



FEDERAL ELECTION COMMISSION  
1050 FIRST STREET, N.E.  
WASHINGTON, D.C. 20463

AGENDA DOCUMENT NO. 22-19-A  
AGENDA ITEM  
For meeting of May 26, 2022

TO: The Commission  
The Office of the Commission Secretary

FROM: Allen Dickerson *AD*  
Chairman

Shana M. Broussard *SMB*  
Commissioner

DATE: May 19, 2022

RE: Interim Final Rule Amending 11 C.F.R. § 109.10(e)(1)(vi)

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The Federal Election Campaign Act of 1971, as amended (the “Act”), provides that any person that is not a political committee and which makes independent expenditures aggregating more than \$250 in a calendar year must file a statement with the Commission that identifies certain contributors. 52 U.S.C. § 30104. The Commission has promulgated a regulation, 11 C.F.R. § 109.10(e)(1)(vi), giving effect to that provision of the statute.

On August 3, 2018, however, the United States District Court for the District of Columbia declared that regulation unlawful under the Administrative Procedure Act. *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm’n*, 316 F.Supp.3d 349, 423 (D.D.C. 2018). That decision was affirmed by the United States Court of Appeals for the District of Columbia Circuit on August 21, 2020. *Citizens for Responsibility & Ethics in Wash. v. Fed. Election Comm’n*, 971 F.3d 340, 356 (D.C. Cir. 2020).

Accordingly, we propose the enclosed Interim Final Rule to amend 11 C.F.R. § 109.10(e)(1)(vi) to conform with these judicial decisions. We intend to place this matter on the Commission’s agenda for the Open Meeting of May 26, 2022.

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 109**

3 **[Notice 2022-\_\_]**

4 **Reporting Independent Expenditures**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Interim Final Rule.

7 **SUMMARY:** The Federal Election Commission is amending a regulation requiring that  
8 certain persons making independent expenditures disclose on their reports the  
9 identification of each person who made a contribution over \$200 to the persons filing  
10 such reports “for the purpose of furthering the reported independent expenditure.” The  
11 Commission is taking this action to comply with the decision of the United States Court  
12 of Appeals for the District of Columbia Circuit, which affirmed a district court decision  
13 holding that the disclosure regulation was invalid. The Commission is accepting  
14 comments on this revision to its regulation and any comments received may be addressed  
15 in a subsequent rulemaking document. Further information is provided in the  
16 supplementary information that follows.

17 **DATES:** The interim final rule is effective on [date after 30 legislative days have  
18 passed]. Comments must be received on or before [INSERT DATE 30 DAYS AFTER  
19 PUBLICATION IN THE *FEDERAL REGISTER*].

20 **ADDRESSES:** All comments must be in writing. Commenters are encouraged to  
21 submit comments electronically via the Commission’s website at  
22 <https://sers.fec.gov/fosers/>, reference REG 2022-XX. Alternatively, commenters may  
23 submit comments in paper form, addressed to the Federal Election Commission, Attn.:

1 Mr. Robert M. Knop, Assistant General Counsel, 1050 First Street NE, Washington, DC  
2 20463.

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

12 **FOR FURTHER INFORMATION CONTACT:** Mr. Robert M. Knop, Assistant  
13 General Counsel, or Ms. Joanna S. Waldstreicher, Attorney, 1050 First Street NE,  
14 Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

15 **SUPPLEMENTARY INFORMATION:** The Federal Election Campaign Act (the  
16 “Act”) provides that any person that is not a political committee and that makes  
17 independent expenditures aggregating in excess of \$250 per calendar year must file a  
18 statement containing certain information about the funds they received and spent,  
19 including identifying each person (other than a political committee) whose contributions  
20 to the person filing such statement aggregated in excess of \$200 within the calendar year,  
21 together with the date and amount of such contribution. 52 U.S.C. 30104(c)(1); *see also*  
22 52 U.S.C. 30104(b)(3)(A). The Act also provides that the statement must identify “each  
23 person who made a contribution in excess of \$200 to the person filing such statement

1 which was made for the purpose of furthering an independent expenditure.” 52 U.S.C.  
2 30104(c)(2)(C).

3 To implement these and other independent expenditure reporting provisions of the  
4 Act, the Commission promulgated the regulation at 11 CFR 109.10, requiring that  
5 “[e]very person that is not a political committee and that makes independent expenditures  
6 aggregating in excess of \$250 with respect to a given election in a calendar year shall file  
7 a verified statement or report . . .” including certain information about the expenditures  
8 and “[t]he identification of each person who made a contribution in excess of \$200 to the  
9 person filing such report, which contribution was made for the purpose of furthering the  
10 reported independent expenditure.” 11 CFR 109.10(b), (e)(1)(vi).

11 On Aug. 3, 2018, the United States District Court for the District of Columbia  
12 Circuit held that the regulation at 11 CFR 109.10(e)(1)(vi) is invalid because it conflicts  
13 with the terms of the statute, which “mandate significantly more disclosure than that  
14 required by the challenged regulation.” *CREW v. FEC*, 316 F. Supp. 3d 349, 410 (D.D.C.  
15 2018). The district court held that 52 U.S.C. 30104(c)(1) “plainly requires broader  
16 disclosure than just those donors making contributions for the purposes of funding the  
17 independent expenditures made by the reporting entity.” *Id.* at 389. The district court  
18 further held that the regulation “substantially narrows subsection (c)(2)” of the statute, *id.*  
19 at 394, and that “the challenged regulation’s substitution of ‘the reported’ for ‘an’ is not  
20 in accord with the statutory text.” *Id.* at 406. The district court therefore vacated the  
21 regulation, effective September 17, 2018. Order, *CREW v. FEC*, No. 16-259 (Aug. 3,  
22 2018) at 2.<sup>1</sup> Shortly after the vacatur of the regulation became effective, the Commission

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<sup>1</sup> The court stayed its vacatur of the rule for 45 days from the date of the order.

1 issued guidance on how persons other than political committees should report their  
2 independent expenditures following the court’s decision, available at:  
3 [https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-  
4 crew-v-fec-316-f-supp-3d-349-ddc-2018/](https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/).

5 On August 21, 2020, the U.S. Court of Appeals for the District of Columbia  
6 Circuit affirmed the district court’s decision. *CREW v. FEC*, 971 F.3d 340 (D.C. Cir  
7 2020). The D.C. Circuit found that 11 CFR 109.10 “disregards [52 U.S.C. 30104](c)(1)’s  
8 requirement that [independent expenditure] makers disclose each donation from  
9 contributors who give more than \$200 . . . .” *Id.* at 350-51. It also found that the  
10 regulation “impermissibly narrows [52 U.S.C. 30104](c)(2)(C)’s requirement that  
11 contributors be identified if their donations are ‘made for the purpose of furthering *an*  
12 independent expenditure’” by requiring disclosure only of donations linked to a particular  
13 independent expenditure. *Id.* at 351 (emphasis supplied). The court concluded that,  
14 because the statute “establishes a broader disclosure mandate than the [Commission’s]  
15 Rule ostensibly implementing it, the Rule is invalid.” *Id.* at 356.

16 Commissioners have previously made efforts to reach consensus on revising the  
17 regulatory description of the reporting requirements, but were unable to find agreement  
18 by the required four affirmative votes.

19 In order to conform with the court opinion, the Commission is now amending 11  
20 CFR 109.10(e)(1)(vi) by simply striking the language in that regulation that the court

1 found to be inconsistent with the statute: “which contribution was made for the purpose  
2 of furthering the reported independent expenditure.”

3 The Commission is issuing this rule as an interim final rule. This interim final  
4 rule will take effect thirty legislative days after its transmittal to Congress. *See* 52 U.S.C.  
5 30111(d). The Commission welcomes public comment on this interim final rule and may  
6 address any comments it receives in a later rulemaking.

7 The Administrative Procedure Act (“APA”) requires an agency promulgating  
8 regulations to publish a notice of a proposed rulemaking in the Federal Register.  
9 5 U.S.C. 553(b). The notice requirement does not apply, however, “when the agency for  
10 good cause finds (and incorporates the finding and a brief statement of reasons therefor in  
11 the rules issued) that notice and public procedure thereon are impracticable, unnecessary,  
12 or contrary to the public interest.” 5 U.S.C. 553(b)(B). According to the APA’s  
13 legislative history, a situation is “impracticable” when “the due and required execution of  
14 the agency functions would be unavoidably prevented by its undertaking public rule-  
15 making proceedings.” *See Administrative Procedure Act: Legislative History*, S. Doc.  
16 No. 248 79-258 (1946); *see also Attorney General’s Manual on the Administrative*  
17 *Procedure Act* 15 (1947). “‘Unnecessary’ means unnecessary so far as the public is  
18 concerned, as would be the case if a minor or merely technical amendment in which the  
19 public is not particularly interested were involved.” *Id.* “Contrary to the public interest”  
20 connotes a situation in which the interest of the public would be defeated by any  
21 requirement of advance notice. *Id.*

22 The notice to amend 11 CFR 109.10(e)(1)(vi) is unnecessary because the  
23 Commission seeks to remove a regulatory provision that has already been invalidated by

1 a federal court and cannot be enforced. 5 U.S.C. 553(b)(B). Removing this provision  
2 from the regulations does not involve any exercise of discretion by the Commission.  
3 Moreover, because this provision is already unenforceable, the Commission’s action will  
4 not affect the rights or interests of any person or entity, nor could the public notice and  
5 comment period benefit the Commission in this rulemaking.

6 In addition, a notice and comment period may be contrary to the public interest.  
7 The Commission notes that the 2022 elections for federal office are scheduled to take  
8 place on November 8, 2022. Although, as noted above, the Commission previously  
9 issued guidance on reporting requirements to the regulated community, the fundamental  
10 part of that guidance should be reflected in the Commission’s regulations as soon as  
11 possible before the general election.

12 In addition, because this interim final rule is exempt from the notice and comment  
13 procedure under 5 U.S.C. 553(b), the Commission is not required to conduct a regulatory  
14 flexibility analysis under 5 U.S.C. 603 and 604 (Regulatory Flexibility Act). *See* 5  
15 U.S.C. 601(2) and 604(a).

16

17 **List of Subjects**

18 11 CFR Part 109

19 Coordinated and Independent Expenditures.

20 For the reasons set out in the preamble, the Commission is amending Subchapter  
21 A of Chapter I of Title 11 of the Code of Federal Regulations as follows:

22 **PART 109 – COORDINATED AND INDEPENDENT EXPENDITURES (52 U.S.C.**  
23 **30101(17), 30116(a) AND (d), AND PUB. L. 107-155 SEC. 214(C))**

1 1. The authority citation for part 109 continues to read as follows:

2 Authority: 52 U.S.C. 30101(17), 30104(c), 30111(a)(8), 30116, 30120; Sec.

3 214(c), Pub. L. 107-155, 116 Stat. 81.

4 § 109.10

5 2. Section 109.10 is amended to read as follows:

6 **§ 109.10 How do political committees and other persons report independent**  
7 **expenditures?**

8 \* \* \* \* \*

9 (e) \* \* \*

10 (1) \* \* \*

11 (vi) The identification of each person who made a contribution in excess of \$200 to the  
12 person filing such report.

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16 Dated: May \_\_, 2022

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18 On behalf of the Commission,

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21 **Allen J. Dickerson,**

22 *Chairman,*

23 *Federal Election Commission.*

24 BILLING CODE: 6715-01-P