



FEDERAL ELECTION COMMISSION
Washington, DC 20463

2016 DEC -7 PM 4:28

AGENDA DOCUMENT NO. 17-06-A

AGENDA ITEM

For meeting of January 25, 2017

December 8, 2016

MEMORANDUM

TO: The Commission

THROUGH: Alec Palmer
Staff Director *AP*

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

Adav Noti *AN*
Associate General Counsel

Lawrence L. Calvert *LC*
Special Counsel to the General Counsel

RE: Proposed Amendment to Directive 17

The Office of General Counsel recommends that the Commission amend Directive 17 to address the certification of Commission tally votes in which fewer than four Commissioners cast approvals and all other Commissioners "object for the record." In preparing this recommendation, we have consulted with the Office of the Commission Secretary ("OCS") and the Office of Compliance, which concur with the proposed amendment.

Pursuant to Directive 52, when a Commissioner objects to a matter on a tally vote, that matter must generally be placed on a Commission meeting agenda, except that "[a]n objection that is 'for the record' does not cause a matter to be added to the agenda for a meeting." Pursuant to Directive 17, a tally vote matter is also added to an agenda if "there is an absence of 4 approvals." Thus, there is an ambiguity in the directives regarding the situation in which a tally vote matter receives fewer than four approvals solely because three or more Commissioners "object for the record." In other words, the directives are unclear as to whether the Commission can use the objection-for-the-record procedure to disapprove a matter on a tally vote without sending that matter to a meeting.

This situation most commonly arises when the Commission deadlocks on a tally vote matter (such as a 20-day advisory opinion) that must be formally voted on pursuant to a statute or a court order prior to the next scheduled Commission meeting.¹ In such instances, the three or more Commissioners who oppose the circulated recommendation are asked to cast objections for the record, rather than objections, because objections would place the matter on the agenda of a meeting that post-dates the matter's deadline. But because Directive 17 can be construed to prohibit certification of tally votes with fewer than four approvals, OCS's usual practice is to direct the Office that circulated the tally vote matter to circulate a separate, subsequent tally vote through which the Commission permits OCS to certify the deadlocked tally vote. This process is problematic for a number of reasons, including that it requires additional time in situations that are already time-sensitive and that it reads a significant tacit limitation into the otherwise unambiguous "object for the record" procedure established by Directive 52.

To eliminate the need for a separate vote to certify a matter that is disapproved by tally vote and cannot be placed on a meeting agenda, we recommend amending Directive 17 to add the language set forth below. This proposed amendment would direct OCS to certify a tally vote that receives fewer than four approvals if every non-recused Commissioner who does not cast an approval casts an objection for the record.

This proposal would have no effect on matters in which any Commissioner casts an objection, regardless of the number of other Commissioners who vote to approve or to object for the record. Pursuant to Directives 17 and 52, such matters would continue to be placed on meeting agendas.²

RECOMMENDATION

Amend Directive 17 as follows:

(a) Add new Part V:

V. If a tally vote matter receives fewer than four approvals and every Commissioner who does not cast an approval casts an "objection for the record" or recuses, the Commission Secretary shall certify the tally vote pursuant to Directive 52 in lieu of placing the matter on a meeting agenda.

(b) Add "subject to Part V" at the end of Parts II.C.1, II.C.2, and III.C.

¹ See, e.g., Advisory Opinion 2016-12 (Citizen Super PAC) (circulated Nov. 3, 2016); Advisory Opinion 2016-13 (Martins for Congress II) (circulated Oct. 11, 2016); *Holmes, et al. v. FEC*, Recommendations Regarding Further Review (circulated May 11, 2016); Advisory Opinion 2012-25 (American Future Fund) (circulated Oct. 12, 2012); cf. *Pursuing America's Greatness v. FEC*, Recommendation to Request Rehearing En Banc at 2 n.1 (circulated Aug. 15, 2016) (noting that date of executive session at which recommendation would normally be discussed was only three days before due date of court filing at issue).

² The proposed amendment also would not apply to matters in which any Commissioner casts a "no vote by ballot" or fails to return the ballot; these matters would continue to be either certified or placed on meeting agendas, depending upon the other votes cast.