



CITIZENS FOR
RESPONSIBILITY &
ETHICS IN WASHINGTON

April 21, 2021

The Honorable Shana M. Broussard
Chair
Federal Election Commission
1050 First Street, N.E.
Washington, DC 20463

By electronic mail (AO@fec.gov)

Re: Comments in Opposition to Draft Statement of Policy Regarding Closing the File at the Initial Stage in the Enforcement Process

Dear Chair Broussard:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests the Federal Election Commission reject Agenda Document No. 21-21-A, the proposed Statement of Policy Regarding Closing the File at the Initial Stage in the Enforcement Process, offered by Commissioners Dickerson, Cooksey, and Trainor on April 1, 2021. The policy not only contradicts the nonpartisan structure of the FEC, it also is prohibited by the Federal Election Campaign Act and the FEC’s rules.

The proposal seeks to alter the FEC’s procedures for enforcement matters by providing that “[w]here there are not four affirmative votes to take any of the actions set forth in the Commission’s policy regarding action at the initial stage of the enforcement process in a matter, the file will be closed unless the Commission votes to keep the file open.” Presumably the latter vote to keep the file open must also have the support of at least four Commissioners. The proposal purports to “conserve[e] resources” and to permit notice to the respondents and complainants about the termination of the process.

The proposal contradicts the nonpartisan structure of the FEC. “The Commission is . . . structured to allow for a diverse range of views,” and to encourage the Commission to “work [to] a consensus” when there is a risk of deadlock.¹ The proposal, however, would permit a non-majority of the commission, likely comprising a partisan bloc,² to direct the FEC’s activities without the support of a member from another party. That would deprive this Commission, and members of all future

¹ Statement of Commissioner Steven Walther to the Senate Committee on Rules and Administration, June 13, 2007, https://www.fec.gov/resources/about-fec/commissioners/walther/statements/Senate_Hearing_Transcript.pdf.

² See Commissioner Ann M. Ravel, Dysfunction and Deadlock: The Enforcement Crisis at the Federal Election Commission Reveals the Unlikelihood of Draining the Swamp 7–8, Feb. 2017, https://beta.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport_feb2017.pdf.

Commissions, of the opportunity to consider on a case-by-case basis which matters are ready for termination.³ It would further deprive the Commission of an opportunity to negotiate a resolution of the impasse. Finally, under recent erroneous precedent of the D.C. Circuit, it would empower a non-majority of this Commission to terminate judicial review of the FEC's nonenforcement decision by permitting them to invoke grounds for dismissal the Commission did not vote to invoke.⁴

Rather than a power that may be evenly shared by members of the Commission, the proposed policy change would only empower those commissioners who vote against proceeding with an enforcement matter. That would cede control of the agency to members who disfavor enforcement, notwithstanding the fact that, by its own terms, the proposed policy only comes into play when the Commission lacks four votes to conclude there is no reason to believe a violation occurred, or to conclude the matter should be dismissed for equitable reasons.

The Commission is designed to require cross-partisan agreement for all of its actions. While a different Commission structure dominated by appointees of a single party may provide for quicker or more efficient resolution of matters, Congress intentionally set up the FEC to require deliberation and compromise among its members. The proposal conflicts with that policy choice and undermines the FEC's nonpartisan structure.

The proposal is also illegal. The Federal Election Campaign Act mandates that “[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission.”⁵ The FECA further provides that “any action” related to enforcement powers must be supported by the “affirmative vote of 4 members of the Commission.”⁶ Moreover, it provides that no member may “delegate to any person his or her vote or any decision-making authority or duty vested in the Commission by the provisions of this Act.”⁷

The proposed policy violates these mandates by permitting a non-majority of the Commission to command an action by the FEC: specifically, to terminate a case and close the file. Such acts are far from “ministerial.” The act of closing a case terminates the complainant’s chance for relief from violations of federal law. In many cases before the Commission, closing the case deprives the complainant, and indeed all Americans, of their constitutional right to receive information to which Congress has entitled them.

Finally, the Commission cannot enact a change as substantial as the proposed policy without at least proceeding through formal rulemaking procedures. The proposal does not merely “advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”⁸ Rather, altering the vote threshold to terminate a complainant’s claim for relief “leaves the agency and its decisionmakers [no] . . . discretion,” and “has binding effects on private parties” as well as the

³ See, e.g., Certification, MUR 7181 (Indep. Women’s Voice), Feb. 9, 2021, https://www.fec.gov/files/legal/murs/7181/7181_06.pdf (showing majority vote to dismiss based on prosecutorial discretion after deadlock).

⁴ See *CREW v. FEC*, No. 19-5161 (D.C. Cir. Apr. 9, 2021).

⁵ 52 U.S.C. § 30106(c); accord 11 C.F.R. § 111.9 (requiring “the Commission” to terminate proceeding).

⁶ 52 U.S.C. § 30106(c).

⁷ *Id.*

⁸ *Chrysler Corp. v. Brown*, 441 U.S. 281, 301 n.31 (1979); see also *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (statements of policy merely “announc[e] the agency’s tentative intentions for the future”).

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“agency itself.”⁹ Accordingly, the change, even if it were permitted under the FECA, would need to proceed through the formal procedures of notice-and-comment rulemaking.

We respectfully request the Commission reject Agenda Document No. 21-21-A.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Noah Bookbinder', with a long horizontal flourish extending to the right.

Noah Bookbinder
President

⁹ *CropLife Am. v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003).