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FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA DOCUMENT NO. 21-21-A
AGENDA ITEM
For the meeting of April 8, 2021

MEMORANDUM

TO: The Commission

FROM: Allen Dickerson
Vice Chair

Handwritten signature of Allen Dickerson in blue ink.

Sean J. Cooksey
Commissioner

Handwritten signature of Sean J. Cooksey in blue ink.

James E. "Trey" Trainor, III
Commissioner

Handwritten signature of James E. "Trey" Trainor, III in blue ink.

DATE: April 1, 2021

SUBJECT: Draft Statement of Policy Regarding Closing the File at the Initial Stage in the Enforcement Process

Pursuant to Directive 17, attached for discussion in open session is a Draft Statement of Policy regarding Closing the File at the Initial Stage in the Enforcement Process. This draft policy would clarify the Commission's procedures when a vote is taken on a matter at the initial stage of the enforcement process and there are not at least four affirmative votes on the disposition of the matter at that stage.

We request that this memorandum and the draft Statement of Policy be made public and placed on the Commission's Open Meeting Agenda for April 8, 2021.

Attachment

FEDERAL ELECTION COMMISSION

11 C.F.R. Part 111

[Notice 2021-__]

Statement of Policy Regarding Closing the File at the Initial Stage in the Enforcement Process

AGENCY: Federal Election Commission.

ACTION: Statement of Policy.

SUMMARY: The Federal Election Commission (“Commission”) is issuing a Policy Statement to clarify the Commission’s policy concerning closing of the file at the initial stage of enforcement proceedings where there are not at least four affirmative votes on the disposition of the matter at that stage.

DATES: Effective on _____, 2021.

SUPPLEMENTARY INFORMATION: The Federal Election Campaign Act of 1971, as amended, 52 U.S.C. 30101 *et seq.* (“FECA” or “the Act”), grants the Commission “exclusive jurisdiction with respect to [] civil enforcement” of the provisions of the Act and Chapters 95 and 96 of Title 26. 52 U.S.C. 30106(b)(1). Enforcement matters come to the Commission through complaints from the public; information ascertained in the ordinary course of the Commission’s supervisory responsibilities, including referrals from the Commission’s Reports Analysis and Audit Divisions; referrals from other government agencies; and self-reported submissions.

In most instances, at the initial stage in the enforcement process, the Commission will, with the affirmative votes of at least four Commissioners, take one of the following actions with respect to a Matter Under Review (“MUR”): (1) find “reason to believe” a respondent has violated the Act; (2) dismiss the matter; (3) dismiss the matter with admonishment; or (4) find “no reason to believe” a respondent has violated the Act. *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007). In some cases, however, there are not at least four affirmative votes to take any of these actions. This policy statement is intended to clarify the Commission’s practice in such cases.

Where 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. Closing the file is a ministerial action signifying that the Commission has completed its consideration of the matter at the initial stage of the enforcement process (by voting on the matter but lacking four affirmative votes to find reason to believe or otherwise dispose of the matter). A Commissioner’s vote on the question of whether to close the file is not a vote in support of or against the recommendations of the Office of General Counsel, nor does it represent a Commissioner’s views on the merits of the matter or whether the Commission should have moved forward with the matter. Rather, closing the file allows the Commission to make public the case file containing the complaint, the response(s), the recommendation(s) of the Office of General Counsel, the certification of votes

taken by the Commission on the matter, and any statements of reasons written by any Commissioner(s). By taking this step, the Commission acts in accordance with FECA's confidentiality provisions and simultaneously prevents the incorrect perception that action has not been taken on a matter where, in fact, the Commission has divided over how to resolve the matter under FECA's four-vote requirement. Furthermore, by closing the file, the Commission's enforcement docket does not become overrun with stale matters, thereby conserving resources, and respondents are given the benefit of being informed about the Commission's action with regard to their matter.

Accordingly, when a vote is taken on a matter at the initial stage of the enforcement process, and there are not at least four affirmative votes to: (1) find "reason to believe" a respondent has violated the Act, or (2) dismiss the matter (with or without admonishment), or (3) find "no reason to believe" a respondent has violated the Act, as to all respondents, the file will close at the adjournment of the executive session at which it was considered, absent the affirmative vote of at least four Commissioners to keep the matter open for further consideration. Upon the closing of the file, the respondent and complainant will be so notified, and the file will be made public consistent with the Commission's policy. *See Disclosure of Certain Documents in Enforcement and Other Matters*, 81 Fed. Reg. 50702 (Aug. 2, 2016).

Conclusion: This policy clarifies the Commission's procedures when a vote is taken on a matter at the initial stage of the enforcement process and there are not at least four affirmative votes to find "reason to believe" as to any respondent, or to dismiss the matter (with or without admonishment), or find "no reason to believe" as to all respondents. The policy does not confer any rights on any person and does not in any way limit the right of the Commission to evaluate every case individually on its own facts and circumstances.

This notice represents a general statement of policy announcing the general course of action that the Commission intends to follow. This policy statement does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public participation, prior publication, and delay in effective date under 5 U.S.C. 553 of the Administrative Procedures Act ("APA"). The provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), which apply when notice and comment are required by the APA or another statute, are not applicable.