

AGENDA DOCUMENT NO. 16-55-A



FEDERAL ELECTION COMMISSION
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AGENDA ITEM

For Meeting of 10-27-16

MEMORANDUM

SUBMITTED LATE

TO: The Commission

THROUGH: Alec Palmer *AWH/jm*
Staff Director

FROM: Lisa J. Stevenson *LJS*
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RE: Proposed Amendments to Directive 52

The Office of General Counsel recommends that the Commission adopt the attached amendments to Directive 52 regarding certain Commission voting procedures. Specifically, we recommend amending Directive 52 to no longer circulate administrative fines matters on no-objection ballots. We also recommend updating other aspects of Directive 52 so that it conforms to the Commission's current, accepted voting practices.

I. CIRCULATION OF ADMINISTRATIVE FINES MATTERS FOR VOTING

Under Directive 52, matters requiring formal Commission action that have not been placed on a meeting agenda are circulated for a vote on either a "tally vote" or a "no-objection" ballot. *See* Directive 52 ¶¶ I.A, II.A, II.B. Matters circulated on a no-objection ballot are "deemed approved" unless the Commission Secretary's Office receives an objection from one or more Commissioners by the voting deadline. *Id.* ¶ II.B.

Until 2008, administrative fines matters — like other enforcement matters requiring formal Commission action — were circulated on tally votes. The Commission changed this practice when it decided to extend the tally vote deadline for sensitive matters from 72 hours to the current practice of generally requiring votes to be submitted by the second Wednesday following the day of circulation. The Commission also simultaneously amended Directive 52 to

allow certain administrative fines recommendations to be circulated for approval on a 24-hour no-objection basis. Thus, Directive 52 currently allows no-objection circulation of administrative fines reason-to-believe recommendations, as well as administrative fines final determinations in which the respondents do not challenge the reason-to-believe finding. *See* Directive 52 ¶ II.B.

Under the Federal Election Campaign Act, to initiate investigation of an enforcement action, the Commission must first determine by an “affirmative vote” of at least four Commissioners that there is reason to believe a violation of the Act has occurred. 52 U.S.C. § 30109(a)(2). The Commission’s regulations governing the administrative fines process also require an affirmative vote of four Commissioners to find reason to believe that a respondent committed a violation. 11 C.F.R. § 111.32. In *Combat Veterans for Congress Political Action Committee v. FEC*, 795 F.3d 151 (D.C. Cir. 2015) (“*Combat Veterans*”), the D.C. Circuit noted that the Commission’s no-objection voting procedure must comport with this “cornerstone” affirmative vote requirement “when [the Commission] takes action to investigate reports of suspected violations,” *id.* at 155, including an “enforcement action against a person who misses a filing deadline under the Act.” *Id.* at 152.

We thus recommend that the Commission amend Directive 52 by adopting the attached proposed amendment. Under this amendment, the Commission would essentially revert to its pre-2008 practice of circulating administrative fines matters for votes on tally rather than on no-objection ballots.¹ To avoid unnecessarily prolonging routine administrative fines matters, however, we recommend that the Commission allow a 24-hour tally vote circulation of reason-to-believe recommendations and final determination recommendations where the respondents do not challenge the reason to believe findings.

II. OTHER PROPOSED AMENDMENTS TO DIRECTIVE 52

We recommend updating additional portions of Directive 52 to reflect how ballots are actually circulated, voted on, and certified.

A. Clarifying How Ballots Are Signed and Submitted

Under Directive 52, “[v]otes on circulation may only be made via a signed ballot delivered to the Commission’s Secretary’s Office.” Directive 52 ¶ IV. This provision could be read to mean that the signed ballots must be delivered in paper form. Yet in practice votes are often submitted electronically, including by email. We thus recommend clarifying that a “signed ballot” includes a ballot submitted electronically or by email.²

¹ Indeed, as a practical matter, administrative fines matters are already being circulated for votes on tally rather than on no-objection ballots. Thus, the proposed amendment also would be consistent with the Commission’s current practice.

² In certain limited circumstances (*i.e.*, when voting to cancel a Commission meeting or to extend voting deadlines), the Commission sometimes uses a “special ballot”: a sheet of paper that is physically presented to each Commissioner sequentially for his or her signature. While that procedure might have had some advantages prior to the implementation of electronic voting, it no longer seems to provide any meaningful procedural or logistical benefit, and it is not accounted for within Directive 52. OGC and the Office of the Commission Secretary therefore

Further, although the D.C. Circuit upheld the practice of Commissioners authorizing staff members verbally or in writing to sign ballots on their behalf, *see Combat Veterans*, 795 F.3d at 158, Directive 52’s requirement that the Commission Secretary maintain “any written authorization, instructions, or after-the-fact ratification” of such authority could be construed as mandating written authorization. Directive 52 ¶ IV. Because written authorization of signing authority is not required,³ we recommend clarifying the Directive by providing that the Secretary will maintain authorizations *if* such authorizations are provided to her.

B. Ballots Received after a Voting Deadline

The D.C. Circuit also noted, but did not decide, the argument that the Commissioners’ voting ballots in the administrative fines matter “were received after a ballot deadline but counted anyway.” *Combat Veterans*, F.3d at 159 n.2. Directive 52 provides that a Commissioner may “amend, withdraw, or cast a vote at any point up to the official certification,” but the Directive then notes that this “normally takes place *immediately* after the voting deadline.” Directive 52 ¶ I.D (emphasis added). In practice, the Commission Secretary certifies the votes as soon as possible after the voting deadline, but the certification may not always be immediate. *See id.* ¶ I.E (stating that certifications of tally votes and no-objection items “will be prepared by the Commission Secretary *as soon as possible* after the vote deadline”). For consistency, and to clarify that the Commissioners indeed may “amend, withdraw, or cast a vote” until the Commission Secretary actually certifies the votes, we recommend replacing “immediately” with “as soon as possible.”⁴

C. Circulation of Non-Filer Information

Under the Act, before taking any enforcement action against a person who failed to file certain required reports before an election, the Commission must notify the person of such failure to file. 52 U.S.C. § 30109(b). For authorized committees, if a satisfactory response is not received within four business days, the Commission “shall . . . publish before the election the name of the person and the report or reports such person has failed to file.” *Id.*; 52 U.S.C. § 30111(a)(7). The Act does not require an affirmative vote of four or more Commissioners to publish such non-filer information. *See* 52 U.S.C. § 30106(c).

In May 2012, the Commission amended Directive 1 (Non-Filer Policy and Procedures) to allow the circulation of non-filer information on a two-hour no-objection basis. This practice of circulating non-filer information has generally been followed ever since. Directive 52, on the

recommend that the Commission cease the use of special ballots. If, however, the Commission intends to maintain their use, we would recommend amending Directive 52 to specifically address them.

³ *See* Directive 52 ¶ IV n.6 (citing Memorandum No. 1247 from William Oldaker to the Commission, Delegation of Document Signing Authority (approved Apr. 7, 1977) (allowing Executive Assistants to sign Commissioner’s name on documents “after fully consulting with their Commissioner” and “receiving the Commissioner’s express permission”)).

⁴ We also recommend making a conforming change to paragraph II.B of the Directive to indicate that objections to no-objection circulations can be submitted until the vote is certified.

other hand, provides for publication of non-filer information “immediately after the vote deadline or as soon as there are four affirmative votes.” Directive 52 ¶ II.C. Because the reference in Directive 52 to “four affirmative votes” could be misunderstood to suggest that affirmative votes are required to approve non-filer publication, we recommend clarifying that this language merely indicates that non-filer information may be published when the no-objection vote deadline passes or when four or more Commissioners affirmatively vote to approve the publication, whichever is sooner. This would allow the Commission to publish non-filer information in the timeliest possible manner.

D. Revisions to Circulated Documents

Under Directive 52, revisions to circulated documents “should be addressed [either] by withdrawal and recirculation or by objection and discussion at a Commission meeting.” Directive 52 ¶ I.C. In practice, however, Commissioners often suggest and approve revisions to circulated documents by email. Indeed, sometimes a circulated document is revised multiple times electronically before the Commissioners actually reach consensus on the revisions and approve the document subject to those revisions. Formally withdrawing and recirculating a document each time a revision is made, as the Directive currently suggests, would be both impractical and unnecessary. We thus recommend amending the Directive to recognize that the Commissioners may approve the revisions at the time they submit their votes on the circulated document. This would conform the Directive to the Commission’s current, reasonable practice.

E. Other Miscellaneous Changes to Voting Procedures to Reflect Current Practice

We recommend two additional technical changes to conform Directive 52 to the Commission’s current practices.

First, Directive 52 states that, when a circulating office withdraws a document before it is discussed at a Commission meeting, the “written or e-mailed notice of withdrawal shall be given to the Commission Secretary, who will then notify the Commission.” Directive 52 ¶ I.B. In practice, however, an office withdraws a document by emailing all the Commissioners Offices and the Secretary at the same time, which is more efficient than the process stated in the Directive. We therefore recommend revising paragraph I.B to provide that withdrawal notices are emailed “simultaneously” to the Secretary and the Commissioners’ Offices.

And second, Directive 52 states that “the withdrawal of a previously cast objection would negate the need for a meeting discussion if the withdrawal results in a unanimous tally.” Directive 52 ¶ I.D. The reference to a “tally” in this provision could be interpreted to exclude ballots circulated on no-objection basis. We recommend clarifying that a meeting discussion is also unnecessary when a Commissioner withdraws a previous objection to a ballot that was circulated on a no-objection basis.

RECOMMENDATION

Approve the attached proposed amendments to Directive 52.

Attachment

PROPOSED AMENDMENTS TO DIRECTIVE 52

Amend Commission Directive 52 as follows:

I. CIRCULATION VOTE POLICIES

B. Objection and Withdrawal. If a Commissioner objects to a document by the voting deadline, the matter will be added to the agenda for a meeting⁵ unless the Commissioner formally withdraws the objection before the meeting by notifying the Commission Secretary in writing or by e-mail communication. An objection that is “for the record” does not cause a matter to be added to the agenda for a meeting. The General Counsel shall be consulted in appropriate instances on matters that have Sunshine Act implications.

Before the Commission discusses at a meeting a document to which there is an objection, the originating office may withdraw the document. A ~~written or e-mailed~~ notice of withdrawal shall be given emailed simultaneously to the Commission Secretary, ~~who will then notify and~~ the Commission. Withdrawal of the document by the originating office nullifies votes previously submitted.

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C. Impact of Revisions. ~~Suggested revisions agreed to by the originating office or division should be addressed by withdrawal and recirculation or by objection and discussion at a Commission meeting. If a Commissioner suggests minor changes without substantive impact, the originating office may advise the other Commissioners orally and seek approval of the changes. If a Commissioner suggests revisions to a circulated document: (1) Commissioners can indicate their agreement with the suggested revisions in their vote submissions (e.g., “I approve subject to the revisions proposed by Commissioner X”); or (2) the Commission can discuss the matter at a Commission meeting. Nothing in this paragraph precludes the originating office or division from withdrawing, revising, and recirculating a document on its own initiative to correct material errors or revise its analyses or recommendations.~~

D. Timing of Votes; Changing of Votes. A Commissioner may amend, withdraw, or cast a vote at any point up to the official certification (which normally takes place ~~immediately as soon as possible~~ after the voting deadline for any matter that has received the requisite four votes and has not received an objection). Any vote so amended, withdrawn, or cast will have the same effect as a vote cast by the voting deadline (e.g., an objection to a matter not previously objected to anytime prior to the official certification would place the matter on a meeting agenda⁶ or, conversely, the withdrawal of a previously cast objection would negate the need for a meeting discussion if the withdrawal results in a unanimous tally no objection remaining and, in the case of a tally vote, at least four approvals).

II. CIRCULATION VOTE PROCEDURES

⁵ See also Directive No. 17, Agenda Deadline Procedures and Sunshine Act Regulations.

⁶ Subject to deadlines established in Directive No. 17.

A. Tally Votes. Sensitive matters shall be circulated on green paper and non-sensitive matters on white paper. Matters for tally votes shall generally be circulated daily and shall have a voting deadline of 4:00 P.M. the second Wednesday following the day of circulation, unless the matter is circulated on a Wednesday, in which case the voting deadline will be the Wednesday following the date of circulation. Public funding certification matters will have a voting deadline of 4:00 P.M. one full business day (“24-hour deadline”) from the day of circulation. In the Administrative Fines Program, reason to believe recommendations and final determination recommendations where the respondents do not challenge the reason to believe finding also may be circulated on a 24-hour deadline.

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B. No-Objection Matters.

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Additionally, items that have no substantive recommendations of first impression for consideration by the Commission or documents to which the Commission has given prior acceptance subject to certain modifications may be circulated on a 24-hour no-objection basis. ~~In the Administrative Fines Program, reason to believe recommendations and final determination recommendations where the respondents do not challenge the reason to believe finding may also be circulated on a 24-hour no-objection basis.~~

Matters circulated on a 24-hour no-objection basis shall be deemed approved unless an objection is received in the Commission Secretary’s Office by the voting deadline before the vote is certified. An objection will result in the matter being placed on the agenda of an Open Meeting or Executive Session, whichever is appropriate, according to the deadlines provided in Directive 17. ~~If a~~ A vote ~~must be~~ is taken during the meeting, ~~which~~ it supersedes all previous no-objection ballots cast.

C. Non-Filer Circulation. Reports Analysis Division (RAD) recommendations regarding publication of non-filer information will be circulated on goldenrod paper in accordance with Directive 1 immediately upon receipt in the Commission’s Secretary’s Office. Publication will occur immediately after the vote deadline if no Commissioner objects by the vote deadline or as soon as there are four affirmative votes, whichever occurs earlier.

IV. DOCUMENT SIGNING AUTHORITY ON VOTING BALLOTS

Votes on circulations may ~~only~~ be made only via a signed ballot (which includes a ballot submitted electronically or an email indicating the Commissioner’s vote) delivered to the Commission Secretary’s Office. A Commissioner may not delegate to any person his or her vote or decision-making authority. However, a Commissioner may delegate to a member of his or her staff the authority to affix, including via email, the Commissioner’s name to a circulation vote provided the Commissioner has given instructions to the staff member regarding the matter being acted on and the staff member is acting in accordance with those instructions. In this way, the

Commissioner is actually casting the vote and the staff member is signing in a purely ministerial capacity. ~~In each instance in which~~ If a Commissioner's expressly authorizes a staff member to sign ballots in a ministerial capacity on the Commissioner's behalf has acted as agent in casting the Commissioner's vote, the Secretary shall maintain ~~with the ballot~~ any written authorization, instructions, or after-the-fact ratification that the Commissioner provides by to the Commissioner Secretary.