

FEC Proposal Takes Agency Rules from 'Horses and Bayonets' to Emojis

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During the last presidential debate of the 2012 general election, one of the more memorable memes to emerge was President Obama's derision of Mitt Romney's military policy as harkening back to the days of "horses and bayonets." Whether fair or not in its original context, President Obama's stinging critique also could be applied to the Federal Election Commission's (FEC) regulations, which still refer to "telegrams," "typewriters," "audio tapes," and "facsimiles."

The FEC recently approved a Notice of Proposed Rulemaking (NPRM) to replace those outdated references, along with some more substantive rule changes to reflect technological advances. The agency also reopened an Advance Notice of Proposed Rulemaking (ANPRM) from 2011 inviting public comments on whether the FEC should initiate a rulemaking to revise its disclaimer requirements to address political communications disseminated over the Internet and mobile devices—an issue which has greatly confounded the agency.

Of relevance to federal PACs, political party committees, and campaign committees, the FEC's technological modernization NPRM proposes to explicitly acknowledge and provide for electronic means to satisfy many of the campaign finance recordkeeping requirements. At a general level, the definition of a "record" required to be kept would permit both paper and electronic records. Requirements to retain "a full size photocopy" of certain checks or other written instruments also would be replaced by the more flexible requirement simply to retain a "record" of an "image" of such forms of payment.

Certain notifications that are still technically required to be sent to the FEC and to contributors by "letter" or "mailings" also would be subject to the greater flexibility of using electronic means of

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notification. "Signature" requirements could similarly be satisfied by "electronic signatures." Curiously, the NPRM also envisions that "emojis" could be "used in lieu of text" in certain circumstances. It is not immediately clear how this would apply in practice. For example, could a contributor use emojis to indicate his or her occupation and name of employer where such information is required for a contribution? Could we start seeing emojis on FEC reports filed by committees?

The FEC proposal also seeks to clarify several technical requirements relating to the transmittal and receipt of contributions as they apply to electronic contributions. Specifically, several of the FEC's existing rules governing the reporting and deposit of contributions depend on when a contribution is considered to be "made" and "received." The NPRM would codify guidance the FEC previously has issued in the form of advisory opinions regarding these issues as they relate to electronic contributions. Under the proposal, payment processors also would be subject to the general deadlines for forwarding contributions to committees once they are "received," but would be exempt from other regulations that apply to "conduits" and "intermediaries" of contributions.

Addressing concerns that pre-paid debit cards may be used to circumvent the contribution limits and source prohibitions, the NPRM also would require federal political committees to treat contributions made by such means as cash contributions. The proposal seeks comment on whether committees are able to distinguish pre-paid debit card transactions from ordinary debit and credit card transactions. While the NPRM does not propose to definitively resolve the issue of Bitcoin contributions—another issue that has divided the FEC—public comments are also being sought regarding this form of payment and other "alternative mediums of exchange."

The NPRM also would allow greater flexibility for when committees are permitted to treat contributions as being "designated" to a primary or general election or "attributed" among joint contributors for the purposes of contribution limits. The proposal's provision for electronic evidence of contribution designations and attributions should be a welcome development, especially for candidate committees, which tend to struggle with the designation and attribution requirements.

Related to the proposed rules on technological modernization, the FEC also reopened its 2011 ANPRM seeking public comment on whether the agency should initiate a rulemaking on disclaimer requirements for political communications made over the Internet. Over the years, the agency has been deeply divided over whether the general disclaimer requirements for political committees, political solicitations, and express advocacy independent expenditures apply to certain small Internet and mobile device ads.

In 2010, the FEC issued a tersely worded advisory opinion on whether the disclaimer requirements apply to Google "AdWords" ads. The lack of any legal analysis in the Google opinion caused Facebook to ask essentially the same question a year later, at which point substantive disagreements among the commissioners scuttled any opinion. A year after the Facebook request, the FEC again was unable to render an opinion in response to a request from Revolution Messaging about whether the disclaimer requirements apply to mobile ads. More recently, the commissioners were again divided in an enforcement proceeding regarding whether candidate and political party committees are required to include disclaimers on their

social media profile pages.

The reopening of the ANPRM on Internet disclaimers continues to raise more questions than it does in providing any answers on a potential regulatory path forward. It is unclear whether the FEC commissioners are any closer now to agreement on the issues raised in the notice, or whether the notice is an attempt at catalyzing consensus.

Public comments on the Internet disclaimers ANPRM are due by December 19, 2016, and a hearing on that potential rulemaking is scheduled for February 1, 2017. Comments on the technological modernization NPRM are due December 2, 2016.

For more information, please contact one of the authors listed.