



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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AGENDA ITEM
For the meeting of June 10, 2021

MEMORANDUM

TO: The Commission

FROM: Sean J. Cooksey *Sean J. Cooksey*
Commissioner

DATE: June 3, 2021

RE: Motion to Amend Directive 68 to Include Additional Information in Quarterly Status Reports to Commission

This memorandum explains the purpose of my amendment to Directive 68 Status of Enforcement Reports to the Commission, which I have placed on the next open meeting agenda.

I. Background

The history of consensus-based accountability measures for enforcement at the Federal Election Commission spans over a decade. It began in December 2009, when then-Chairman Steven T. Walther proposed Directive 68 and the Commission adopted it unanimously.¹ Under that directive, for the first time, the Commission started to hold itself responsible for its enforcement docket by publishing regular enforcement status reports, as well as giving case updates to respondents with pending matters.² Not satisfied with these improvements, in the years since, Commissioners, including Commissioner Walther, have consistently pressed for greater levels of transparency and accountability through amendments to Directive 68 and greater public disclosure and reporting on agency activity.³ This praiseworthy work has done much to improve the FEC's commitment to fair and efficient enforcement of the law.

Under Directive 68 today, the Commission publishes quarterly Status of Enforcement reports that provide comprehensive information about our enforcement caseload. Among other

¹ Minutes of Open Meeting of the Federal Election Commission (Dec. 17, 2009), *available at* <https://www.fec.gov/resources/updates/agendas/2010/approved2010-02.pdf>.

² FEC Directive 68, Enforcement Procedures (Dec. 17, 2009), *available at* <https://www.fec.gov/resources/updates/agendas/2009/mtgdoc0986.pdf>.

³ *See, e.g.*, Memorandum to the Federal Election Commission: "Motion to Amend Directive 68 to Establish Deadlines for the Timely Processing of Enforcement Matters" at 2 n.4 (May 1, 2019), *available at* https://www.fec.gov/resources/cms-content/documents/mtgdoc_19-17-A.pdf (cataloging previous amendments to Directive 68 proposed by Commissioner Walther).

things, these reports help Commissioners and the public see how many enforcement matters are open at the Commission, how many are awaiting Commission action, and where cases are in the enforcement process (*e.g.*, how many are in conciliation, alternative dispute resolution, investigation, or at the probable-cause stage).⁴ The reports further track how these cases meet our enforcement-timeline goals and how performance on these metrics has changed relative to previous years. Finally, although redacted in their public-facing form, the reports track individual case statuses, with a focus on cases that are neglected or imperiled by the statute of limitations. These metrics help Commissioners monitor both the Office of General Counsel's performance and our own; inform case prioritization; and provide policymakers, the regulated community, and the public with critical information for evaluating agency performance.

Additionally, Directive 68 mandates that respondents be given regular updates about the status of their cases so that they too can have greater information about where their matters stand in the enforcement process. Directive 68 thereby increases transparency at the Commission and provides important information for the agency to improve its operations.

II. Proposed Amendment to Directive 68

To continue to fulfill its transparency and accountability purposes, Directive 68 must adapt to new trends in our enforcement docket. This proposed amendment expands reporting on the status of our enforcement matters to include a new category of enforcement disposition not currently included in these reports.

Over the past several years, the Commission has changed how it handles matters at the initial stage of enforcement when fewer than four Commissioners vote affirmatively to proceed with enforcement or to dismiss a matter, as our governing statute requires. Historically, the Commission's practice in such circumstances has been to close the case file. By closing the file, the Commission makes the case materials public, it informs the parties of the outcome, and Commissioners issue statements of reasons explaining their votes.⁵ This disposes of the matter and removes it from the Commission's enforcement docket.

Recently, however, a non-majority of Commissioners have begun to refuse to close case files in certain matters after the Commission has voted on their merits and failed to garner four votes to resolve them. By refusing to close the file, this non-majority turns these cases into zombie matters—dead but unable to be laid to rest. They remain with the agency and on our enforcement docket indefinitely, despite having been adjudicated, with the vote outcome and Commissioners' reasoning withheld from the complainant, the respondent, and the public.

⁴ FEC Directive 68, Enforcement Procedures (Dec. 14, 2017), *available at* https://www.fec.gov/resources/cms-content/documents/directive_68.pdf.

⁵ A motion to close a file is not an action on the merits of a case by the Commission, but a ministerial act that makes a case public when the Commission fails to approve further enforcement by the required four votes. Because closing the case file is not a dismissal, it does not require four affirmative votes of the Commission, but only a simple majority vote.

This practice has several harmful and predictable consequences. First, by failing to disclose our adjudication, the Commission is left vulnerable to a lawsuit under 52 U.S.C. § 30109(a)(8), whereby complainants (often ideologically driven organizations) can attempt to bypass our agency and pursue enforcement and regulatory changes through litigation. If the Commission does not appear in court to defend itself in a lawsuit—a scandalous and largely unheard-of behavior—the reviewing court is left ignorant of the Commission’s action and views, and the Commission is subject to a default judgment. Meanwhile, respondents are left to their own devices to intervene and defend their positions in court.

As the use of this tactic by a non-majority of Commissioners has expanded, the number of zombie matters on the Commission’s enforcement docket has increased dramatically. At the end of 2020, the Commission had 4 matters for which it voted on the merits of the allegations, failed to garner the necessary votes to proceed with an enforcement case or to dismiss, and then failed to close the file. As of May 2021, the number is now 13 unclosed files—a *225 percent increase*. It will likely continue to rise as the Commission processes its enforcement backlog.⁶

To better monitor these zombie matters being hidden from the parties, federal courts, and the public, the Commission should begin to track and report them separately in our quarterly Status of Enforcement reports. That is what this amendment does, and it serves several important purposes.

First, it corrects a misrepresentation on the Status of Enforcement reports. Currently, these matters are listed in the same category as adjudicated matters pending before the Commission. This wrongly suggests that they are awaiting Commission action and that Commissioners are neglecting their responsibility to timely consider the Office of General Counsel’s First General Counsel Reports and recommendations. But that is false. To be more accurate, our reports should reflect the work that the Commission has actually completed in these matters by separating them from those for which no Commission deliberation has taken place.

Second, to the extent that certain Commissioners justify refusing to close case files by claiming that the Commission may subsequently revisit these matters in order to compromise or reach consensus on a merits disposition (something that does not occur in practice), a report listing them separately may facilitate those future negotiations. If, on the other hand, the Commission is not revisiting these matters, that too is useful information for Commissioners considering whether this practice furthers consensus building. Likewise, as the allegations in these withheld matters age and fall outside of the applicable statute of limitations, these reports may prompt some Commissioners to reconsider their earlier refusal to close the files.

Finally, this reported data will serve as an important tool to inform the public about the Commission’s activities that would otherwise remain hidden, and thereby will promote greater accountability for the agency’s enforcement work. Those outside of the FEC—including federal courts, policymakers, the regulated community, and the general public—will be able to assess trends in the number of zombie matters and judge the FEC and Commissioners accordingly. As a

⁶ Statement of Commissioner Ellen L. Weintraub on the Senate’s Votes to Restore the Federal Election Commission to Full Strength (Dec. 9, 2020), *available at* <https://www.fec.gov/resources/cms-content/documents/2020-12-Quorum-Restoration-Statement.pdf>.

federal agency sworn to uphold the law and serve the public interest, the Commission has no legitimate interest in obscuring or hiding these activities from scrutiny.

III. Conclusion

As Justice Louis Brandeis wrote, “Sunlight is said to be the best of disinfectants.”⁷ The Commission should have nothing to fear from increasing transparency in our enforcement process. This amendment to Directive 68 is a small step toward greater accountability in how the Federal Election Commission enforces this critical and constitutionally sensitive area of law. This and other changes are long overdue.

⁷ Louis D. Brandeis, *OTHER PEOPLE’S MONEY AND HOW BANKERS USE IT* 62 (1914).