



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SECRETARIAT
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MEMORANDUM

AGENDA ITEM
For Meeting of 7/21/11

SUBMITTED LATE

TO: The Commission

FROM: Cynthia L. Bauerly *CB*
Chair

Ellen L. Weintraub *ELW*
Commissioner

DATE: July 20, 2011

RE: Policy Statement Extending a Pilot Program for Requesting Consideration of
Legal Questions by the Commission

On July 15, 2010, the Commission adopted a Pilot Program for Requesting Consideration of Legal Questions by the Commission. The Notice for the Pilot states that "After one year, a vote will be scheduled on whether the program should continue."

The proposed Extension of the Pilot Program incorporates changes recommended by staff including extension of the program as a two-year pilot. During the one year pilot, the Commission received one request for consideration. Given our limited experience with this program, and the several modifications proposed based on that one experience, this draft continues the pilot for two additional years so the Commission can consider additional experience with the program before making permanent.

We ask that this document be made public.

Attachment

FEDERAL ELECTION COMMISSION

[NOTICE 2011-XX]

Policy Statement Extending a Pilot Program for Requesting Consideration of Legal Questions by the Commission

AGENCY: Federal Election Commission

ACTION: Agency Policy Statement

SUMMARY: The Federal Election Commission (“Commission”) is extending its pilot program providing for a means by which persons and entities may have a legal question considered by the Commission earlier in both the report review process and the audit process.

DATES: Effective [upon publication in the Federal Register].

**FOR FURTHER
INFORMATION**

CONTACT: _____, Assistant General Counsel, or _____,
Attorney, 999 E Street, NW, Washington, DC 20463, (202) 694-1650
or (800) 424-9530.

**SUPPLEMENTARY
INFORMATION:**

The Commission is revising and extending its pilot program providing for a means by which persons and entities may have a legal question considered by the Commission earlier in both the report review process and the audit process. Specifically, when the Office of Compliance (“OC”) (which includes the Reports Analysis Division and the Audit Division) requests that a person or entity take corrective action during the report review or audit process, if the person or entity disagrees with the request based upon a material dispute on a question of law, the person or entity may seek Commission consideration of the issue pursuant to this procedure.

I. Procedures

Within 15 business days of a determination by the Reports Analysis Division or Audit Division that a person or entity remains obligated to take corrective action to resolve an issue that has arisen during the report review or audit process, the person or entity may seek Commission consideration if a material dispute on a question of law exists

with respect to the recommended corrective action.¹ A “determination” for purposes of triggering the 15 business days is either: (1) notification to the person or entity of legal guidance prepared by the Office of General Counsel at the request of the Reports Analysis Division recommending the corrective action; or (2) the end of the Committee’s Audit Exit Conference response period.

Any request for consideration by a Committee during the report review process or the audit process shall be limited to questions of law on material issues, when: (1) the legal issue is novel, complex, or pertains to an unsettled question of law, (2) there has been intervening legislation, rulemaking, or litigation since the Commission last considered the issue, or (3) the request to take corrective action is contrary to or otherwise inconsistent with prior Commission matters dealing with the same issue. The request must specify the question of law at issue and why it is subject to Commission consideration. It should discuss, when appropriate, prior Commission matters raising the same issue, relevant court decisions, and any other analysis of the issue that may assist the Commission in its decision-making. The Commission will not consider factual disputes under this procedure, and any requests for consideration other than on questions of law on material issues will not be granted.

All requests, including any extension requests, should be directed to the Commission Secretary, Federal Election Commission, 999 E Street, NW, Washington, DC 20463, and must be received within 15 business days of the determination of corrective action. Upon receipt of a request, the Commission Secretary shall forward a copy of any Request to each Commissioner, the General Counsel, and the Staff Director.

Any request for an extension of time to file will be considered on a case-by-case basis and will only be granted if good cause is shown, and the Commission approves the extension request by four affirmative votes within five business days of receipt of the extension request. Within five business days of notification to the Commissioners of a Request for Consideration of a Legal Question, if two or more Commissioners agree that the Commission should consider the Request, OGC will prepare a recommendation and, within 15 business days thereafter, circulate the recommendation in accordance with all applicable Commission directives.

After the recommendation is circulated for a Commission vote, in the event of an objection, the matter shall be automatically placed on the next meeting agenda consistent with the Sunshine Act, 5 U.S.C. § 552b(g), and applicable Commission regulations, 11 C.F.R. part 2. However, if within 60 business days of the filing of a request for consideration, the Commission has not resolved the issue or provided guidance on how to proceed with the matter by the affirmative vote of four or more Commissioners, the OC may proceed with the matter. After the 60 business days has elapsed, any requestor will be provided a copy of OGC’s recommendation memorandum and an accompanying vote certification, or if no such certification

¹ Many disputes involving corrective action requests hinge on questions of fact rather than questions of law, and thus are not appropriate for this procedure.

exists, a cover page stating the disposition of the memoranda. Confidential information will be redacted as necessary.

After the request review process has concluded, or a Final Audit Report has been approved, the recommendation memorandum and accompanying vote certification or disposition memorandum will be placed with the Committee's filings or audit documents on the Commission's website within 30 days.

This procedure is not intended to circumvent or supplant the Advisory Opinion process provided under 2 U.S.C. § 437f and 11 C.F.R. part 112. Accordingly, any legal issues that qualify for consideration under the Advisory Opinion process are not appropriate for consideration under this new procedure. Additionally, this policy statement does not supersede the procedures regarding eligibility and entitlement to public funds set forth in Commission Directive 24 and 11 C.F.R. 9005.1, 9033.4, 9033.6 or 9033.10.

II. Pilot Program

This agency procedure is being extended as a pilot program. The pilot program will continue for two years from the time that this revised policy is approved. After two years, a vote will be scheduled on whether the program should continue. Four affirmative votes will be required to extend or make permanent the program. The program will be terminated after that vote if there are not four affirmative votes to make the program permanent or to extend it for some time period. In preparation for this vote, the OC and OGC will provide recommendations on any procedural issues the Commission should address in considering if the program should continue. The Commission may terminate or modify this pilot program through additional policy statements prior to the twenty-fourth month of the pilot program by an affirmative vote of four of its members.

Cynthia L. Bauerly
Chair
Federal Election Commission

DATED _____