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AGENDA ITEM
For Meeting of: 09-24-09

MEMORANDUM

TO: The Commission
FROM: Chairman Walther *AW*
DATE: September 24, 2009
RE: Proposal to Post Substantive Litigation Documents from All Parties and *Amici* on the FEC Website

SUBMITTED LATE

This memo outlines a proposal to revise the Commission's practices for posting documents related to Commission litigation on the FEC website. Specifically, in addition to the litigation documents currently posted on the website, the memo proposes to also include documents filed by adverse parties and *amici*.

This proposal was generated, in part, by a thoughtful and constructive letter the Commission received back in May from an attorney located in Washington State, a copy of which is attached. The proposal is also in furtherance of my memo sent to the Commission on June 22, 2009, suggesting that the Commission place online the substantive and non-voluminous pleadings from all parties in non-frivolous cases. A copy of the June 22 memo is also attached.

This memo outlines (1) the Commission's current practice for posting litigation documents on the FEC website, (2) the proposed practice of also posting adverse filings, (3) the resources that would be required for implementation of the proposed practice, and (4) a proposed disclaimer that would appear on the FEC website related to the posted litigation documents.

1. Current FEC Practice

I. The Commission posts documents filed by the FEC, but not by opposing parties. Certain *amicus* briefs are also posted.

II. The Commission only posts substantive court filings. In practice, some filings are hard to categorize, so a certain amount of discretion is needed. For example, if a motion

in limine sought to strike the most important evidence in a case, it might be considered “substantive.”

2. Proposed Practice

- I. As a general rule, the Commission will post on the FEC website, court filings in cases that the FEC is a party to the litigation. However, the Commission will not post court filings in certain cases at the discretion of the Office of the General Counsel subject to Commission oversight, for example, cases that have no impact beyond the parties to the litigation.

- II. The following categories of substantive court filings by all parties and *amici* (including adverse parties and *amici*) will be posted on the FEC website, subject to the discretion of the Office of General Counsel in any given case:
 - A. Complaints and answers
 - B. Substantive motions and related briefs at all levels of a case. These include, for example:
 1. Motions to dismiss
 2. Motions for summary judgment
 3. Pre-trial motions such as motions for preliminary injunctions
 4. Petition for rehearing
 - C. Court opinions and orders on substantive issues, including consent judgments entered to effect settlements
 - D. In addition to lower court filings, for cases before the Supreme Court also include:
 1. Petitions for a writ of certiorari
 2. Jurisdictional statements
 3. Motions to dismiss or affirm

- III. Generally, the following categories of documents will *not* be posted on the FEC website:
 - A. Discovery materials
 - B. Motions and briefing about discovery disputes
 - C. Procedural and scheduling motions and orders
 - D. Bulky exhibits
 - E. Statements of facts
 - F. Proposed orders

3. Resource Impact of the Proposed Practice

Based on the volume of past filings, the Office of General Counsel estimates that the proposed practice would result in the posting of an average of five to ten additional documents onto the website each month. Currently, three Divisions within the Commission work together in posting litigation documents to the FEC website (the Litigation Division, the Information Division and the Information Technology Division).

These Divisions report that the increase in resources necessary for implementing this proposal would be negligible.

Litigation Division. The Litigation Division is already evaluating which documents are to be posted to the website and has indicated that including documents filed by adverse parties would, at most, require a marginal increase in the time it takes to conduct such evaluations.

Once the Litigation Division determines that a document is to be included on the website, the Litigation Division would forward the document as an attachment to the Information Division, requesting that the document be posted on the website. The Litigation Division is already using this procedure for posting documents under the current practice.

Information Division. The Information Division would receive the document in an e-mail from the Litigation Division and build appropriate updated web pages and links on the website. The Information Division would then e-mail the Information Technology Division requesting deployment of the revised web pages and uploading of the documents themselves. Again, the Information Division already uses this procedure for posting of documents under the current practice and the Information Division has indicated that each document currently requires approximately five to ten minutes of work, depending on whether a document relates to a new case or an already existing one.

Information Technology Division. The Information Technology Division would receive the request from the Information Division for deployment of the revised web pages and for uploading of the documents. The Information Technology Division has confirmed that the increase in resources needed to facilitate posting of these additional documents would go “almost unnoticed,” both in terms of Information Technology Division personnel and server capacity.

4. Proposed Disclaimer

The following is a proposed disclaimer to describe the scope of litigation documents that would be available in the FEC website:

For recent cases, this portion of the website generally contains the following categories of litigation documents: (a) complaints and answers, (b) substantive briefs, and (c) court opinions and orders on substantive issues. When cases reach the Supreme Court, petitions for a writ of certiorari and similar documents are also included. The website does not generally include factual materials such as statements of material facts, bulky exhibits, or briefing and orders on procedural or discovery issues.

Steven T Walther/FEC/US
06/22/2009 05:26 PM

To Commissioners Office, Thomasenia
Duncan/FEC/US@FEC, Christopher Hughey/FEC/US@FEC
cc
bcc
Subject Fw: Litigation materials on our website

About a month ago I was asked why the FEC only posts its own pleadings on its website. I was unable to find out how or why the policy was initially established, and asked Tommie if her office would think about the policy and its impact if we were to put the pleadings of all parties on our website, and her comments are below.

I think there is merit to putting the pleadings of all parties on-line, and would like comment.

Disclosing all pleadings advances the cause of transparency and disclosure; additionally, it would enable the reader to understand the context in which our arguments and positions are advanced. If a person wants to learn about the litigation, on one-sided view is not always very helpful, and the viewer is likely going to want to go to another site to see why we are making certain arguments, and how they are made in connection with other arguments being made by other parties.

By separate email, I have attached an outline that tracks the one attached to Tommie's note below, with only very small edits, for your consideration.

Steve

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May 21, 2009

Steven T. Walther, Chairman
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

Matthew S. Petersen, Vice Chairman
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

Re: FEC Website Posting of Pleadings in Major Litigation

Dear Chairman Walther and Vice Chairman Petersen:

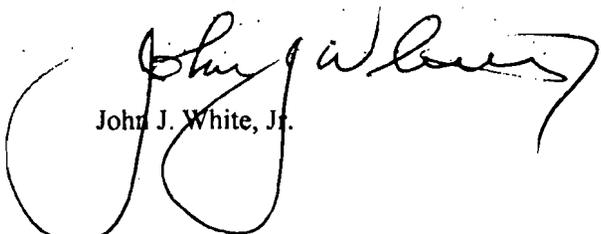
Recently, I visited the Federal Election Commission Website seeking information on the pending lawsuit between the Republican National Committee and the Federal Election Commission over regulation of soft money raised by national parties or in cooperation with state and local parties. I was able to find copies of the pleadings by the Federal Election Commission and by parties aligned with the FEC during the litigation. However, the pleadings page did not include any items that were filed by the Republican National Committee or that might have been filed by any persons aligned with the Republican National Committee in the litigation.

The FEC's Website would provide better service to the public if pleadings on both sides of important cases were posted to the Website. With some additional digging, I was able to locate copies of some of the pleadings from the Republican National Committee. In most circumstances, private parties do not post litigation documents for public review. While documents may be available through the particular federal district court in which an action is filed, unless members of the public know in which district the litigation is ongoing, that resource is not available as a practical matter.

I ask that the Commission consider, as a matter of public policy, making available key pleadings from the FEC and its co-parties and from party opponents.

Very truly yours,

LIVENGOOD, FITZGERALD &
ALSKOG, PLLC


John J. White, Jr.

JJW/lw