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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

AGENDA DOCUMENT NO. 24-16-A
AGENDA ITEM
For meeting of Apr. 18, 2024

April 11, 2024

MEMORANDUM

TO: The Commission

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

Neven F. Stipanovic *NFS*
Associate General Counsel

Robert Knop *RMK*
Assistant General Counsel

Luis Lipchak *LML*
Attorney

SUBJECT: REG 2019-01 (Valuable Information) - Draft NOD

Attached is draft Notice of Disposition for REG 2019-01 (Valuable Information). One or more Commissioners have asked for this draft to be made public and placed on the agenda for the Commission's April 18, 2024, Open Meeting.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 100**

3 **[NOTICE 2024-XX]**

4 **Amending Definition of Contribution to Include “Valuable Information”**

5 **AGENCY:** Federal Election Commission.

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

7 **SUMMARY:** The Commission announces its disposition of a Petition for Rulemaking
8 filed on April 29, 2019. The Petition asked the Commission to amend the existing
9 regulation defining “contribution” by adding a new section to include within the
10 definition of contribution certain “valuable information.” The Petition would further
11 require the Commission to initiate investigations and report to a law enforcement agency
12 “automatically” and without a vote whenever the Commission receives notice that any
13 person has received certain “foreign information” or “compromising information.” The
14 Commission is not initiating a rulemaking at this time because it lacks the statutory
15 authority to do so.

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

17 **FOR FURTHER INFORMATION CONTACT:** Mr. Robert M. Knop, Assistant
18 General Counsel, or Mr. Luis M. Lipchak, Attorney, 1050 First Street, NE., Washington,
19 D.C. 20463, (202) 694-1650 or (800) 424-9530.

20 **SUPPLEMENTARY INFORMATION:** The Federal Election Campaign Act, 52
21 U.S.C. 30101-45 (the “Act”), and Commission regulations define a contribution as “any
22 gift, subscription, loan, advance, or deposit of money or anything of value made by any

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1 person for the purpose of influencing any election for Federal office.”¹ “Anything of
2 value” includes all in-kind contributions, such as the provision of goods and services
3 without charge or at a charge that is less than the usual and normal charge.² Moreover,
4 Commission regulations identify the following as contributions: payment for attendance
5 at a fundraiser, political event, or the purchase price of a fundraising item sold by a
6 political committee³; compensation by a third party for personal services an individual
7 provides unpaid to a political committee⁴; an extension of credit, unless the extension is
8 extended in the ordinary course of a person’s business and under terms and conditions
9 that are substantially similar to credits extended to nonpolitical entities⁵; and anything of
10 value given to a national party committee for the purchase or construction of an office
11 building or facility.⁶

12 On April 29, 2019, the Commission received a Petition for Rulemaking
13 (“Petition”) from Sai, Fiat Fiendum, Inc., Make Your Laws PAC, Inc., and Make Your
14 Laws Advocacy, Inc. (collectively “Petitioners”). The Petitioners asked the Commission
15 to amend 11 CFR Part 100, Subpart B, by adding a new section 100.57 to include within
16 the definition of contribution certain “valuable information.”⁷

¹ 52 U.S.C. 30101(8)(A)(i); *see also* 11 CFR 100.52(a).

² 11 CFR 100.52(d)(1).

³ 11 CFR 100.53

⁴ 11 CFR 100.54

⁵ 11 CFR 100.55

⁶ 11 CFR 100.56

⁷ Petition at 3.

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1 The Petition proposes to define “valuable information” as information that: 1) is
2 not freely available to the public; 2) is provided to a person regulated by the Act at a cost
3 less than the market rate or by a person not hired by the recipient to generate such
4 information; 3) would cost a non-trivial amount for the recipient to obtain at their own
5 expense; and 4) is information that would likely have the effect of influencing any
6 election for federal office or that parties or candidate committees have traditionally
7 expended money to obtain.⁸

8 The proposal sets out two types of “valuable information” that would require
9 special treatment: “foreign information” and “compromising information.”⁹ “Foreign
10 information” would include any information that comes from a source that is prohibited
11 from making contributions under the Act.¹⁰ “Compromising information” would include
12 “any information that could be used to blackmail or otherwise compromise any candidate
13 for Federal office (including indirect coercion, such as of a candidate’s family),
14 regardless of source.”¹¹

15 The Petition would require any person who receives “foreign information” or
16 “compromising information,” or is offered any “foreign information” or “compromising
17 information,” to notify the Commission in writing within three days.¹² Any
18 “compromising information” the Commission received would have to be maintained
19 under seal unless the information was otherwise available to the public, or all persons

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Petition at 3-4.

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1 against whom the information could be used had consented to the information being
2 made public.¹³

3 Under the Petitioners’ proposal, upon learning of any “foreign information” or
4 “compromising information,” the Commission would be required, automatically and
5 without a vote of the Commission, to: (1) initiate investigations pursuant to 11 CFR
6 111.3 and 111.10; (2) provide a report to the Federal Bureau of Investigation; and (3) in
7 the case of “compromising information,” provide a report to every reasonably identifiable
8 person against whom such information could be used, or whose private information is
9 disclosed by such information.¹⁴ The Petitioners’ proposal would also require the
10 Commission, upon learning of any “foreign information” or “compromising
11 information,” to: 1) immediately provide a report to any other law enforcement entity
12 with likely jurisdiction over the matter; 2) within 14 days, publicly issue a report on the
13 matter, redacting any material under seal and any material the disclosure of which could
14 compromise an ongoing law enforcement investigation; and 3) within 30 days after the
15 conclusion of any law enforcement investigation, issue a public report on the matter,
16 redacting any material under seal.¹⁵

17 The Commission published a Notice of Availability (“NOA”) on July 31, 2019,
18 asking for public comment on the Petition.¹⁶ The Commission received 39 comments
19 from individuals supporting the Petition, two from individuals opposing the Petition, and

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See* Notice of Availability, 84 Fed. Reg. 37154 (July 31, 2019).

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1 one from an individual posing several questions regarding the Petition. The Commission
2 also received comments from three organizations that opposed initiating a rulemaking in
3 response to the Petition. The organizational comments raised various concerns with the
4 petition, including that the proposed regulations are vague, would lead to confusion and
5 burdens that would unnecessarily implicate the First Amendment, and that, as
6 acknowledged by the Petition, the Act already covers “valuable information” addressed
7 by the proposed regulation.

8 One organizational commenter opposed the Petition because the “proposed
9 regulatory definition is redundant” and the information covered by the proposed
10 amendment is “already a ‘contribution’ within the meaning of the Act.”¹⁷ Another
11 organizational commenter argued that the Petition was “either unconstitutional or
12 duplicative,” that the proposed definitions were vague, and that the proposed enforcement
13 procedures were inconsistent with the statute.¹⁸

14 In deciding whether to initiate a rulemaking in response to a petition, the
15 Commission generally considers five factors: (1) the Commission’s statutory authority;
16 (2) policy considerations; (3) the desirability of proceeding on a case-by-case basis; (4)
17 the necessity or desirability of statutory revision; and (5) available agency resources.¹⁹
18 After considering these factors and reviewing the comments received on the Petition, the
19 Commission has decided not to initiate a rulemaking at this time.

¹⁷ Campaign Legal Center, Comment.

¹⁸ Institute for Free Speech, Comment

¹⁹ 11 CFR 200.5.

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1 First, and most significantly, the Commission lacks the statutory authority to
2 promulgate the rule sought by the Petition. The Act empowers the Commission to
3 “make, amend, or repeal such rules . . . as are necessary to carry out the provisions of
4 [the] Act.”²⁰ The Act requires an affirmative vote of at least four Commissioners in order
5 to initiate an investigation or report apparent violations to the appropriate law
6 enforcement authorities.²¹ Thus, the Commission has no authority to promulgate a rule,
7 as Petitioners wish, that would require the Commission to initiate an investigation or
8 report an apparent violation to a law enforcement agency “automatically,” without a
9 Commission vote. Furthermore, the Act prohibits the Commission from disclosing any
10 information about a pending investigation without the written consent of the
11 respondent.²² Thus, the Commission also lacks the authority to promulgate a rule, as the
12 Petitioners propose, that would require the Commission to disseminate “compromising
13 information” or other information that may be subject of a pending Commission
14 enforcement action.

15 Additionally, the Commission chooses not to amend the definition of contribution
16 to include “valuable information” as a matter of policy, because such an amendment
17 would be redundant and potentially confusing to the public. The existing definition of
18 contribution includes “anything of value.”²³

²⁰ 52 U.S.C. 30107(a)(8).

²¹ 52 U.S.C. 30106(c), 30107(a)(9), 30109(a)(2).

²² 52 U.S.C. 30109(a)(4), (12).

²³ 52 U.S.C. 30101(8)(A)(i); 11 CFR 100.52(a). *See also* Petition at 2, which acknowledges that “valuable information” is already covered by the Act (“To be absolutely clear, we believe that the information covered in this amendment is already a “contribution” within the meaning of the Act, whether or not it is adopted.”).

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1 Accordingly, after reviewing the comments received regarding the Petition and in
2 consideration of the factors discussed, the Commission declines to initiate a rulemaking
3 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 2019-01 Amending Definition
6 of Contribution to Include “Valuable Information” (2019)) and at the Commission’s
7 Public Records Office, 1050 First Street NE., Washington, D.C. 20463, Monday through
8 Friday between the hours of 9 a.m. and 5 p.m.

9

10 DATED: _____

11 On behalf of the Commission,
12

13 **Sean J. Cooksey,**

14 *Chairman,*

15 *Federal Election Commission.*