisory Opinion 2012-17 (Red Blue T et al.) at 6 (“m-Qube I”) (“Under m-Qube’s proposed factoring arrangement, which is similar to how credit card contributions are handled, the Commission considers the contributions to be received at the time of the opt-in, as opposed to when the bill is paid.”); FEC, Campaign Guide: Congressional Candidates and Committees 23, 74 (June 2014), [available at www.fec.gov/pdf/candgui.pdf](http://www.fec.gov/pdf/candgui.pdf).

1 contributions made by text message⁷² or via web-based platforms.⁷³ The Commission proposes
2 to revise its forwarding regulations at 11 CFR 102.8 and its earmarking regulations at 11 CFR
3 110.6 to codify some of the conclusions of these advisory opinions.

4 a. Proposed Revisions to Forwarding Rule, 11 CFR 102.8

5 Section 102.8 implements FECA’s requirement that “[e]very person who receives a
6 contribution” for a political committee must forward the contribution and information about the
7 contributor to the recipient political committee within either 10 or 30 days, depending on
8 whether the recipient is an authorized or unauthorized committee and the amount of the
9 contribution. 52 U.S.C. 30102(b)(2). Under the proposed revisions to the definition of “receipt,”
10 discussed above, this forwarding requirement would be triggered when a commercial payment
11 processor receives a contributor’s authorization to make a contribution, even if the payment
12 processor has not yet received the contributor’s funds.

13 Because this scenario occurs frequently in modern electronic transactions,⁷⁴ the
14 Commission proposes to add a new paragraph (d) to 11 CFR 102.8 to make clear that payment
15 processors must satisfy FECA’s forwarding requirement within 10 or 30 days of receiving a
16 contributor’s authorization of a contribution, even if the processor has not yet received the

⁷² See, e.g., Advisory Opinion 2012-30 (Revolution Messaging); Advisory Opinion 2012-28 (CTIA – The Wireless Association) (“CTIA II”); Advisory Opinion 2012-26 (Cooper for Congress Committee et al.) (“m-Qube II”); Advisory Opinion 2012-17 (m-Qube I); Advisory Opinion 2010-23 (CTIA – The Wireless Association) (“CTIA I”).

⁷³ See, e.g., Advisory Opinion 2014-07 (Crowdpac); Advisory Opinion 2012-35 (Global Transaction Services Group); Advisory Opinion 2012-22 (skimmerhat); Advisory Opinion 2012-09 (Points for Politics); Advisory Opinion 2011-19 (GivingSphere); Advisory Opinion 2011-06 (Democracy Engine et al.); Advisory Opinion 2007-04 (Atlatl); Advisory Opinion 2006-08 (Brooks).

⁷⁴ For example, when a credit card holder uses a credit card to purchase goods or services from a merchant, the merchant often receives payment for the goods and services before the credit card holder is even billed. See How a Visa Transaction Works, Visa, usa.visa.com/merchants/become-a-merchant/how-a-visa-transaction-works.jsp (last visited Aug. 14, 2015); What We Do, Mastercard, mastercard.com/us/company/en/whatwedo/processing_behind_transaction.html (Aug. 14, 2015). Similarly, in certain text message transactions, payment processors transmit funds to merchants before the mobile phone users pay bills with associated charges. See Advisory Opinion 2010-23 (CTIA I); Advisory Opinion 2012-17 (m-Qube I).

1 contributor's funds. Under proposed paragraph (d), a payment processor will satisfy the
2 forwarding requirements of 52 U.S.C. 30102(b) if it transmits funds and contributor information
3 to a recipient political committee within 10 or 30 days, as applicable, of the contributor's
4 authorization of the transaction. To ensure that a payment processor does not make contributions
5 to candidates and committees by transmitting the funds, the payment processor must meet this
6 forwarding requirement in its ordinary course of business. See, e.g., 11 CFR 116.3; Advisory
7 Opinion 2012-26 (m-Qube II); Advisory Opinion 2012-31 (AT&T).

8 The proposal would thus reflect how modern transactions are conducted and ensures that
9 FECA's forwarding requirement is satisfied when contributors and political committees make
10 and receive contributions electronically.⁷⁵ See Advisory Opinion 2012-35 (Global Transaction
11 Services Group) at 4 (approving proposal where processor transmitted contributions to political
12 committees within ten days); Advisory Opinion 2010-23 (CTIA I) at 6-7 (rejecting proposal to
13 process contributions by text message because, in part, contributions would not be forwarded to
14 recipient committees within timeframe required by 52 U.S.C. 30102(b) and 11 CFR 102.8).

15 Should the Commission adopt this approach? Is it consistent with how electronic
16 transactions are conducted? The Commission is not proposing regulatory language to define
17 "ordinary course of business" but expects that the term would be construed consistently with the
18 definition of the same term in 11 CFR 116.3(c), which looks to the vendor's past practices, as

⁷⁵ In Advisory Opinion 2012-17 (m-Qube I), the Commission approved a proposal to process contributions made by text message, even though the processor would provide funds to the recipient political committees before the contributors had paid their mobile phone bills. Id. at 10. The Commission explained that the transmitted funds were extensions of credit in the ordinary course of business, "not contributions that [the processor] received and forwarded." Id. at 7, 10. And because the forwarding requirements of 52 U.S.C. 30102(b) and 11 CFR 102.8 are triggered only upon the receipt of a contribution — not when a vendor extends credit — the payments "did not implicate the forwarding requirements." Id. at 10. The Commission's rationale in that advisory opinion applied the existing regulations, which the Commission here proposes to revise.

1 well as industry custom, to determine whether the vendor acted in the ordinary course of
2 business. Should the Commission revise the proposed rule to reflect this expectation?

3 b. Proposed Revisions to Earmarking Rule, 11 CFR 110.6

4 FECA provides that, for purposes of the contribution limitations, “all contributions made
5 by a person, either directly or indirectly . . . , including contributions which are in any way
6 earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be
7 treated as contributions from such person to such candidate.”⁷⁶ 52 U.S.C. 30116(a)(8). The
8 Commission defines “earmarked” to mean “a designation, instruction, or encumbrance, whether
9 direct or indirect, express or implied, oral or written, which results in all or any part of a
10 contribution . . . being made to . . . a clearly identified candidate.” 11 CFR 110.6(b)(1).

11 Whether a person is a “conduit or intermediary” turns on whether the person “receives
12 and forwards an earmarked contribution to a candidate.” 11 CFR 110.6(b)(2). Persons
13 prohibited from making contributions and expenditures, however, are also prohibited from being
14 conduits or intermediaries. 11 CFR 110.6(b)(2)(ii). Thus, because FECA prohibits corporations
15 from making contributions to candidate committees, see 52 U.S.C. 30118, a corporation
16 generally may not “receive[] and forward[]” earmarked contributions.

17 The Commission’s regulations provide for certain exceptions to this rule, see 11 CFR
18 110.6(b)(2)(i), but these exceptions do not squarely apply to the kinds of payment processors that
19 the Commission has addressed in its recent advisory opinions regarding electronic contributions.
20 In some of these opinions, the Commission concluded that the transactions were permissible
21 because the corporations that processed the contributions were acting as commercial vendors to

⁷⁶ Thus, earmarked contributions are “subject to the original contributors’ limits on contributions to the candidate.” *Affiliated Committees, Transfers, Prohibited Contributions, Annual Contribution Limitations and Earmarked Contributions*, 54 FR 34098, 34105 (Aug. 17, 1989).

1 the political committee.⁷⁷ In other opinions, the Commission approved the transactions under the
2 rationale that the corporations were providing services to the contributors.⁷⁸ And in Advisory
3 Opinion 2012-22 (skimmerhat), the Commission determined expressly that a for-profit
4 corporation that processed customers' contributions to candidates via the corporation's website
5 was not a conduit. Advisory Opinion 2012-22 (skimmerhat) at 5-6. The Commission explained
6 that "certain electronic transactional services . . . do not run afoul of the prohibition on
7 corporations acting as a conduit or intermediary for earmarked contributions because certain
8 electronic transactional services are so essential to the flow of modern commerce that they are
9 akin to 'delivery services, bill-paying services, or check writing services.'" Id. (citing Advisory
10 Opinion 2011-06 (Democracy Engine)); see also Advisory Opinion 2014-07 (Crowdpac)
11 (approving commercial processor's transmission of contributions to candidates); ActBlue,
12 Comment at 5 (June 3, 2013), sers.fec.gov/fosers/showpdf.htm?docid=297360 (stating that
13 without electronic payment processors, "committees would not be able to raise campaign funds
14 on the Internet or by credit card at all").

15 The Commission now proposes to revise section 110.6 to clarify the regulatory status of
16 electronic payment processors and bring the rule into line with the role of "certain electronic
17 transactional services [that] are so essential to the flow of modern commerce." Advisory
18 Opinion 2012-22 (skimmerhat) at 10. The Commission proposes to do so by exempting
19 commercial payment processors from the definition of "conduit or intermediary" in a proposed
20 new paragraph (F) of 11 CFR 110.6(b)(2)(i). The Commission is proposing two alternative

⁷⁷ See Advisory Opinion 2007-04 (Atlatl); Advisory Opinion 2004-19 (DollarVote.org); see also Advisory Opinion 2012-09 (Points for Politics).

⁷⁸ See Advisory Opinion 2011-19 (GivingSphere); Advisory Opinion 2011-06 (Democracy Engine); Advisory Opinion 2006-08 (Brooks).

DRAFT B

1 versions of new paragraph (F). Alternative A of proposed paragraph 110.6(b)(2)(i)(F) would
2 provide that a commercial payment processor is any person whose usual and normal business is
3 to process payments and who processes payments to candidates and authorized committees in the
4 ordinary course of business. Alternative B of proposed paragraph 110.6(b)(2)(i)(F) would differ
5 only in that Alternative B would also expressly state that a commercial payment processor does
6 not exercise direction or control over the choice of the recipient candidate or authorized
7 committee.

8 The Commission seeks comment on the alternatives. Specifically, does Alternative A
9 accurately reflect and codify Commission determinations that, for example, “where a
10 commercial vendor provides contribution processing services to contributors, the contributions
11 made through the platform . . . are . . . direct contributions to the candidate . . . made via a
12 commercial processing service” and not earmarked contributions through a conduit or
13 intermediary? Advisory Opinion 2017-08 (eBundler.com) at 8. Would the reference to
14 “direction or control” in Alternative B cause confusion within the public given that none of the
15 other exemptions to the definition of conduit or intermediary include such a reference, and that
16 “direction or control,” as used at 11 CFR 110.6(d), reflects actions taken by conduits and
17 intermediaries?

18 The Commission anticipates that specific applications of the exemption, regardless of
19 which Alternative is selected, will be informed by its prior advisory opinions and refined through
20 future advisory opinions. The proposed term “commercial payment processors” would not
21 distinguish between persons who process contributions as a service to contributors and those
22 who process contributions as a service to candidates and authorized committees. Thus, the term
23 would encompass processors that transmit funds from wireless service providers to recipient

1 committees, as well as online payment systems such as eBay and Square, and the requestors in
2 the advisory opinions in which the Commission has approved electronic payment processing.⁷⁹
3 The Commission anticipates, however, that the distinction will remain relevant to determine
4 whether fees associated with contributions made through commercial payment processors are
5 considered part of the contributed amount. As the Commission has explained in several advisory
6 opinions, where a contributor’s payment of a fee would “relieve the recipient political
7 committee[] of a financial burden [it] would otherwise have had to pay,” the fee would be
8 considered a contribution. See, e.g., Advisory Opinion 2015-15 (WeSupportThat.com) at 5
9 (quoting Advisory Opinion 2014-07 (Crowdpac) and Advisory Opinion 2011-06 (Democracy
10 Engine)).

11 The Commission intends the proposed revision to 11 CFR 110.6(b)(2)(i) to clarify and
12 codify its existing guidance on the issue, and thus to encourage the use of evolving and emerging
13 technological innovations to process contributions electronically. Does the proposal provide
14 sufficient guidance and clarity to the regulated community as to which persons are not
15 considered conduits and intermediaries? Should the Commission bring section 110.6 in line with
16 the flow of modern commerce by revising the definition of “earmarked” at 11 CFR 110.6(b)(1)
17 rather than revising the definition of “conduit or intermediary” at 11 CFR 110.6(b)(2)? For
18 example, should the Commission clarify that the definition of earmark does not generally include
19 a contributor’s authorization to initiate an electronic transaction? Additionally, is existing
20 guidance sufficient with respect to how political committees should report contributions received
21 via commercial payment processors?

⁷⁹ Because the proposed clarification also does not turn on the incorporation status of a payment processor, a limited liability company that opts to be treated like a partnership for tax purposes could process contributions to candidates in the ordinary course of business without being considered a conduit or intermediary. See Advisory Opinion 2012-09 (Points for Politics).

1 Furthermore, in addition to concluding that commercial payment processors are not
2 conduits under 11 CFR 110.6, the Commission has also determined that where a commercial
3 payment processor provides its services to its customers, as opposed to the political committees
4 that receive the customers' contributions, the processor itself would not make contributions to
5 the recipient political committees. See, e.g., Advisory Opinion 2015-15 (WeSupportThat.com)
6 at 4 ("Identifying candidates whose activities are of interest to its users, and processing users'
7 contributions to those candidates, are services that the requestor may permissibly provide to its
8 users."); Advisory Opinion 2015-08 (Repledge) at 6 ("As long as Repledge transmits funds to
9 the opposing candidates, as requested by its members . . . Repledge's reasonable commercial
10 decision to limit its universe of candidate recipients does not render its proposal
11 impermissible."); Advisory Opinion 2014-07 (Crowdpac) at 6 ("Accordingly, Crowdpac's
12 proposal to match users with candidates and utilize the . . . platform to process and forward
13 users' contributions to candidates would not result in impermissible contributions by Crowdpac
14 to federal candidate committees."). The Commission seeks comment as to whether it should
15 promulgate regulatory language that codifies these determinations, and if so, where in its
16 regulations.

17 3. When a Political Committee Deposits the Contribution: Campaign
18 Depositories, Merchant Accounts, Recordkeeping, and Internet-Based
19 Alternative Mediums of Exchange

20 Once a political committee has received a contribution, it must deposit that receipt in an
21 account at a campaign depository within ten days. 52 U.S.C. 30102(h)(1); 11 CFR 103.3(a).
22 The campaign depository must be a state bank, federally chartered depository institution, or
23 depository institution with accounts insured by certain federal agencies. See 52 U.S.C.

1 30102(h)(1); 11 CFR 103.2; see also 11 CFR 102.2(a)(1)(vi) (disclosure of campaign
2 depositories).

3 The Commission is proposing to revise several regulations to address issues related to the
4 deposit into campaign depositories of contributions made electronically. First, the Commission
5 proposes to revise 11 CFR 103.3(a) to clarify the campaign depository requirements with respect
6 to joint merchant accounts. Second, the Commission proposes to revise 11 CFR 102.9(a)(4)(ii)
7 to address recordkeeping related to the electronic transfer of contributions from a payment
8 processor to a political committee’s campaign depository. Finally, the Commission is
9 considering whether to revise 11 CFR 103.3(a) and 102.10 to address how the requirements for
10 deposits to and disbursements from campaign depositories apply to contributions of Internet-
11 based alternative mediums of exchange, such as bitcoin.

12 a. Proposed Changes Regarding Campaign Depositories for Joint
13 Merchant Accounts — 11 CFR 103.3

14 Many political committees and payment processors use merchant accounts to process
15 contributions. As one commenter noted in response to the ANPRM: “In order to accept credit
16 card contributions, the committee must have a merchant account with the payment processor
17 which is connected to the website on the contribution end and to a specific bank account on the
18 processing end.” ActBlue, Comment at 2 (June 3, 2013),
19 [sers.fec.gov/fosers/showpdf.htm?docid=297360](https://www.fec.gov/fosers/showpdf.htm?docid=297360). The commenter characterized the merchant
20 account system that is used for payment transfers as “nothing but an accounting tool which
21 operates purely as a pass-through.” Id. at 4.

22 Merchant accounts operated and controlled by a payment processor may contain
23 contributions for several different political committees. See Advisory Opinion 1995-34

1 (Politechs) n.6 (describing processing of contributions for multiple committees through one
2 merchant account). The Commission has indicated that a political committee receiving funds
3 through one of these merchant accounts should report and treat the merchant account as a
4 campaign depository account. Id.; see also Advisory Opinion 1999-22 (Aristotle Publishing)
5 (approving proposal under which recipient political committees would report payment
6 processor’s FDIC-insured merchant account through which their contributions flowed as
7 campaign depository accounts); Advisory Opinion 2012-07 (Feinstein for Senate) at 5 n.9
8 (reaffirming that “joint merchant account” of type described in Advisory Opinion 1999-22
9 (Aristotle Publishing) is campaign depository).

10 The Commission is now reconsidering its earlier requirement that political committees
11 should report the joint merchant accounts through which their contributions flow as their own
12 campaign depository accounts. The Commission is not convinced of the disclosure or
13 compliance value of reporting a third party’s pass-through account, which the recipient political
14 committee does not own, operate, or control, as the committee’s own account. See ActBlue,
15 Comment at 4 (June 3, 2013), [sers.fec.gov/fosers/showpdf.htm?docid=297360](https://www.fec.gov/fosers/showpdf.htm?docid=297360) (noting that
16 merchant accounts are standard aspect of credit card processing and arguing that therefore “there
17 is no need to treat merchant accounts as campaign depositories which must be registered with the
18 Commission”).

19 The Commission proposes to amend 11 CFR 103.3(a), which governs the deposit of
20 receipts in campaign depositories, to provide that contributions deposited in the ordinary course
21 of business in the merchant account of a person whose usual and normal business involves the
22 electronic processing and transmission of payments are not “receipts” of the recipient political
23 committee, but are, instead, contributions to be forwarded by the processor under 11 CFR

1 102.8.⁸⁰ Together with the revisions to section 102.8 discussed above, this proposed amendment
2 would ensure that electronic payments passing through merchant accounts comply with the
3 FECA’s forwarding requirements, while also adapting the campaign-depository rule to account
4 for the ways in which electronic payments differ from the cash and check contributions that
5 predominated when those requirements were enacted.

6 This proposed change is not intended to apply to merchant accounts over which a
7 recipient political committee exercises control. Should the Commission make this limitation
8 explicit, or does the reference to a payment processor’s “ordinary course of business” suffice?
9 Alternatively, should the Commission update its campaign-depository rules by revising 11 CFR
10 103.2, which defines the term “campaign depository,” instead of 11 CFR 103.3(a)? Under either
11 approach, should the Commission expressly supersede Advisory Opinion 1995-34 (Politechs),
12 Advisory Opinion 1999-22 (Aristotle Publishing), and Advisory Opinion 2012-07 (Feinstein for
13 Senate), to the extent that these advisory opinions can be read as requiring political committees
14 to treat joint merchant accounts as their own campaign depository accounts?

15 b. Proposed Changes to Recordkeeping — 11 CFR 102.9(a)(4) and
16 9036.1(b)(4)

17 As noted above, FECA and Commission regulations require any person who receives a
18 contribution for or on behalf of a political committee to forward the contribution and information
19 about the contributor to the political committee within a certain period of time. 52 U.S.C.
20 30102(b)(2); 11 CFR 102.8(a). The Commission has seen, through its auditing function, that
21 committees often receive contributions separately from contributors’ information; that is,
22 payment processors often forward contributions as an aggregated amount but forward

⁸⁰ For ease of reading, the Commission also proposes to divide section 103.3(a) into two subparts to address the two distinct issues (receipts and disbursements) addressed therein.

1 information about each individual contributor separately. Because of this, marrying individual
2 contributor information with the recipient political committee's records of receipts and deposits
3 can be a challenge when committees are audited.

4 To address these challenges, the Commission proposes to revise 11 CFR 102.9(a)(4).
5 Section 102.9(a)(4) currently requires political committees to maintain, for each contribution that
6 they receive in excess of \$50, either (i) a full-size photocopy of the check or written instrument,
7 or (ii) a digital image of the check or written instrument. As revised, paragraphs (4)(i) and (4)(ii)
8 would be replaced with a new paragraph (4), which would require political committees to
9 maintain a "record" of each contribution received. For checks or written instruments in excess of
10 \$50, the revised rule would still require treasurers to maintain an image of the instrument. For
11 all contributions, the revised rule would add a requirement that a record of the receipt must
12 include sufficient information associating that contribution with its deposit in the political
13 committee's campaign depository, such as a batch number. The revised rule would also remove
14 the requirement that committees provide the Commission with the electronic means to read such
15 records because that requirement would appear in the proposed new definition of "record"
16 discussed above.

17 The Commission proposes a similar revision to the recordkeeping provision at 11 CFR
18 9036.1(b)(4), which applies to bank documentation of deposits of publicly matched
19 contributions. Section 9036.1(b)(4) requires a candidate to submit "bank documentation, such as
20 bank-validated deposit slips or unvalidated deposit slips accompanied by the relevant bank
21 statements, which indicate that the contributions were deposited into a designated campaign
22 depository." The Commission proposes to add, after "relevant bank statements," language that

1 would apply to electronic deposits: “or, for deposits made electronically, information associating
2 contributions to their deposit in the designated campaign depository, such as a batch number.”

3 The Commission invites comment on whether the proposed rule provides sufficient
4 guidance to enable information about specific contributions and contributors to be matched to
5 political committees’ aggregated receipt and deposit of contributions. If so, is the proposed rule
6 flexible enough to accommodate evolving methods of electronic transfers? The Commission is
7 also interested in comment addressing whether the specificity required of records of checks and
8 written instruments is still necessary in light of the new definition of “record,” discussed above.

9 c. Contributions of Internet-Based Alternative Mediums of Exchange —
10 11 CFR 102.10 and 103.3

11 The Commission is considering whether to revise its rules regarding the receipt of
12 contributions in the form of bitcoin and other Internet-based alternative mediums of exchange
13 that cannot currently be deposited in campaign depositories. In Advisory Opinion 2014-02
14 (Make Your Laws PAC), the Commission determined that a political committee could accept
15 \$100 worth of bitcoin contributions per contributor per election. Bitcoin is a privately issued
16 alternative medium of exchange that exists “only as a long string of numbers and letters in a
17 user’s computer file.”⁸¹ Users receive transfers of bitcoin into their online bitcoin “wallets”
18 (essentially, encrypted computer files) and can transfer bitcoin from those “wallets” to other
19 users, to merchants to purchase goods or services, or to exchanges to convert into government-
20 issued currency.⁸² At this time, the Commission is aware of no institution that meets the

⁸¹ U.S. Gov’t Accountability Office, GAO-13-516, Virtual Economies and Currencies 5 (2013), available at gao.gov/assets/660/654620.pdf.

⁸² Id.; see also Francois R. Velde, Fed. Reserve of Chi., No. 317, Bitcoin: A Primer 2 (2013), available at chicagofed.org/digital_assets/publications/chicago_fed_letter/2013/cfldecember2013_317.pdf (describing bitcoin wallet).

1 statutory criteria of a campaign depository, see 52 U.S.C. 30102(h), and that maintains bitcoin
2 wallet “accounts” for its customers. The Commission seeks comment as to whether the unique
3 nature of bitcoin and other Internet-based alternative mediums of exchange pose any potential
4 challenges under FECA that necessitates regulatory amendment.

5 Current Commission regulations establish procedures for political committees to receive
6 and report in-kind contributions of “stocks, bonds, art objects, and other similar items to be
7 liquidated.” 11 CFR 104.13(b). Under this provision, political committees may accept such
8 items as in-kind contributions and hold them as investments outside of their campaign
9 depositories until later sale, without being subject to the 10-day deposit requirement. See
10 Advisory Opinion 2000-30 (pac.com) at 8 (citing Advisory Opinion 1989-06 (Friends of
11 Sherwood Boehlert) and Advisory Opinion 1980-125 (Cogswell for Senate Committee 1980)).

12 The Commission is interested in comment on whether the inability to deposit bitcoin and
13 other alternative mediums of exchange in a campaign depository necessitates treating
14 contributions of such alternative mediums of exchange as in-kind contributions rather than
15 contributions of money. Should the Commission revise 11 CFR 103.3 to clarify that all receipts
16 by a political committee must be deposited in campaign depositories, except for in-kind
17 contributions that cannot be deposited? The Commission seeks comment on how best to
18 reconcile an interpretation allowing in-kind contributions to not be deposited in a campaign
19 depository with FECA’s requirement that “all receipts . . . shall be deposited” in an account at a
20 campaign depository. See 52 U.S.C. 30102(h)(1).

21 Related to the question of whether in-kind receipts must be deposited in a campaign
22 depository is the question of how to interpret the statutory requirement that all disbursements be
23 made from a campaign depository. The Commission has reached differing conclusions in

1 advisory opinions on whether in-kind contributions received and held outside of a campaign
2 depository may be disbursed from outside of that depository or whether they must first be
3 liquidated and deposited in a campaign depository prior to disbursement.⁸³ Should the
4 Commission revise 11 CFR 102.10 to specify that a disbursement need not be made from a
5 campaign depository if the asset being disbursed was not required to be deposited into a
6 campaign depository? The Commission seeks comment on how best to reconcile an
7 interpretation allowing the disbursement of assets held outside campaign depositories with the
8 statutory requirement that “[n]o disbursements may be made . . . except by check drawn” on an
9 account at a campaign depository. See 52 U.S.C. 30102(h)(1).

10 E. Other Considerations in Electronic Contributions and Disbursements

11 The Commission is considering revisions to other regulations to modernize requirements
12 concerning the receipt of “currency” and “cash”; the receipt, disbursement, and transfer of funds;
13 the records of contributions eligible for public matching funds; and the designation and
14 attribution of contributions in light of electronic transactions and records.

15 1. “Currency” and “Cash” — 11 CFR 110.4

16 The term “contribution” includes gifts, advances, and deposits of “money” by any person
17 for the purpose of influencing a federal election.⁸⁴ The term “money” includes “currency of the
18 United States or of any foreign nation,” as well as checks, money orders, and any other
19 negotiable instrument payable on demand.⁸⁵

⁸³ Compare Advisory Opinion 1982-08 (Barter PAC) (allowing disbursement of “credit units” in that form),
with Advisory Opinion 2000-30 (pac.com) (requiring liquidation and deposit prior to disbursement).

⁸⁴ 52 U.S.C. 30101(8)(A)(i); 11 CFR 100.52(a); see also 52 U.S.C. 30101(9)(A)(i); 11 CFR 100.111(a)
(corresponding provisions for the term “expenditure”).

⁸⁵ 11 CFR 100.52(c); see also 11 CFR 100.111(d) (corresponding provision for expenditures).

1 The legislative history of FECA indicates that Congress was particularly concerned about
2 the role of cash in federal elections. As one legislator noted, “cash offers too facile a medium for
3 unethical and illegal activities”; its “untraceability” and “easy transferability” were of particular
4 concern. 120 Cong. Rec. H7832 (daily ed. Aug. 7, 1974) (statement of Rep. Boland). Thus,
5 Congress limited contributions of currency to \$100. 52 U.S.C. 30123.⁸⁶ Commission
6 regulations also prohibit the use in federal elections of any portion of an anonymous “cash”
7 contribution that exceeds \$50.⁸⁷

8 Some non-cash electronic payment methods — particularly prepaid cards and Internet-
9 based alternative mediums of exchange — have characteristics very similar to cash. Like
10 currency, prepaid cards and some Internet-based alternative mediums of exchange are easily
11 transferable and relatively untraceable. They are not associated with a depository institution and
12 thus are not subject to those institutions’ “know-your-customer” obligations under federal law.⁸⁸
13 All that a person needs to acquire and use prepaid cards in amounts within FECA’s contribution
14 limits is sufficient cash to purchase the cards. Similarly, “all that is needed to complete a
15 [bitcoin] transaction is a bitcoin address, which does not contain any personal identifying
16 information.”

17 Because prepaid cards present the same concerns as those noted by Congress when it
18 limited contributions of currency to \$100, the Commission proposes to update its rules to apply
19 the limitations on contributions of cash or currency at 11 CFR 110.4(c) to contributions made by

⁸⁶ See also 11 CFR 110.4(c) (also referring to such contributions as “cash”); 11 CFR 9034.3(j) (disallowing matching funds for contributions of currency of United States or foreign country).

⁸⁷ 11 CFR 110.4(c)(3); see also 52 U.S.C. 30102(c)(2) (requiring name and address of contributors for contributions over \$50).

⁸⁸ See 31 CFR 103.121(b) (setting forth customer identification programs for banks, credit unions, and other depository institutions, including through records of customer names and addresses).

1 prepaid cards. To accomplish this, the Commission proposes to add paragraph (c)(4) to 11 CFR
2 110.4 to clarify that a “cash contribution” includes a contribution (1) of currency of the United
3 States or any foreign country, or (2) made using a prepaid card. The Commission also proposes
4 to make a conforming change to 11 CFR 110.4(c)(1) by updating the current prohibition on
5 making contributions aggregating more than \$100 in “currency of the United States, or of any
6 foreign country” to apply to any “cash contribution,” as provided in proposed 11 CFR
7 110.4(c)(4).

8 The Commission intends the term “prepaid card” to mean a card, payment code, or
9 device that is not linked to the contributor’s checking, savings, or other depository account but is
10 instead purchased or loaded on a prepaid basis and honored, upon presentation, by merchants for
11 goods or services, or at automated teller machines, as provided in federal electronic transfer
12 consumer rights protection laws. See 15 U.S.C. 16931-1(a)(2)(A). The Commission seeks
13 comment on whether it should define the term “prepaid card” in the regulations themselves or
14 whether it should otherwise update its rules for cash contributions to apply to prepaid cards.

15 The Commission also seeks comment on any compliance challenges that might result
16 from the proposed rule if adopted. In particular, one commenter noted in response to the
17 ANPRM that a political committee that receives a contribution from a prepaid card “is unlikely
18 to know that . . . a prepaid card” has been used to make the payment because “a prepaid card is
19 treated the same as any other payment card” in the payment processing.⁸⁹ The Commission
20 understands, however, that prepaid card issuers are able to exclude certain categories of

⁸⁹ See ActBlue, Comment at 6 (June 3, 2013), [sers.fec.gov/fosers/showpdf.htm?docid=297360](https://www.fec.gov/fosers/showpdf.htm?docid=297360).