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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AGENDA DOCUMENT NO. 21-29-A
AGENDA ITEM
For the meeting of June 24, 2021

MEMORANDUM

TO: The Commission

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

DATE: June 17, 2021

RE: Proposed Statement of Policy Regarding the Disclosure of Vote Certifications
Relating to Litigation

Pursuant to Directive 17, attached for inclusion on the next open meeting agenda is a proposed Statement of Policy regarding disclosure of vote certifications relating to litigation. This policy would establish the regular publication and disclosure of Commission votes relating to litigation matters involving the Commission. I intend to move adoption of this policy statement at the Commission's meeting on June 24, 2021.

FEDERAL ELECTION COMMISSION

11 CFR Part 111

[Notice 2021-__]

Statement of Policy Regarding the Disclosure of Vote Certifications Relating to Litigation

AGENCY: Federal Election Commission.

ACTION: Statement of Policy.

SUMMARY: The Federal Election Commission (“Commission”) is issuing a Statement of Policy to clarify the Commission’s policy concerning the disclosure of vote certifications relating to litigation matters involving the Commission.

DATES: Effective Date: ____ __, 2021.

SUPPLEMENTARY INFORMATION: Under the Freedom of Information Act, the Commission is required to “make available for public inspection a record of the final votes of each member in every agency proceeding.” 5 U.S.C. § 552(a)(5). In the enforcement context, the Commission is required to make public documents that reflect the agency’s final determination. *See* 5 U.S.C. § 552(a)(2)(A); 52 U.S.C. § 30109(a)(4)(B)(2). As a matter of policy, the Commission determined that, because certain documents “play a critical role in the resolution of a matter, the balance tilts decidedly in favor of public disclosure.” Federal Election Commission, Statement of Policy: Disclosure of Certain Documents in Enforcement and Other Matters, 81 Fed. Reg. 50702, 50703 (Aug. 2, 2016) (“Enforcement Disclosure Policy”). Thus, the Commission adopted a policy to go beyond the bare minimum and to disclose additional enforcement documents that provide the public a fuller understanding of the Commission’s final determinations. This policy, however, does not address Commission votes, apart from its consideration of a matter’s merits, to authorize the Office of General Counsel to enter into related litigation, whether before or after an enforcement matter is closed. It also does not address Commission votes on litigation unrelated to enforcement matters.

The Federal Election Campaign Act of 1971, as amended (the “Act”), provides that, if the Commission cannot conciliate with respondents who violate the Act, it may, “upon an affirmative vote of 4 of its members, institute a civil action for relief.” 52 U.S.C. § 30109(a)(6)(A); *see also* 52 U.S.C. § 30107(a)(6). The Act further provides that “[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.” 52 U.S.C. § 30109(a)(8)(A). The Act grants the Commission the power to “defend (in the case of any civil action brought under section 30109(a)(8) of this title) or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel.” 52 U.S.C. § 30107(a)(6). Such defense also must be authorized by the affirmative vote of four or more Commissioners. 52 U.S.C. § 30106(c).

For most of the Commission’s history, votes to defend the agency in lawsuits relating to administrative complaints or agency actions have been routine, even when there were not four affirmative votes to resolve an underlying complaint. *See* Statement of Chair James E. “Trey”

Trainor III on the Dangers of Procedural Disfunction at 6 (Aug. 28, 2020); Statement of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen Regarding the Commission’s Vote to Authorize Defense of Suit in *Public Citizen. et. al. v. FEC*, Case No. 14-CV-00148 (RJL) (Apr. 10, 2014). In recent years, however, votes to defend the agency have become more contentious. Since 2019, the Commission has failed to appear—without explanation—in multiple lawsuits under § 30109(a)(8)(A).

Commission votes to authorize an enforcement suit or defense of the agency in litigation are not published or disclosed to the public as a matter of course. These votes are not addressed as part of the Commission’s Enforcement Disclosure Policy, and so there is no means by which the public is made aware of how Commissioners vote on these questions. This is true despite the fact that these votes are often a critical aspect of the Commission’s work and “final votes in an agency proceeding.”

Publishing Commission votes related to agency litigation furthers the FEC’s transparency and accountability mission. The Commission has no legitimate interest in withholding entirely this information. The public interest in seeing and understanding votes to authorize litigation (both offensively and defensively) is made greater by recent changes in the Commission’s litigation activity. There are currently six ongoing lawsuits against the FEC under § 30109(a)(8)(A) where the agency has failed to appear in federal court. The parties and the courts in those cases—as well as policymakers and the public—would benefit from knowing whether the Commission voted to defend those lawsuits and, if so, how Commissioners voted.

In order to ensure affirmative compliance with the Freedom of Information Act and to continue to serve the public interest by providing a fuller understanding of final Commission actions, the Commission is adopting a policy to place on the public record all vote certifications on motions to authorize the Office of the General Counsel to institute a civil enforcement suit, to defend the agency in suits relating to enforcement actions, or otherwise to enter into litigation involving the Commission. Specifically, the Commission will include such vote certifications in the relevant administrative files, as applicable, and will publish each certification on the Commission website. The Commission will likewise publish all vote certifications relating to litigation ongoing at the time this policy becomes effective. The Commission reserves the right to redact portions of such documents consistent with the Act.

This document amends an agency practice or procedure. This document does not constitute an agency regulation requiring notice of proposed rulemaking, opportunities for public comment, prior publication, and delay effective under 5 U.S.C. § 553 of the Administrative Procedure 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.