

AGENDA DOCUMENT NO. 16-11-A



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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AGENDA ITEM

MEMORANDUM

TO: The Commission

THROUGH: Alec Palmer
Staff Director

For Meeting of 3-16-16

FROM: Compliance Office
Patricia C. Orrock *PCO*
Chief Compliance Officer

Thomas E. Hintermister *TH*
Assistant Staff Director
Audit Division

Debbie Chacona *DC*
Assistant Staff Director
Reports Analysis Division

Office of General Counsel
Lisa Stevenson *LS*
Deputy General Counsel – Law

Lorenzo Holloway *LH*
Assistant General Counsel for
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Margaret J. Forman *MA*
Attorney

Danita C. Alberico *DA*
Attorney

Joshua Blume *JB*
Attorney

**SUBJECT: Proposed Modifications to Program for Requesting Consideration of
Legal Questions by the Commission – LRA 941**

The Office of Compliance (“OC”) and Office of General Counsel (“OGC”) submit to the Commission an informational document, the Proposed Modifications to Program for Requesting Consideration of Legal Questions by the Commission – LRA 941, attached. The OC and OGC intend to ask the Chair to add this memorandum to a future open session agenda.

Attachment

Proposed Modifications to Program for Requesting Consideration of Legal Questions by the Commission – LRA 941



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WASHINGTON, D.C. 20463

SEP 22 2015

MEMORANDUM

TO: The Commission

THROUGH: Alec Palmer *AP*
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SUBJECT: **Proposed Modifications to Program for Requesting Consideration of
Legal Questions by the Commission – LRA 941**

I. INTRODUCTION

As part of the written report submitted to the Commission on June 24, 2015, pursuant to the Program for Requesting Consideration of Legal Questions by the Commission (“the Program”), we advised the Commission that we expected to submit a proposal, for Commission consideration, to (1) clarify that requests for consideration must be submitted to the Commission Secretary and (2) build five business days into the program to allow time for informal resolution of matters. This memorandum includes our recommendations to the Commission of proposed modifications to the Program.

II. THE COMMISSION SHOULD CLARIFY THAT REQUESTS MUST BE SUBMITTED TO THE COMMISSION SECRETARY

We recommend that the Commission clarify that a Request for Legal Consideration (“Request”) must be submitted to the Commission Secretary. In a prior Request a committee sent its Request by email directly to the auditor assigned to the audit, rather than to the Commission Secretary who is responsible for transmitting the Request to each Commissioner, the General Counsel, and the Staff Director. *See Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission*, 78 Fed. Reg. 63203 (Oct. 23, 2013). Although the auditor received the Request, if the auditor had been out of the office, or otherwise missed the email, the processing of the Request could have been delayed. The Program states that “[a]ll requests ***should be directed to the Commission Secretary***” and that “[p]aper requests ***must be sent to the Federal Election Commission, Attn.: Commission Secretary***, 999 E Street, N.W., Washington, DC 20463.” 78 Fed. Reg. 63203 (Oct. 23, 2013) (emphasis added).

To address the issue of Requests being submitted to individuals and offices other than the Commission Secretary, we recommend that the Commission modify the Program to specify that Requests must be submitted to the Commission Secretary. Therefore, the draft Policy Statement, attached, modifies the Program for Requesting Commission Consideration of Legal Questions by the Commission, *Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission*, 78 Fed. Reg. 63203 (Oct. 23, 2013), as follows:

- Delete “should” and replace with “must” in the sentence “All requests should be directed to the attention of the Commission Secretary.”
- Delete “Requestors may submit requests electronically via email.”
- Insert in its place: “Requestors may submit requests electronically via email. If a Requestor chooses to submit a request electronically via email, the email must be sent.”
- Immediately after the sentence: “Paper requests must be sent to the Federal Election Commission, Attn.: Commission Secretary, 999 E Street, N.W, Washington, DC, 20463” and insert the following: “Requestors are advised that if they submit a request, electronically or otherwise, to a different address than designated in this Policy, the processing of the request may be delayed.”

III. THE COMMISSION SHOULD INCLUDE FIVE ADDITIONAL BUSINESS DAYS TO ALLOW FOR INFORMAL RESOLUTION

We also recommend that the Commission include five additional business days in the program to give the Office of General Counsel (“OGC”) and the Office of Compliance (“OC”) the flexibility to attempt to informally resolve the underlying issues in Requests, thereby potentially obviating the need to proceed to formal resolution and conserving Commission

resources. During the course of the past year, we encountered two situations that we were able to resolve informally.¹ The current policy provides only for a single 15-business day period within which to draft a recommendation to the Commission on how the matter should be resolved formally. As a result, OGC was obligated in these matters either to draft a recommendation and attempt an informal resolution simultaneously, or to delay drafting a recommendation and concentrate on achieving an informal resolution. In the latter case, OGC faced a potential loss of drafting time, if attempts at informal resolution had been unsuccessful. Providing for a limited period of time at the outset that may be dedicated exclusively to attempting an informal resolution of the issues in the Request would address these problems and, at the same time, potentially minimize the number of Requests that the Commission must formally consider. This may also have the salutary effect of narrowing and focusing the issues upon which OGC must concentrate in the drafting stage in the event that, for example, a Request presents multiple issues and some issues are informally resolved while others are not.²

In proposing this modification, we are mindful of the need to provide swift resolution of legal questions arising within audits or RAD reviews. Further, such resolution is necessary to guide OC in its processing of its work, which is itself subject to deadlines. Thus, we have proposed five business days as the maximum amount of time OGC would need to determine whether informal resolution, and the concomitant saving of Commission resources, is possible, in light of this objective.³

We do not anticipate that we would need the entire period of five business days to reach a conclusion about whether informal resolution is possible in every case. In particular, we recognize that some issues may not be conducive to informal resolution attempts. We also recognize that some informal resolution efforts may fail early in the process.

Because of this potential variability from case to case, we will inform the Commission of our success or failure in resolving any issues presented in a Request, or of our determination that an issue is otherwise not suited for informal resolution, during this five-business-day period. We will send an e-mail regarding informal resolution to the Commission. The e-mail will present a brief summary of all of the issues presented in the Request, and identify which issues have been resolved, which issues have not been resolved, and which issues were not suited for informal resolution. The e-mail will explain how the issues were resolved. The e-mail will also indicate whether any further action is required on the part of the Committee, or of OGC or OC to effectuate the resolution. Finally, in the event that any issues remain unresolved, the e-mail will

¹ In one case, the Audit Division, after reviewing additional documentation from the committee and conferring with OGC, was able to resolve the matter which was the subject of the Request. The committee, therefore, withdrew its Request. In the other case, the Audit Division, after consultation with OGC, was able to resolve the matter which was the subject of the Request. That committee withdrew its Request.

² The process of exploring informal resolution of an issue might also conceivably disclose the existence of other issues implicated by the issue presented in the Request that may then be addressed during the drafting stage, thereby affording the Commission the benefit of a more informed analysis and recommendation.

³ We also include language in the proposed modification which makes clear that a Requestor may file an additional request on additional and subsequent recommended actions from OC.

inform the Commission that OGC is proceeding to formal resolution by drafting a recommendation memorandum to the Commission. The 15-business day period for drafting the recommendation memorandum will commence on the next business day after the date of the e-mail.

To incorporate these changes into the Program, the attached draft Policy Statement modifies the Program, *Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission*, 78 Fed. Reg. 63203 (Oct. 23, 2013), as follows:

- Delete “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.”
- Insert in its place: “if two or more Commissioners agree that the Commission should consider the request, OC and OGC may, at that time, attempt to resolve the matter informally over the course of five business days. Within 15 business days from the date upon which OC and OGC conclude that the matter cannot be resolved informally, or from the expiration of the five business day period, whichever occurs first, OGC will prepare and circulate a recommendation in accordance with all applicable Commission Directives. If the matter is resolved informally, OC and OGC will notify the Commission that the matter has been resolved, and notify the Requestor in writing of the notification to the Commission.”
- Insert at the end of the fourth paragraph in the “Procedures” section: “Informal resolution of a matter does not prevent the Requestor from seeking Commission consideration, in an additional or subsequent determination, subject to the requirements of this program.”

IV. RECOMMENDATION

The Office of Compliance and the Office of the General Counsel recommend that the Commission approve the attached Policy Statement for publication in the *Federal Register*, with any technical and conforming edits as necessary.

Attachment

FEDERAL ELECTION COMMISSION**[Notice 2015-12]****Policy Statement Regarding a Program for Requesting Consideration of Legal****Questions by the Commission****AGENCY:** Federal Election Commission.**ACTION:** Policy Statement.

SUMMARY: The Federal Election Commission (“Commission”) adopted a program on August 1, 2011, 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. On October 23, 2013, the Commission revised this policy to provide an alternative electronic means to file a request with the Commission. This new policy is identical to the October 23, 2013 program, except that it makes two modifications: (1) to clarify that requests for consideration be submitted to the Commission Secretary to ensure that such request are processed in timely manner, and (2) to build five business days into the program to allow time for informal resolution of matters.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Mr. Lorenzo Holloway, Assistant General Counsel, or Margaret Forman, Attorney, 999 E Street NW, Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On August 1, 2011, the Commission adopted a 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. This Commission is now revising this program. The October 23, 2013 revision of the program was identical to that August 1, 2011 program, except that it provided alternative means to file a request with the Commission. This change was made to address and clarify timeliness issues due to delays in the processing and receipt of requests mailed to the Commission, by encouraging requests to be filed electronically by email. Processing delays can result in an untimely submission of a request under the program. Persons and entities making such a request may not be aware that these processing delays can occur when documents are sent via first class mail to a federal government agency. As currently revised, the program is identical to the October 23, 2013 program, except that it makes two modifications: (1) to clarify that requests for consideration be submitted to the Commission Secretary to ensure that such request are processed in timely manner, and (2) to build five business days into the program to allow time for informal resolution of matters. The first change was made to address and clarify that these requests must be sent to the attention of the Commission Secretary, either through the dedicated email address, LegalRequestProgram@fec.gov, or by mail to the Commission’s mailing address. There are two reasons for this change. First, the Commission Secretary is the person responsible for transmitting the Request to each Commissioner, the General Counsel, and the Staff Director, and therefore must be the recipient of any requests.

Second, if the request is sent to another staff member, by email or otherwise, the processing of the request could be delayed. The second change was made to build five business days into the program to allow time for informal resolution of matters. This informal resolution process will be especially helpful in situations where the information related to or generated in the request reveals information that could potentially result in the informal resolution of the matter, without using additional Commission resources to submit the request formally through the entire Program. Allowing five business days to attempt to informally resolve matters will provide OGC and OC with an amount of time dedicated exclusively to informal resolution efforts instead of dividing their time and resources between attempting informal resolution and preparing the recommendation memorandum in a compressed time period intended solely for drafting the recommendation to the Commission. This informal resolution process would allow for a more efficient use of Commission resources. The policy statement regarding this program is reprinted in its entirety, below. It includes the revisions outlined above, which appear in the third and fourth paragraphs of the “Procedures” section, below.

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

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.

entity of legal guidance prepared by the Office of General Counsel (“OGC”) 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, must be received by the Commission within 15 business days of the determination of corrective action. All requests must be directed to the attention of the Commission Secretary. Requestors may submit requests electronically via email. If a Requestor chooses to submit a request electronically via email, the email must be sent to LegalRequestProgram@fec.gov. Requestors are encouraged to submit comments electronically to ensure timely receipt and consideration. Alternatively, requests may be submitted in paper form. Paper requests must be sent to the Federal Election Commission, Attn.: Commission Secretary,

92 999 E Street, N.W., Washington, DC, 20463. Requestors are advised that if they submit
93 a request, electronically or otherwise, to a different address than designated in this Policy,
94 the processing of the request may be delayed. Upon receipt of a request, the Commission
95 Secretary shall forward a copy of any request to each Commissioner, the General
96 Counsel, and the Staff Director.

97 Any request for an extension of time to file will be considered on a case-by-case
98 basis and will only be granted if good cause is shown, and the Commission approves the
99 extension request by four affirmative votes within five business days of receipt of the
100 extension request. Within five business days of notification to the Commissioners of a
101 request for consideration of a legal question, if two or more Commissioners agree that the
102 Commission should consider the request, OGC may, at that time, attempt to resolve the
103 matter informally over the course of five business days. Within 15 business days from
104 the date upon which OC and OGC conclude that the matter cannot be resolved
105 informally, or from the expiration of the five business day period, whichever occurs first,
106 OGC will prepare and circulate a recommendation in accordance with all applicable
107 Commission Directives. If the matter is resolved informally, OC and OGC will notify the
108 Commission that the matter has been resolved, and notify the Requestor in writing of the
109 notification to the Commission. Informal resolution of a matter does not prevent the
110 Requestor from seeking Commission consideration, in an additional or subsequent
111 determination, subject to the requirements of this program.

112 After the recommendation is circulated for a Commission vote, in the event of an
113 objection, the matter shall be automatically placed on the next meeting agenda consistent
114 with the Sunshine Act, 5 U.S.C. 552b(g), and applicable Commission regulations, 11

CFR 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 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, a copy of the request for consideration, as well as 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. These materials will also be placed on the Commission's webpage dedicated to legal questions considered by the Commission under this program.

This procedure is not intended to circumvent or supplant the Advisory Opinion process provided under 2 U.S.C. 437f and 11 CFR 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 CFR 9005.1, 9033.4, 9033.6 or 9033.10.

II. Annual Review

No later than July 1 of each year, the OC and OGC shall jointly prepare and distribute to the Commission a written report containing a summary of the requests made

under the program over the previous year and a summary of the Commission's consideration of those requests and any action taken thereon. The annual report shall also include the Chief Compliance Officer's and the General Counsel's assessment of whether, and to what extent, the program has promoted efficiency and fairness in both the Commission's report review process and in the audit process, as well as their recommendations, if any, for modifications to the program.

The Commission may terminate or modify this program through additional policy statements at any time by an affirmative vote of four of its members.

On behalf of the Commission,

Ann M. Ravel,
Chair,
Federal Election Commission.

DATED: _____
BILLING CODE: 6715-01-P