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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM
For meeting of August 31, 2022
SUBMITTED LATE

August 30, 2022

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
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SUBJECT: REG 2013-01 (Technological Modernization)

Attached is a draft *Federal Register* notice requesting additional public comments in the above-referenced rulemaking. One or more Commissioners have asked for this draft to be made public and placed on the agenda for the Commission's August 31, 2022, Open Meeting.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Parts 1, 4, 5, 6, 100, 102, 103, 104, 105, 106, 108, 109, 110, 111, 112, 114, 116, 200, 201, 300, 9003, 9004, 9007, 9032, 9033, 9034, 9035, 9036, 9038, and 9039

[NOTICE 2022-XX]

Technological Modernization

AGENCY: Federal Election Commission.

ACTION: Request for Additional Comment.

SUMMARY: The Federal Election Commission is seeking additional public comment on previously proposed rules that would modernize the agency’s regulations in light of technological advances in communications, recordkeeping, and financial transactions, and that would eliminate and update references to outdated technologies and address similar technological issues.

DATES: Comments must be submitted on or before [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: All comments must be in writing. Commenters may submit comments electronically via the Commission’s website at <http://sers.fec.gov/fosers/>, reference REG 2013-01.

Each commenter must provide, at a minimum, his or her first name, last name, city, and state. All properly submitted comments, including attachments, will become part of the public record, and the Commission will make comments available for public viewing on the Commission’s website and in the Commission’s Public Records Office. Accordingly, commenters should not provide in their comments any information that they do not wish to make public, such as a home street address, personal email address, date of birth, phone number, social

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1 security number, or driver’s license number, or any information that is restricted from disclosure,
2 such as trade secrets or commercial or financial information that is privileged or confidential.

3 **FOR FURTHER INFORMATION CONTACT:** Ms. Amy L. Rothstein, Assistant General
4 Counsel, or Ms. Joanna S. Waldstreicher or Mr. Tony Buckley, Attorneys, Office of the General
5 Counsel, at techmod@fec.gov.

6 **SUPPLEMENTARY INFORMATION:** The Federal Election Commission is seeking
7 additional public comment on certain aspects of its prior proposals to modernize campaign
8 finance regulations in light of technological advances. The Commission published its proposals
9 in a Notice of Proposed Rulemaking (“NPRM”) on November 2, 2016.¹ The Commission had
10 previously issued an Advance Notice of Proposed Rulemaking (“ANPRM”) on the subject.² The
11 Commission received several public comments in response to both the ANPRM and the NPRM,
12 which are available on the Commission website, at <https://sers.fec.gov/fosers/search.htm> (search
13 for REG 2013-01).

14 The Commission is now seeking additional public comment about any technological
15 developments that may have occurred following publication of the NPRM that would be relevant
16 to the Commission’s consideration of its proposed rules. In particular, the Commission is
17 soliciting updated information regarding electronic payment processing, newer electronic
18 payment technologies, and contributions made via prepaid cards, to ensure that its understanding
19 of the relevant technologies and associated practices in these areas is up to date.

¹ Technological Modernization, 81 FR 76416 (Nov. 2, 2016).

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

1 *Payment Processing*

2 Several of the Commission’s proposed rules relate to the standards and practices that
3 vendors and payment processors use to process payments made by credit card, debit card,
4 prepaid card, and other electronic payment methods such as text message and direct carrier
5 billing. Some of the proposed rules also concern the methods by which vendors and payment
6 processors verify a payor’s identity, attribute payments, and collect, maintain, and transmit
7 transaction records. The Commission seeks comment on whether practices in these areas have
8 changed since publication of the NPRM in ways that would affect the applicability and utility of
9 the proposed rules.

10 The Commission also seeks additional comment on proposed revisions to its regulations
11 regarding when a contribution initiated through electronic means is considered to be “made” and
12 “received.” Specifically, in the NPRM the Commission proposed to revise 11 C.F.R.
13 110.1(b)(6), which describes when a contribution is “made.” As revised, it would state that “[a]
14 contribution made in an electronic transaction is considered to be made when the contributor
15 authorizes the transaction,” even if the contributor has not yet transmitted any funds. Similarly,
16 the Commission proposed to revise 11 C.F.R. 102.8(a) and (b)(2), which describe when a person
17 “receives” a contribution for a political committee and must forward the contribution to the
18 political committee’s treasurer. As revised, the “date of receipt” of “a contribution made in an
19 electronic transaction in which the receipt of authorization precedes the receipt of funds” would
20 be the date the person “obtains the contributor's authorization of the transaction.” Finally, the
21 Commission recognized that many electronically initiated contributions to political committees
22 — including contributions made via text message or internet-based platforms — are first
23 received by commercial entities that process the contributions electronically. Accordingly, the

1 Commission proposed new 11 C.F.R. 102.8(d), which would provide that “[e]very person whose
2 usual and normal business involves the processing and transmission of payments and who
3 processes a contribution to a political committee in the ordinary course of its business will satisfy
4 the [forwarding] requirements . . . if such person transmits funds and contributor information to
5 the recipient political committee within the time periods prescribed,” even if the payment
6 processor has not yet received any funds from the contributor.

7 The Commission received one comment on these proposals. The commenter, a wireless
8 communication industry trade association, opposed the proposals as applied to wireless
9 companies involved in direct carrier billing.³ The commenter stated that “[w]ireless companies
10 do not front — in the ordinary course of business — money to merchants, political committees,
11 or other designated recipients of funds before the customer pays his or her wireless bill,” and
12 asserted that “[a]ny regulatory requirement that would force money to be transferred to political
13 committees sooner than standard business practices dictate will preclude wireless carriers from
14 offering DCB as a means of processing political contributions.”⁴ The commenter characterized
15 these proposals as effectively “overturn[ing] the conclusion in the m-Qube advisory opinion —
16 and preclud[ing] political contributions made by the processes approved therein.”⁵

³ The commenter described direct carrier billing as “a payment process . . . which enables consumers to purchase goods and services by charging them to a wireless bill.” CTIA, Comment at 1, (Dec. 2, 2016), REG 2013-01.

⁴ CTIA, Comment at 9.

⁵ *Id.* In Advisory Opinion 2012-17 (Red Blue T, Armour Media, m-Qube), which concerned the use of text messaging to raise funds for political committees, the Commission concluded that “[u]nder 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.” Advisory Opinion 2012-17 (Red Blue T, Armour Media, m-Qube) at 6. The Commission further concluded that “because m-Qube’s factored payments will be extensions of credit under 11 CFR part 116,” the payments would not constitute prohibited corporate contributions by m-Qube. *Id.* at 9. Consequently, because “the factored payments are extensions of credit by m-Qube in the ordinary course of business and are not contributions that m-Qube has received and forwarded, the factored payments do not trigger the forwarding requirements of 2 U.S.C. 432(b) and 11 CFR 102.8.” *Id.* at 10.

1 The Commission invites additional comment on the proposed rules in light of these
2 statements, and on current processes used by the wireless communication industry to process
3 contributions to political committees. For example, how prevalent is direct carrier billing in
4 processing payments generally, and contributions to political committees in particular? Under
5 current processes, would these proposals, if adopted, require wireless carriers or other companies
6 participating in processing contributions to depart from their standard business practices? Do
7 wireless carriers or other companies typically extend credit to political committees and other
8 customers as described in Advisory Opinion 2012-17 (Red Blue T, Armour Media, m-Qube)?
9 Would the proposals present an obstacle to direct carrier billing or other methods wireless
10 carriers use in processing political contributions? Do connection aggregators still engage in
11 factoring as described in Advisory Opinion 2012-17 (Red Blue T, Armour Media, m-Qube)?
12 What other post-NPRM developments in the processing of electronic payments should the
13 Commission consider?

14 *Electronic Payment Technologies*

15 Some of the Commission’s proposed rules also relate to newer electronic payment
16 methods such as PayPal, Venmo, BitPay, Square, and other electronic wallet, swipe P2P, mobile
17 app, and social media payment platforms. The Commission seeks comment on whether practices
18 in these areas have changed since publication of the NPRM in ways that would affect the
19 applicability and utility of the proposed rules. The Commission also seeks comment on whether
20 additional new methods of electronic payment have been developed or become more commonly
21 used, that would be affected by the existing or proposed rules in ways that the Commission has
22 not yet considered.

1 *Contributions by Prepaid Cards*

2 The Commission also proposed revisions to its regulations with respect to contributions
3 made by prepaid cards. Like currency, prepaid cards are easily transferable and relatively
4 untraceable. They are not linked to a customer’s identity, and they are not associated with a
5 depository institution and thus are not subject to those institutions’ “know-your-customer”
6 obligations under federal law.

7 Accordingly, the Commission proposed to update its rules to apply the limitations on
8 contributions of cash or currency at 11 CFR 110.4(c) to contributions made by prepaid cards, to
9 clarify that a “cash contribution” includes a contribution made using a prepaid card. The
10 Commission also proposed a conforming change to 11 CFR 110.4(c)(1) by updating the current
11 prohibition on making contributions aggregating more than \$100 in “currency of the United
12 States, or of any foreign country” to apply to any “cash contribution,” as provided in new
13 11 CFR 110.4(c)(4).

14 The Commission received one comment on this proposal. The commenter, a non-
15 connected political committee that processes electronic contributions, opposed treating prepaid
16 cards differently from other electronic contributions.⁶ The commenter acknowledged that
17 prepaid cards could be used to evade campaign finance regulations, but pointed out that “[n]o
18 online contribution is ever made without the contributor providing identifying information.”⁷
19 The commenter further stated that a “committee to whom the card number is presented online for
20 payment is unlikely to know that it is a prepaid card.”⁸ The Commission requests feedback on

⁶ ActBlue, Comment at 3 (June 3, 2013), REG 2013-01.

⁷ *Id.* at 6.

⁸ *Id.*

1 these two statements by this commenter. First, as a practical matter, are online contributions
2 made by prepaid cards always accompanied by sufficient identifying information about the
3 contributor to enable recipient political committees to fulfill their reporting obligations and avoid
4 accepting prohibited contributions? Are there any ways in which the process of making a
5 contribution using a prepaid card differs from the process of making a contribution using a credit
6 card, such as the information collected or the way the card number is provided? Second, are
7 recipient political committees actually able to determine whether online contributions are made
8 using prepaid cards? How do (or could) they make that determination?

9 The same commenter also stated that it “would not be practical to expect that the
10 payment industry would limit all transactions using these cards to \$100 to accommodate
11 campaign finance regulations.”⁹ The Commission’s understanding, however, is that prepaid card
12 issuers are able to exclude certain categories of merchants from receiving payments made by
13 prepaid cards.¹⁰ Is this understanding accurate? Do prepaid card issuers, in fact, exclude certain
14 categories of merchants from receiving payments made by prepaid cards? Could political
15 committees, as a category of merchants, use this or another mechanism (such as partial
16 authorization) to decline contributions made by prepaid cards either entirely or in excess of
17 \$100? The Commission is interested in how this might work in practice. For example, does
18 Merchant Category Code 8651 (“political organizations”) cover all political committees

⁹ *Id.*

¹⁰ See, e.g., Visa, Visa Core Rules and Visa Product and Service Rules 258 (2022), <https://www.visa.com.bs/content/dam/VCOM/download/about-visa/visa-rules-public.pdf> (indicating that selective authorization may be based on criteria including merchant category classification); Visa Merchant Data Standards Manual, Visa Supp. Requirements 101 (2021), [visa-merchant-data-standards-manual.pdf](https://www.visa.com.bs/content/dam/VCOM/download/about-visa/visa-rules-public.pdf) (listing “political organizations” as Merchant Category Code 8651); see also U.S. Dept. of Labor, [Description for 8651: Political Organizations | Occupational Safety and Health Administration \(osha.gov\)](https://www.osha-slc.gov/8651) (describing “political organizations” in SIC 8651 as including “Political Action Committees (PACs),” “Political campaign organizations,” and “Political fundraising (except on a contract or fee basis)”).

1 (including separate segregated funds, party committees, and nonconnected committees), or only
2 a subset?¹¹ Is it possible to exclude political committees without also excluding any non-
3 political committees that might also fall under MCC 8651? Who would request the political
4 committees' exclusion, and who would be responsible for putting their exclusion into effect?

5 What other means do political committees have to limit or decline contributions made by
6 prepaid cards? Can individual merchants set limits on the amounts of payments they will accept
7 using prepaid cards? Are there other factors relating to the mechanisms of prepaid card
8 transactions that the Commission should take into consideration?

9 Finally, the Commission invites comments on whether it should consider any other post-
10 NPRM developments in the processing of electronic payments in general, or prepaid cards in
11 particular, before promulgating final rules.

12 *Conclusion*

13 The Commission's goal in this rulemaking is to promulgate final rules that are flexible
14 enough to encompass both traditional and electronic forms of payments and communications,
15 and that remain relevant as new forms of information storage and payment methods emerge in
16 the future. Accordingly, the Commission welcomes comment on any other recent innovations in

¹¹ See Visa Merchant Data Standards Manual, Visa Supp. Requirements 101 (2021), [visa-merchant-data-standards-manual.pdf](#) (listing "political organizations" as Merchant Category Code 8651).

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1 technologies used for recordkeeping, payment processing, or communications that would affect
2 issues addressed by this rulemaking.

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4 Dated: _____

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6 On behalf of the Commission,

7

8 Allen J. Dickerson,
9 *Chairman, Federal Election Commission*

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12 BILLING CODE: 6715-01-P