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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

AGENDA DOCUMENT NO. 24-31-A
AGENDA ITEM
For meeting of Aug. 29, 2024

August 22, 2024

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *NFS for LJS*
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Assistant General Counsel

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Attorney

SUBJECT: REG 2019-03 (Mailing Lists) Draft Notice of Disposition

Attached is a draft Notice of Disposition in REG 2019-03 (Mailing Lists). One or more Commissioners have asked for this draft to be made public and placed on the agenda for the Commission's August 29, 2024, Open Meeting.

Attachment

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3 **FEDERAL ELECTION COMMISSION**

4 **11 CFR Part 104**

5 **[NOTICE 2024-##]**

6 **Requiring Reporting of Exchanges of Email Lists**

7 **AGENCY:** Federal Election Commission.

8 **ACTION:** Notification of Disposition of Petition for Rulemaking.

9 **SUMMARY:** The Commission announces its disposition of a Petition for Rulemaking
10 filed on June 28, 2019. The Petition asks the Commission to revise existing reporting
11 rules to state that mailing lists received or disbursed as part of an equal-value exchange
12 must be reported. For the reasons described below, the Commission is not initiating a
13 rulemaking at this time.

14 **DATES:** [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

15 **FOR FURTHER INFORMATION CONTACT:** Ms. Amy Rothstein, Assistant
16 General Counsel, or Ms. Sarah Herman Peck, Attorney, 1050 First Street, NE.,
17 Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

18 **SUPPLEMENTARY INFORMATION:** The Federal Election Campaign Act, 52
19 U.S.C. 30101-45 (the “Act”), and Commission regulations require political committees to
20 report “all receipts”¹ and “all disbursements.”² Specifically, 52 U.S.C. 30104(b)(2)
21 requires political committees to report both the “total amount of all receipts” generally
22 and the “total amount of all receipts” in certain specified categories, namely:

¹ 52 U.S.C. 30104(b)(2); *see also* 11 CFR 104.3(a)(2)(ix).

² 52 U.S.C. 30104(b)(4); *see also* 11 CFR 104.3(b).

1 contributions; loans; federal funds; rebates; refunds; offsets to operating expenditures;
2 transfers from affiliated committees (and, for political party committees, transfers from
3 another political party committee regardless of whether it is affiliated); and dividends,
4 interest, and “other forms of receipts.”³

5 Through a series of advisory opinions, the Commission has concluded that an
6 equal-value exchange of mailing lists is neither a contribution, donation, or transfer of
7 funds or any other thing of value.⁴ Therefore, it is “a non-reportable event.”⁵

8 Then, in REG 2003-03 (Mailing Lists), the Commission proposed, and ultimately
9 declined, to issue new regulations on mailing list sales, rentals, and equal-value
10 exchanges. In the Notice of Proposed Rulemaking, the Commission proposed “to adopt
11 formally its historical approach . . . or to modify those approaches . . . and to provide
12 candidates and political committees with more comprehensive guidance on commercial
13 transactions involving mailing lists.”⁶ For equal-value exchanges, the Commission
14 proposed to treat them neither as a contribution nor a reportable receipt if the exchange
15 satisfies three elements.⁷ First, the parties must ascertain in advance the “usual and
16 normal charge” for the mailing list.⁸ Second, the mailing lists must be of “equal value.”⁹

³ 52 U.S.C. 30104(b)(2). The Act contains a similar reporting provision for disbursements. *See id.* section 30104(b)(4).

⁴ *See* Advisory Opinion 1981-46 (Dellums); Advisory Opinion 1982-41 (Dellums); Advisory Opinion 2002-14 (Libertarian National Committee).

⁵ Advisory Opinion 2002-14 (Libertarian National Committee) at 5.

⁶ Mailing Lists of Political Committees, 68 FR 52531, 52532 (Sept. 4, 2003).

⁷ *Id.* at 52535.

⁸ *Id.*

⁹ *Id.*

1 And third, the mailing list exchange must be a “*bona fide* arm’s length transaction with
2 commercially reasonable terms.”¹⁰

3 After reviewing the comments received on the proposed rule and holding a public
4 hearing, the Commission decided not to proceed to final rules.¹¹ In doing so, the
5 Commission relied on comments asserting that the appropriate factors for determining the
6 usual and normal charge and whether a transaction is commercially reasonable will “vary
7 considerably depending upon the circumstances.”¹² Because the Commission could not
8 conclude that any particular test would be “sufficiently flexible and comprehensive to
9 address all circumstances to which the proposed rules would apply,” it terminated the
10 rulemaking through a Notice of Disposition.¹³

11 A decade and a half later, on June 28, 2019, the Commission received a Petition
12 for Rulemaking (“Petition”) from Campaign Legal Center (“CLC”) asking the
13 Commission to “amend 11 C.F.R § 104.3 to clarify that the receipt or disbursement of a
14 mailing list or other valuable information is subject to the reporting requirements in
15 section 104.3.”¹⁴ Specifically, CLC asked the Commission to “clarify” that a list not
16 subject to disclosure as a “contribution” or “expenditure,” such as a list received or
17 provided as part of an equal-value exchange, “must nevertheless be reported as ‘other
18 receipts’ under 11 C.F.R. § 104.3(a)(2)(viii), or ‘other disbursements,’ under 11 C.F.R.

¹⁰ *Id.*

¹¹ Mailing Lists of Political Committees, 68 FR 64571, 64571-72 (Nov. 14, 2003).

¹² *Id.* at 64572.

¹³ *Id.*

¹⁴ Campaign Legal Center, Petition for Rulemaking at 1 (June 28, 2019), REG 2019-03,
<https://sers.fec.gov/fosers/showpdf.htm?docid=408334>.

1 § 104.3(b)(ix).”¹⁵ The Petition argued that Advisory Opinions 1981-46 (Dellums), 1982-
2 41 (Dellums), and 2002-14 (Libertarian National Committee) — in which the
3 Commission concluded that the equal-value exchange of mailing lists consistent with
4 industry practice is neither a contribution nor otherwise reportable under the Act — are
5 “contrary to the plain text of the law, which requires disclosure of ‘all receipts’ and ‘all
6 disbursements,’ not merely contributions, expenditures, or transfers.”¹⁶

7 The Commission published a Notice of Availability on August 28, 2019, asking
8 for public comment on the Petition.¹⁷ The Commission received three timely comments
9 from individuals and three late comments from CLC. Of the individual comments, two
10 supported and one opposed the Petition.¹⁸ CLC’s comments urged the Commission to
11 prioritize this and other pending regulatory matters.¹⁹

12 In deciding whether to initiate a rulemaking in response to a petition, the
13 Commission generally considers five factors. They are (1) the Commission’s statutory
14 authority; (2) policy considerations; (3) the desirability of proceeding on a case-by-case

¹⁵ *Id.*

¹⁶ *Id.* at 3.

¹⁷ *See* Requiring Reporting of Exchanges of Email Lists, 84 FR 45116 (Aug. 28, 2019).

¹⁸ One comment supporting the Petition characterized the Commission’s treatment of mailing list exchanges as a “loophole” that allows “independent expenditure-only committees (*i.e.* super PACs) to provide direct, valuable aid to candidate committees, in contravention of the law.” Samir Sheth & Professor Michael D. Gilbert, Comment at 1 (Oct. 28, 2019), <https://sers.fec.gov/fosers/showpdf.htm?docid=410225>. The comment opposing the Petition asserted that the proposed rulemaking would “place[] an undue onerous burden upon citizen activists.” Christine Kramar, Comment at 1 (Oct. 20, 2019), <https://sers.fec.gov/fosers/showpdf.htm?docid=410224>.

¹⁹ Campaign Legal Center, Comment at 2-3 (June 5, 2023), <https://sers.fec.gov/fosers/showpdf.htm?docid=423361>; Campaign Legal Center, Comment at 12 (Jan. 13, 2021), <https://sers.fec.gov/fosers/showpdf.htm?docid=413005>; Campaign Legal Center, Comment at 6-7 (June 16, 2020), <https://sers.fec.gov/fosers/showpdf.htm?docid=411922>.

1 basis; (4) the necessity or desirability of statutory revision; and (5) available agency
2 resources.²⁰

3 After considering these factors and reviewing the comments received on the
4 Petition, the Commission has decided not to initiate a rulemaking at this time. The
5 Commission previously expended considerable resources on this issue during its
6 consideration of REG 2003-03 (Mailing Lists); indeed, construing the Act to require the
7 reporting of equal-value exchanges of mailing lists, as the Petition requests, would likely
8 raise the same thorny questions of valuation that led the Commission to terminate the
9 2003 rulemaking.²¹ Commenters in that rulemaking explained that the value of a
10 particular mailing list often depends on factors outside of the content of the list itself,
11 such as the identities of the buyers and sellers, the number of times the recipient plans to
12 use the list, whether there are any restrictions placed on using the names received, and
13 even media coverage of a particular issue, event, or candidate.²² Absent compelling
14 evidence of a need to reopen these issues in a new rulemaking, doing so would not be a
15 good use of agency resources, particularly given the Commission’s numerous other
16 pending rulemaking petitions and ongoing rulemaking projects.

²⁰ 11 CFR 200.5.

²¹ One such issue is who would be responsible for determining a list’s value and how. *See, e.g.*, Transcript of Hearing on Candidate Travel, Multi-Candidate Committee Status, Biennial Contribution Limits at 182-85 (Oct. 1, 2003), REG 2003-03 (Mailing Lists) (“Hearing Transcript”), <https://sers.fec.gov/fosers/showpdf.htm?docid=425177> (discussing use of list brokers and means of list-price negotiations). Several commenters questioned the use of independent appraisers. *See* Lyn Utrecht, Eric Kleinfeld, James Lamb, and Pat Fiori, Comment at 1-2 (Sept. 25, 2003), <https://sers.fec.gov/fosers/showpdf.htm?docid=13912>. One cautioned that deferring to the valuation by “the SDRS [sic] and similar directories” would discount price negotiations that are “ubiquitous” in these transactions. Hearing Transcript at 184.

²² *See* Hearing Transcript, *supra* note 21, at 57-58, 163, 202-03; Utrecht, Kleinfeld, Lamb, and Fiori, *supra* note 21, at 1.

1 Nor is the Commission aware of any widespread misuse of mailing list exchanges
2 to thwart the purposes of the Act and warrant Commission rulemaking action. The
3 Petition provided only a single example of potential misuse, which the Commission
4 appropriately addressed through its enforcement process.²³

5 Furthermore, the context in which the terms “all receipts” and “all disbursements”
6 appear in the Act validates the Commission’s longstanding conclusion that equal-value
7 exchanges of mailing lists are “non-reportable events.”²⁴ Unlike the exchange of one list
8 for another list of equal value, the forms of “receipts” enumerated in § 30104(b)(2) all
9 serve to improve the reporting committee’s financial position.²⁵ Thus, under traditional
10 canons of statutory construction,²⁶ the equal-value exchange of mailing lists — which
11 would not itself change the reporting committee’s financial position — does not lend

²³ See Petition for Rulemaking, *supra* note 14, at 3-4 (pointing to MUR 6932 (Hillary Rodham Clinton) (failing by vote of 2-2 to approve First General Counsel’s Report recommendation that Commission find reason to believe email-list exchange was not *bona fide*). The Petition did not identify other examples of mailing list exchanges that were resolved through the Commission’s enforcement process, such as MUR 6888 (Republican National Committee, et al), in which the Commission approved the First General Counsel’s Report’s recommendation of no reason to believe that a data exchange was not an arm’s length, commercial arrangement for an exchange of equal value, and MUR 5396 (Bauer for President 2000, Inc.), which resulted in a conciliation agreement where the parties agreed that lists exchanged were not of equal value.

²⁴ See Advisory Opinion 2002-14 (Libertarian National Committee) at 5.

²⁵ See 52 U.S.C. 30104(b)(2) (requiring reporting of contributions; loans; federal funds; rebates; refunds; offsets to operating expenditures; transfers from affiliated committees (and, for party committees, transfers from another party committee regardless of whether it is affiliated); and dividends, interest, and “other forms of receipts”). The Act contains a similar reporting provision for “disbursements.” See *id.* section 30104(b)(4).

²⁶ “Under the ‘*ejusdem generis*’ principle (that’s Latin for ‘of the same kind’), a more general phrase that comes at the end of a specific list takes on the qualities of the list.” *Revitalizing Auto Communities Env’t Response Tr. v. Nat’l Grid USA*, 92 F.4th 415, 445 (2d Cir. 2024). “[T]he scope-of-subparts canon of statutory interpretation . . . holds that ‘[m]aterial contained in unindented text relates to all the following . . . indented subparts.’” *United States v. Lowell*, 2 F.4th 1291, 1296 (10th Cir. 2021) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 156 (2012)).

1 itself to being a “receipt” subject to the Act’s reporting requirements.²⁷ Moreover,
2 reading the statutory term “receipt” to require reporting the value of a mailing list
3 received in an equal-value exchange because it is “received” in the most literal sense of
4 the word (as the Petition appears to suggest) would lead to absurd results, such as
5 requiring political committees to assign a value to and report everything they have
6 “received,” including uncompensated volunteer services²⁸ and other goods and services
7 that are not “contributions” under the Act.

8 Additionally, the equal-value exchange of mailing lists is better suited to
9 disposition on a case-by-case basis through advisory opinions and the enforcement
10 process, as the Commission has been doing for the past 40 years. The Commission has
11 issued several advisory opinions over the course of four decades on the treatment of
12 mailing lists, several of which are referred to above. The Commission also previously
13 conducted the 2003 rulemaking to consider whether to change its historical case-by-case
14 practice to valuing mailing list exchanges and ultimately concluded that a case-by-case
15 approach is the right way to go. Further, a case-by-case approach is more appropriate if,
16 as several commenters in the prior rulemaking indicated, the proper valuation of a
17 mailing list often depends on case-by-case facts.

18 Finally, there does not appear to be great public interest in the proposed
19 rulemaking. The Commission received only six public comments in response to its
20 Notice of Availability, half of which came from the petitioner here.

²⁷ See Advisory Opinion 1981-46 (Dellums) at 2 (concluding that if there is “an exchange of names of equal ‘value’ according to accepted industry practice, the exchange would be considered full consideration for services rendered,” and, “[t]hus, no contribution or expenditure would result and the transaction would not be reportable under the Act”).

²⁸ 11 CFR 100.74.

1 Accordingly, after considering the comments received regarding the Petition and
2 in consideration of each of the factors discussed, the Commission declines to initiate a
3 rulemaking in response to the Petition.

4 Copies of the comments and the Petition for Rulemaking are available on the
5 Commission’s website, <http://www.fec.gov/fosers/> (REG 2019-03 Requiring Reporting
6 of Exchanges of Email Lists (2019)) and at the Commission’s Public Records Office,
7 1050 First Street NE., Washington, D.C. 20463, Monday through Friday between the
8 hours of 9 a.m. and 5 p.m.

9

10 DATED:

11 On behalf of the Commission,

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15 **Sean J. Cooksey,**

16 *Chairman,*

17 *Federal Election Commission.*