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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

TO: The Commission

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SUBJECT: Third-Party Appearances before the Commission to Discuss Advisory Opinions

Attached is a memorandum on the above-referenced subject. We have been asked to have it placed on the agenda for the July 16, 2015 Commission meeting.

Attachment

AGENDA ITEM

For Meeting of 7-16-15

SUBMITTED LATE



FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 9, 2015

MEMORANDUM

TO: Regulations Committee

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SUBJECT: Third-Party Appearances before the Commission to Discuss Advisory Opinions

At the Commission's May 21, 2015, open meeting, Commissioners asked the Office of the General Counsel to assess whether and how the public could further participate in the Commission's consideration of advisory opinions at open meetings.

Accordingly, this memorandum (1) summarizes the Commission's existing advisory opinion procedures; (2) identifies potential benefits and drawbacks of allowing third parties¹ to appear before the Commission at open meetings; and (3) outlines a proposed procedure for such appearances should the Commission decide to allow them.

I. Existing Advisory Opinion Procedures

The Act and Commission policy provide two opportunities for public input on advisory opinions. First, under the Act, the Commission must accept public comment on advisory opinion requests ("AORs") for 10 days prior to issuing an opinion.² Second, the Commission makes

¹ As used in this memorandum, the terms "third party" and "public" refer to anyone other than the requestor, the requestor's counsel, Commissioners, or Commission staff.

² 52 U.S.C § 30108(d); 11 C.F.R. § 112.3; *see also* Advisory Opinions, <http://www.fec.gov/pages/brochures/ao.shtml> (revised June 2015).

draft advisory opinions available for public comment whenever feasible in advance of the open meetings at which the AORs are considered.³

Current Commission policy also permits requestors and their counsel to appear at open meetings to answer Commissioners' questions about their AORs. Adopted in 2009, this policy was intended to address what had been a source of frustration to the Commission and requestors: Even when requestors or counsel were present in the hearing room during an open meeting discussion of an AOR, no formal mechanism had existed for requestors to respond to Commissioners' questions that arose during the open meeting.⁴ Thus, the policy was intended to "promote transparency and fairness," "help ensure that the Commission fully considers all significant aspects of the proposed transaction or activity before voting on the advisory opinion," and "help some Requestors to understand better the basis for the Commission's decision."⁵

Under the policy, requestors or their counsel may appear before the Commission (in person or by telephone) for the limited purpose of addressing questions raised by Commissioners during the open meeting.⁶ A requestor may appear as of right if any draft of the advisory opinion is made public less than one week before the meeting at which the advisory opinion will be considered. Otherwise, the requestor must affirmatively request, in writing and no later than 48 hours before the meeting, to appear at the open meeting.⁷

When the Commission adopted this policy in 2009, it also considered whether to allow members of the public to appear before the Commission when the Commission considers an AOR.⁸ The Commission ultimately rejected this idea, noting that, under the Act, advisory opinions are issued "with respect to a specific transaction or activity by the person who submitted the request."⁹ Further, the Commission noted existing opportunities for public engagement with advisory opinions, such as the submission of written comments, and expressed

³ See Advisory Opinion Procedure, 74 Fed. Reg. 32160, 32161 (July 7, 2009) (describing advisory opinion comment procedure). The only time that a draft advisory opinion might not be made available for public comment is when a Commissioner releases such a draft late on the morning of the open meeting at which the draft is to be considered.

⁴ See, e.g., *id.*; Transcript of Public Hearing on Agency Practices and Procedures at 20, 27 (2009) (statements of Comm'r Thomas and Mr. Elias).
<http://www.fec.gov/law/policy/enforcement/2009/01141509hearingtranscript.pdf>; Former Commissioner Hans von Spakovsky, Comment at 3-4 (Jan. 5, 2009).
<http://www.fec.gov/law/policy/enforcement/2009/comments/comm31.pdf>.

⁵ Advisory Opinion Procedure, 74 Fed. Reg. at 32160.

⁶ *Id.* at 32160-61. In other words, a requestor's appearance does not guarantee that any questions will be asked or that the requestor will have the opportunity to address the Commission.

⁷ *Id.* at 32161. In practice, such requests have always been granted.

⁸ See Agency Procedures, 73 Fed. Reg. 74495, 74499-500 (Dec. 8, 2008).

⁹ Advisory Opinion Procedure, 74 Fed. Reg. at 32161 (quoting 52 U.S.C. § 30108(a)(1)).

concern that holding oral hearings “for all interested parties . . . would be inefficient and impractical.”¹⁰

II. Considerations Bearing on Whether to Permit Public Participation in Open Meeting Discussions of Advisory Opinions

The Commission’s current practice of permitting requestors — and only requestors — to appear at open meetings has had certain negative consequences that might be at least partially alleviated by allowing public participation.

The primary drawback of the current policy, as the Chair has noted, is that the Commission currently hears in person from only one “side” of the legal issue presented in the AOR.¹¹ This creates a dynamic in which requestors may make controversial assertions of law during the open meeting without other interested or knowledgeable parties having an opportunity to rebut those assertions prior to the Commission’s vote. OGC staff can attempt to provide Commissioners with guidance at the open meeting, but this is not ideal. (Responding at the meeting also requires OGC to publicly adopt an adversarial stance towards the requestor, which creates an uncomfortable situation for requestors, counsel, and Commissioners alike.) In most cases, therefore, a requestor’s arguments at an open meeting go unrebutted, even when they are potentially meaningful to the result of the advisory opinion. Allowing third parties to present their views could mitigate any one-sided presentation of legal issues and present opportunities for more helpful development of nuanced arguments.

Less common, but also of concern, are requestor appearances to discuss AORs that implicate the interests of particular third parties as much as or more than they implicate the interests of the requestor. In recent years, this situation has arisen several times in the context of AORs seeking preemption of state law. For example, in AOR 2014-04 (Enterprise Holdings), the requestor asked the Commission to preempt a New York labor statute and regulation. As the government of New York conveyed to the Commission in written comments, this was a matter of direct importance to the state. Under the Commission’s advisory opinion policy, requestor’s counsel appeared at two Commission meetings to provide Commissioners with the requestor’s views on New York’s comment. But because New York was not a party to the AOR, it had no opportunity to appear before the Commission to explain the comment, to discuss the state interests served by the laws and regulations at issue, or to flesh out its interpretation of those

¹⁰ Advisory Opinion Procedure, 74 Fed. Reg. at 32161. Most federal agencies do not provide for hearings or public discussion when issuing advisory opinions or similar guidance. We have identified only three agencies that offer opportunities for oral dialogue with requestors: none of these agencies grant opportunities to appear as of right and only one of these agencies has procedures to hold such discussions publicly (though it is unclear whether such public discussions of advisory opinions have ever occurred). See 21 C.F.R. §§ 10.65, 10.85 (describing opportunities for conferences, public meetings, and discussions for Food and Drug Administration’s consideration of advisory opinion requests); 19 C.F.R. § 177.4 (describing U.S. Customs and Border Protection procedures for private oral discussions or conferences with requestors); Office of the Inspector Gen., U.S. Dep’t of Health & Human Servs., *Advisory Opinions FAQ*, <https://oig.hhs.gov/faqs/advisory-opinions-faq.asp> (last visited June 9, 2015) (describing procedures for private informal discussions with requestors when “useful”). We have identified no agency that allows the general public to participate in open and public discussion of an advisory opinion.

¹¹ Audio Recording of Discussion on Agenda Doc. 15-23-A (Memorandum on Engaging the Public and Stakeholders) (Mar. 21, 2015), http://www.fec.gov/audio/2015_2015052105.mp3 at 5:55.

provisions. In such situations, allowing third parties with a vested interest in an advisory opinion outcome to appear before the Commission to discuss a pending AOR would give Commissioners greater insight into the full ramifications of approving or disapproving the request.

Nonetheless, as the Commission considers whether to allow third parties to personally appear before it during consideration of advisory opinions, it should also take into account several potential concerns.

First, allowing third parties to appear before the Commission would likely increase the burden on requestors. For example, requestors who do not otherwise intend to appear at an open meeting may feel the need to appear — or to retain counsel to appear, at significant expense — to protect their interests once they learn that a third party whose interests are adverse to theirs will appear. The Commission could partially address such concerns by allowing requestors to respond to a third party’s assertions in writing after the meeting, but this might be problematic in light of the 60-day statutory deadline,¹² and in any event it would still impose a meaningful new burden on requestors.

Second, appearances by the public would be somewhat at odds with the statutory purpose of the advisory opinion process. Because an AOR must relate to “a specific transaction or activity that the *requesting person* plans to undertake” — and may not pose “general questions of interpretation” or pertain to “the activities of third parties”¹³ — the Commission’s consideration of an AOR is generally limited to the facts presented by the requestor. The existing policy for requestor appearances is consistent with the Act’s framework because a requestor can provide timely information that the Commission considers necessary to its decision-making process regarding the specific transaction or activity proposed by the requestor. In contrast, it is rare for third parties to provide information that is necessary for the Commission’s consideration of an AOR. And if a third party were to assert at an open meeting facts that conflicted with a requestor’s representations, the Commission might be placed in a fact-finding role, weighing the requestor’s evidence and credibility against that of the third party. Such an adversarial inquiry would be in significant tension with the Commission’s historical understanding of its statutory mandate to decide advisory opinion questions as they are presented by the requestor. Moreover, should a third party introduce new or conflicting facts during the open meeting, such that the Commission would like to request an extension to consider these facts, the requestor may be put

¹² 52 U.S.C. § 30108(a); *see also* Advisory Opinion Procedure, 74 Fed. Reg. at 32162 (noting Commission’s goal of processing certain AORs on 20- or 30-day timelines).

¹³ 11 C.F.R. § 112.1(b) (emphasis added); 52 U.S.C. § 30108(a). In addition, an advisory opinion does not set forth a prospective rule. *See* 52 U.S.C. § 30108(b) (prohibiting rules and regulations from being promulgated by advisory opinions). An advisory opinion is thus not a sword to be used against the general public, but a shield to be used by a requestor (and persons with materially indistinguishable facts). *See* 52 U.S.C. § 30108(c); *Unity08 v. F.E.C.*, 596 F.3d 861, 864 (D.C. Cir. 2010) (“Commission’s refusal to issue a favorable advisory opinion therefore deprives the organization that requested it of a legal reliance defense which it could otherwise receive.”). An advisory opinion rendered by the Commission may be relied on only by the person “involved in the specific transaction or activity with respect to which such advisory opinion is rendered” and other persons engaged in materially indistinguishable activity. 52 U.S.C. § 30108(c); 11 C.F.R. § 112.5(a). For this reason, the Commission includes in each of its advisory opinions the following statement: “If there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.”

in the awkward position of having to decide on the spot whether to toll its statutory right to a timely advisory opinion in light of the third party's representations.

Finally, just as the current procedures potentially require OGC staff to respond to a requestor's statement at an open meeting, third-party appearances at open meetings would likely raise the same concerns. While third-party appearances might reduce the need for OGC to publicly correct a *requestor's* misstatement of law — *e.g.*, because requestors might be more cautious if they know immediate rebuttal is possible — such appearances would raise the new concern that OGC might have to publicly disagree with legal assertions by the *third party*. Thus, if the Commission decides to allow third-party appearances at open meetings, we would recommend that at the end of the testimony the Chair ask OGC if it requests any confidential discussion. If OGC answers in the affirmative, the Chair might inquire as to the amount of time necessary for OGC to provide its guidance and, if necessary, seek a corresponding extension of the statutory deadline from the requestor.

III. Proposed Procedure for Public Participation During Consideration of Advisory Opinions at Open Meetings

If the Commission decides to allow third parties to appear before it during its consideration of advisory opinions, we recommend the following procedures. These recommendations are intended to address the concerns noted above and to be consistent with the Commission's procedures for appearances in certain other contexts, such as audit hearings and probable cause hearings.

As to who may appear before the Commission to discuss an advisory opinion:

1. As a prerequisite for appearance, the Commission should require a third party to submit a written comment on a draft advisory opinion. Consistent with Commission practice in audit hearings and probable cause hearings, the Commission should require the third party to state with specificity in the written comment the substance of the matters intended to be addressed during the appearance — whether factual or legal — with citations to relevant authority, if applicable.¹⁴ Requiring a third party to submit the request to appear in conjunction with a written comment (whether as a single document or in separate communications) will ensure that Commissioners, Commission staff, and the requestor can adequately prepare for the third party's appearance, thereby making the appearance more productive and reducing the likelihood of delays in the advisory opinion process.¹⁵

¹⁴ The Commission requires that requests for audit and probable cause hearings "must state with specificity why the hearing is being requested and what issues the [committee or respondent] expects to address" and "should include specific citations to any authorities (including prior Commission actions) on which the [committee or respondent is relying] or intends to cite at the hearing." Procedural Rules for Audit Hearings, 74 Fed. Reg. 33140, 33142 (July 10, 2009); Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. 64919, 64919-20 (Nov. 19, 2007).

¹⁵ Should the Commission release additional drafts after a third party has submitted a request to appear, the third party should not need to amend the request to appear to address additional issues raised in the subsequent drafts.

2. To limit the potential for gamesmanship in the timing of requests to appear, the deadline for submitting such a request should be the same as the deadline for filing written comments on the draft advisory opinion.
3. Third parties should be allowed to appear at an open meeting only when at least two Commissioners agree that the appearance would help resolve significant or novel legal issues or significant questions about the application of the law to the facts presented. Again, such a requirement would be similar to one the Commission has adopted in response to requests for audit and probable cause hearings, which are granted “if any two Commissioners agree that a hearing would help resolve significant or novel legal . . . issues or significant questions about the application of the law to the facts.”¹⁶ Because coordinating this pre-meeting approval may be difficult when drafts are released shortly before the open meeting, the Commission should provide that the two-Commissioner approval requirement does not apply when a third party properly submits written comments and a request to appear in response to an advisory opinion draft that is made public less than 24 hours before an open meeting.
4. If the Commission approves the appearance of any member of the public, the requestor should be permitted to appear as of right, regardless of whether the requestor has submitted its own request to appear.

As to how open meeting discussions would be conducted:

1. A third party who is permitted to appear during the open meeting should do so only to answer questions specifically directed to that person by Commissioners during the meeting. Thus, as with the current procedure for requestor appearances, there would be no guarantee that a third party would be asked any questions or given an opportunity to address the Commission.
2. The format and time allotted for third-party participation regarding each advisory opinion would be determined by the Chair under the Commission’s standard rules and procedures for open meetings, considering factors such as time constraints, the complexity of the issues raised, and Commissioners’ interest in the substance of the third party’s comment.¹⁷ Because interested third parties might not be located in the Washington area, appearances should be allowed either in person or remotely. If the Commission allows third parties to appear remotely, it might wish to upgrade the telecommunications system in the hearing room.

¹⁶ Procedural Rules for Audit Hearings, 74 Fed. Reg. at 33142; *see also* Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. at 64919. The Requests for Legal Consideration Program has similar procedures. Although that program does not involve hearings, two Commissioners must agree to consider “hearing” a matter. *See* Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 78 Fed. Reg. 63203, 63203 (Oct. 23, 2013).

¹⁷ *See* Procedural Rules for Audit Hearings, 74 Fed. Reg. at 33142; Procedural Rules for Probable Cause Hearings, 72 Fed. Reg. at 64920.

3. If Commissioners are concerned that third parties' testimony might exceed the scope of the parties' written comments, we would recommend adding to the Commission's meeting procedures a provision that would allow a Commissioner to raise a point of order against Commissioner questions or witness testimony that goes beyond the scope of the written comment.