



AGENDA DOCUMENT NO. 18-32-A

MINUTES OF AN OPEN MEETING
OF THE
FEDERAL ELECTION COMMISSION
THURSDAY, MAY 24, 2018

PRESENT: Caroline C. Hunter, Chair, presiding
Ellen L. Weintraub, Vice Chair
Matthew S. Petersen, Commissioner
Steven T. Walther, Commissioner
Alec Palmer, Staff Director
Lisa Stevenson, Acting General Counsel
Dayna C. Brown, Secretary and Clerk

Chair Caroline C. Hunter called the Federal Election Commission to order in an open meeting at 10:13 A.M. on Thursday, May 24, 2018 with a quorum present.

Chair Hunter recognized Vice Chair Weintraub who

MOVED that the Commission add to the agenda consideration of the *Adoption of Forty Year Report*, and that the Commission determine pursuant to 11 C.F.R. § 2.7(d), that business so requires and no earlier public announcement was possible; and

FURTHER MOVED to suspend the rules on the timely submission of agenda documents in order that the Commission may consider the late submission of Agenda Documents No. 18-27-A, 18-28-A, and 18-28-B.

The motion carried by a vote of 4-0 with Commissioners Hunter, Petersen, Walther, and Weintraub voting affirmatively for the decision.

I. CORRECTION AND APPROVAL OF MINUTES

Minutes for March 14, 2018
Agenda Document No. 18-24-A

Minutes for April 26, 2018
Agenda Document No. 18-25-A

Chair Hunter recognized Vice Chair Weintraub who

MOVED to approve the minutes for the Open Meeting of March 14, 2018 as set forth in Agenda Document No. 18-24-A, and the minutes for the Open Meeting of April 26, 2018, as set forth in Agenda Document No. 18-25-A.

The motion carried by a vote of 4-0 with Commissioners Hunter, Petersen, Walther, and Weintraub voting affirmatively for the decision.

II. DRAFT ADVISORY OPINION 2018-07

Mace by Dan Backer, Esq.

Agenda Document No. 18-28-A (Draft A)
(Submitted Late)

Agenda Document No. 18-28-B (Draft B)
(Submitted Late)

Chair Hunter recognized Mr. Dan Backer, Esq., who was available to answer Commissioners' questions. The Chair then recognized Ms. Esther Gyory of the Office of General Counsel who presented the draft advisory opinion request from South Carolina State Representative Nancy Mace. The requestor asks several questions about the application of the Federal Election Campaign Act (the Act) and Commission regulations to the requestor's proposal to establish, maintain, and control a non-connected federal independent expenditure-only political committee that will make public communications promoting, supporting, attacking, or opposing clearly identified federal candidates. Both drafts conclude that the proposed committee would be acting as Representative Mace's agent in making the public communications described in the request. The drafts further conclude that because Representative Mace is a state office holder and candidate, she and her agents, including the proposed committee, may not use nonfederal funds to pay for public

communications promoting, supporting, attacking, or opposing clearly identified federal candidates.

Mr. Backer confirmed that he was able to review both drafts and expressed his belief that the *SpeechNow* case was the controlling opinion in this matter, rather than *McConnell* because there were no Super PACs when *McConnell* was decided and the standard of corruption used was expressly overruled in *Citizens United* and *McCutcheon*.

Chair Hunter recognized Commissioner Petersen who stated that while he understood Mr. Backer's point, the Commission did not have the latitude, through the Advisory Opinion process, to declare a provision unconstitutional that was not addressed in the *SpeechNow* case. Personal sympathies aside, he stated that the analysis in the drafts before the Commission were a straightforward take on the legal requirements. He further stated that under the current statutory framework, the drafts reach the right conclusion.

Chair Hunter aligned herself with the comments of Commissioner Petersen.

Chair Hunter recognized Vice Chair Weintraub who stated that both drafts were legally sound and that she could support either one.

Discussion continued.

Chair Hunter informed Vice Chair Hunter of her and Commissioner Petersen's preference for Draft B.

Vice Chair Weintraub then

MOVED to approve Draft B, as set forth in Agenda
Document No. 18-28-B.

Commissioner Walther requested time to review Draft B which circulated last night, and indicated his preparedness to vote in favor of Draft A.

Chair Hunter asked Mr. Backer his preference on whether to wait for Draft B or receive an answer on Draft A, to which Mr. Backer replied he did not have a preference given that the drafts reach the same conclusion.

Chair Hunter recognized Vice Chair Weintraub who withdrew her motion and then

MOVED to approve Draft A, as set forth in Agenda
Document No. 18-28-A.

The motion carried by a vote of 4-0 with Commissioners Hunter, Petersen, Walther, and Weintraub voting affirmatively for the decision.

III. RULEMAKING PROPOSAL TO COMBAT FOREIGN INFLUENCE IN U.S. ELECTIONS

Memorandum from Vice Chair Ellen L. Weintraub
dated May 17, 2018

Agenda Document No. 18-26-A

Chair Hunter recognized Vice Chair Weintraub who referenced a recent statement released by the Senate Select Committee on Intelligence from Senators Burr and Warner about foreign interference in past and future U.S. elections. Vice Chair Weintraub stated that she shares the Senators' concern

that foreign actors have intervened in past elections and, it appears, intend to intervene again. The Vice Chair explained that new information has come to light since the Commission last discussed this, including an indictment issued in February that indicted 13 Russians and 3 Russian entities for engaging in a conspiracy to defeat the lawful government functions of the United States by dishonest means in order to interfere with U.S. political and electoral processes including the 2016 U.S. Presidential election. The indictment specifically named provisions of the Federal Election Campaign Act (the Act) as part of the laws that were targeted and violated.

Discussion continued.

Vice Chair Weintraub stated that while the Commission does have an enforcement process to deal with complaints related to the 2016 election, which while important, looks retroactively. She noted her concern, even more so, for the elections that are coming up. The Vice Chair reminded the Commission that in 2002 Congress passed the Bipartisan Campaign Reform Act and gave a very tight timeline of 90 days to finalize a rulemaking, which the Commission met. The Vice Chair stated that the current Commission could do likewise as it relates to preventing foreigners from spending money in U.S. elections, and that it was not too late to try to put some additional backstops in place before the 2018 election.

Discussion continued.

Chair Hunter recognized Commissioner Petersen who stated that the issue of foreign interference in American elections is one that all Commissioners take seriously as it relates to the legitimacy of our democracy. Commissioner Petersen remarked that the Commission has had some bipartisan breakthroughs as it relates to this issue, as evidenced by the use of Facebook ads and other internet communications wherein indictments have been brought against foreign individuals and companies that have allegedly violated the Act and the foreign national prohibition contained in the Act. He pointed out that the Commission has a rulemaking underway to address this specific issue, for which the Commission will hold a hearing next month. Commissioner Petersen expressed his optimism that the Commission will find a path forward on that issue.

With regard to the statement by Senators Burr and Warner referenced by the Vice Chair, Commissioner Petersen highlighted that the inquiry continues and findings will be issued by the Senate Select Committee on Intelligence. Commissioner Petersen stated that he looked forward to seeing what those findings are and seeing the extent to which the efforts to interfere involve matters within the Commission's jurisdiction; matters such express advocacy that clearly fall within the Commission's jurisdiction, as well as the prohibition on foreign nationals making contributions, donations, or expenditures in connection with federal elections.

Discussion continued.

Commissioner Petersen reiterated that he looked forward to the findings and information of the Senate Intelligence Committee and the various other government investigations that are currently taking place, and based on those findings he may reconsider his past positions; however, at this point where the evidence has been strongest has been on the internet ads, and as a result he supported the Internet Disclaimer rulemaking. He stated that he would not be able to support a motion made by the Vice Chair today, but he was not foreclosing future consideration of such a motion once additional information and evidence is received.

Chair Hunter recognized Commissioner Walther who expressed his desire for the Commission to involve itself in whatever it has in the way of jurisdiction as it relates to policies or rulemakings in order to strengthen its grip on the flow of money that may be coming from outside sources. He stated that he applauded any effort to do so, expressed his support for Vice Chair Weintraub's motion, and stated that it would be good for the Commission to begin to be leaders in this effort rather than waiting for information from other governmental agencies. Commissioner Walther further stated that how the Commission learns to deal with corporate activity in the campaign finance field needs to be examined in terms of composition and power, such as who owns the shares of stock; who controls the shares of stock; voting shares vs. non-

voting shares of stock, etc., in order to determine where money is actually coming from.

Chair Hunter expressed her desire to associate herself with the comments of Commissioner Petersen. The Chair further stated that she stood by the statements that the Republican Commissioners have previously put out on these issues.

Discussion continued.

Vice Chair Weintraub then

MOVED to take the following actions:

1. Open a rulemaking.
2. Direct the Office of General Counsel to collect all of the proposals previously suggested at the agency, including: the proposals within the attempted 2011 Notice of Proposed Rulemaking; the Policy Statement put forward by the Republican Commissioners; and the ideas suggested at the June 23, 2016 Forum and summarized in Vice Chair Weintraub's September 2016 memorandum to the Commission.
3. Direct the Office of General Counsel to incorporate the suggestions into a Draft Notice of Proposed Rulemaking for Commission consideration on a schedule that would allow the Commission to finalize a rule within 90 days.

Ms. Erin Chlopak of the General Counsel's Office participated in the continuing discussion that included clarification of the motion, the potential

process for compiling each of the named documents into one, and acknowledgement of the large undertaking that would result from the motion.

The motion failed by a vote of 2-2 with Commissioners Walther and Weintraub voting affirmatively for the motion. Commissioners Hunter and Petersen dissented.

Chair Hunter recognized Vice Chair Weintraub who expressed her desire to try a narrower proposal and then

MOVED to take the following actions:

1. Open a rulemaking.
2. Direct the Office of General Counsel to draft a Notice of Proposed Rulemaking including any appropriate proposed rule text that would address, specifically: the topic of preventing spending by foreign government owned or controlled corporations; the topic of preventing the use of corporate conduits by foreign nationals to spend funds on American elections; and, the proposal put forth by Republican Commissioners involving negative certifications.
3. Direct the Office of General Counsel to draft the Notice of Proposed Rulemaking on an expedited schedule that would allow the Commission to adopt a rule within 90 days.

Discussion followed.

The motion failed by a vote of 2-2 with Commissioners Walther and Weintraub voting affirmatively for the motion. Commissioners Hunter and Petersen dissented.

IV. ADOPTION OF FORTY YEAR REPORT

Memorandum from Commissioner Steven T. Walther
dated May 21, 2018

Agenda Document No. 18-27-A
(Submitted Late)

Commissioner Walther stated that the document will be pulled so that he can revise it. He further expressed his belief that a document such as this, inclusive of the history and origins of the agency was important and valuable to the general public. Commissioner Walther stated that the most recent such report, the agency's 30 Year Report, is no longer accurate or comprehensive.

Chair Hunter recognized Commissioner Petersen who stated that in 2015 the Commission's Information Division took the initiative to create a 40 year anniversary timeline which is available on the Commission's website. Commissioner Petersen suggested that the Commission may want to look into enhancing this timeline, which includes links to the Commission's 10, 20, and 30 Year Reports, on a periodic basis, as a means of addressing the concerns raised by Commissioner Walther.

Discussion continued.

Chair Hunter recognized Vice Chair Weintraub who expressed her appreciation for Commissioner Walther's efforts on this issue. She further stated that she is a big fan of the Commission's Information Division that wrote a 40 Year Report based largely on earlier decade reports adopted and issued by

the Commission. Vice Chair Weintraub stated that preparing a history of the Commission is something that can be delegated to Commission staff and expressed her contentment with the excellent work of the Information Division, without the revisions proposed by Commissioners' offices.

Chair Hunter stated that tomorrow is the deadline for the comment period on the Internet Disclaimer rulemaking and that there will be a hearing on the matter at the end of June. The Chair further stated that the Commission endeavors to work on the Nationwide Independent Expenditure rulemaking soon.

Vice Chair Weintraub stated that she shared the Chair's interest in the comments on the Internet Disclaimer rulemaking.

V. MANAGEMENT AND ADMINISTRATIVE MATTERS

There being no further business to come before the Commission, the meeting adjourned at 11:12 A.M.

Signed:

Caroline C. Hunter
Chair of the Commission

Attest:

Dayna C. Brown
Secretary and Clerk of the Commission